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THERE'S NO PLACE LIKE HOME: ACCESS TO HOUSING FOR ALL SOUTH AFRICANS

INTRODUCTION

South Africa has an acute shortage of housing.¹ Recovering from nearly fifty years of apartheid, its democratically-elected government, led by the African National Congress, has had mixed results in addressing the housing crisis it inherited from decades of white minority rule.² The new government began with a solid foundation—a new Constitution that enshrined housing among other socioeconomic rights as protected and guaranteed.³ However, when it came to interpreting those rights, South Africa's Constitutional Court fell short of mandating that the government take additional action to meet the housing needs of its citizens.⁴

Substandard housing is a living legacy of apartheid.⁵ Out of a total population of 51.8 million people, 3.3 million—7 percent—live in informal⁶ or traditional⁷ housing.⁸ As of 2010, there were 1.85 million people waiting for government-subsidized housing; their names sit on a list for an average of four years before they are placed in homes.⁹ Low-income communities are rising up and

1. Robert Brand & Mike Cohen. *Where the Heart is: South Africa's Post-Apartheid Housing Failure*, MAIL & GUARDIAN (Aug. 2, 2013), <http://mg.co.za/article/2013-08-02-where-the-heart-is-south-africas-post-apartheid-housing-failure>. See also *Government of the Republic of South Africa v. Grootboom*, 2000 (1) SA 46 (CC) para. 6 (S. Afr.).

2. See Brand & Cohen, *supra* note 1.

3. See S. AFR. CONST. 1996.

4. See *Government of the Republic of South Africa v. Grootboom*, 2000 (1) SA 46 (CC) para. 6 (S. Afr.).

5. Brand & Cohen, *supra* note 1.

6. Informal housing in the South African context generally refers to shacks or other improvised shelters. See also Raylene Keightley, *Symposium: Public Law in Three Nations: The Challenges of Litigating Socioeconomic Rights in South Africa*, 2011 NZ LAW REV. 295, 311 (2011).

7. Traditional housing in the South African context generally refers to mud huts with thatched roofs. See *id.*

8. Sapa, *More South Africans Living in Formal Housing*, POLITY.ORG.ZA (Sept. 8, 2010), <http://www.polity.org.za/article/more-south-africans-living-in-formal-housing-2010-09-08>.

9. *Id.*

speaking out about their living conditions, with a record 173 protests in 2012 about insufficient shelter and municipal services.¹⁰

Moderate-income South Africans also have reason for concern.¹¹ Out of the 14.5 million households in the nation, only 15 percent earn enough to obtain a mortgage.¹² Of the remaining 85 percent of households, only 60 percent qualify for state housing because they meet the income requirement, earning less than ZAR 3,500 per month.¹³ That leaves 25 percent of South Africans without ready access to housing because they earn too much to qualify for state assistance, but too little to qualify for a mortgage.¹⁴ Out of the national ZAR 838 billion mortgage market, affordable housing accounts for a mere 5 percent of mortgages.¹⁵ Additionally, out of those who qualified for a home loan, as of June, 2013, about 75,000 property owners were in arrears on their mortgage payments for more than three months.¹⁶

This note will take a critical look at how far South Africa has come in realizing its progressive right of access to housing and how far it still has to go. Part I will begin with a look at the legacy of apartheid and the foundation of South Africa's housing policy since 1994. Part II will discuss the Constitutional Court

10. Brand & Cohen, *supra* note 1.

11. See Solenn Honorine, *S. Africa Struggles to Provide Housing to Black Middle Class*, VOICE OF AMERICA (May 27, 2013), <http://www.voanews.com/content/south-africa-struggles-to-provide-housing-to-black-middle-class/1668919.html> ("People in the black middle class still own far less, per capita, than their white countrymen. They are too rich to qualify for government-subsidized housing, but too poor to afford living in the affluent suburbs at the other end of the city. Accommodation for them remains a challenge.").

12. Brand & Cohen, *supra* note 1.

13. *Id.*

14. *Id.*

15. *Id.*

16. *SA Banks Struggling to Deal with Distressed Property Owners*, SA COMMERCIAL PROP NEWS (Oct. 16, 2013, 3:00AM), <http://www.sacommercialpropnews.co.za/property-types/housing-residential-property/6385-banks-striving-to-reduce-bond-defaults.html>.

[First National Bank Home Loans CEO Jan Kleynhans said that] demand for residential property was unlikely to improve in the near term, given SA's fairly low economic growth rate and 'persistent and relatively high' household debt levels, which were constraining the ability of consumers to take on new mortgage debt.

Id.

case, *Government of the Republic of South Africa v. Grootboom*,¹⁷ and its relationship to the persistent lack of access to housing in South Africa. Part III will examine the executive and legislative responses to the Constitutional housing access requirement and the *Grootboom* decision. In light of the Constitutional Court's unwillingness to give teeth to the housing provision in the Bill of Rights, Part IV will encourage specific legal reforms, to be undertaken by the executive and legislative branches of the government, as well as suggest legal strategies for future litigants and advocates. The Constitutional Court of South Africa has failed to enforce the Constitution's promise of access to adequate housing for all South Africans; therefore, the legislative and executive branches of South Africa's government must amend the law to shift from the unsustainable practice of delivering completed units of housing toward delivering infrastructure and public services that will support the private development of affordable housing.

I. BACKGROUND

The housing landscape in South Africa today exists in the shadow of apartheid.¹⁸ Apartheid restricted where the majority non-white population could live and work, creating a regime of "separation with only the merest pretense of equality."¹⁹ As the

17. It is worth noting that early in the *Grootboom* opinion the Court admits, "[t]he Constitution's promise of dignity and equality for all remains for many a distant dream." *Government of the Republic of South Africa v. Grootboom*, 2000 (1) SA 46 (CC) para. 2 (S. Afr.).

18. See Juanita M. Pienaar, *Access to Housing in South Africa: An Overview of Dimensions and Mechanisms*, 36 J. JURID. SCI. 119, 123 (2011) ("The fact that the South African population was regulated on the basis of race had a direct impact on access to land, in general, and access to housing, in particular."). Pienaar describes three pillars of apartheid: influx control, spatial racial segregation, and the regulation of unlawful occupation of land. These three pillars continue to shape South African society long after the fall of the apartheid regime. Influx control measures resulted in black workers temporarily living and working in cities while their families stayed in their homes in rural areas. Spatial racial segregation dictated what kind of rights people could have to real estate based on their race. The regulation of unlawful occupation of land was strictly enforced and had adverse impacts on the black population of South Africa. *Id.*

19. Eric C. Christensen, *Adjudicating Non-Justiciable Rights: Socioeconomic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321, 328 (2007).

apartheid regime fell, the African National Congress (“ANC”) began to shape a new Constitution for South Africa, including a Bill of Rights that would ensure government protection of basic socioeconomic rights.²⁰ The final Bill of Rights included a provision on the right of access to housing.²¹ The Constitutional Court clarified this provision, and the government’s role vis-à-vis access to housing, in a key case, *Government of the Republic South Africa v. Grootboom and Others*.²² The national government, before *Grootboom* and after, adopted a slew of initiatives to address South Africa’s housing crisis.²³ Yet millions of South Africans still occupy informal housing.²⁴

A. A Legacy of Apartheid

The system of apartheid, in place from 1948 through 1994, left deep scars of segregation, poverty, and inequality on South African society.²⁵ But discrimination against African, Asian, and mixed populations did not begin with apartheid—it dates back to the arrival of the European settlers in the seventeenth century.²⁶ After colonizing the Cape region, French, German, and Dutch immigrants enslaved local peoples.²⁷ In the nineteenth century, the British and Boers vied for supremacy in the region and, in an agreement in 1910, they came together to form the Union of South Africa.²⁸ In 1948, the white, Afrikaner-dominated National Party began its program of apartheid that di-

20. Mark S. Kende, *The South African Constitutional Court’s Construction of Socioeconomic Rights: A Response to Critics*, 19 CONN. J. INT’L L. 617, 626 (2004).

21. S. AFR. CONST., Ch. 2, 1996.

22. *Government of the Republic of South Africa v. Grootboom*, 2000 (1) SA 46 (CC) at para. 41–46 (S. Afr.).

23. See KATE TISSINGTON, SOCIOECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA, A RESOURCE GUIDE TO HOUSING IN SOUTH AFRICA 1994-2010, at 60 (2011), available at http://www.housingfinanceafrica.org/wp-content/uploads/2012/01/SERI_A-Resource-Guide-to-Housing-in-South-Africa_Feb11.pdf.

24. Sean Jacobs, *After Mandela*, NATION (June 23, 2013), <http://www.thenation.com/print/article/174945/after-mandela#axzz2ffeG98Df>.

25. *Id.*

26. Ralph Wolf, *Participation in the Right of Access to Adequate Housing*, 14 TULSA J. COMP. & INT’L L. 269, 270 (2007).

27. *Id.*

28. *Id.* at 269, 270–71.

vided the races in all areas of life—social, political, and economic.²⁹ The freedoms of non-white South Africans were severely restricted, and, as the policies expanded in the 1960s and 1970s, apartheid laws wormed their way into all facets of people's lives and relationships, both with others and with the state.³⁰

One of the most visible scars of apartheid can be seen today in South Africa's informal settlements, where millions of men, women, and children still live without basic modern necessities like running water, electricity, and sanitary waste removal systems.³¹ These settlements are a vestige of apartheid's policies of "influx control" and forcible relocation of non-whites, which severely limited where the majority of South Africans could live.³² A concerted effort was made to keep Africans out of urban areas.³³ These policies removed and relocated the majority black population, in order to maintain white power, by subverting the political and economic power of blacks in South Africa.³⁴ The white apartheid government limited African land ownership in 86 percent of country, created "native reserves" on the remaining 14 percent, and limited Africans' ability to live and work anywhere outside these "homelands."³⁵ As the Constitutional Court put it, "the cycle of the apartheid era . . . was one of untenable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor to the cities, inadequate

29. Christensen, *supra* note 19, at 328. See also *Government of the Republic of South Africa v. Grootboom*, 2000 (1) SA 46 (CC) para. 6 (S. Afr.) ("Colonial dispossession and a rigidly enforced racial distribution of land in the rural areas had dislocated the rural economy and rendered sustainable and independent African farming increasingly precarious. Given the absence of formal housing, large numbers of people moved into informal settlements throughout the Cape peninsula.")

30. *Id.*

31. Kende, *supra* note 20, at 619.

32. *Id.* See also Pienaar, *supra* note 18, at 119.

33. *Government of the Republic of South Africa v. Grootboom*, 2000 (1) SA 46 (CC) para. 6 (S. Afr.). The Court's opinion also refers to another case, which provides background on the policy of restricting African Occupation in rural areas. See *Ex Parte Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v. North West Provincial Government and Another* 2000 (4) BCLR 347 (CC) paras 41-47 (S. Afr.).

34. Kristin Henrard, *The Internally Displaced in South Africa: The Strategy of Forced Removals and Apartheid*, 32 JURA FALCONIS 491 (1995-1996), available at <http://ssrn.com/abstract=1972992>.

35. Wolf, *supra* note 26, at 271.

housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials, and intermittent forced removals.”³⁶

B. A Way Forward: The New Constitution and the Grootboom Decision

At the end of apartheid, the ANC, in cooperation and consultation with other interested parties, began to shape the new Constitution.³⁷ The ANC favored the incorporation of socioeconomic rights into the Constitution, especially in light of the pervasive discrimination during the apartheid era.³⁸ While the ANC proposed incorporating socioeconomic rights, they were cautious about the role of the judiciary in enforcing those rights, and they presumed the supremacy of the legislative and executive branches to affect social change.³⁹ The National Party, fighting to maintain the status quo that helped keep them in power for decades, argued against the inclusion of these rights, maintaining they would not be justiciable.⁴⁰ Critics of the inclusion of socioeconomic rights in the Constitution were not concerned about the nature of the rights themselves, but about how the courts might interpret and enforce those rights.⁴¹

After several drafts and much debate, a Bill of Rights was added to the final Constitution, enshrining socioeconomic rights for the first time in global history.⁴² The Constitution is widely viewed as one of the most progressive in the world.⁴³ It includes

36. *Government of the Republic of South Africa v. Grootboom*, 2000 (1) SA 46 (CC) para. 6 (S. Afr.).

37. Kende, *supra* note 20, at 626.

38. Christensen, *supra* note 19, at 330 (2007). For more detailed information on the ANC's position regarding the development of the constitution, see ANC, CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA (1988), reprinted in 21 COLUM. HUM. RTS. L. REV. 235 (1989); ANC, READY TO GOVERN: ANC POLICY GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA ADOPTED AT THE NATIONAL CONFERENCE (1992), available at <http://www.anc.org.za/show.php?id=227>; ANC, BUILDING A UNITED NATION: ANC POLICY PROPOSALS FOR FINAL CONSTITUTION (1995), available at <http://www.anc.org.za/show.php?id=284>.

39. Kende, *supra* note 20, at 625–27.

40. Christensen, *supra* note 19, at 333.

41. *Id.* at 346.

42. Kende, *supra* note 20, at 627.

43. See generally CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO (2001).

“positive” socioeconomic rights to environmental protection, education, access to health care, food, and water.⁴⁴ The Bill of Rights also includes more traditionally protected “negative” rights, like political rights, freedom of expression, freedom of religion, privacy, and access to government information.⁴⁵ As a result of its incorporation of a broad array of rights, freedoms, and privileges, South Africa’s Constitutional Court is leading the way in socioeconomic rights jurisprudence.⁴⁶

Chapter 2, §26 of the Bill of Rights addresses the right to access housing as follows:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.⁴⁷

Like other socioeconomic rights that are provided for in the Bill of Rights, the right to housing is modified by several different terms.⁴⁸ First, it is not an absolute right to housing; it is a right to “access” housing. As a result, the Constitution does not obligate the government to put a roof over the head of every citizen.⁴⁹ Second, the state is merely required to take “reasonable legislative and other measures” toward the realization of the

44. S. AFR. CONST., Ch. 2, 1996.

45. *Id.* For a more comprehensive discussion of the negative and positive rights included in South Africa’s Constitution, see Christensen, *supra* note 19, at 321, 345–47.

46. *See generally* Kende, *supra* note 20.

47. S. AFR. CONST., Ch. 2, 1996. *See also* Lilian Chenwi, *The Right to Have Access to Adequate Housing*, 8 ESR REV. 2, 21 (2007), available at <http://www.communitylawcentre.org.za/projects/socio-economic-rights/Research%20and%20Publications/ESR%20Review/July%202007.pdf/view> (“The right of access to adequate housing is important for the enjoyment of all human rights. A house is fundamental for human dignity and for physical and mental health, which are crucial for socio-economic development.”).

48. Christensen, *supra* note 19, at 341.

49. FISCAL AND FINANCIAL COMMISSION, EXPLORING ALTERNATIVE FINANCE AND POLICY OPTIONS FOR EFFECTIVE AND SUSTAINABLE DELIVERY OF HOUSING IN SOUTH AFRICA 13 (2013).

right.⁵⁰ This means that they need not craft the best policy or implement programs in the most effective manner; their effort merely needs to be reasonable. Third, the right to access adequate housing shall be realized “progressively,” meaning that all South Africans need not have access to adequate housing by a particular date, and the right need not be achieved in a particular way.⁵¹ In addition to the textual limitations included in the wording of Chapter 2, §26, the Bill of Rights contains guidance about how to interpret its rights. Chapter 2, §39(1) stipulates that, “when interpreting the Bill of Rights, the court ‘must consider international law; and may consider foreign law.’”⁵²

In a landmark case in 2000, *Government of the Republic South Africa v. Grootboom and Others*, the Constitutional Court ruled for the first time on the right to access housing codified in the Bill of Rights.⁵³ A group of squatters filed the case, claiming that the Government had an obligation to provide them access to housing after they were forcefully evicted from their homes.⁵⁴ The Court ruled in favor of the claimants, and held that the state must “act to meet the obligation imposed upon it by Section 26(2) of the Constitution . . . [including] the obligation to devise, fund, implement and supervise measures to provide relief to those in

50. S. AFR. CONST., Ch. 2, 1996.

51. FISCAL AND FINANCIAL COMMISSION, *supra* note 49.

52. S. AFR. CONST., Ch. 2, 1996. §39 reads as follows:

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

53. *Government of the Republic of South Africa v. Grootboom*, 2000 (1) SA 46 (CC) (S. Afr.).

54. *Id.* paras. 3, 4.

desperate need.”⁵⁵ The Government plan only needed to be “reasonable,” and it is allowed, per the Constitution, to be constrained by the availability of resources.⁵⁶

The Court’s ruling made it clear that the state had to take some action to meet its §26 duties, but it did not go any further in explaining what the state’s obligations are, giving deference to the elected branches of government.⁵⁷ The Court’s decision also implied that if resources are not available, the state is essentially excused for only taking limited actions.⁵⁸ The ruling also failed to explain “the right of access to adequate housing” and specifically declined to define the “minimum core obligation” of the government in fulfilling this Constitutional right.⁵⁹ It was silent on the creation of any mechanism or measure to hold the government accountable for failing to provide access to adequate housing.⁶⁰ While the language of §26 reads that the state must take “reasonable” action “within its available resources,” the court should have gone further in articulating steps the government must take and ways to measure their effectiveness. As a result, the government has been given discretion to develop its own policies and metrics as it works to achieve the goal of access to adequate housing for all South Africans.⁶¹

55. *Id.* para. 46.

56. *Id.* paras 41–46.

57. See Kende, *supra* note 20, at 623.

58. *Government of the Republic of South Africa v. Grootboom*, 2000 (1) SA 46 (CC) para. 45 (S. Afr.).

59. *Id.* para. 32.

60. Kameshni Pillay, *Implementing Grootboom*, 3 ESR REV. 17, 18 (2002), available at <http://www.communitylawcentre.org.za/projects/socio-economic-rights/Research%20and%20Publications/ESR%20Review/Volume%203%20No%201%20-%20July%202002.pdf>.

61. In the case of Mrs. Irene Grootboom, lead plaintiff in *Government of the Republic South Africa v. Grootboom and Others*, she ended up dying “homeless and penniless.” See Pearlle Joubert, *Grootboom Dies Homeless and Penniless*, MAIL & GUARDIAN (Aug. 8, 2008), available at <http://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless>. See also Sivuyile Mbambato & Bonny Schoonakker, *Where’s the Victory in This, Then?*, ALLAFRICA.COM (Mar. 22, 2004), available at Westlaw.

She gave her name to one of the court’s most important judgments in its 10-year history, but now Grootboom feels let down. “Nothing has happened,” Grootboom said this week of the October 2000 ruling that upheld her constitutional right to ‘adequate housing’. . . . [Grootboom said,] “By the end of 2000 we will be in our houses. . . . [w]e wanted land, proper running water and toilets, but nothing has happened.”

C. Housing Policy Under the African National Congress

South Africa's government began operationalizing the right to access housing even before the Constitution was finalized.⁶² In its Housing White Paper of 1994, the government articulated its vision, goals, plans for delivery, and a menu of substantive policy interventions, including subsidies, housing support, and land use.⁶³ This paper served as a foundation for the government's new housing policy.⁶⁴ The first statutory codification of housing policy in post-apartheid South Africa came with the passage of the Housing Act of 1997.⁶⁵ The Housing Act set out lofty general principles, including that all levels of government—national, provincial, and local—must “promote the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions.”⁶⁶

The government followed up with an amendment to the Housing Act in 2001, and several other pieces of legislation that addressed South Africa's housing situation in some way, including the Growth, Employment and Redistribution Strategy of 1996, the Public Finance Management Act of 2003, and the Municipal Finance Management Act of 2003. A 2009 white paper on the Policy Context of the National Housing Code is an updated version of the government's overarching policy on housing development.⁶⁷

Two years ago, she left the settlement she fought so hard for. “I got tired of staying there. My shack burnt down three times and I lost everything. I was out looking for a job. When I came back I saw smoke and realised it was my house burning.”

Id.

62. Wolf, *supra* note 26, at 271.

63. GOV'T OF S. AFR., *White Paper on New Housing Policy and Strategy for South Africa* (1994), available at <http://www.info.gov.za/whitepapers/1994/housing.htm>.

64. Wolf, *supra* note 26, at 271.

65. Housing Act 107 of 1997 (S. Afr.).

66. *Id.* at § 2(1)(e)(iii).

67. For a summary on the legislative and policy framework of housing in South Africa, see Tissington, *supra* note 22.

D. The ANC's Record

In the nearly twenty years since the fall of the apartheid regime in South Africa, the government, led by the African National Congress, has enjoyed its share of successes and failures.⁶⁸ Charged with picking up the pieces of a society deeply fractured by decades of systematic discrimination, some would say the ANC has done the best it could under the difficult circumstances that it inherited.⁶⁹ Its successes include lifting more blacks into the middle class, shepherding a reconciliation of the races, ensuring democratic freedoms and free elections, and nurturing the economy.⁷⁰ But its failures include pervasive inequality, perpetuating segregation through public housing construction, and overcrowded black schools.⁷¹ Unemployment rates also remain high, as the South African economy lost an estimated one million jobs during the latest recession.⁷² As of 2009, the percentage of the nation's population in poverty stood at 56.8 percent.⁷³

With regard to realizing the Constitution's promise to progressively expand access to housing, the government's record has been mixed. Under ANC rule, public housing construction has increased significantly.⁷⁴ As of 2011, the government spent 4.3 percent of its budget on housing, or ZAR 33,661,000—up from ZAR 28,173,000 in 2010.⁷⁵ Even though public sector spending on housing is increasing, it is clear that the government's efforts are not sufficient to meet its constitutional obligations.⁷⁶

68. See Jacobs, *supra* note 24.

69. See generally *id.*

70. *Id.*

71. *Id.*

72. Sapa, *South African Unemployment Hits 4.6 million: Stats SA*, TIMES LIVE (May 6, 2013), available at <http://www.timeslive.co.za/local/2013/05/06/south-african-unemployment-hits-4.6-million-stats-sa>.

73. *Poverty*, STATISTICS SOUTH AFRICA (Aug. 27, 2014), http://beta2.statssa.gov.za/?page_id=739&id=1.

74. Jacobs, *supra* note 24.

75. PALI LEHOHLA, STATISTICS SOUTH AFRICA, SOUTH AFRICAN STATISTICS 2011 (2011), <http://www.statssa.gov.za/publications/SAStatistics/SAStatistics2011.pdf>.

76. See Chenwi, *supra* note 47 (“The rate of delivery of housing is below the rate of formation of low-income households. Those most affected by the housing crisis are the poor and other vulnerable social groups. This crisis undermines the strides made by the government to implement and realize the right to adequate housing.”).

II. THE CONSTITUTIONAL COURT AND ACCESS TO HOUSING

The story of Irene Grootboom illustrates the ANC government's failure to fulfill the Constitutional promise of access to housing for all South Africans. Forced from one settlement because of overcrowding and evicted from another because of plans for a new development, Mrs. Grootboom and her neighbors sought relief in the courts.⁷⁷ While the plaintiffs' plight was a sympathetic one, the Constitutional Court's reaction to their case was measured, holding that a reasonable government program need not address the full realization of the right of access to housing, but rather it must "provide relief to those in desperate need."⁷⁸ Reactions to the Court's opinion are mixed, but the outcome for too many South Africans is clear—the Court and the government have yet to make access to housing a reality.

A. *Grootboom's Story*

The landmark case involving the constitutional right of access to housing was brought by Mrs. Irene Grootboom and her fellow community members—510 children and 390 adults—who lived in "New Rust," an informal settlement on the eastern fringe of the Cape Metropolitan ("Cape Metro") area.⁷⁹ The story of Mrs. Grootboom and the other plaintiffs is representative of thousands of South Africans living in similar conditions across the nation. The legacy of apartheid influx control is to blame for the housing shortage in the Western Cape, which stood at more than 100,000 units at the time the interim Constitution was adopted in 1994.⁸⁰ Mrs. Grootboom and the other class members previously inhabited Wallacedene, an informal settlement of shacks on partially waterlogged land with no running water, sewage, or trash removal and little access to electricity.⁸¹ They began to move out of Wallacedene in late 1998 to escape these terrible living conditions.⁸²

Mrs. Grootboom and her neighbors relocated to New Rust, a stretch of land that, somewhat ironically, happened to be slated

77. *Government of the Republic of South Africa v. Grootboom*, 2000 (1) SA 46 (CC) paras. 4, 7, 8, 11 (S. Afr.).

78. *Id.* para. 96.

79. *Id.* paras 4, 10.

80. *Id.* para. 6.

81. *Id.* para. 7.

82. *Id.* para. 8.

for the development of formal, affordable housing.⁸³ They were evicted from their new homes by force in a process that was characterized as inhumane and unfortunately reminiscent of the evictions that took place during apartheid.⁸⁴ The New Rust community relocated again to the Wallacedene sports field, and sought relief from the courts as the cold winter rains set in.⁸⁵ The respondents prayed to the Cape of Good Hope High Court for an order to require the government “to provide them with adequate basic shelter or housing until they obtained permanent accommodation.”⁸⁶ The lower court ordered the government to provide the children and their parents with shelter, based on §28(1)(c) of the Constitution, which guarantees a right to shelter for children, and the Government appealed.⁸⁷

B. Grootboom: The Court’s Analysis

1. Setting the Stage

The *Grootboom* decision, as discussed below, is an unsatisfying piece of jurisprudence for proponents of the robust enforcement of socioeconomic rights. It is easy to level specific criticisms at the Court’s individual arguments within the decision, as it is clear that they could have been more aggressive in enforcing the right to access housing.⁸⁸ However, the opinion as a whole is thorough, careful, and thoughtful in light of the context in which the Court operated.⁸⁹ Mainly, the Court appears to be aware of

83. *Id.*

84. *Id.* para. 10. Bulldozers were used to level their community before the evictors burnt it to the ground, destroying not only the settler’s homes but their personal possessions as well.

85. *Id.* para. 11.

86. *Id.* para. 4.

87. *Id.* paras 15, 16. In its *Grootboom* ruling, the Constitutional Court analyzes this right and ultimately overturns the High Court’s decision, on the grounds that §28 puts the responsibility to shelter children primarily on families and secondarily on the government and, as a result, it does not entitle South Africans “to claim shelter or housing immediately upon demand.” See paras. 75, 95.

88. For example, the Court could have clearly defined the right to access housing by determining a “minimum core” as suggested by international law. But, as discussed below, they refused to do so.

89. See Kende, *supra* note 20, at 617. (“The Court’s circumspection avoids an escalation of separation of powers and other tensions.”).

its place as the first judicial body charged with enforcing socioeconomic rights.⁹⁰ The Court also appears to be reacting to the political and societal context of a new government, operating under a new Constitution, in a country still reeling from the effects of decades of apartheid rule.⁹¹ Aware that it must tread lightly to maintain its credibility and balance of power between the judicial and political branches of government, it gives deference to the legislature and the executive.⁹² It seeks to hold the government accountable by highlighting deficiencies in its efforts to provide the rights outlined in the Constitution, but it provides flexibility to let policymakers and government officials determine the specific remedies to achieve those rights.⁹³

2. The Decision

In Justice Yacoob's decision in the *Grootboom* case, the Court clearly acknowledges that socioeconomic rights do not merely exist on paper, and frames the larger question as follows: how exactly should the Court go about enforcing them?⁹⁴ Examining its context, the Court notes that §26 of South Africa's Constitution secures the general right of access to housing for all South Africans, but is restricted by three limitations on the state's positive obligation to provide for the right.⁹⁵ These limits are defined by the (1) "reasonableness" of "legislative and other measures," (2) the "available resources" the state has at its disposal, and (3) the

90. *Id.* at 618.

91. *See generally id.*

92. Keightley, *supra* note 6, at 308.

[T]he state is required to set clear targets for the fulfilment of its socioeconomic rights obligations, and to explain its policy choices, the information it has considered and the process it followed in determining its policies. However, provided the policy in question is reasonable, and the process followed is not flawed, the courts will not interfere.

Id.

93. *Id.* at 309.

94. *Government of the Republic of South Africa v. Grootboom*, 2000 (1) SA 46 (CC) para. 20 (S. Afr.). The court begins its analysis by reaffirming the justiciability of socioeconomic rights in paragraph 20. In light of the debate as to whether to include them in the Bill of Rights, as discussed above, it is no surprise that the Court made the effort to affirm its ground to rule in these matters.

95. *Id.* para. 21.

fact that the right shall be achieved through “progressive realization.”⁹⁶

International law plays a role in the *Grootboom* analysis and in South African jurisprudence generally because South Africa’s Constitution requires its courts to consider international law when interpreting the Bill of Rights.⁹⁷ In *Grootboom*, at the prompting of the amici curiae, the Court looks to the International Covenant on Economic, Social and Cultural Rights (“Covenant”) for guidance in determining the state’s Constitutional obligation regarding access to housing.⁹⁸ The United Nations Committee on Economic, Social and Cultural Rights (“Committee”) gives guidance on the interpretation and application of the Covenant’s provisions.⁹⁹ The Committee states that the Covenant creates a “minimum core obligation” or “minimum essential levels of each of the [socioeconomic] rights” that every state must meet.¹⁰⁰ The Court notes that while the Covenant creates the expectation that each state will meet this “minimum core obligation,” it fails to define that same obligation.¹⁰¹

After acknowledging the Covenant’s reference to a minimum core obligation, the opinion sets out to define the term in the South African context.¹⁰² The decision repeatedly highlights the

96. *Id.*

97. S. AFR. CONST. 1996, Ch. 2, § 39(1). Christensen notes that, “typically the Court reviews contrary holdings merely to differentiate them from South African circumstances and reviews consistent opinions only as support for its conclusions.” See Christensen, *supra* note 19, at 356.

98. *Government of the Republic of South Africa v. Grootboom*, 2000 (1) SA 46 (CC) para. 26 (S. Afr.). Right away, the Court distinguishes South Africa’s §26 from its corollary in the Covenant and hints that international laws are not all equally binding. The Covenant provides the “right” to adequate housing whereas South Africa’s constitution merely provides the “right of access” to adequate housing; additionally, the Covenant requires parties to take “appropriate” steps where the South African constitution merely requires the state to take “reasonable” legislative and other measures. This analysis lays the foundation for the Court’s “minimum core obligation” analysis, a key element of its holding in the case.

99. *Id.*

100. *Id.* para. 29 (quoting the United Nations Committee on Economic, Social and Cultural Rights, General Comment 3, para. 10 (1990)).

101. *Government of the Republic of South Africa v. Grootboom*, 2000 (1) SA 46 (CC) para. 30 (S. Afr.).

102. *Id.* para. 32. Since the Committee did not provide a precise definition of the term, the Court took the opportunity to deliver its own interpretation of

complexity of the issue, the difficulty of answering questions related to the definition, and the many variations this standard would have to address based on socioeconomic, geographical, cultural, and historic differences.¹⁰³ The Court also notes that it simply does not have “comparable information” to the information the Committee had access to when it developed the minimum core concept.¹⁰⁴ This acknowledgement speaks directly to the concerns of those who oppose the justiciability of socioeconomic rights, as they often argue that the Court should not rule on these kinds of matters because it does not have access to the information it needs to make a sound decision.¹⁰⁵ After providing a thorough list of reasons why it is uncomfortable defining a minimum core, the Court declines to do so.¹⁰⁶

The Constitutional Court’s refusal to define a minimum core standard for the right to access housing has been sharply criticized by scholars and commentators.¹⁰⁷ David Bilchitz argued that all the Court had to do was define the right on the most basic level—cover from the elements and an environment that does not threaten their health.¹⁰⁸ In a way, the Court’s unwillingness to create this baseline lets the government off the hook. The *Grootboom* decision should have defined the minimum core so the legislature and executive would have clear direction about

what the term meant, declaring that the “minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question.” *Id.*

103. *Id.*

104. *Id.*

105. See Christensen, *supra* note 19, at 351. Christensen says courts suffer from an information problem, especially when compared to legislatures, because they do not have the same capacity “to engage in fact-finding and research.” Courts also “traditionally work exclusively from the record before them,” though he notes that the South African Constitutional Court routinely orders parties to “make submissions of reports, studies or other factual documentation for the justices to review.” *Id.*

106. *Government of the Republic of South Africa v. Grootboom*, 2000 (1) SA 46 (CC) para. 33 (S. Afr.).

107. For a discussion about several scholars who criticized the Constitutional Court’s decisions and actions as “not far enough” toward enforcing socioeconomic rights, see Kende, *supra* note 20, at 621–25.

108. David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance*, 119 S. AFR. L.J. 484, 488 (2002).

what they need to provide to ensure compliance with the Constitution.¹⁰⁹ Just because providing access to housing for all South Africans is a complicated endeavor should not mean that the Court can simply shrug its shoulders and say it is not equipped to define the Government's Constitutional duties regarding the provision of this right.

In its analysis of §26, the Court is willing to hold that the government, at a minimum, has a negative obligation to “desist from preventing or impairing the right of access to adequate housing.”¹¹⁰ The Court circles back to its comparison between the Constitution and the Covenant, stating that the Constitution's interpretation of housing is more than just “bricks and mortar”—it requires land, municipal services, financing, and the home itself.¹¹¹ As such, the Court suggests the state cannot, and should not, be the only actor responsible for the provision of access to housing, but it must create the conditions that enable other agents and individuals themselves to attain the right.¹¹² In this language, it is apparent that the Court is backing away from the notion that the government should be wholly responsible for providing access to housing for all of its people. The Court again notes the complexity of the problem—another hint that it might be unreasonable to expect the government to solve it—observing that South Africans in different economic and geographic circumstances require different types of assistance to achieve access to affordable housing.¹¹³

109. Because the “minimum core” is a concept defined by international law, and Chapter 2, §39 requires that international law be considered when interpreting the Bill of Rights, a definition of the minimum core would have clarified the government's obligation to its people, vis-à-vis Chapter 2, §26—the right to access housing.

110. *Government of the Republic of South Africa v. Grootboom*, 2000 (1) SA 46 (CC) para. 34 (S. Afr.).

111. *Id.* para. 35.

112. *Id.*

113. *Id.* paras. 35–40. The Court, in examining subsection (2) of §26, determines that the Constitution requires the state to “devise a comprehensive and workable plan to meet its obligations” with regard to the right of access to housing. *Id.* para. 38. In its discussion of the “reasonableness of legislative and other measures” as prescribed by §26, the Court notes that in order to be reasonable, a national housing program must “clearly allocate responsibilities and tasks to the different spheres of government,”—national, provincial, and local—as each has an obligation to ensure the provision of constitutional rights. *Id.* para. 39. The Court emphasizes, however, that the national government has the “important responsibility” of allocating revenue to the provinces and

In defining the term “reasonable,” the Court favors the recognition of a “wide range of possible measures” that the state could adopt to meet its constitutional obligations, another sign of deference to the political branches of government.¹¹⁴ While there might be a better policy to solve a problem, or a situation where resources could have been spent more effectively, those actions would not be labeled unreasonable.¹¹⁵ The Court also outlines the requirement that the state takes other measures—including “well-directed” executive policies and programs—in addition to enacting legislation.¹¹⁶ And, lest the government think that it can get off the hook by simply writing the policy, the Court is clear that program formulation is merely the first step; the program “must also be reasonably implemented.”¹¹⁷ The Court goes further in its definition of reasonableness by coming up with a reasonableness “test” that judges a program on the following characteristics: (1) whether it considers housing problems in context along with the capacity of the institutions set to implement the program; (2) whether it is balanced and flexible enough to meet short and long term goals; (3) whether it includes most segments of society; and (4) whether it is continuously reviewed.¹¹⁸

The opinion refers to the right of access to housing from the perspective of two populations: the poor (i.e., those who cannot afford to pay for adequate housing), and those who can afford to pay for housing.¹¹⁹ The Court notes that the poor are “particu-

local governments equitably in furtherance of this goal. *Id.* para. 40. While addressing the importance of the government’s role in providing access to housing, the Court makes sure to share some accountability with individuals.

114. *Id.* para. 41. Christensen, *supra* note 19, at 376, formulates “reasonableness” as follows:

Is the legislative or other government action comprehensive and well-coordinated; was there appropriate division of political and expert authority in its formulation; can it facilitate realization of the right in question; is it balanced and flexible to the extent necessary; and does it include all significant segments of society and take into account those persons in most dire need?

Christensen, *supra* note 19, at 376.

115. *Id.*

116. *Id.*

117. *Id.* para. 42.

118. *Id.* para. 43.

119. *Id.* para. 36.

larly vulnerable” and thus their needs “require special attention.”¹²⁰ The Court also considers the neediest in its reasonableness analysis, stating that those with the “most urgent” needs “must not be ignored” by the policies aimed at achieving access to housing.¹²¹

The “progressive realization of the right” to access adequate housing also modifies the state’s positive Constitutional obligation. Justice Yacoob recognizes this as another way to allow the government flexibility in delivering on its commitment, as it simply must show progress—housing offered to a larger number and wider range of people—as time goes by.¹²² Finally, “within available resources” is treated by the Court as another element of the Constitution’s §26 that governs the state’s obligation. The Court, relying on its previous decision in the case of *Soobramoney v. Minister of Health (Kwazulu-Natal)*, says the state simply cannot be expected to fulfill an “unqualified obligation”; thus, the resource limitation is a rational one.¹²³ While it is clear that the Constitution does not require the Court to prescribe a precise level of resources that the government must devote to promotion of the right of access to housing, the Court should have encouraged the government to maximize the resources available to it to achieve this goal.

3. The Ruling and the Reaction

The Court ultimately found that the Cape Metro Council did not comply with §26(2)(b) of the Constitution because “it failed to make reasonable provision[s] 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.”¹²⁴ The opinion “requires the state to act to meet the obligation to devise, fund, implement, and supervise measures to provide relief to those in desperate need.”¹²⁵ Notably, the Court confines its decision to the Cape Metro municipality. While it can justify this specificity based on the fact that it should only rule on the case before it, the Court should have broadened the scope of its ruling by attributing Cape

120. *Id.*

121. *Id.* para. 44.

122. *Id.* para. 45.

123. *Id.* para. 46.

124. *Id.* para. 99.

125. *Id.* para. 96.

Metro's Constitutional noncompliance to failures at the national level. In order to monitor the state's compliance with its §26 obligations, the Court ordered the South African Human Rights Commission ("SAHRC") to provide oversight and report on the government's progress.¹²⁶ This supervisory role was not clearly defined, and thus gave the Commission a great deal of discretion in discharging its monitoring duties. Kameshni Pillay explained that with this discretion, the SAHRC focused more on monitoring the plaintiffs' situation in Wallacedene rather than compliance at the provincial or national level.¹²⁷ The Commission also faces resource constraints, and it has been unwilling to engage NGOs and other organizations based in civil society in the drafting of its reports.¹²⁸ Additionally, the Commission is not required to report back to the Court, which shows the Court's apparent unwillingness to watch over the enactment of its decision.¹²⁹

Pillay noted several other deficiencies of the Constitutional Court's remedial scheme in *Grootboom*.¹³⁰ She asserts that the Court's order is weakened by the fact that it is "merely" declaratory and therefore "does not compel the State to take steps to ensure that its programme complies with the Constitutional requirements."¹³¹ Additionally, the fact that the order does not specify a particular time frame in which the government must act to remedy its §26 deficiencies is another gap in accountability created by the Court's decision that allows the government complete discretion regarding the speed and efficiency of its response.¹³²

Scholarly opinion on the soundness of the *Grootboom* decision varies. Eric Christensen, who has written extensively on the topic of South Africa's socioeconomic jurisprudence, notes that while the *Grootboom* Court made an effort to enforce constitutional provisions, "the limits of [the court's] enforcement remain

126. *Id.* para. 97. The Commission, per Section 184 (1)(c) of the Constitution, has the power "to investigate and to report on the observance of human rights" and "to take steps to secure appropriate redress where human rights have been violated." *Id.* para. 97.

127. Pillay, *supra* note 60.

128. D. Horsten, *The Role Played by the South African Human Rights Commission's Economic and Social Rights Reports in Good Governance in South Africa*, 9 POTCHEFSTROOM ELECTRONIC L. J. 177, 183–84 (2006).

129. Pillay, *supra* note 60.

130. *Id.*

131. *Id.*

132. *Id.*

unclear.”¹³³ Christensen considers the Court’s analysis to be a “very close reading of the constitutional text” and points out that while the Court “prais[ed] much about the current housing policies of the government . . . [it nonetheless] held that the current system unreasonably neglected to consider and address those in most dire need.”¹³⁴ Ralph Wolf characterizes *Grootboom* as “instrumental in providing precedent for judicial intervention to secure socioeconomic rights . . . [as] the Court may intervene where lack of reasonableness in the implementation of laws, policies and programs is found.”¹³⁵ Mark S. Kende, a defender of the Court’s approach to adjudicating socioeconomic rights, said the Court “revealed its pragmatism and humility” by deferring to the national government on the allocation of funds to housing in the national budget.¹³⁶ Kende argues that courts “should only issue broad rulings when there are actual facts that require such a result”¹³⁷ and that the political branches were intended by the framers of the post-apartheid government to have supremacy over the courts.¹³⁸ Raylene Keightley adds that “it is appropriate that democratic responsibility should, in the first place, rest with government to determine [the content of socioeconomic rights] and the pace and methods of implementation.”¹³⁹

It is no wonder why scholarly opinions on *Grootboom* are split because the Court seems to be talking out of both sides of its mouth. On one hand, it is cautious to qualify the limitations on the Constitutional right to access housing. Yet on the other, it states that the “Constitution obliges the state to give effect to [these rights]” and goes on to say “[t]his is an obligation that courts can, and in appropriate circumstances must, enforce.”¹⁴⁰

III. GOVERNMENT IMPLEMENTATION OF POLICIES TO DATE

A functional housing sector comprises a complex relationship between market forces, private sector firms, governmental

133. Christensen, *supra* note 19, at 367–68.

134. *Id.* at 366.

135. Wolf, *supra* note 26, at 285.

136. Kende, *supra* note 20, at 620.

137. *Id.* at 624.

138. *Id.* at 625.

139. Keightley, *supra* note 6, at 322.

140. *Government of the Republic of South Africa v. Grootboom*, 2000 (1) SA 46 (CC) para. 94 (S. Afr.).

rules and regulations, financing and facilitative interventions, as well as inputs and investment by the households.¹⁴¹

A. Executive and Legislative Action Before Grootboom, 1992-2000

Examining the policies and programs of South Africa's government on paper prior to the *Grootboom* decision, one might conclude that it had the housing crisis under control. The national housing subsidy was developed in 1992 with a goal to deliver one million houses in five years—though it ultimately took seven.¹⁴² The government's Housing Policy and Strategy, issued in 1994, highlighted eight approaches to addressing the housing shortage: (1) stabilizing the housing environment to increase private investment; (2) improving institutional relationships between all levels of government, the private sector, and civil society; (3) providing subsidies to those who need them in an equitable manner; (4) incentivizing personal savings as a way to gain access to credit; (5) increasing the availability of housing credit; (6) supporting individuals and communities throughout the housing process; (7) ensuring effective land delivery; and (8) providing the infrastructure and services necessary to support communities.¹⁴³ To achieve its goal of rapid housing delivery, the government focused on one-time capital subsidies to low-income families used by private developers to construct homes.¹⁴⁴ These early actions seemed indicative of the government's commitment to fulfilling its Constitutional obligations with regard to access to housing.¹⁴⁵

The Housing Act of 1997 codified and effectuated many of the principles set forth in the 1994 Policy white paper.¹⁴⁶ The Act sought to promote "the establishment, development, and maintenance of socially and economically viable communities and of safe and healthy living conditions" and set forth obligations for national, provincial, and municipal governments.¹⁴⁷ The government continued to use supply side interventions to

141. FISCAL AND FINANCIAL COMMISSION, *supra* note 49, at 12.

142. *Id.* at 14.

143. GOV'T OF THE REPUBLIC OF SOUTH AFRICA, A NEW HOUSING POLICY AND STRATEGY FOR SOUTH AFRICA, sec. 5 (1994).

144. Tissington, *supra* note 23.

145. Housing Act No. 107 of 1997 (S. Afr.).

146. *Id.* Parts 1–2.

147. *Id.* Part 2 (2)(e)(iii).

increase access to affordable housing.¹⁴⁸ Housing education and consumer protection, integration, increasing development density, prohibiting gender discrimination, and ensuring the effective functioning of the housing market were all included in the text of the Act as goals that the government must promote through its policies and actions.¹⁴⁹ In 2000, the government published the National Housing Code prescribed in the Housing Act.¹⁵⁰ The Code further refined the principles established by the Act, encouraging the government to support partnerships with organizations and individuals, ensuring economic, social, financial, and political sustainability, and also promoting transparency, accountability, and monitoring to ensure an equitable distribution of resources.¹⁵¹ In a report to the United Nations General Assembly Thematic Committee, the Government characterized its policy as “strong in its commitment to achieve a holistic concept of adequate housing.”¹⁵²

Housing delivery increased steadily in the early years of the ANC government, from 20,000 units per year completed in 1994 to just over 200,000 units per year completed in 2000.¹⁵³ Before the *Grootboom* decision, the government’s housing policies delivered over a million housing units to South Africans who needed them, but many beneficiaries were dissatisfied with the size and quality of the units, and developers were unhappy that their compensation from the government was not sufficient to meet its building standards.¹⁵⁴ Additionally, the subsidy program had to be driven by developers because local governments did not have the capacity to administer the development projects.¹⁵⁵ The developer-driven model led to a lack of coordination and produced disconnected developments in remote locations.¹⁵⁶

148. General Assembly, Special Session for an Overall Review & Appraisal of the Implementation of the Habitat Agenda, New York, June 6-8, 2001, *The South African Housing Policy: Operationalizing the Right to Adequate Housing* (2001) [hereinafter *South African Housing Policy*].

149. Housing Act No. 107 of 1997, Part 2 (2)(e) (S. Afr.).

150. REPUBLIC OF SOUTH AFRICA DEPARTMENT OF HUMAN SETTLEMENTS, THE NATIONAL HOUSING CODE: THE POLICY CONTEXT (2000).

151. *Id.* at 12–14.

152. *South African Housing Policy*, *supra* note 148.

153. FISCAL AND FINANCIAL COMMISSION, *supra* note 49, at 14.

154. *Id.*

155. *Id.*

156. *Id.* See also Tissington, *supra* note 23.

B. Executive and Legislative Action After Grootboom, 2001 to the Present

The most immediate legislative reaction to the *Grootboom* decision occurred in 2001 with the passage of amendments to the 1997 Housing Act.¹⁵⁷ These amendments focused on the structural relationships between government institutions with an aim of increasing efficiency of housing delivery.¹⁵⁸ Between 2004 and 2009, the Breaking New Ground (“BNG”) policy framework was rolled out, focusing on a more holistic objective of delivering sustainable human settlements.¹⁵⁹ BNG represented a shift from focusing on quantity of units delivered to quality of units delivered, as well as an expansion of government effort to upgrade informal settlements, in addition to building completely new homes.¹⁶⁰ The policy’s aim was to produce better designed and located housing through projects driven by demand and innovation.¹⁶¹ BNG responded to a change in the demand for housing, which was affected by an increase in population, a decrease in household size, a higher rate of unemployment, differences in needs across regions, and a backlog that continued to grow despite years of government intervention.¹⁶² This shift, when combined with the global financial crisis that began in 2007, the mismanagement and incomplete spending of resources at the local level, and an increase in the cost of construction, all contributed to a decline in the production of housing units from over 250,000 units per year in 2006 to just over 150,000 units per year in 2009.¹⁶³

A revised Housing Code was published in 2009, signaling yet another shift in housing policy, this time away from subsidy programs administered by municipalities and toward the promotion of a secondary housing market.¹⁶⁴ In addition, “Outcome 8,” a goal set by the President to attain sustainable human settlements and an improved quality of life for households, led the

157. Housing Amendment Act No. 4 of 2001 (S. Afr.).

158. PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA, PUBLIC SERVICE SELECT COMMITTEE, *Housing Amendment Bill: Briefing*, PMG.ORG (Mar. 9, 2001), <http://www.pmg.org.za/minutes/20010308-housing-amendment-bill-briefing>.

159. FISCAL AND FINANCIAL COMMISSION, *supra* note 49 at 15.

160. *Id.*

161. Tissington, *supra* note 23, at 66.

162. *Id.*

163. FISCAL AND FINANCIAL COMMISSION, *supra* note 49 at 15.

164. *Id.* at 16.

government to commit to upgrading 400,000 households living in informal settlements by 2014.¹⁶⁵ The movement away from the direct government subsidy of new housing seemed to have an effect on the number of units completed or under construction per year, as it was only 121,879 for the period from 2010 to 2011 and 88,441 from 2011 to 2012.¹⁶⁶

While progress has certainly been made in fulfilling the constitutional promise of access to housing for all South Africans, there is undoubtedly a long way to go. The government has delivered over three million homes to South Africans who could not afford them; however, the backlog of housing units stands at over two million.¹⁶⁷ A high rate of unemployment creates an overreliance on the state to provide housing, with 60 percent of households thought to be eligible for fully subsidized housing.¹⁶⁸ In 2011, approximately 200,000 more households lived in informal dwellings than in 1996, a figure that demonstrates how challenging it is to reduce the size of informal settlements.¹⁶⁹ Though there have been initiatives aimed at improving informal housing, a well-executed *in situ* upgrade has yet to occur in the slums of Durban, Cape Town, or Johannesburg.¹⁷⁰ Moreover, in an effort to move more households into “formal” situations, many people are forced to relocate to underdeveloped areas farther away from employment, arguably making them worse off than when they lived in an informal community closer to economic opportunities.¹⁷¹

IV. INNOVATIVE RIGHTS, INNOVATIVE SOLUTIONS

There is a mismatch in South Africa between its progressive, groundbreaking Constitution, and its traditional, subsidy-based approach to delivering housing. The problem, as Justice Yacoob stated in *Grootboom*, is that housing is “more than bricks and

165. *Id.*

166. *Id.* The latter figure is calculated only through December, 2011.

167. *Id.* at 16.

168. *Id.* at 10.

169. *Id.* at 12.

170. Tissington, *supra* note 22, at 9.

171. *Id.* at 66.

mortar.”¹⁷² It is a wicked problem¹⁷³ that requires a solution involving the public sector, the private sector, civil society, and individuals.¹⁷⁴

A. Legal Reform at the National Level

The elected branches of government alone cannot fix South Africa's housing crisis. The state provision of finished housing units to those in need of permanent homes is not sustainable, and therefore unlikely to achieve the Constitution's promise of access to housing.¹⁷⁵ A recent report published by South Africa's Financial and Fiscal Commission (“FFC”), a body established by the Constitution to make recommendations to Parliament on financial matters and the division of revenue, includes recommendations on sustainable housing development.¹⁷⁶ The FFC proposes that redefining the role of the state must shift it away from delivering completed units of housing, classified as “private goods,” and toward delivering “public goods” such as infrastructure, services, and facilities.¹⁷⁷ As a part of this transformation, the state must work to stimulate individuals to be able to contribute to meeting their housing needs so it can focus providing purely public goods.¹⁷⁸ Parliament and the Prime Minister must

172. *Government of the Republic of South Africa v. Grootboom*, 2000 (1) SA 46 (CC) para. 32 (S. Afr.).

173. See Frieda Elizabeth le Roux, *The Provision of Low-Cost Housing in South Africa: A Wicked Problem with a Systems Theory Solution* (Mar. 2011) (unpublished M.Phil research report, University of Stellenbosch), available at http://scholar.sun.ac.za/bitstream/handle/10019.1/17474/le_roux_provision_2011.pdf?sequence=1.

174. Raylene Keightley, *supra* note 6, at 321, may have framed it best when she stated the following:

To turn around such entrenched social injustice requires a concerted effort on the part of all branches of the state and society. It requires, inter alia, appropriate economic strategies; political will; bureaucratic efficiencies; strong, accountable, and competent local government; community involvement; a willingness on the part of citizens to hold their elected members to account through the ballot box; and, of course, judicial leadership though responsible adjudication of socio-economic rights cases.

Raylene Keightley, *supra* note 6, at 321.

175. FISCAL AND FINANCIAL COMMISSION, *supra* note 49, at 39.

176. FISCAL AND FINANCIAL COMMISSION, *supra* note 49.

177. *Id.* at 39.

178. *Id.* at 16, 39.

work together to pass legislation to create a program that incentivizes household savings. A housing voucher program could then supplement individual savings.¹⁷⁹ To garner resources from the private sector, the elected branches should use the legislative process to build a program that encourages banks and developers to invest in housing in exchange for tax rebates.¹⁸⁰ If the government fails to reform its approach to housing, Financial and Fiscal Commission Chairperson Bongani Khumalo said that it would cost approximately ZAR 800 billion to provide everyone who needs housing with a home by 2020.¹⁸¹

Members of civil society have encouraged other reforms, such as building partnerships with nonprofit organizations to create mixed-income, diverse housing developments.¹⁸² Individual metropolitan areas across South Africa should look to New York City's Inclusionary Housing program, which allows private developers to build larger buildings than a particular zoning area would normally allow in exchange for including units reserved for low-income families.¹⁸³ This type of development could work to reverse the trend of state-subsidized housing development in remote areas, disconnected from jobs and larger communities. It could also help integrate South Africa's communities, as segregation is a persistent issue in the wake of apartheid.

To complete these important reforms, the executive branch should take administrative law action to amend the 2009 Housing Code. If changes to the law are required, Parliament should work to further update the 1997 Housing Act.

B. Litigation Strategies for Public Interest Organizations

The difficulty for lawyers involved in socio-economic rights work in South Africa is that because of weaknesses in other parts of this system, disproportionate reliance is sometimes

179. *Id.* at 40.

180. *Id.*

181. Roderick Macleod, *R800-billion Needed to Solve Housing Woes by 2020*, ENCA, Oct. 21, 2013, available at <http://www.enca.com/south-africa/r800-billion-solve-countys-housing-woes-2020>.

182. Anna Majavu, *South Africa's Non-Existent Affordable Housing Program*, THE SOUTH AFRICAN CIVIL SOCIETY INFORMATION SERVICE (Dec. 13, 2013), <http://www.sacsis.org.za/site/article/1522>.

183. U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, *Inclusionary Housing in New York City*, BREAKTHROUGHS NEWSLETTER (Apr. 2011), http://www.huduser.org/portal/rbc/newsletter/vol10iss4_1.html.

placed on finding a solution through law in order to rectify the appalling hardships still being suffered by too many South Africans. In turn, we lawyers place disproportionate reliance on the courts to find real solutions through their judgments.¹⁸⁴

Like the elected branches of government, the Courts are also not in a position to single-handedly solve the housing situation in South Africa. As proved by *Grootboom* and subsequent cases,¹⁸⁵ the Constitutional Court is not willing to prescribe how the elected branches should solve the housing crisis.¹⁸⁶ Instead, the Court is satisfied with allowing the state to take “reasonable steps” to achieve the “progressive realisation” of access to adequate housing for all South Africans.¹⁸⁷ In light of the Court’s reluctance to take a more activist position to force the government’s hand, individual litigants and the organizations that represent them can only hope to bring a case that may improve their situation or the situation of their community or municipality.¹⁸⁸ While the prospects are dim for the success of a case that impacts housing policy on a national level, change on a smaller scale is possible. And with every case that is brought, local governments will have more incentive to ensure their housing policies are in line with the Constitution.

CONCLUSION

Nearly twenty years after the end of apartheid, far too many South Africans are without stable homes.¹⁸⁹ While guaranteed that their government will work to “progressively realise” access to housing for the people of South Africa by their Constitution, this guarantee rings hollow to those without adequate shelter.¹⁹⁰ The Constitutional Court’s jurisprudence on the issue does not mandate any specific action that the national government must

184. Keightley, *supra* note 6, at 321–22.

185. In one such case, *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd.* 2012 (2) SA 104 (CC) (2011), the Court held the City of Johannesburg’s policy for providing shelter for people who have been evicted was unconstitutional based on the claim of eighty-six people who were evicted from a single property in the City.

186. *See Government of the Republic of South Africa v. Grootboom*, 2000 (1) SA 46 (CC) (S. Afr.).

187. *Id.* paras 39–41.

188. *See* Keightley, *supra* note 6, at 318–22.

189. *See* Brand & Cohen, *supra* note 1.

190. FISCAL AND FINANCIAL COMMISSION, *supra* note 49, at 12.

take to remedy the need for housing, nor does it create any real accountability or oversight measures to ensure that the elected branches meet their Constitutional duties.¹⁹¹ Because of the Court's unwillingness to challenge the authority of the elected branches, the Parliament and the Prime Minister must take action to amend the Housing Act of 1997 and the 2009 Housing Code in order to shift the government's role from the provision of homes to the provision of public goods, such as infrastructure and municipal services. Potential litigants may have luck in the courts if their cases are tailored to show the unconstitutionality of a particular local government practice or policy.¹⁹² Ultimately, it will take many different approaches from all sectors of society to realize the Constitutional promise of access to adequate housing.

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191. Pillay, *supra* note 60.

192. Keightley, *supra* note 6, at 318–22.

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