Challenges of housing delivery in South Africa:
Lessons learnt from jurisprudence

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This article deals with the lessons to be learned from the Grootboom’s judgment, twelve years after the judgment, which declared the State’s housing policy to be unreasonable and thus invalid, was delivered by the Constitutional Court. It also deals with the right of everyone to have access to adequate housing, children’s rights to basic shelter, and prisoners’ rights to adequate accommodation and legislations and policies which deal with the right of access to housing. The South African Constitution entrenches housing as a specific socio-economic right. This right is also provided for in the White Paper on Housing and in the Housing Act (1997). The main challenges to the protection and enforcement of housing rights in South Africa are corruption, nepotism and the cadre deployment policy of the ruling party and the numerous community protests regarding poor service delivery indicate the extent to which this right is not being realized.

Key words: Challenges, housing policy, basic socio-economic amenities, jurisprudence, South Africa.

INTRODUCTION

This article deals with the lessons to be learned from the Grootboom judgment, twelve years after the judgment was delivered by the Constitutional Court. The Constitutional Court ruled in Grootboom’s favour, saying that she and others living in an informal settlement on Wallacedene sports ground near Kraaifontein had a right to demand that the State act reasonably to provide access to housing to all South Africans by devising and implementing a housing policy that did not neglect the most poor and vulnerable members of society. Because the State’s housing policy did not cater at all for homeless people-those in urgent need-the Court declared the State’s housing policy to be unreasonable and thus invalid. However, because it was careful to respect the separation of powers and feared that it did not have the institutional competence to dictate to the State exactly how it had to act to provide progressively more and more South Africans with improved access to housing, the Constitutional Court found that Grootboom could not demand a house from the State. She could only demand that the State act reasonably to implement a housing policy. Grootboom died in August 2008 still living in an informal settlement. Ten years after the judgment was delivered, her conditions had not yet improved despite the positive judgment which was delivered in 2000.

The article also deals with the right of everyone to have access to adequate housing, children’s rights to basic shelter, and prisoners’ rights to adequate accommodation and legislations and policies which deal with the right of access to housing. The South African Constitution entrenches housing as a specific socio-economic right. This right is also provided for in the White Paper on Housing and in the Housing Act (1997). This right is linked to the availability of funds and the realization of this right over time. In the meantime, a number of low income communities have put their hopes in the courts to enforce the right to have access to adequate housing, of which the Grootboom case has been probably the most prominent. However, there have also been other
attempts, such as in the case of the City of Johannesburg v Rand Properties (Pty) Ltd and Others (2007) and the case of the President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd and Others (2005), where the court rulings have had to determine the plight of the poor.

METHODOLOGY

The research methodology used in this study is qualitative as opposed to quantitative. This research is library based and reliance is on library materials such as textbooks, reports, legislations, regulations, case laws and articles. Consequently, a combination of legal comparative and legal historical methods, based on jurisprudential analysis was employed. A legal comparative method was applied to find solutions, especially for the provision of and access to housing in South Africa. The study established the development of legal rules, the interaction between law and social justice, and proposed solutions or amendments to the existing law or constitutional arrangement, based on practical or empirical and historical facts. Concepts were analysed and arguments based on discourse analysis were developed. A literature and case law survey of the constitutional prescriptions and interpretation of statutes were done.

INTERNATIONAL LAW ON HOUSING

The protection of socio-economic rights emerged in international law at the end of the Second World War with the establishment of the United Nations in 1945. Thus, for instance, Article 55(a) of the Charter of the United Nations requires the United Nations to promote “higher standards of living, full employment, and conditions of economic and social progress and development”. In addition, the Charter requires in Article 55(b) the promotion of “solutions of international economic, social, health and related problems; and international cultural and educational co-operation”.

There are a number of international human rights instruments or covenants which also protect the rights of people to have access to adequate housing (Devenish, 1996). These include the Universal Declaration of Human Rights (UDHR) of 1948, the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, the African Charter on Human and Peoples’ Rights (ACHPR) of 1981, the European Convention on Human Rights and Fundamental Freedoms (ECHRFF) of 1950 and the European Social Charter (ESC) of 1961. South Africa accepted the UDHR but has not ratified the ICESCR.

Although at the time of writing, the South African Government has not as yet ratified the ICESCR, and is therefore not a state party to it, in a broader sense, the developing international interpretation relating to the right to housing is relevant to understanding the legal implications of the housing provisions in the South African Bill of Rights.

The socio-economic rights in the Constitution, including housing provisions, have been modeled on the covenant (Pillay, 2002). Since Section 39 of the Constitution recognizes the relevance of international law in the interpretation of the rights enumerated in the Bill of Rights, and there are not many other sources that South Africa jurisprudence can draw upon, international law and its instruments must be an important source. The cases show that our courts are persuaded to rely on international law in many cases.

NATIONAL CONSTITUTIONS DEALING WITH THE RIGHT TO ADEQUATE HOUSING

Certain national constitutions also embrace housing rights of different descriptions and oblige states to act in relation to housing matters (Devenish, 1996). These include the constitutions of Brazil, the Dominican Republic, the Netherlands, Portugal, Switzerland, Ireland, Namibia and India (Devenish, 1996).

Even when social and economic rights are included in the constitution, they often cannot be enforced in the courts, and are meant merely to be guidelines for the government. When socio-economic rights are included in a constitution as guidelines they are called “directive principles” of state policy as, for example, in the Namibian, Indian and Irish Constitutions. Sometimes, the courts are willing to use the directive principles of state policy to give more meaningful interpretation to civil and political rights (Choma, 2009).

THE RIGHT OF ACCESS TO ADEQUATE HOUSING

Section 26 of the 1996 Constitution (CFRSA, 1996) provides that everyone has the right to have access to adequate housing. In this regard the state is obliged to “take reasonable legislative and other measures, within its resources, to achieve the progressive realization of this right”. Furthermore, no one may be evicted from their homes, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

In the case of Jaftha v Schoeman 2 SA 140 (CC) pars 31 and 33 (2005), the Constitutional Court took pains to explain that the three subsections of Section 26 must be read as a whole as a part of a new dispensation in relation to the housing needs of people. It is important to note that this right recognizes “a right to have access to adequate housing” as opposed to “a right to adequate housing”. The distinction is crucial since Section 26 makes it clear that there is no unqualified obligation on the State to provide free housing on demand for all members of the public (Davis et al., 2002).

Section 26 is formulated in such a manner that a right of “access to” adequate housing is provided for rather
than a right to housing. The obligation placed on the State is therefore to create an enabling environment in which individuals are able to realize the right for themselves (Davis et al., 2002). The State has to ensure, for example, that people are protected against forced evictions and that there are housing subsidies available. However, this does not mean that the state is absolved from all responsibility for actually providing housing (Centre for Human Rights, 2002). In instances of floods or other natural disasters or other situations in which people find themselves in a position where they do not have a roof over their heads, the state is required to step in and provide them with housing.

On the international level, the term “adequate housing”, as used in the ICESCR has been clarified by the Committee on Economic, Social and Cultural Rights. In its General Comment 4, it noted that whilst adequacy is partially determined by social, economic, cultural, climatic, ecological and other factors, it nevertheless believed that there are certain aspects which must be taken into account when making determination as to adequacy as observed in the case of Government of the Republic of South Africa and Others v Grootboom and Others (2000). (10) BCLR 1253 (CC):

a. Legal security of tenure including legal protection against forced evictions;
b. Availability of services, materials and infrastructure essential for health, security, comfort and nutrition;
c. Affordable housing including the provision of housing subsidies for those who are not able to obtain affordable housing and protection from unreasonable rentals or sporadic rent increases;
d. Habitable housing with adequate space and protection from the cold, damp, heat, rain or other threats to health, structural hazards and disease;
e. Accessible housing, with priority being accorded to disadvantaged groups such as the elderly, children, the physically disabled, the terminally ill, HIV positive individuals, the mentally ill, victims of natural disasters, people living in disease prone areas and vulnerable groups;
d. Housing at an “appropriate” location, which allows access to places of employment, health care services, schools, child-care centres and other social and recreational facilities. Such locations should also not pose a hazard to the health of the inhabitants.
e. Culturally, adequate housing in which the cultural identity of the group being housed is given expression to.

Similarly, an inquiry as to adequacy in the South African context will also have to take into account the factors mentioned in the foregoing in addition to the prevailing circumstances in the country. The majority of the people in South Africa are still living in squalid settlements, in other words, they do not have access to decent houses because of poverty and the high rate of unemployment. It will take time for the government to promote the realization of this right given the slow pace at which it is addressing it.

The right to have access to adequate housing does not mean that every person must be given adequate housing on his or her demand (Davis et al., 2002). It will depend on the resources available to the State. Socio-economic rights do not mean that adults should depend on the government for adequate housing. They should first attempt to acquire adequate housing themselves. The state may only be able to assist those who are poor or homeless (Currie and De Waal, 2005). The primary responsibility with regard to socio-economic rights lies with the people themselves. The State has a secondary responsibility in facilitating access to housing.

There is therefore no unqualified obligation on the State to provide free housing on demand for all members of the public. This approach is in accordance with the ICESCR, according to which the state is obliged to enforce the socio-economic social rights of persons and to create conditions possible for their fulfillment. Section 26(1) must be interpreted contextually and holistically in accordance with the general provisions of Chapter 2 of the Constitution, and in particular with Section 7(2), which stipulates that, the State is obliged “to respect, protect, promote and fulfill the rights in the Bill of Rights”. The extent of the State’s obligation is two dimensional, involving both a negative and a positive aspect. The courts will have to consider various competing interests in order to determine which conduct of the State is justified and which is not. Any conduct of the State which constitutes deprivation will have to fall within the ambit of the limitation provision as set out in Section 36 of the Constitution.

Evictions or demolitions are examples of curtailments of this right, for which justification would have to be sought within the parameters of the limitation clause. In this regard foreign case law could provide some guidance. For instance, the Canadian case of Sparks v Dartmouth/Halifax Regional Housing Authority (1993), which dealt with the legality of law which permitted the termination of leases of low-income public tenants without fair reasons or notice. The appellant Irma Sparks, a single black mother with two children relied on social assistance and had lived in public housing for ten years. She was given one month’s notice that she would be evicted without no reason given. Public housing was exempted from the security of tenure provisions of the Residential Tenancies Act. Sparks alleged the legislation discriminated on the grounds of race and sex and on the “analogous” grounds of marital/family status (single mothers) and poverty/income. Evidence showed public housing residents are poor, a significant proportion of them are Black, and that many are single mothers. The trial judge dismissed the application, finding that Blacks, poor people and single mothers were not singled out for
AN APPRAISAL OF CASE LAW ON HOUSING RIGHTS

Millions of South Africans in deep rural areas are currently homeless or lack adequate housing due to apartheid laws and policies, which were enacted to benefit white people only. Many years of forced removals, pass laws, the migrant labour system, the Bantustan system and the Group Areas Act are largely responsible for today’s housing crisis. The Groups Areas Act of 1966, for example, resulted in people being evicted from their homes without any compensation and being relocated in remote racially defined areas that deprived them of work and educational opportunities. The result has been substandard and grossly inadequate housing for black people in South Africa (Liebenberg and Pillay, 2002).

Poor South Africans experience many barriers, which block their access to adequate housing including, lack of awareness of housing rights and programmes, difficulties in accessing land, lack of services such as clean water, sanitation and refuse removal, the high costs of housing and the inadequacy of the housing subsidy scheme and the special housing needs of women, people with disabilities and other disadvantaged groups.

In Grootboom’s case (2001), the court rejected the notion of a “minimum core” obligation on the State to provide a basic level of services to every individual in need. Instead, it held that the real question, based on a failure to fulfill the positive duties under Section 26(2), was whether the legislative and other measures taken by the State were “reasonable”. The court emphasized that it would not be prescriptive as to which particular policy choices were more desirable in realizing socio-economic rights. It recognizes that there could be a range of policy choices that met the standard of reasonableness provided the State could show that its choices met the standard, the court would not interfere. The State must always have policies which are aimed at realizing the right of the people to have access to adequate housing and that this policy must be just, fair and reasonable.

The court interpreted the phrase “progressive realization” in Section 26(2) in such a way as to impose a duty on the state to examine “legal, administrative, operational and financial hurdles” and where possible, to lower these over time. Housing should be made accessible “not only to a larger number of people but to wider range of people as time progress”.

In Jattha v Schoeman and Others, and Van Rooyen v Stoltz and Others (2003), the case concerned the issue whether the attachment of immovable property constituting state-aided houses was inconsistent with Section 26 of the Constitution, which guarantees the right of access to adequate housing. In this case, the applicants had been evicted in execution of a court warrant following judgment debts. Their houses had been attached after failure to find immovable property to satisfy the judgment debts. This was done in accordance with the provisions of Section 66(1) (a) of the Magistrates Courts Act (1994). The applicants contended that Section 66(1) (a) of the MCA while its purpose was unobjectionable had enabled development of a procedure whereby individuals could be unnecessarily and disproportionately deprived of their homes and that the section permitted the sale of immovable property, which could constitute the home of the judgment debtor, for trifling debts and at unrealistic prices.

The court held that the right delineated in Section 26(1) is a right of access to adequate housing as distinct from the right to adequate housing in international covenants. The court further held that “the right of access to adequate housing entails more than brick and mortar, it requires available land, appropriate services such as provision of water and removal of sewerage”. The right also suggests that in addition to the State, other agents within society, including individuals, are responsible and the Statemust provide houses to the poor. They have the secondary responsibility. The State must create the conditions for access to adequate housing for people of
all economic levels. Due to the deterioration of existing residential structures and the changing needs of people, the State’s obligation is of an ongoing nature.

The court further held that when the provisions of Section 26(1) and (2) were read together, as they should be, the scope of the right would best be described as correlative of the positive and negative obligations imposed thereby on the State, as well as on other entities and persons. The ambit of the right may vary from person to person, place to place and time to time because of the different social strata and economic levels prevailing.

The court held that the ownership of immovable property is not encapsulated in the right of access to housing entrenched by Section 26(1). Therefore loss of ownership as a consequence of the execution process does not violate the right of access to adequate housing. Once a judgment debtor has lost the legal basis for his or her occupation of an immovable property, he may elect to vacate the property voluntarily or simply continue to occupy it without any contractual arrangement with the purchaser. In the event of the latter the purchaser will be obliged to institute legal proceedings for the eviction of the judgment debtor. Similarly, a sheriff who has contractually bound himself to provide vacant possession will have to institute proceedings in which the provisions of the Prevention of Illegal and Unlawful Occupation of Land Act 19 of 1998 (PIE, 1998) will be considered.

Finally, the court ruled that the section was therefore found not to be inconsistent with Section 26(1) of the Constitution.

In Minister of Public Works and Others vs. Kyalami Ridge Environmental Association and Others (2001), severe floods displaced people in Alexandra Township. The government sought to come to the aid of these people by establishing a transit camp on a state-owned land as a temporary measure. The people would move to permanent housing when such housing became available and the camp would be demolished. The plan was made without discussions with residents living near the area. An action was thus brought by a residents’ association, asking the High Court to restrain the Minister of Public Works and the contractor from establishing and constructing the camp.

It was argued on behalf of the association that the government’s action in this regard was not supported by legislation. It was also contended that the setting up of the camps contravened a town planning scheme, land and environmental legislation, and that it had been undertaken without consulting local residents. The High Court found in favour of the association and granted the interim interdict. The government appealed to the Constitutional Court.

The Constitutional Court ruled that the national government had the responsibility in terms of Section 26(2) of the Constitution to ensure that laws, policies, programmes and strategies were adequate to meet the state’s obligation to provide access to adequate housing. Referring to Grootboom’s case, this obligation, it was held, included the need to facilitate access to temporary relief for people who were living in intolerable conditions and for people who were in crisis due to such natural disasters as floods and fires, or because their homes were under threat of demolition. It was therefore held that the decision by the government to establish a temporary camp was lawful as it was intended to give effect to its constitutional obligations.

The court further held that as an owner of property, the government was entitled to enjoy all the rights attaching to the property, including the right to erect buildings thereon. A decision to assert such right in fulfillment of its constitutional obligations was held to be lawful. None of the enactments relied on by the residents’ association was designed for or appropriate to the provision of relief to flood victims. These pieces of legislation did not exclude or limit the government’s common law power to make its land available to flood victims pursuant to its constitutional duty to provide them with access to housing. This judgment is one of the most important notable pronouncements of the court affirming the constitutional obligations of the state to realize the right of access to adequate housing.

**Prohibition of arbitrary evictions**

Section 26(3) explicitly prohibits people from being evicted or having their homes demolished without an order of court after due consideration has been accorded to all relevant circumstances. Furthermore, it also prohibits legislation permitting arbitrary evictions. Unlike many other socio-economic rights provisions in the Constitution, which are progressively realizable and subject to available resources, Section 26(3) requires immediate implementation.

Section 26(3) should also be read in conjunction with Section 25(6) of the Constitution, which aims at protecting groups that are particularly vulnerable to evictions by reinforcing security of tenure. Section 25(6) expressly provides that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory practices or laws is entitled, to the extent provided by an act of parliament, either to tenure which is legally secure or to comparable redress.

In terms of international law the Committee on Economic, Social and Cultural Rights noted in its General Comment No. 4, that instances of forced evictions are prima facie incompatible with the requirements of the ICESCR (1966) and can only be justified in the most exceptional circumstances and in accordance with the relevant principles of international law. Due to the widespread nature of forced evictions which surfaced in the consideration of state party reports, the Committee adopted General Comment No.7, to clarify the implications of the practices of forced evictions in terms
of the obligations contained in the ICESCR.

It is clear, in terms of both the constitution and international law, that the state has an obligation to take measures towards ensuring legal security of tenure as well as avoiding instances where evictions take place. In the case of the constitution, an eviction can only take place with an order of the court, which has considered all of the relevant circumstances. In terms of international law, an eviction can only be justified in the most exceptional circumstances.

In City of Johannesburg v Rand Properties (Pty) Ltd and others (2007), the appeal concerned in the main, the right of a local authority to order occupiers by notice to vacate a building because it is necessary for their safety or the safety of others. The Supreme Court of Appeal (SCA) noted that the court below (the High Court) had found after an inspection that the conditions of the buildings concerned were appalling, abysmal and at times disgraceful; that the occupants were in an emergency situation and that there existed fire and health hazards. The occupants were mostly desperately poor, had no formal employment and many had no income.

The central dispute was whether the City of Johannesburg was precluded from exercising its powers to order persons to vacate unsafe buildings unless it first provided them (or at least intended to provide them) with adequate alternative housing. A subsidiary question that arose was whether such alternative housing must be within the inner city itself.

The SCA found that the powers of the City to order the evacuation of unsafe buildings were not dependent upon its being able to offer alternative housing to the occupants. But the SCA also found that the eviction of occupants triggered a constitutional obligation upon the City to provide at least minimum shelter to those occupants who had no access to alternative housing. It further held that the shelter that the City was obliged to provide need not necessarily be located within the inner city as demanded by the respondents.

In Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others (2008), the appeal before the Constitutional Court that the City of Johannesburg had failed to consult the residents adequately over its decision to evict them from bad buildings. The court held that engaging with the people who might become homeless because of an eviction was a constitutional obligation and in line with the idea of sustainable development. The City of Johannesburg was obliged to encourage the involvement of communities and community organizations in matters of local government. The court made some important points about the nature of this engagement. It stated that engagement was a two-way process in which the municipality and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives. The engagement had to be tailored to the particular circumstances of each situation, and the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement. The court added that the engagement process should not be shrouded in secrecy. In addition, the court also affirmed that local authorities were obliged to consider the availability of suitable alternative accommodation or land in deciding whether to proceed with an eviction or not.

In President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd and Others (2005), a group of about 400 people had moved onto private land owned by Modderklip Boerdery (Pty) Ltd, owing to the overcrowding and shortage of land in the nearby Daveyton and Chris Hani informal settlement. On 12 April 2001, the Johannesburg High Court ordered an eviction against them. The occupants failed to vacate within the two months period given by the court. Meanwhile, their numbers continued to increase. At the time the matter was heard in the Transvaal Provincial Division (TPD), it was estimated that there were 40,000 occupiers on the land.

In the TPD, the landowner attempted to get state’s assistance for the execution of the eviction order. Eviction at that time was estimated to cost about R2.2 million, as it would require the services of private contractors. The landowner was unwilling to spend this amount. The TPD ruled that the state was in breach of its obligation to the landowner and of its constitutional obligations to the unlawful occupiers’ rights of access to adequate housing. As such, it ordered the state to devise a comprehensive plan that would end the occupation of the land.

The state appealed against this decision to the Supreme Court of Appeal (SCA). The SCA held that the state, by failing to provide land for the occupiers, infringed the rights of Modderklip as provided in Section 7(2), 9(1), 2 and 25(1) of the Constitution. The rights of occupiers to have access to adequate housing in Section 26(1) of the Constitution had also been infringed. The SCA ordered that the landowner was entitled to the payment of damages by the Department of Agriculture and Land Affairs in respect of the occupied land, and directed that these damages be calculated in terms of Section 12(1) of the Expropriation Act (EA, 1975). As for the occupiers, the SCA ordered that they were entitled to stay on the land until alternative land was made available to them.

The state appealed against the SCA decision to the Constitutional Court and made two key contentions: First, that Modderklip’s right to property and the occupiers’ rights to have access to adequate housing had not been breached. Secondly, that Modderklip was not entitled to the relief it claimed because it had neglected to apply for an urgent eviction order timeously (in other words that Modderklip was to blame for the problem). They also raised the question of whether or not Section 25(1) (the property clause) applied horizontally (if it could be invoked to govern relations between private parties).
The Constitutional Court did not find it necessary to make findings on any of the above contentions made by the state. It found that it was unreasonable for a private entity such as Modderklip to be forced to bear the burden which was on the state of providing the occupiers with housing. Modderklip would not have met the stringent requirements for an urgent eviction order in terms of section 5 of the PIE. The court found Modderklip’s claim was based on the fact that it had been deprived of the right of ownership of the land. Its conduct of trying to involve the state was “prudent and reasonable in the circumstances” and accordingly could not be blamed.

The court set aside the order of the Supreme Court of Appeal and replaced it with an order declaring that:

(i) By failing to provide appropriate mechanism to give effect to the eviction order, the state violated the right of Modderklip Boerdery to access courts, read with the principle of the rule of law in Section 1 (c) of the Constitution.
(ii) Modderklip was entitled to the payment of compensation by the Department of Agriculture and Land Affairs in respect of the occupied land, and that the compensation had to be calculated in terms of the Expropriation Act.
(iii) The court further ruled that the residents were entitled to occupy the land until alternative land was made available to them by the state or the provincial or local authority.

In Port Elizabeth Municipality v Various Occupiers (1) SA 217 (CC) (2005), the case was first heard as an eviction application in the South Eastern Cape Local Division of the High Court. The applicant in this matter was the Port Elizabeth Municipality in whose jurisdiction the alleged unlawful occupation took place. The eviction application was sought against 68 people (including 23 children) who had occupied private, undeveloped land within the Municipality’s jurisdiction. The application was based on Section 6 of the PIE, which states that “an organ of State may institute proceedings for the eviction of an unlawful occupier within its area of jurisdiction”.

At the time of the application, the respondents had been living on the land for periods ranging from two to eight years. Most of them had moved onto the land after being evicted from land that they had previously occupied. The respondents indicated their willingness to vacate the property, provided that they were given suitable alternative land to which they could move. They however rejected a proposal made by the municipality that they move to a place called Walmer Township. They did so on the basis that amongst other negative considerations, no form of security of tenure had been provided and that they would subsequently be liable to further eviction if they relocated to the identified land.

The municipality argued that while it was cognizant of its constitutional obligations to provide housing, it could not be seen to give the occupiers preferential treatment by providing them with alternative land. To do so, it was argued, would disrupt the existing housing programme currently in place, and would effectively amount to ‘queue-jumping’ by the occupiers. The High Court therefore granted the application for eviction on the basis that it saw no reason why the eviction order should not be granted. The respondents successfully appealed this order to the Supreme Court of Appeal (SCA).

The SCA in its judgment held that the occupiers were not seeking preferential treatment. They were in fact not asking that housing be made available to them at the expense of other people on the housing waiting list, but only that alternate land be identified for their occupation, where they could enjoy a degree of security of tenure.

The municipality appealed the above decision to the Constitutional Court on the basis that it was not constitutionally bound to provide alternative accommodation or land when it sought the eviction of unlawful occupiers.

The decision of the Constitutional Court was as follows: The court recognized the complexities involved in balancing the constitutional rights of landowners and unlawful occupiers. In the context of the history of unfair eviction procedures in the past, the court held that in reaching a “just and equitable decision” in eviction cases, the provisions of both section 26 of the Bill of Rights and the PIE Act must be interpreted within its constitutional framework and the rehabilitative and reformatory purpose of these provisions.

a. The need for dealing with homelessness in a sensitive and orderly manner was emphasized.
b. It furthermore held that in eviction proceedings, municipalities must show equal accountability to occupiers and landowners. The court held however those municipalities, unlike private landowners, had particular duties in terms of section 26 of the Constitution. These duties had a bearing on considerations of whether it is ‘just and equitable’ to make an eviction order in terms of section 6 of PIE.
c. The “relevant circumstances” to be taken into account included: “the circumstances of the occupation of the land”; “the period of unlawful occupation”; and “the availability of suitable accommodation or land.”
d. The court found however that the relevant circumstances identified in Section 6 of PIE, were not an exhaustive list. It held that justice and equity would take into account factors like the extent to which negotiations had taken place to reach an equitable solution. Given the special nature of the competing circumstances involved in Section 6 applications, the court held that “it would not ordinarily be just and equitable to order eviction if proper discussions and or mediation had not been attempted”.
e. In this particular case, given the length of occupation of the land, the fact that no steps had been taken to address the problem before launching the application, and that the
land was not needed for immediate use by either the landowner or the municipality, the court found that it was not “just and equitable” to evict the occupiers.

The application of leave to appeal the SCA order therefore failed and the municipality was ordered to pay the costs of the respondents.

In City of Cape Town v Neville Rudolph and Others (11) BCLR 1236 (C) (2003), the case centered on the occupation of land belonging to the applicant, the City of Cape Town. The respondents in these eviction proceedings were all residents of Valhalla Park, an area within the jurisdiction of the applicant. Some respondents had been placed on the housing waiting list of the applicant as far back as ten years previously. As a result of the over-crowded, intolerable conditions under which they were living at the time, they decided to move onto vacant land that was owned by the applicant. The applicant subsequently applied to the High Court for an order of eviction against them.

The applicant contended that the PIE did not apply to the respondents’ actions. They argued that as the respondents’ actions could be described as a “typical case of land grabbing”, the provisions of the PIE could not be applicable in that case. They therefore sought relief from the court in terms of the common law. In the event that the court found the PIE to be applicable, they then sought urgent relief in terms of Section 5(2) of the PIE for the immediate eviction of the respondents. In the alternative, the applicant submitted that the PIE was unconstitutional as it condoned the practice of ‘land grabbing’ by failing to define adequately the concept of an ‘unlawful occupier’. They urged that if the provisions of the PIE extend protection to unlawful occupiers “who invaded the land and/or buildings of an owner forcibly or stealthily without the owners’ consent and knowledge, thereby denying the property rights of the owner, it would be unconstitutional to the extent that it would allow such a result.

The respondents not only opposed the application, but also brought a counter-application on the basis that the applicants’ housing policies and programmes had failed to fulfill its constitutional and statutory obligations to give effect to their right of access to adequate housing in Section 26 of the Constitution. In particular, they argued that the applicant had failed to give effect to the judgment of Grootboom.

The court, on the main application (for eviction) held that the PIE was applicable to the eviction proceedings. Furthermore, it concurred that the definition of ‘unlawful occupiers’ includes ‘squatters’ as well as ‘illegal land grabbers’ as discussed in the case of Ndlovu v Ngcobo (1) SA 46 (CC) (2001) and Bekker and Another v Jika (1) SA 113 (SCA) (2003). As to the contention of the applicants that the common law remedies were also available to them, the court held that it would have the effect of “undermining the over-all purpose of the PIE particularly the purpose of the protections provided therein. In respect of the urgent relief sought by the applicant in terms of Section 5 of the PIE, the court held that taking into account the cumulative factors stipulated in PIE, the applicant had not satisfied the court that it met the requirements for such an application. The court held that the legislature did not intend that occupiers would be lightly deprived of the protection against arbitrary evictions.

The court also held that the provisions of PIE were not unconstitutional, but had their roots in the Bill of Rights, particularly Section 26(3) of the Constitution which prohibits arbitrary evictions. Furthermore, the procedural safeguards provided for in the PIE did not amount to an “arbitrary” deprivation of property. The court clarified the fact that when an eviction application was refused, it was not PIE that deprived owners’ of the use of their land, but an independent court, exercising judicial discretion. The court also held that PIE did not expropriate property rights it only aims to regulate the exercise thereof. The court therefore dismissed the application.

The court, in respect of the counter-application, found that the applicant had failed to provide any short-term programmes that could meet the housing needs of the residents of Valhalla Park. The respondents made reference to the fact that the only criteria which the applicant took into consideration in the allocation of housing, was the length of time an applicant had been waiting on the housing list, which in itself did not provide any guarantee of being allocated a house timeously.

The court, in evaluating the desperate housing situation that existed within the Cape Town Metropolitan Municipality jurisdiction, acknowledged that in spite of the Grootboom judgment, the housing situation had deteriorated. In the Grootboom judgment, the Constitutional Court referred to the Accelerated Managed Land Settlement Programme, as an example of the type of the programme that would provide relief to those in desperate need. No such programme had yet been put in place. The applicants had therefore failed to realize progressively the rights of access to adequate housing, as stipulated in the Grootboom judgment.

The court therefore held that in the light of the standards set in Grootboom, the housing policies in the City of Cape Town had failed to fulfill its constitutional and statutory obligations. The court accordingly ordered the City of Cape Town to comply with these obligations and produce a report within four months, detailing what steps it had taken to ameliorate the situation, and what future policies and programmes would be put in place to this end.

There are various lessons which can be learned from the above cases. The Grootboom case was a landmark case which was celebrated by the majority of the people in South Africa. This case which was decided in the year 2000 lays the foundation of the socio-economic rights jurisprudence. There are those academics who felt that
this case was a disaster and that it offers no solutions to the poor. One of the appellants in this case, Mrs. Irene Grootboom died in the year 2008 while she was still residing in an informal settlement despite the Constitutional Court ruling which ordered the state to provide alternative accommodation to the appellants. The evictions cases wherein the state was ordered not to permit arbitrarily evictions have also laid the foundations; the Modderklip case being one such important case which sets the jurisprudence.

There are various cases which deal with evictions which are not discussed in this paper which are also important. These signify that the state has to undertake a series of measures, including policy and legislative recognition of each of the constituent aspects of the right to housing and has to protect and improve houses and neighbourhoods rather than damage or destroy them. In cases of crises, desperate and life threatening situations, evictions or when people are in need of houses as a matter of urgency, the state must see to it that they are provided with alternative accommodation.

In Groengrass Eilandome (Pty) Ltd v Elandsfontein Unlawful Occupants (1) SA 125 (T) (2002), the court ruled that Section 26(3) of the Constitution prevented the eviction of people from their homes in an unfair manner and without due process of law, but did not render eviction of unlawful occupiers impossible. Similarly, the intention of the PIE was to ensure that fairness and dignity prevail when an eviction is allowed, and not to prevent eviction completely. This decision echoes the sentiments expressed in the earlier Port Elizabeth Municipality case, and probably summarizes the current situation most accurately when the PIE applies: unlawful occupiers can be evicted, but only with due regard for the restrictive provisions in Section 26(3) and in the PIE, which are intended to ensure that the eviction takes place fairly and with due respect to the dignity of the occupants.

There is the recent case of Abahlalibase Mjondolo Movement of South Africa and Another v Premier of the Province of KwaZulu-Natal and Others ZACC 31 (2009). The application was first brought by the Abahlalibase Mjondolo Movement SA (AbM) and its president, Sibusiso Zikode, in the Durban High Court in February 2008. The case was heard before Tshabalala, JP, on 6 November 2008. AbM challenged Section 16 of the Slums Act specifically, which they contend bypassed PIE, particularly the safeguards in this Act which protect unlawful occupiers from eviction.

Tshabalala, JP, handed down judgment on 27 January 2009 dismissing the application, finding that the Slums Act was reasonable and not inconsistent with the Constitution or the PIE. He congratulated the province for passing the legislative measures to eradicate slums. This decision was appealed to the Court of Appeal (CC) and the case was heard on 14 May 2009.

In a judgment written by Moseneke, DCJ, (with all the judges except Yacoob, J concurring), he found that “Section 16 cannot be reconciled with the National Housing Act and the National Housing Code, both of which have been passed to give effect to Section 26(2) of the Constitution and that the MEC’s power to issue a notice as envisioned in Section 16 is “overbroad and irrational. Moseneke DCJ further found that Section 16 was incapable of an interpretation that promoted the ostensible objectives of eliminating and preventing slums and providing adequate housing. He referred to the fact that other provinces were awaiting guidance from the court before deciding on similar legislation. This clarity has now thankfully been restored.

The court further ruled that this section made it compulsory for municipalities to institute proceedings for eviction of unlawful occupiers where the owner or person in charge of the land failed to do so within the time prescribed by the MEC. The applicants argued that Section 16 of the Slums Act was in violation of Section 26(2) of the Constitution in three ways: it precluded meaningful engagement between municipalities and unlawful occupiers; it violated the principle that evictions should be a measure of last resort; and it undermined the precarious tenure of unlawful occupiers by allowing the institution of eviction proceedings while ignoring the procedural safeguards inherent in the PIE. Without Section 16, the Slums Act was rendered ineffective.

There is a recent case on evictions which was decided in February 2010. In Blue Moonlight Properties 39 (Pty) Limited v The Occupiers of Saratoga Avenue (2006), the court ruled that the City of Johannesburg must provide the Occupiers of Saratoga Avenue with alternative accommodation and, if there is no alternative accommodation, they must pay the rent for them somewhere else. The days of quick and easy money for property investors in the inner city may be over. Judge Thokozile Masipa held that the High Court could not consider an application for the eviction of 80 desperately poor people living in disused warehouses and workshops in Saratoga Avenue, Berea. It could decide on the application only after the city of Johannesburg had reported to the court what it would do to re-house the occupants and when such action would be taken.

The Saratoga Avenue judgment develops the already progressive jurisprudence of the Johannesburg High Court on evictions in two important respects. Importantly, it confirms that the city has duties to provide alternative shelter for people who are under threat of eviction from private land, if that eviction would lead to homelessness. Although the law had been pregnant with this requirement since the Constitutional Court’s decision in the Grootboom case, the Saratoga Avenue judgment makes it explicit. The judgment also sweeps aside the city’s proposition that its obligations are primarily to people it seeks to evict from properties it considers to be unsafe, or to people displaced as part of its housing and other development programmes. On the contrary, as the judgment states, the city is required to respond to
potential homelessness, whatever its source.

In addition, the judgment requires the city to respond to the particular situation of the people threatened with eviction, and not simply to present a court with a general report on its housing policy. The city must respond with plans that engage with and cater for people’s individual circumstances—which it habitually fails to do. If the city refuses to provide shelter at all, it may be held to a very high standard of justification, since its failure to act could frustrate the occupiers’ constitutional right to adequate housing, and a property owner’s common law right to the use of his/her property.

The judgment is particularly significant in the inner city of Johannesburg. First, the city can no longer through its urban regeneration strategy encourage property investors to buy and renovate buildings at a profit, and then turn its back on people who are evicted when those developers carry out the necessary renovations.

Though the judgment does not expressly say so, the city will have to change its housing plans to take account of the likely effect of eviction applications in the inner city and respond to these reasonably. It will have to engage carefully with communities living on private land and respond reasonably to their housing needs. It will also have to justify its policy to property developers, who may feel aggrieved by any failure to deal promptly with the housing needs of occupiers of their land.

One possibility for the city would be to use the recently published Chapter 13 of the National Housing Code. In appropriate circumstances, Chapter 13 allows municipalities to expropriate informally occupied land and upgrade it for formal housing while the occupiers remain. This would certainly be an appropriate way to deal with the inner cities, many informal settlements and those living in similar circumstances.

Second, property developers seeking to make money quickly by buying up derelict buildings on the cheap, evicting the occupiers and redeveloping the buildings at often massive profits will find themselves having to deal creatively with the occupiers of the buildings purchased. This is unless, of course, they have the stomach for lengthy legal battles in which the occupiers assert their rights against the state, and the patience for the likely delays in the implementation of whatever housing plan the city devises for the occupiers.

These solutions may involve an interim lease pending the implementation of the city’s housing plans, in which poor occupiers pay what they can afford to stay on private land, on the understanding that they will leave when their alternative shelter is provided by the city. In other circumstances, a private developer may be prepared to forgo some profits in order to provide alternative housing to occupiers of its land. Whatever the case, property developers, who are often irrationally contemptuous of poor people they “find squatting” on their recently purchased land, will now need to respond more reasonably and constructively.

The judgment and the Johannesburg High Court jurisprudence leading up to it have made real the Constitution’s promise to put the poor first. This entails a wholesale change in the way property developers and the state engage with the poor. Property developers, in particular, will have to appreciate the risks of buying occupied land and factor into their bottom lines the cost of engaging constructively with occupiers who face homelessness as a result of their plans.

The judgment presents the opportunity to strike a fairer balance in the distribution of the benefits and burdens of urban regeneration. The city, property owners and the poor must seize the opportunities presented by it to end the social conflict and desperation caused by the extractive capitalism that has characterized much urban regeneration until now.

Children’s right to shelter

In the High Court decision of Grootboom, Davis J, relying on the precedent set by the Constitutional Court in Soobramoney, found that the respondents had “produced clear evidence that a rational housing programme [had] been initiated at all levels of government and that such programme [had] been designed to solve a pressing problem in the context of the scarce financial resources”. As such, the application based on Section 26 had to fail. The court was, therefore, easily satisfied that the state had demonstrated that it had put in place a reasonable housing programme.

The High Court next considered the alternative claim based on Section 28(1)(c) of the Constitution and found that, while the primary obligation to maintain and shelter children rests with their parents, when parents are unable to provide shelter, there is an obligation on the state to do so (Rosa and Dutschke, 2006). In coming to this conclusion, Davis noted the textual difference between the qualified right of everyone to have access to adequate housing, and the unqualified right of children to shelter, and interpreted this textual difference as according to a stronger right of shelter to children. Accordingly, the question of budgetary limitations is not applicable to the determination of rights in terms of Section 28(1)(c). The right is conferred upon children. That right has not been made subject to a qualification of availability of financial resources. Section 28(1)(c) of the Constitution is widely regarded as providing the clearest example of a socio-economic right. The right conferred is intended to serve primarily as a safety net, in cases of deprivation, neglect, starvation or abuse (Davis et al., 2002).

Children’s right to basic shelter should be distinguished from the general provision of Section 26 of the Constitution, which provides for the right of access to adequate housing for everyone. In terms of Section 28(1), the Constitution provides that every child has the
right to basic shelter. Unlike Section 26(1), which provides that everyone has the right to have access to adequate housing, Section 28(1)(c) requires the state and parents or legal guardians to provide progressively for the realization of this right because a child cannot strive to have adequate accommodation. The right of every child to shelter is immediately realizable and resource constraints cannot be used as a justification to limit the right (Centre for Human Rights, 2002).

It should also be borne in mind that as a vulnerable group, children should be accorded priority in resource allocation. This sentiment is reiterated in the unqualified formulation of Section 28(1)(c). As with the right of access to adequate housing, the state has an obligation to respect, protect, promote and fulfill the right of all children to shelter.

Many academic commentaries prior to the decision of the Constitutional Court in Grootboom had suggested that the effect of Section 28(1)(c) was to confer upon the state an unqualified duty to provide a minimum level of shelter and social services for children in vulnerable circumstances (Pierre De Vos, 1997).

The decision of the Cape High Court in Grootboom v Oostenberg Municipality and Others (3) BCLR 277 (C) (2000) had the effect of upholding a claim for emergency shelter, which claim was based on children’s rights to this amenity in circumstances where their parents were unable to provide this. Given that it is not in the best interests of children to be taken away from their parents in order for shelter to be provided, Davis J, held that their parents enjoyed a derivative right to shelter. The court held, however, that the parents do not, thereby, become bearers of the constitutional right, which remains the right of the child. In this reading, the court affirmed that Section 28(1)(c) was drafted as an unqualified constitutional right which could be directly enforced against various organs of state.

Prisoner’s right to adequate housing

Although the Constitution does not spell out what conditions of detention are ‘consistent with human dignity’, the right to such conditions includes at least “exercise and the provision, at State expense, for adequate accommodation”. Both international and South African jurisprudence supports the proposition that lawful imprisonment does not spell farewell to all fundamental rights. A prisoner retains all the rights enjoyed by a free citizen except those necessarily lost as an incident of imprisonment.

Section 35(2)(e) of the Constitution provides for prisoners’ rights to adequate accommodation at the State’s expense. As in the case of children’s rights, prisoners’ rights to adequate accommodation differ from the provisions of Section 26 in a number of respects (Centre for Human Rights, 2002). As in the case with children’s rights, prisoners’ rights are not qualified by the term “access”. Prisoners as charges of the State are entitled to accommodation at State expense. The only qualification which is contained is that such accommodation must be appropriate.

In determining adequacy in the South African context, cognizance should be taken of international standards as set out in treaties such as the Standard Minimum Rules for the Treatment of Prisoners (FUNCPCTO) (1955). The emphasis both at international level as well as in the South African Constitution is that the conditions in which people are detained and accommodated needs to be consistent with human dignity. In meeting health standards and conforming to the protection of human dignity, factors such as climatic conditions have to be borne in mind. Furthermore, cubic content of air, minimum floor space, lightning, heating and ventilation will also have to be taken into account (FUNCPCTO) (1955).

The State must respect, protect and promote the right of prisoners to adequate housing. This right requires the State to provide prisoners with accommodation which is conducive and which does not impair their dignity. We have visited some prisons in Gauteng and Limpopo Provinces to find out whether the conditions at prisons were responding to the minimum obligations imposed on the State in Section 35(2)(e) of the Constitution. We found out that the conditions were not conducive. In Leeuwkop, North of Johannesburg, most prisoners stay in the communal cells. The communal cells were fairly large and clean with high ceilings. The cells open onto small courtyards where the prisoners are able to spend most of their day. Prisoners complained that there was no privacy and they were required to use the toilet in the same place and sometimes at the same time while others might be cooking or eating. According to the prisoners, the situation and condition is humiliating.

The cells in Matatshe Prison varied. In the ‘raadafdeling’ the cells were cramped but were kept fairly clean. Prisoners sleep on bunk beds, about 35 to a cell. The walls were dirty and had not been painted for several years. The corridors and staircases were filthy and looked as though they had not been swept or washed for several days. The prison and the ablution facilities are filthy. Prisoners stated that the showers get blocked and take time to fix. They also stated that they spent a week with the toilet blocked and a leaking tap and these were only fixed after a series of complaints had been lodged. They also stated that they did not have soap.

In the awaiting trial section, prisoners sleep on double mattresses, two to a mattress on the floor. Between 30 and 42 people were held in the cell. Only one toilet and shower, separated from the main part of the cell by a wall, were available for these prisoners. Personal hygiene has been raised as a problem.

Several prisoners in the awaiting trial section complained that their blankets were dirty and were full of lice. Prisoners have to wash their blankets themselves.
and have to hang the blankets out of their cell windows to dry. One bar of soap is given to prisoners every two weeks to serve for both personal use and for the washing of clothes. Awaiting trial prisoners wash their own clothes in their cells. Prisoners in the sentenced section have their blankets washed every month.

The prisoners at the Simphiwe Mantatshe Prison at Limpopo said that they were given five rolls of toilet papers every two weeks for use by 42 prisoners. They stated that they felt horrible. In the morning, prisoners in the cell start washing from 4 to 6 am, and then in the evening from 3 to 7 pm. There is only one toilet and one bathroom and prisoner shave to shower together. However, older prisoners are allowed to shower alone. The prison is overcrowded.

**NATIONAL HOUSING POLICY AND STRATEGY**

The Housing White Paper (HWP, 1995) sets out government’s broad housing policy and strategy. On the basis of its seven key strategies, housing has since 1994 evolved and implementation has proceeded. All current policy exists within the context of the Housing White Paper. Similarly, the Urban and Rural Development frameworks, both published in 1996, set the framework for urban and rural housing policy and development.

**Statutory protection of housing rights**

The Housing Act (1997) is one of the statutes which protects the rights of persons to have access to adequate housing. It is an important law that sets out the framework for housing delivery in South Africa. It repeals all discriminatory laws on housing, dissolves all apartheid housing structures and creates a new non-racial system for implementing housing rights in South Africa. It defines the role of national, provincial and local governments on housing, commits local authorities to take reasonable steps to ensure that all inhabitants in their areas of jurisdictions have access to adequate housing on a progressive basis (in other words, over a period of time), places a duty on municipalities to set housing delivery goals and identify land for housing development and deals with the principles that must guide “housing development.

The Act provides the basic principles to guide national, provincial and local governments on housing development. Its objectives include giving priority to the needs of the poor in housing development, encouraging and supporting individuals and communities to fulfill their own housing needs by assisting them in accessing land, services and technical assistance and promoting education and consumer protection in housing development. This Act also states the functions which the national government has in respect of housing delivery in South Africa. Firstly, the minister must determine national policy, including national norms and standards in respect of housing development. Secondly, the minister must also set broad national housing delivery goals and facilitate the setting of provincial and, where appropriate, local government housing delivery goals and also monitor the performance of the national government and, in cooperation with every MEC, the performance of provincial and local governments against housing delivery goals and budgetary goals. Thirdly, he or she must also determine a procurement policy, which is consistent with Section 217 of the Constitution in relation to housing development and also 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. Fourthly, 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 and promote consultation on matters regarding housing development between the national government and representatives of civil society, the sectors and sub-sectors supplying or financing housing goods or services, provincial and local governments and any other stakeholder in housing development.

The Act also provides for a national housing code. The code is binding on the provincial and local spheres of government. The provincial and local governments also have power to establish their housing policies which address the housing crisis in the Republic.

The National Department of Human Settlements has facilitated the development of the Housing Code, White Paper on Housing, 1995 and the Housing Act, 1997. These policies and legislation have clear guidelines on how to address the housing problems in South Africa. Since 1994 few houses have been built for the poor and subsidized houses have been built for the low income earners. There are challenges which are still facing the department and there are backlogs of houses which still need to be built.

The question of housing has been addressed in the Freedom Charter, a key founding document of South Africa’s democratic Constitution. This charter is relevant to the vision of a new South Africa. Its housing clause states without any equivocation: “There shall be houses, security and comfort for all. All people shall have the right to live where they choose, to be decently housed, and to bring up their families in comfort and security. Slums shall be demolished and new suburbs built where all shall have transport, roads, lighting, playing fields, crèches and social centers. Therein lays the founding philosophy, strategy, vision and practicality of human settlements as enshrined in the Freedom Charter adopted at the Congress of the People, Kliptown on 26 June 1955”.

This vision cannot be celebrated eighteen years into democracy because there are still numerous informal settlements which are not conducive for human settlement. As a reflection of the increased demand, the
number of informal settlements has ballooned to more than 2,700; 70 of which are slums occupied solely by black people (Sexwale, 2010). These unhygienic informal settlements pose a great risk to the health of the people. There is a need to demolish these and build houses of an acceptable standard. Houses have to be built for all the people of all races. When this happens, we can celebrate the vision of the charter.

The Ministry of Human Settlements is committed to the target of building 220,000 units per year between now and 2014. It has also stated that 625 hectares of well-located state land have been acquired for human settlements development and an enabling environment is being created for the provision of 600,000 new loans in the affordable housing sector. In addition, 500,000 informal settlement dwellings are being upgraded. The ministry has emphasized that such upgrading does not detract from government’s long-term objective of eradicating slums (Sexwale, 2010).

Since 1994, more than 2.3 million housing units have been made available for nearly 11 million people. The scale of government housing delivery is second only to China, as the Banking Association of South Africa has pointed out (DHS, 2010). However, the housing backlog has grown in leaps and bounds from 1.5 million in 1994 and now stands at approximately 2.1 million. That means approximately 12 million South Africans are still in need of better shelter (DHS, 2010). These statistics show that we are a far cry from the visions of the Constitution and the Freedom Charter and that much work needs to be done by the Department of Human Settlements (DHS, 2010).

There are a number of cases of corruption in the housing fraternity which has been reported in the media. This affects service delivery. Corruption has become endemic in our society, and needs to be rooted out. There are also a number of reported cases in which contractors have failed to build houses even though they have received the money. Other houses have been built without roofing. The Ministry of Human Settlements has committed to fight the scourge of corruption and appointed a National Audit Task Team in 2009, headed by the special investigations unit (SIU), working in partnership with the Auditor-General’s office, the national department and provincial government representatives. The task team is hard at work tracking down those responsible for corruption, abuse and malpractices (DHS, 2010). These people if caught will be forced to repay the money which will be used to build more houses.

The second important statute on housing rights is Housing Consumers Protection Measures Act (1998) which provides for the protection of housing consumers and provides for the establishment and functions of the National Home Builders Registration Council.

The Act states the objectives of the Council which are, inter alia, (i) to represent the interests of housing consumers by providing warranty protection against defects in new homes, (ii) to regulate the home building industry, (iii) to establish and to promote ethical and technical standards in the home building industry and to black people (Sexwale, 2010). These unhygienic informal improve structural quality in the interests of housing consumers and the home building industry, (iv) to promote housing consumer rights and to provide housing consumer information and communicate with and to assist home builders to register in terms of the Act, (v) to assist home builders, through training and inspection, to achieve and to maintain satisfactory technical standards of home building.

The third legislation is the Housing (Amendment) Act (2001) which came into operation in order to amend the Housing Act, so as to provide for the abolition of the South African Housing Development Board and Provincial Housing Development Boards, to establish advisory panels, to provide for the determination of procurement policy in respect of housing development, to provide for the publication in the Gazette of lists of national housing programmes and national institutions, to make the National Housing Code binding on all spheres of government and to provide for the regulation of the sale of State-funded housing.

The fourth piece of legislation is the Home Loan and Mortgage Disclosure Act (2000), which promotes fair lending practices, which require disclosure by financial institutions of information regarding the provision of home loans and to establish an Office of Disclosure. There is also the Disestablishment of South African Housing Trust Limited Act (2002), National Development Agency Act (1998), Housing Rental Act (1999) and Prevention of Illegal eviction from and occupation of Land Act (1998) which also address the housing crisis.

The fifth legislation is the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (1998) which provide for the prohibition of unlawful eviction and procedures for the eviction of unlawful occupiers. This piece of legislation has been discussed in great detail under the heading Probation of arbitrary evictions.

The sixth legislation is the Rental Housing Act (1999), which defines the responsibility of government in respect of rental housing property, creates mechanisms to promote the provision of rental housing property, promotes access to adequate housing through creating mechanisms to ensure proper functioning of the rental housing market, makes provision for the establishment of Rental Housing Tribunals, defines the functions, powers and duties of such Tribunals, lays down general principles governing conflict resolution in the rental housing sector and provides for the facilitation of sound relations between tenants and landlords.

The last legislation is the Disestablishment of South African Housing Trust Limited Act (2000), which was enacted to de-establish the South African Housing Trust Limited and transfer the rights and assets of the South African Housing Trust limited to the national Housing...
CONCLUSIONS AND RECOMMENDATIONS

In interpreting the ambit of the housing rights in Section 26 of the Constitution, it is now clear that the courts will be slow to accept parallels drawn from constitutions such as India, where, to avoid the non-binding effect of directive principles, economic and social rights have been shrewdly protected under the broader civil and political rights, such as the right to life. The Grootboom judgment is an important precedent on housing rights; it highlighted the State obligations to enforce housing rights. The right of access to housing does not provide the individual with a right to demand that the government provides him or her with access to a house. However, it does begin to spell out the duties of the State in progressively realizing the right of access to housing. It is clear that the exact duties of the State will depend on the specific context and that cases will have to be judged on the individual merits. The Constitution compelled the parliament to pass legislations which protect housing rights. Those legislations were passed but there is a need also to have other laws which will cater for the poor or people from rural areas. Civil society organizations, non-State actors and state institutions supporting constitutional democracy must also commit themselves to address the housing crisis in the country. They have a duty to educate the public about housing rights.

South Africa has good policies on socio-economic rights. However, despite these policies, the lives of the people of South Africa are worsening. When the Reconstruction and Development Policy (RDP) was introduced in 1994, it gave people confidence that their lives would improve. This good policy which outlined various socio-economic rights was replaced by GEAR. Today, eighteen years into democracy, their lives are still the same. These two policies have failed to yield results. There is a high rate of unemployment and many people are dependants of the State, since they rely on social grants offered by the government.

This paper recommends that the government must revisit all its policies on socio-economic rights especially the GEAR policy. It further recommends that the combination of both the RDP and GEAR can be a solution to the problems South Africa faces. The RDP had its strengths and weaknesses and more lessons can be learned from it. Even GEAR has its strengths since it make it possible for the South Africa economy to grow even though it had crashed by almost 25% in 1996. However, it is apparent that GEAR is not the solution to the problem.

The present government has not yet introduced a new economic policy which will replace GEAR except for the establishment of the National Planning Commission which has not yet reported its progress to the members of the general public. This paper recommends that the government hold an indaba where all stakeholders including business, the public sector, private sector, non-governmental organizations, academics and religious organizations will gather and debate the new economic policy which will shape the new South Africa in the next fifteen years. The ruling party policy indaba together with the tripartite alliance is not enough since it always excludes the intellectuals who are not politically active. More often than not this indaba is used by other politicians to fight their political battles.

The legislations on socio-economic rights which have been passed by parliament since 1994 were all influenced by white papers. These legislations are not improving the lives of the people of South Africa. Thus the increasing reports of protests by citizens regarding their dissatisfaction with the services offered by government. These legislations are weak because they fail to articulate the position should government not comply with them. It is recommended that the following statutes must be amended to respond to the needs of the society:

1. The Housing Act must be amended to include provisions which are aimed at disciplining contractors who default. The Minister of Human Settlements and the SIU are currently busy trying to recover the wasted expenditure on the building of RDP houses where the services were not rendered despite the fact that the contractors were paid. This Act must consider introducing the Public-Private Partnership route whereby all the risks are transferred to the private party when tenders are being awarded. The low cost houses are meant for people who qualify for a loan in the approved banks which are preferred by the Department of Human Settlements. This practice excludes many people who fail to meet the requirements as a result of having being black-listed prior to the promulgation of the Act. This Act must be amended to find a way to accommodate these people.

2. The Corruption Act must be amended to fast track more cases on corruption which are before courts. This Act must impose harsher punishment or sentences on corrupt officials as this will ensure that funds meant for service delivery are properly used. The Act must consider the introduction of a specialized court which deals with corruption cases of those who have tampered with State resources. The Act must further provide more protection for whistle blowers who report corruption to the law enforcement agencies.

In addition to the foregoing, the following is also recommended. The principle of cadre deployment must be stopped since it affects the pace of service delivery. The government must fast-track the Municipal Bill which is before parliament and which disqualifies leaders of political parties from occupying positions in the munici-
palities. This will encourage the appointment of competent leaders to positions which influence service delivery.

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