

# Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights

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## 1 INTRODUCTION

One of the ANC's key election promises during the run-up to the 1994 election was 'homes for all'. This promise subsequently formed the basis of the Reconstruction and Development Programme (RDP) in terms of which the South African government committed itself to delivering free low-cost housing to those who could not afford to purchase or build their own homes.

In fulfilling this promise the government spent R14.8 billion on building 1 129 612 subsidised houses between 1994 and 2000.<sup>1</sup> Despite what appears, on the face of it, to be a good delivery record, the government still faces a housing backlog which is burgeoning at an alarming rate. At the end of June 1998, the housing shortage was estimated at 2.6 million units in urban areas.<sup>2</sup> At a media briefing in September 2000, Housing Minister Sanki Mthembu Mahanyele confirmed that there was a backlog of two to three million houses.<sup>3</sup> In March 2001, the Director-General of Housing, Ms Nxumalo, was quoted in newspapers as stating that it would be impossible for government to address the housing backlog in the near future.<sup>4</sup>

To complete the bleak picture, according to statistics released by Statistics SA there were 676 000 informal dwellings in South Africa in 1995. This figure rose to 1.3 million by 1999.<sup>5</sup> The sharp increase in the numbers of people resorting to informal dwellings is a stark indication that government is fast losing the battle to provide 'homes for all'.

In its National Housing Code, the Department of Housing acknowledged that there is a severe housing shortage. It estimated that there were 2.2 million families without adequate housing in 1997. It also forecasted that,

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1 SAIRR 2002: 45.

2 SAIRR 2000: 66.

3 See "Housing Ministry media briefing" 12 September 2000.  
< [www.pmg.org.za/briefings/000912housing.htm](http://www.pmg.org.za/briefings/000912housing.htm) >

4 *Business Day* 2001.

5 Quoted in *Business Day* 2001 24 December.

in view of population growth, this number would increase by 204 000 every year.<sup>6</sup>

Rampant homelessness and inadequate housing in South Africa raise the question of the extent to which the state has adhered to the constitutional imperative to progressively realise the right of access to adequate housing. This is particularly pertinent in view of the decision of the Constitutional Court in the case of *Government of the RSA and Others v Grootboom and Others*<sup>7</sup> (hereafter *Grootboom*) which has been hailed as a milestone victory for homeless and landless people of South Africa.

The *Grootboom* judgment has finally settled any doubt around the justiciability of the socio-economic rights enshrined in the Constitution.<sup>8</sup> It emphasised that, as was held in the first Certification judgment,<sup>9</sup> socio-economic rights are justiciable despite the fact that the enforcement of these rights has budgetary implications for the state.

However, while the judgment is groundbreaking, questions have been raised around whether it has resulted in a significant improvement in the day-to-day lives of the individual applicants in that matter, who still reside at the Wallacedene sports complex. They constantly face threats of fires because their dwellings are built very close to each other due to the limited space available. They also face the possibility of contracting illnesses because of the waterlogged surface on which their dwellings are erected and because of a lack of sanitation.

This paper focuses on the implementation of the *Grootboom* judgment. In doing so, it examines the relief granted by both the High Court<sup>10</sup> and the Constitutional Court in the *Grootboom* matter with a view to assessing the extent to which the formulation of these court orders have contributed to the lack of implementation thereof.

## 2 THE IMPACT OF THE GROOTBOOM DECISION

The *Grootboom* case has, undisputedly, had a marked impact on the development of South African constitutional jurisprudence, particularly on the enforcement of socio-economic rights. In this regard the judgment has been hailed as a "positive precedent for the judicial enforcement of economic and social rights"<sup>11</sup> and as a "meaningful step forward for socio-economic rights".<sup>12</sup> In *Grootboom*, Yacoob J held that, while the justiciability of socio-economic rights was beyond question, the issue to be grappled with was how to enforce these rights in any given context.<sup>13</sup>

6 Department of Housing n.d.

7 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC), 2000 (11) BCLR 1169 (CC).

8 Constitution of the Republic of South Africa Act No. 108 of 1996.

9 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC).

10 *Grootboom and Others v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C) (hereafter *Grootboom* (High Court)).

11 Liebenberg 2001: 212.

12 Sloth-Nielsen 2001: 224.

13 *Grootboom*, supra note 7 par 20.

The second area of impact of the *Grootboom* judgment is on international law and, in particular, on the interpretation of the International Covenant on Economic, Social and Cultural Rights (ICESCR). While South Africa has not yet ratified the ICESCR, the Constitutional Court, at the invitation of the *amicus curiae*, relied in *Grootboom* on the interpretation of the ICESCR to give meaning to section 26 of our Constitution, in particular the words "progressive realisation" contained in section 26(2). In view of this, *Grootboom*, is perceived as contributing to the development of a "transnational consensus"<sup>14</sup> on international law obligations in relation to socio-economic rights.

On a practical level, the case has the potential to significantly impact on housing policy at national, provincial and local government level. The judgment is an indication from the Constitutional Court of what the term 'reasonable', used in section 26, requires of the state in formulating and implementing its housing policy. It is a directive to the state that, in order to pass constitutional muster, housing policies and programmes must cater for people who are in desperate and crisis situations.

Further, the case has improved, and has the potential to further improve, the situation and circumstances of the community who initially approached the Cape High Court for assistance (and who are referred to in this paper as the *Grootboom* community).<sup>15</sup> On the day the case was heard in the Constitutional Court, an offer was made to the *Grootboom* community by the Western Cape provincial administration and the Oostenberg local administration in order to ameliorate their immediate crisis. The offer was accepted. Four months after the parties appeared in court to argue the matter, the *Grootboom* community made an urgent application to the Constitutional Court in which they alleged that the appellants had not complied with the agreement reached. The parties appeared in court again in September 2000, after which the Court issued an order "putting the municipality on terms to provide certain rudimentary services"<sup>16</sup> to the *Grootboom* community. The litigation therefore brought direct and immediate benefits to the community.

Finally, and most importantly, the judgment impacts on the lives of persons other than the *Grootboom* community, who are now able to scrutinise and challenge national, provincial and/or local housing policy on the basis that it does not cater for people in desperate and crisis situations.

### 3 CONSTITUTIONAL REMEDIES: THE POWER OF THE COURTS

The Constitution gives the courts a wide discretion when granting relief in matters involving the enforcement of constitutional rights. Section 38 of the Constitution states that the court may grant "appropriate relief, including a declaration of rights".

14 Term used by Scott & Alston in describing the impact of the High Court decision in the *Grootboom* case. Scott & Alston 2000: 213.

15 The community was initially referred to as the Mooinooi community, but, since the widely acclaimed judgment, prefer to be identified as the *Grootboom* community.

16 *Grootboom*, *supra* note 7 par 5.

In *Hoffman v South African Airways*<sup>17</sup> the Constitutional Court held that section 38 must be read in light of the provisions of section 172(1)(b) of the Constitution, which enables a court deciding a constitutional matter to make any order that is just and equitable in the circumstances. Accordingly, in deciding what is 'appropriate' in a given set of circumstances, the main constraints on the power of the court to grant a remedy are the dictates of justice and equity.<sup>18</sup>

In the context of socio-economic rights, the effect of the remedial provisions of the Constitution is to confer a wide discretion on the courts to fashion appropriate and innovative remedies to meet the needs of the poor and the desolate. The impact of this wide remedial power is reinforced by the jurisprudence developed by the Constitutional Court, which emphasises that in order to be 'appropriate,' a remedy must be effective. In *Fose v Minister of Safety and Security*<sup>19</sup> the Constitutional Court held:

In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.<sup>20</sup>

Despite this considerable power, which has been described as "the widest powers to develop and forge new remedies for the protection of constitutional rights and the enforcement of constitutional duties",<sup>21</sup> courts are subject to institutional constraints that curb the extent to which they can and will exercise it.<sup>22</sup> For the purposes of socio-economic rights litigation, the most important constraint on the discretion of the courts is their inability to step into the domain of the other branches of government because of the doctrine of separation of powers. This constraint was alluded to by the Constitutional Court in the case of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*<sup>23</sup> where it was said that:

The other consideration a Court must keep in mind is the principle of the separation of powers and, flowing therefrom, the deference it owes to the Legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the Legislature.<sup>24</sup>

17 *Hoffman v South African Airways* 2001 1 SA (1) (CC) at par 42.

18 Trengove 1999:8.

19 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

20 *Ibid* par 69.

21 Trengove 1999: 8.

22 See Klug 1997:185.

23 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC)

24 *Ibid* at par 66.

The benefit derived from courts deferring to other branches of government on appropriate issues was highlighted by Sachs J in *Du Plessis and Others v De Klerk and Another*<sup>25</sup> when he stated that:

The matter is not simply one of abstract constitutional theory. The judicial function simply does not lend itself to the kinds of factual enquiries, cost-benefit analyses, political compromises, investigations of administrative/enforcement capacities, implementation strategies and budgetary priority decisions which appropriate decision-making on social, economic and political questions requires. Nor does it permit the kinds of pluralistic public interventions, press scrutiny, periods for reflection and the possibility of later amendments which are part and parcel of Parliamentary procedure. How best to achieve the realisation of the values articulated by the Constitution is something far better left in the hands of those elected by and accountable to the general public than placed in the lap of the Courts.<sup>26</sup>

The principle of separation of powers is one of the cornerstones of South Africa's constitutional democracy because it regulates the exercise of public power. However, this principle does not detract from the duty on courts to grant effective remedies where rights are being enforced. This duty on the courts was described in the Canadian case of *Nelles v Ontario*<sup>27</sup> where it was stated that:

When a person can demonstrate that one of his Charter rights have been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur.<sup>28</sup>

This sentiment was mirrored in the English case of *Dixon v Harris*<sup>29</sup> where it was said that "a man hath a right to a thing for which the law gives him no remedy; which is in truth as great an absurdity, as to say, the having of right, in law, and having no right, are in effect the same".<sup>30</sup> South African courts have also recognised the importance of granting remedies to give effect to rights. In 1993, the Appellate Division held that in the absence of a remedy there can be no right.<sup>31</sup>

In deciding constitutional matters, and particularly in matters involving the enforcement of socio-economic rights, judges are required to perform a complex and unenviable balancing function. On one hand, they need to consider their role as protectors of the Constitution, but on the other, they need to be aware of the need to accord an appropriate degree of deference to the legislative and executive arms of government to establish policy and determine budgets and expenditure.<sup>32</sup>

25 In *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC).

26 *Ibid* par 931 to 932.

27 *Nelles v Ontario* 1989, 60 DLR (4th) 609.

28 *Ibid* p 641.

29 *Dixon v Harris* 124 ER 958.

30 *Ibid* p 964.

31 In the case of *Administrator of the Transvaal v Brydon* 1993 (3) SA 1 p 16 the Court held that in the absence of a *remedium* (remedy) there can be no *jus* (right).

32 O'Regan 1999: 5.

The institutional dynamic described above is the backdrop against which the decisions of the High Court and the Constitutional Court in the *Grootboom* matter must be viewed.

## 4 GROOTBOOM IN THE COURTS

### 4.1 High Court

The *Grootboom* case first came before the Cape Provincial Division of the High Court on 1 June 1999 in the form of an urgent application launched by the Grootboom community. The order sought from the High Court was one directing the respondents to provide the applicants with temporary and adequate shelter and/or housing and/or land, pending the applicants and their children obtaining permanent accommodation. The applicants further sought an order directing the respondents to provide their children with sufficient basic nutrition, shelter, health and care services and social services.

Josman AJ was the acting judge who presided over the urgent application. He conducted an *inspection in loco* and ordered that:

Pending a further hearing of this application on Tuesday, 22 June 1999, respondents jointly and severally are ordered to make available to the applicants, free of charge, the Wallacedene Community Hall on a continuing basis in order to provide temporary accommodation to the various children of the applicants and in the case of children who require supervision, one parent/adult for each such child.

Because of the urgent nature of the application before the High Court, the order was not accompanied by reasons setting out its basis. The order also did not contain a declaration of rights identifying the right which the High Court recognised and upheld. Despite this, an analysis of the order (and in particular the words “in order to provide temporary accommodation to the various children”) indicates that it was intended to give effect to the rights of children under section 28 of the Constitution.

The order was an interim one. On the return day of the urgent application, when the matter came before Judges Davis and Comrie, the High Court made an order that was in part declaratory. In paragraph 2, the High Court declared that, in terms of section 28 of the Constitution, the applicant children were entitled to be provided with shelter by the appropriate state department or organ and that the applicant parents were entitled to be accommodated with their children in the said shelter. The High Court declared that:

the appropriate organ or department of state is obliged to provide the applicant children, and their accompanying parents, with shelter until such time as the parents are able to shelter their own children.<sup>35</sup>

In addition to the declaratory order, Davis J directed the respondents to present reports, under oath and within three months, on the implementation of the declaratory order setting out the obligations on the state. The

<sup>35</sup> *Grootboom* (High Court), *supra* note 10 at p 293j.

order also made provision for the applicants to deliver their commentary on the report within one month of presentation thereof and for the respondents to reply to the applicants' commentary.

With regard to immediate relief for the applicants, the High Court directed that the order of Josman AJ should remain in force until the procedure for the reporting, commenting and replying had been completed.

The order handed down by the Cape High Court has been described as "creative and pragmatic".<sup>34</sup> It declares what the duties of the state are in respect of the child applicants.<sup>35</sup> The Court uses a structural interdict to place the respondents on terms with regard to reporting on the implementation of the order. It also shows a sufficient degree of deference by leaving it to state agents to devise an appropriate plan to deal with the crisis. Importantly, the order imposed time frames within which the envisaged process had to take place.

The order handed down by Judges Davis and Comrie clearly draws a distinction between applicant adults and applicant children. This distinction is consistent with the basis for the relief granted, namely the rights of children under section 28. However, the order also made provision for the parents of the applicant children to be accommodated with the children.

After the Cape High Court handed down its decision, the government applied for, and was granted, leave to appeal to the Constitutional Court. In the Constitutional Court, the South African Human Rights Commission (SAHRC) and the Community Law Centre of Western Cape University applied jointly to be admitted as *amici curiae*.

Written argument submitted by the appellants and respondents centred on the meaning and interpretation of the section 28(1)(c), which encompasses the right of children to shelter, basic health care services and social services. However, the *amici* attempted to broaden the issues by submitting that all the respondents, including adults, were entitled to shelter because of the minimum core obligation on the state under section 26.

None of the parties objected to the issues being broadened and the Constitutional Court accordingly extended them to include an analysis of section 26.

As discussed earlier, the *Grootboom* matter commenced as an urgent application in the Cape High Court. When the appeal was due to be heard in the Constitutional Court, an offer was made to the *Grootboom* community by the Western Cape provincial administration and the Oostenberg Municipality in order to ameliorate their immediate crisis. The offer, made "not in the fulfilment of any accepted constitutional obligation, but in the interests of humanity and pragmatism",<sup>36</sup> was accepted by the community and the matter was no longer treated as urgent.

The arrangement agreed to by the parties was that the Western Cape province and the Oostenberg Municipality would provide temporary

34 Scott & Alston 2000: 206.

35 Under s 28 of the Constitution.

36 *Grootboom*, *supra* note 7, par 91.

accommodation on the Wallacedene sportsfield until the community could be housed in the available housing programmes and, in particular, under the Accelerated Land Managed Settlement Programme (ALMSP). The temporary accommodation would comprise of a marked-off site, provision for temporary structures intended to be waterproof, and basic sanitation, water and refuse services.

However, four months after the parties appeared in the Constitutional Court to argue the matter, the Grootboom community made an urgent application to the Court in which they alleged that the Western Cape province and the Oostenberg Municipality had not complied with the agreement reached. The parties appeared in court again in September 2000, after which the Court issued an order "putting the Municipality on terms to provide certain rudimentary services".<sup>37</sup>

There were accordingly two orders made in the *Grootboom* matter. The first (which will be referred to as the interlocutory order) gave effect to an agreement reached by the parties which secured specific benefits only for the members of the Grootboom community.<sup>38</sup> The second (which will be referred to as the general order) was a declaratory order that set out the requirements of section 26(2) of the Constitution in relation to 'reasonable state measures'.<sup>39</sup>

## 4.2 The interlocutory order

The interlocutory order was made by the Constitutional Court on 21 September 2000 after the Western Cape provincial government and the Oostenberg Municipality failed to comply with the terms of the initial agreement between the parties.

When the Grootboom community approached the Court on an urgent basis claiming that the provincial and local spheres were not adhering to the settlement agreement, the Court, "after communication with the parties", made the settlement agreement an order of Court. This order set out the obligations of the provincial and local administrations in relation to providing temporary accommodation for the Grootboom community. It confirmed the undertakings made in relation to sanitation and basic services, water and erection of temporary structures to house the community. The order also made provision for the provincial and local administrations to report back to the court on the implementation of the interlocutory order by 6 November 2000.

On 6 November 2000, the State Attorney, acting for second respondent (the provincial government) filed a letter with the Constitutional Court indicating that they had complied with the interlocutory order. On 13 November 2000, the attorneys acting for the Oostenberg Municipality filed a letter with the Court confirming that they had done so.

37 See *ibid.*, par 54C

38 Being interlocutory in nature, this order is not reported.

39 The judgment in terms of which this order was given is reported as *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

In order to fully analyse the Constitutional Court's judgment and understand the import and effect of the general order handed down, it is important to appreciate the difference between a judgment and an order.

In legal terms, there is a distinct and marked difference between an order of a court and the reasons for such an order. According to Herbstein and Von Winsen,<sup>40</sup> the effect of a court order is as follows:

The order with which a judgment concludes has a special function: it is the executive part of the judgment that defines what the court requires to be done or not done. While the order must be read as part of the entire judgment and not as a separate document, the court's directions must be found in the order and nowhere else.<sup>41</sup>

The order is accordingly the part of the judgment that is directly enforceable and which places specific obligations on parties. Where any party fails to act as required by the order, that party is in contempt of court. The rest of the judgment consists of the reasons for the order. While the reasons develop law and jurisprudence, they do not create specific obligations which are immediately enforceable.

The general order granted by the Court is worth reproducing *in totam* and reads as follows:

- 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.
- (d) There is no order as to costs.<sup>42</sup>

The order granted by the Court takes the form of a declaratory order which sets out the requirements of section 26(2) with regard to 'reasonable state measures'. The order also declared that the state housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements of reasonableness as contained in section 26(2).

40 Van Winsen, Cilliers & Loots 1997: 679.

41 *Ibid* p 690.

42 *Grootboom, supra* note 7 par 99.

The order does not specifically direct the state to take positive steps to fulfil the obligations set out in the order. Even though Yacoob J stated in the body of the judgment, "The order requires the state to act to meet the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need",<sup>43</sup> this is not repeated in the actual order handed down by the Court and is accordingly not directly enforceable. This is a serious shortcoming. In order to compel the state to fulfil the declaratory obligations in the order, follow-up litigation will have to be conducted to obtain a mandatory order, which compels the state to act, rather than a purely declaratory order.

The order declares that section 26(2) requires the state to devise and implement, within its available resources, a comprehensive and coordinated program to progressively realise the right of access to adequate housing. Importantly, the Constitutional Court found that the 'reasonable' standard built into section 26 applied to both the formulation of programmes and the implementation thereof.

It is also important to note that the order shows clear deference to the legislature to determine the precise content of the housing programme, even though the Court did cite the AMSLP as an example of the type of measure that would provide relief to people in desperate and crisis situations.

## 5 IMPLEMENTATION OF THE *GROOTBOOM* ORDERS

### 5.1 The interlocutory order

The interlocutory order has been implemented to a limited extent. The sum of R200 000 was made available to the community for basic shelter. The community used this money to buy zinc sheets, windows and doors. Each dwelling was allocated sheets for a roof, as well as one window and a door.<sup>44</sup> Twenty toilets were erected on the sports field, along with taps. However, in contravention of the interim order, as at October 2001<sup>45</sup> the toilets were not being maintained by the Oostenberg Municipality. As a result, at the time that this paper was written, eight of the 20 toilets were not in working condition. The remaining 12 were being used by the 2 800-strong community, as well as members of the surrounding Wal-lacedene community.<sup>46</sup>

Ten taps were installed by the Oostenberg Municipality. Initially, they were fitted with a mechanism that required a token (costing 25c) to be inserted before 25 litres of water were released. However, this system did not work efficiently and the mechanism was eventually removed. As a result, the community presently has free access to water.

43 *Ibid* par 96.

44 Interview with Lucky Gwaza, community leader, Cape Town, 31 October 2001.

45 This is the month in which the writer conducted an inspection of the area where the community live.

46 Comprising approximately 6 000 shacks.

There is no drainage on the sports field where the shack dwellings were erected. After rains, water does not seep into the ground and so stagnates on the surface. Children who play in it fall ill. There is also no refuse removal. Refuse is dumped in the area surrounding the taps and in the vacant land adjoining the sports field,<sup>47</sup> creating unhygienic and intolerable conditions. Under the interim order, both the Premier of the Western Cape and the Oostenberg Municipality were ordered to provide basic sanitation services.

It is not ideal for the community to be housed on the sports field. Sports bodies, who still use the field weekly for sporting fixtures, resent the community's presence there. Because of the proximity of the dwellings to the sports field, members of the community repeatedly have to deal with damage caused by soccer balls hitting their shacks.

The dwellings are also erected very close together. Because the community do not have access to electricity, they are forced to use candles for light. This is a fire hazard which, since the date of the interlocutory order, has already resulted in four serious outbreaks of fires. This fire hazard is aggravated by the fact that many shacks are located quite a distance from the area where the ten taps are situated. The result is that the fires are difficult to control and extinguish.

The main difficulty that the community have with their current situation is the *ad hoc* nature of the arrangement. They have been accommodated in 'temporary' shelter for well over a year. The community feel that they have no security of tenure over the land that they occupy, which is a source of great insecurity.<sup>48</sup>

## 5.2 The general order

The order handed down by the Constitutional Court does not set out the specific obligations of the three spheres of government. The order states that the state is required to devise and implement a reasonable programme<sup>49</sup> and declares that "the state housing programme in the area of the Cape Metropolitan Council"<sup>50</sup> falls short of meeting the requirement of reasonableness.

However, the powers and functions among the three spheres of government were dealt with in the body of the judgment. The Constitutional Court held that:

The Constitution allocates powers and functions amongst these different spheres emphasising their obligation to cooperate 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. Local governments have an important obligation to ensure that services are provided in a sustainable manner to the communities that they govern.<sup>51</sup>

47 Ironically, this land, known as 'New Rust', is the land from which the community was initially evicted.

48 Interview with Lucky Gwaza, *ibid*.

49 *Grootboom*, *supra* note 7, par 65.

50 *Ibid* par 65.

51 *Ibid* at par 39.

Of importance is the Court's finding that national government ultimately bears the overall responsibility of ensuring that the state's obligations under section 26 are fulfilled.<sup>52</sup>

Furthermore, to identify the roles and responsibility of the different spheres of government in implementing the order the judgment must be understood in the context of the broader housing policy framework. While the Constitution does not allocate functions to the different spheres of government, the Housing Act of 1997<sup>53</sup> allocates roles and functions among the three spheres of government.

The principle behind the allocation of roles, as defined in the Housing Act, is that government functions should be performed at the lowest possible sphere, closest to the people. The Housing Act requires that national government establishes and facilitates a sustainable national housing development process, which entails:

- determining national policy, including norms and standards;
- setting broad national housing delivery goals;
- facilitating the setting of provincial and local government housing delivery goals;
- monitoring the performance of national government and, in consultation with the provincial Members of Executive Committees (MECs), monitoring the performance of provincial and local government against delivery and budgetary goals;
- assisting provinces to develop administrative capacity;
- supporting and strengthening the capacity of municipalities to manage their own affairs; and
- promoting consultation and communication on matters involving housing development.

The duty of provincial government is to promote and facilitate the provision of adequate housing in its province within the framework of national housing policy. In terms of the Housing Act, this entails:

- determining provincial policy in relation to housing;
- promoting the adoption of provincial legislation to ensure effective housing delivery;
- supporting and strengthening the capacity of municipalities to effectively perform their functions; and
- coordinating housing development in the province; preparing and maintaining a multi-year plan in respect of execution of national and provincial housing programmes.

A further power that the provincial government has is the power to intervene when a municipality cannot or does not perform a duty imposed by the Housing Act.

<sup>52</sup> *Ibid* par 65.

<sup>53</sup> The Housing Act No. 107 of 1997.

At local government level, every municipality must take all reasonable and necessary steps, within the framework of national and provincial housing legislation and policy, to ensure that the housing right as set out in section 26 of the Constitution is progressively realised. This should be done by actively pursuing the development of housing, addressing issues of land, services and infrastructure provision, and creating an enabling environment for housing development in its area of jurisdiction.

Despite a clear allocation of roles in the Housing Act, the lack of specificity in the *Grootboom* order with regard to the allocation of responsibilities between the three spheres of government has been blamed for discord and uncertainty among them with regard to their obligations under the *Grootboom* judgment. The SAHRC, in a letter filed in the Constitutional Court, stated that "after initial uncertainty about the locus of responsibility for the implementation of the court order, the two organs of state finally put aside their differences in June 2001".<sup>54</sup>

The *Grootboom* judgment was handed down on 4 October 2000. It therefore appears that the provincial administration of the Western Cape and the Oostenberg local administration were engaged in a dispute for almost a year as to where the responsibility lay in respect of the implementation of the *Grootboom* order.

The report filed by the SAHRC (in terms of its undertaking to report on the implementation of the Constitutional Court's order in the *Grootboom* matter), mentions no attempt by any of the three spheres of government to coordinate efforts and reach consensus on what the *Grootboom* order required, nor on the manner in which it had to be implemented to ensure housing policies' and programmes' consistency with the requirements of section 26.

In the *Grootboom* judgment, the Constitutional Court held that:

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 program 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 receive it immediately. Such planning too will require proper cooperation between the different spheres of government.<sup>55</sup>

After the *Grootboom* judgment was handed down, the National Department of Housing proposed to the Treasury that at least 1% of the national housing budget should be allocated for contingencies that may result in people living in desperate situations.<sup>56</sup> The response from the Treasury was that any contingency allocation had to be administered at provincial level. The result of this is that, in terms of the Division of Revenue Act 1 of 2001, provinces are allowed to use between 0.5% and 0.75% of their budgets for '*Grootboom*-type situations' in order to provide relief to families living in intolerable conditions or crisis situations.

54 Letter filed by the SAHRC with the Constitutional Court, dated 14 November 2001.

55 *Grootboom*, *supra* note 7.

56 Interview with Monty Narsoo, Deputy Director-General of the Department of Housing, Pretoria 7 January 2002.

However, according to the National Department of Housing, the administration of these funds at provincial level rather than at national level is not practicable because the the budgetary allocation in one province may be highly inadequate, while in another province, the budget may be unused, since provinces do not experience crisis situations of equal proportions, if at all. For example, during one financial year, one province may experience severe crises (such as the Western Cape floods early in 2002), while another may not experience any crisis at all.

The National Department of Housing<sup>57</sup> strongly motivates for the money to be controlled at national level because it will allow it to assess applications for contingency funding from provinces and release funds accordingly, thus avoiding problems of over- and under-spending.

## 6 RAPID LAND RELEASE PROGRAMMES

In order to demonstrate that they had complied with their obligations under section 26, the appellants put evidence before the Court of various legislative and other measures related to housing. The Cape Metropolitan Council (CMC) presented to the Court its ALMSP, which was drafted in June 1999.

The AMLSP provided for the rapid release of land for families in crisis, with a progressive provision of basic services. According to the Programme document,<sup>58</sup> the AMLSP was intended to neither substitute nor supplement existing housing programmes, but was aimed at catering for exceptional circumstances where people found themselves in crisis situations. Examples are:

- families that find themselves waterlogged after heavy rains;
- settlements in flood lines devastated by heavy rains;
- communities that illegally occupy a strategic parcel of land; and
- invasions of privately owned land or a project in progress.

The idea is that the AMLSP can provide immediate relief to people who have fallen into desperate situations while preventing isolated incidents from stalling progress in terms of the national housing program.

The AMLSP depends on the project-linked subsidy for funding. However, the key difference between conventional housing projects and the AMLSP is that the latter only seeks to secure land and to install basic services. Once these steps are completed the site is eligible for progressive upgrading.

It is apparent from the Constitutional Court judgment that the AMLSP played a significant role in the relief eventually granted by the Court. The Court commented that:

57 *Ibid.* Correspondence with Louis van Der Walt, Director: Housing Policy and Strategy, National Department of Housing, 10 January 2002.

58 Unpublished document produced by the Cape Metropolitan Administration Housing Department, 2000, entitled "Accelerated Managed Land Settlement Programme in the CMA".

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 obligations, which the State has towards people in the position of the respondents in the Cape Metro . . . However, as with legislative measures, the existence of the programme is a starting point only. What remains is the implementation of the program 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.<sup>59</sup>

During the hearing, the Court was informed by counsel for the state that the AMLSP was not in force at the time the proceedings were initiated but, at the time of the hearing (in May 2000), it had been adopted and was being implemented.

In the general order, the Constitutional Court held that in order to progressively realise the right of access to adequate housing a state programme should include reasonable measures to provide relief for people who have no access to land and who are living in intolerable situations. In the order the Court indicated that it considered the AMLSP of the CMC to be an example of a reasonable measure which is aimed at providing relief to desperate people with no roof over their heads.

The AMLSP also, by implication, featured in the interlocutory order handed down by the Court. In the initial agreement between the parties, the Department of Planning, Local Government and Housing (Western Cape) and the Oostenberg Municipality undertook to provide the applicants with temporary accommodation until they could be housed in terms of existing housing programmes, and in particular, the AMLSP.

The AMLSP presented to the Constitutional Court was an initiative by the CMC. In practice municipal councils were meant to apply to the CMC for funding and then execute specific projects.

However, with the collapse of the two tier system of local government around May 2001, the practicability of the AMLSP was called into question. While the AMLSP was still official policy, the restructuring of local government in the Western Cape resulted in it not being implemented in its original form.<sup>60</sup> Instead, at the time of the drafting of this paper, reaction to crises by the the City of Cape Town was on an *ad hoc* basis but modelled on the principles of the AMLSP. Due to budgetary constraints, the efforts of the City of Cape Town were concentrated on specific housing projects in specific areas.

Since August 1999 the AMLSP has also been adopted by provincial government as a provincial housing programme for the Western Cape. However, the implementation of the programme is severely hampered by budgetary constraints and a scarcity of land in the Western Cape.

One of the main shortcomings of the AMLSP that calls into question its appropriateness as an adequate answer to the issues raised in the *Grootboom*

59 *Grootboom*, *supra* note 7 at par 67.

60 Interview with J Kuhn, Department of Housing, City of Cape Town, Cape Town, 5 December 2001.

judgment, is that it is aimed exclusively at persons who qualify for state housing subsidies. This means that persons who do not qualify for state subsidies will also not be eligible for assistance under the AMLSP. Some of the groupings that will not qualify for state subsidies include foreign nationals, second-time homeowners and minors.

The question is, what form of assistance is available for people who do not qualify for state housing subsidies but who find themselves in desperate and crisis situations? An example that highlights the difficulty with this situation is the plight of minors who, as a result of the HIV/AIDS scourge, find themselves as heads of households. They would not be accommodated under the AMLSP. Furthermore, currently, in direct contravention of the *Grootboom* decision, there is no housing policy or program in place that caters for them. Therefore, despite the *Grootboom* decision, these children may not be catered for under section 26 (although they may be entitled to direct relief under section 28(1)(c)<sup>61</sup> of the Constitution).

Despite the fact that the Constitutional Court patently approved of the Western Cape version of a rapid land release programme to fill the gap in housing policy, national government has not required all provinces to adopt rapid land release programs.<sup>62</sup> The policy of the National Department of Housing is that provinces are free to adopt rapid land release programmes as long as they are consistent with national housing policy. Information received from the Department of Housing is that, as at January 2002, rapid land release programmes have been adopted in only four provinces: the Western Cape, Gauteng, Eastern Cape and KwaZulu-Natal.<sup>63</sup>

It is important to note that the Court assessed the national housing programme in *Grootboom*. While it concluded that the programme represented a systematic response to a pressing social need,<sup>64</sup> it found that there was no provision in the national housing programme for people in desperate need.<sup>65</sup> The lack of a national rapid land release programme, or a similar programme that addresses the plight of people in desperate and crisis situations, renders existing housing policy unconstitutional. Of concern is the fact that this position subsists more than two years after the *Grootboom* decision was handed down.

Information received from the National Department of Housing<sup>66</sup> is that it is in the process of developing a new housing programme, which will be termed the National Housing Programme for Housing Development in Emergency Circumstances. It will provide a funding framework for housing development in emergencies, such as instances where people are totally destitute, are living in intolerable or dangerous conditions, have lost their houses through fire or storms, or in relation to people who, for

61 See Sloth-Nielsen in this volume.

62 Interview with Monty Narsoo, *ibid*.

63 *Ibid*.

64 *Grootboom*, *supra* note 7, par 54.

65 *Ibid*.

66 Information obtained from Louis van Der Walt, Director: Housing Policy and Strategy, National Department of Housing, 10 January 2002.

some other reason, have to be resettled urgently. The programme will also provide for dedicated funding and shortened development processes but will not compromise the general procurement prescripts applicable to organs of the state.

According to the Department of Housing, it is also foreseen that the programme will allow for the funding to be applied to temporary developments in order to enable the authorities to establish transit areas to which people could be moved on an urgent basis and from which such affected persons could be re-housed in permanent housing on a progressive basis. Services that will be provided in these areas will be basic and could include shared facilities and certain basic house building materials. The cost involved in funding the programme will not affect the permanent housing that is to be provided. One of the central themes that underlie the new policy is the provision of emergency solutions with a permanent horizon. This is essential to ensure the optimal use of limited state funding.

The programme will be aligned to the housing subsidy scheme, but will introduce certain exceptions to the rules so that persons who do not qualify for housing subsidies might still qualify for resettlement to a transit area, thus allowing them time to find permanent accommodation. As indicated, the ultimate solution will be to resettle people who are destitute in permanent areas and houses and by so doing, enable them to access the housing subsidy.

It is, however, unclear at this stage what the nature of the relationship is between this programme and the existing housing subsidy scheme.

It appears that the new programme will, once implemented, go a long way to addressing the unconstitutionality of the present housing programme. The key issues that remain are when it will be brought into effect and how successfully it will be implemented.

## 7 SUPERVISION BY THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

The general order handed down by the Constitutional Court is silent on any obligation on the SAHRC to monitor or supervise the implementation of the order.

However, in the body of the judgment it is stated that:

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 rights have been violated.

Counsel for the SAHRC indicated during argument that it had the duty and was prepared to monitor and report on the state's compliance with its section 26 obligations in accordance with the judgment.<sup>67</sup>

<sup>67</sup> *Grootboom*, *supra* note 7 par 97.

The Court stated that the SAHRC would “monitor, and if necessary, report in terms of these powers”<sup>68</sup> on the steps taken by the state to comply with section 26.

There are two significant issues that arise from the way in which the Court dealt with the monitoring and reporting to be done by the SAHRC.

First, the order handed down is silent on any obligation on the SAHRC to monitor and report. This means that, should the SAHRC neglect to do so, it would not be in contempt of the Constitutional Court. Thus, while the Court certainly aimed to compel the SAHRC to monitor the implementation of the order (even if this was not reflected in the order), it appears to make the reporting optional, stating that the SAHRC should report “if necessary”.

Second, the use of the words “in terms of these powers” indicates that the Court interpreted the SAHRC’s authority to monitor and/or report in the *Grootboom* matter as being directly derived from the Constitution. This accordingly left unclear whether the SAHRC was meant to report back to the Court, or whether the optional ‘report’ referred to by the Court was to form part of the report which, in terms of the Human Rights Commission Act 54 of 1994,<sup>69</sup> the SAHRC has to table annually in the National Assembly and the Senate.

The novelty of the Constitutional Court judgment and its lack of detail meant that the SAHRC was left with the task of identifying, first, whether it was required to monitor compliance with both the interlocutory and the general orders, and second, what, in practical terms, the roles of monitoring and reporting required.

With regard to the monitoring of the interlocutory order, it concluded that it was not under a specific obligation to monitor compliance, in terms of the judgment. Despite this, it did monitor compliance with the interlocutory order through its complaints department.

In relation to the general order, it appears from the report filed by the SAHRC with the Constitutional Court on 14 November 2001 that it conducted several site visits to the Grootboom community and held meetings with officials of the local administration and the provincial administration.<sup>70</sup> While the report does not mention any interaction with officials in the National Department of Housing, according to representatives of the SAHRC numerous letters were addressed to the Department but no response was received.<sup>71</sup>

The report filed by the SAHRC deals almost exclusively with the efforts of the provincial and local administrations to relieve the plight of people living in the broader Wallacedene area of the Western Cape. It sets out the process initiated by the local authority to fast track the Wallacedene

68 *Ibid.*

69 SAHRC, Act 54 of 1994, s 7(1)(d).

70 Interview with Charlotte McClain, Commissioner at the SAHRC, Johannesburg, 12 January 2002.

71 Telephonic interview with Victor Southwell, SAHRC, 21 November 2001.

spatial plan de-densification strategy, which deals with issues such as identifying critical areas to be addressed first for de-densification, how de-densification should happen and how relocation should take place, identification of land needed by the de-densification exercise, and development plans for identified areas.

A task team was also appointed by the provincial and local authorities. Called the Wallacedene Regeneration Team, its aim is to plan the re-development of the whole of the Wallacedene area. According to the SAHRC report:

In order to address problems, the Local Authority has therefore determined that it needs to address the crises in the community as a whole rather than focusing on a particular community. This may be the correct approach because the court order in the *Grootboom* judgment (which) is not specific to the *Grootboom* community speaks of the need to develop a plan to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crises situations. Clearly,<sup>72</sup> therefore, the Wallacedene community falls into the ambit of the court order.

The SAHRC states further that "it is not clear that the local authority has correctly interpreted the order", since it has proposed a final answer to the housing crises in Wallacedene rather than relief for people living in intolerable or crises situations. The SAHRC states that enquiries made with the local authority confirmed that it has no plans to provide relief beyond what was granted in the interim order of the Constitutional Court. In this regard the SAHRC concludes that it is therefore "not clear that the Development Plan complies with the order of the Constitutional Court".<sup>73</sup>

It is ironic that the manner in which the provincial and local governments have chosen to interpret and implement the Constitutional Court order is in direct contrast to what the Constitutional Court intended. They have interpreted the order as requiring them to devise and implement a plan for permanent housing for people in the broader Wallacedene area. In so doing, they have accelerated the provision of permanent housing for people who belong to the broader Wallacedene community. This is tantamount to providing housing on a preferential basis.

What the Western Cape provincial government and the Oostenberg Municipality failed to appreciate is that the judgment handed down by the Constitutional Court is not specific to any community or area. It is directed at policy generally and requires the state to devise and implement a policy or programme for all persons who find themselves in desperate and crisis situations. This plan need not, and clearly cannot, be the provision of permanent housing to all persons in desperate and crisis situations.

While the SAHRC has correctly identified that the general order in the *Grootboom* judgment goes broader than addressing the needs of the members of the *Grootboom* community (or even that of the broader Wallacedene community), it is unclear how this understanding of the

72 Letter from SAHRC addressed to the Constitutional Court in the matter of *Government of South Africa and Others v Grootboom and Others*, 14 November 2001.

73 *Ibid.*

impact of the judgment fed into the manner in which the SAHRC performed its monitoring and reporting exercise.

The SAHRC report states that the local and provincial authorities interpreted the *Grootboom* judgment as requiring them to deal with the plight of the members of the *Grootboom* community (which they then extended to the entire Wallacedene area). However, there is nothing in the SAHRC's report to indicate that it was brought to the attention of the relevant authorities that their obligations under *Grootboom* were to devise a housing programme that met the 'reasonableness' standard. This included the key component of catering on a short-term basis for desperate people in crisis.

With regard to whether the SAHRC was meant to report back to the Court or not, it appears from the Constitutional Court's lack of a public response to the letter filed by the SAHRC that the Court does not consider itself seized of the matter any longer. This reinforces the notion that the Constitutional Court never intended to retain jurisdiction over the *Grootboom* matter and that the report by the SAHRC was intended by the Court to be part of the report to the National Assembly and the Senate.

Despite the shortcomings in the manner in which the Court engaged the services of the SAHRC, the mere use of the institution to oversee the implementation of court orders is novel and innovative. The biggest advantage is that the Court is exploiting a resource that is already available. However, the *Grootboom* experience has shown that use of the SAHRC is not effective unless the SAHRC is required, by an order of Court, to report back to the Court. In other words, the SAHRC should only be used in supervisory interdicts where the Court retains jurisdiction over a matter and can place strict time frames on the monitoring and reporting activity to be undertaken by the SAHRC.

## 8 COMPARISON WITH THE ORDER IN THE TAC CASE<sup>74</sup>

Subsequent to the decision of the Constitutional Court in *Grootboom*, the next case before the Constitutional Court which involved the enforcement of socio-economic rights was the case of *Treatment Action Campaign and Others v Minister of Health and Others*.<sup>75</sup> In that matter, a number of organisations and individuals in civil society who are concerned with the treatment of people living with HIV/AIDS approached the High Court for relief relating to the state's programme of preventing or reducing mother-to-child transmission (MTCT) of HIV. Among the orders requested was a declaration that the state is under a duty to make the anti-retroviral drug, Nevirapine, available to pregnant women with HIV/AIDS where it is medically indicated and, further, compelling the state to make Nevirapine available in such circumstances.

74 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC), 2002 (10) BCLR 1033 (CC) (TAC).

75 *Treatment Action Campaign and Others v Minister of Health and Others* 2002 (4) BCLR 356 (1).

The High Court ruled in favour of the applicants. The respondents then took the matter on appeal to the Constitutional Court (hereafter the *TAC* case).<sup>76</sup> The Constitutional Court found that the government policy in connection with the treatment of HIV/AIDS does not pass constitutional muster “because it excludes those who could reasonably be included where such treatment is medically indicated to combat mother-to-child transmission of HIV”.<sup>77</sup>

The first part of the order handed down by the Constitutional Court was purely declaratory and set out the duty on the government to devise and implement a policy or programme to progressively realise the rights of pregnant women and their babies to have access to health services to combat MTCT of HIV. The Court also declared that the present government policy fell short of meeting the constitutional standard. However, the Court went further and ordered the government, “without delay”, to take steps to facilitate and expedite the use of Nevirapine at public hospitals and clinics.<sup>78</sup>

Unlike the *Grootboom* matter, where the Constitutional Court stopped short of compelling the state to act to remove the unconstitutionality inherent in its housing programme, in the *TAC* case the Court adopted a robust approach and compelled the government to act.

The effect of the mandatory order issued by the Court is that it retains jurisdiction over the matter if there is non-compliance with the order. The applicants are accordingly in a position to approach the Court for relief if the various respondents fail to act in the manner in which the order compels them. The relief available includes making an application for the committal of the relevant government officials for failing to abide by the court order.

The Constitutional Court did allow the government a measure of flexibility in using other methods to reduce the risk of MTCT of HIV. However, such methods would have to be “equally appropriate or better” than the use of Nevirapine.<sup>79</sup>

Of concern, though, is that the Constitutional Court declined to retain jurisdiction over the *TAC* matter and to include within its order a structural interdict requiring the government to submit a revised policy to it to satisfy the Court that the Constitutional requirements had been met. In this regard, the Court said the following:

We do not consider, however, that orders should be made in those terms unless this is necessary. The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present matter.<sup>80</sup>

76 *TAC*, *supra* note 74.

77 *Ibid* par 125.

78 *Ibid* par 135.

79 *Ibid* par 135, order 4.

80 *Ibid* par 129.

This stance is disturbing, particularly in view of the fact that the applicants (whose attorneys of record were the same attorneys who represented the *amici curiae* in the *Grootboom* matter) drew the attention of the Court in their argument before it to the difficulties experienced in implementing the *Grootboom* order.

## 9 CONCLUSION

An analysis of the orders handed down by the High Court and Constitutional Court in the *Grootboom* matter clearly demonstrates the complexity of fashioning a remedy that is appropriate and effective in matters impacting on the formulation and implementation of state policy. This is largely due to the delicate balancing act which the courts are called on to perform as the vindicators of rights, on one hand, and needing to defer to other branches of government with regard to political and policy decisions, on the other.

The courts may feel constrained by the need to accord an appropriate degree of deference to political branches of government to give orders which are not robust enough to achieve a tangible effect. This was clearly seen in the *Grootboom* case where the Court stopped short of issuing a mandatory order placing the state on terms to take steps to rectify its housing programme to provide for people living in desperate and intolerable situations. The lack of a time frame in which the state was compelled to act has resulted in a lack of decisive action, despite two years passing since the *Grootboom* judgment was handed down.

The *Grootboom* judgment has demonstrated that excessive restraint by the Court results in orders that do not compel the state to act to address the unconstitutionality which the Court identifies. These orders will consequently be ineffective. In essence the Court runs the risk of failing in its obligation to respect, protect, promote and fulfil the rights contained in the Bill of Rights.<sup>81</sup>

The lack of clarity in the *Grootboom* order has also been exploited by the different spheres of government, who have not moved swiftly enough to make the required changes in housing policy at national, provincial and local government levels. While it is appreciated that the development of policy takes time, in the absence of timely and effective action the overall housing policy in its present state falls short of meeting the requirements of section 26 of the Constitution.

In contrast with the *Grootboom* order, the Constitutional Court in the *TAC* case made orders, in addition to the declaratory orders, compelling the state to act to remove the unconstitutionality inherent in its policy on the treatment of HIV/AIDS. The Court, however, declined to include a structural interdict because it found that there was no reason to believe that the government would not respect and execute its orders. This stance is surprising in view of the lack of implementation of the *Grootboom* order.

81 S 7(2) of the Constitution.

Meanwhile, in the context of the *Grootboom* case millions of people continue to live in desperate and crisis situations while the process of devising and implementing a policy and programme that will pass constitutional muster drags on. For them, victory in the Constitutional Court does indeed have "a hollow ring".<sup>82</sup>

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82 This expression was used by Chaskalson P in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC), at par 8.