The Rudolph case illustrates how the Grootboom jurisprudence can practically assist people who are homeless or living in intolerable conditions.

Poverty is a deeply entrenched feature of the South African landscape. One of the fundamental concerns of the South African government consequently centres on the need to provide housing and a secure place to live for the majority of its citizens.

Despite the early successes achieved by the government in ameliorating the housing backlog, the phenomenon of overcrowded informal settlements, homelessness and the occupation of private land is still prevalent. The recent spate of eviction cases highlighted in the media highlights the lack of security of tenure of many South Africans.

Grootboom

The landmark Grootboom judgment made an invaluable contribution to constitutional jurisprudence on socio-economic rights by defining not only what the ambit of the s 26 right of access to adequate housing is, but also the corresponding duties that it imposes on government.

The Court, in interpreting the terms “reasonable legislative and other measures”, “progressive realisation” and “available resources” established the criteria against which government’s efforts in fulfilling this right can be evaluated.

Government programmes that fail to make provision for the short-term housing needs of the “most vulnerable in society”, or persons in “crisis situations” cannot be considered to be “reasonable”.

Furthermore, the Court held that s 26 (1) imposes, at a minimum, a negative obligation “upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing”. This negative right is further spelt out in subsection 3 which prohibits arbitrary evictions (para 34).

While national housing programmes have yielded significant results (approximately 1.5 million houses delivered since 1994) they have not been able to maintain this momentum. The housing backlog, currently estimated at 2.3 million houses nationally, is expected to increase by approximately 200 000 households per year (Budget Speech by the Minister of Housing: 19 May 2003). Consequently the increase in the housing backlog, together with the new housing demands placed on the system, makes it increasingly difficult for government to meet its projected outputs. In 2001 it was estimated that there were approximately 1 088 informal settlements in South Africa, accommodating 1.6 million households. An example of the tremendous burden that this places on provincial housing departments can be demonstrated by the average waiting period of 7.5 years for applicants who place their names on the housing waiting list in Gauteng.

Modderklip

Evictions and the right of access to adequate housing

Annette Christmas

The City of Cape Town has given notice of its intention to appeal the decision.

Grootboom II?
The case of Neville Rudolph may become ‘Grootboom II’, in that it seeks to apply and develop the principles established in both the Grootboom case and the case of Minister of Health v TAC 2002 (5) SA 721 (CC) on the rights of access to adequate housing and health care services. These cases require government to have in place and implement a reasonable programme to give effect to socio-economic rights. The Rudolph case illustrates how this jurisprudence can practically assist people who are homeless or living in intolerable conditions.

Ashraf Mahomed, formerly of the Cape Town office of the LRC, was the attorney for the residents (the Legal Aid Board also represented some of the residents). Geoff Budlender of the Constitutional Litigation Unit and Peter Hathorn of the Cape Town Bar (formerly of the LRC) appeared on behalf of the LRC’s clients.
Evictions
The formation of settlements on privately owned land is more often than not attributable to the scarcity of available land and housing. Sometimes such settlements constitute a ‘spillover’ from existing, overcrowded informal settlements and townships. Our courts have acknowledged that in the past, the eviction of those occupying land illegally often occurred in an arbitrary fashion that was incompatible with the underlying values of respect for human rights as enshrined in our Constitution. This resulted in the promulgation of legislation aimed at providing unlawful occupants with some form of procedural and substantive protection in relation to eviction proceedings. The Extension of Security of Tenure Act 62 of 1997 (ESTA) together with the Interim Protection of Informal Land Rights Act 31 of 1996 are aimed at providing protection for unlawful occupants who previously had some form of consent or right to occupy the land in question. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (better known as PIE) provides substantive and procedural protection for all unlawful occupants who are not afforded protection in terms of the aforementioned Acts.

Slow implementation of Grootboom
The sad reality of the current housing situation in South Africa is that despite our justiciable Bill of Rights and the progressive Grootboom judgment, government has still not instituted a comprehensive programme to meet the short-term housing needs of people who find themselves in ‘crisis situations’. A substantial proportion of households in South Africa today do not have access to land, nor do they have roofs over their heads, and they live in intolerable conditions as described by the Court in Grootboom (para 44). Almost three years after the Grootboom judgment, the South African Human Rights Commission (SAHRC) has reported that none of the national housing programmes make specific provision for the homeless or provide relief for those who find themselves in ‘crisis situations’. The Commission concludes that while government has taken steps towards the realisation of the right of access to adequate housing, its programmes cannot be said to be reasonable or comprehensive as they neglect significant members of our society. (See the SAHRC’s Fourth Economic and Social Rights Report 2000/2002, p 62.)

A promising draft policy, the Programme for Housing Assistance in Situations of Exceptional Housing Urgency, was considered by the Housing MINMEC in August 2003.

When adopted, this programme will form part of the National Housing Code. Its timely adoption would go a long way to meeting the obligations imposed on the state by the Grootboom judgment.

The failure to adopt such a nationwide programme to date, however, is clearly exacerbating the situation where people living in intolerable conditions seemingly have no other alternative but to occupy private land.

Our courts are thus placed in the uncomfortable position of having to balance landowners’ constitutional rights to property (s 25) against unlawful occupants’ rights against arbitrary eviction (s 26 (13)) as well as their rights of access to adequate housing (s 26 (11)).

Two recent related cases that have highlighted this tension revolve around the development of an informal settlement on privately owned land in the East Rand. The first case, Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another 2001 (4) SA 385 (W) resulted in an eviction order against the community in terms of PIE. The second case, Modderklip Boerdery (Edms) Bpk v President van die RSA en Andere 2003 (6) BCLR 638 (T) arose as a result of the landowner’s quest for state assistance to execute the eviction order.

The eviction judgment
This case arose from the occupation by a group of people of a portion of the farm Modder East in the East Rand, which falls within the jurisdiction of the Ekurhuleni Municipality jurisdiction. The occupation started in May 2000, as a result of overcrowding and a subsequent shortage of land and shelter in Daveyton and the Chris Hani informal settlement adjacent to the farm.

By the time the landowner, Modderklip Boerdery (Pty) Ltd, applied to the court for an eviction order against this community in terms of s 4(6) of PIE, the number of occupants had increased to approximately 36 000.

Section 4(6) of PIE stipulates that:

If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings were initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disa-
Should an eviction order be upheld if the unlawful occupiers will be left homeless as a result of the execution thereof?

In considering the factors raised by the respondents in their affidavits, the Court was of the opinion that there were obvious gaps in the information that was placed before it. In respect of their contention that an eviction order would leave them homeless, the Court stated that they had failed to show that all of them would indeed be homeless.

In addition to this, they had not shown whether any concerted effort had been made to persuade the second respondent or any other organ of government to provide land upon which they could settle (at 394).

The Court therefore held that it was entitled to accept that the parties had placed before it what they considered to be relevant circumstances, and then proceeded to deal with the matter on that basis (at 392 G–H). The court subsequently granted the eviction order and stipulated that the respondents vacate the property within two months, failing which the Sheriff was duly authorised to evict them.

Enforcement of the eviction order
The enforcement of the eviction order proved to be problematic as the occupiers failed to vacate the property within the allocated period. In attempting to execute the eviction order, the landowner was informed by the Sheriff that a deposit of R1.8 million (which later increased to R2.2 million) had to be paid, as the execution necessitated expenditure that unlawful occupations are problematic as they had the effect of undermining official land redistribution programmes. It argued, furthermore, that prioritising the settlement of this community was not relevant in this matter (at 658–F).

The state also expressed its opposition to land invasions as they had the effect of undermining official land reform and housing programmes. It argued, furthermore, that prioritising the settlement of this community was not relevant in this matter (at 658–F).
of the Grootboom judgment.

The Court ordered the state to produce a comprehensive plan within three months that would provide for:

1. ending the unlawful occupation of the applicant’s land within a reasonable timeframe, by means of expropriation of the land in question or by alternate means;
2. fulfilling the duty of protecting the independence of the courts by giving effect to its orders in terms of s 165(4) of the Constitution;
3. prioritising a programme which would give effect to the community’s right of access to land and housing;
4. providing alternative accommodation for those unlawful occupiers who do not qualify for housing subsidies; and
5. monitoring the implementation of this comprehensive plan.

The appeal

The state has been given leave to appeal the judgment of de Villiers, J to the Supreme Court of Appeal (SCA). The state disagrees with the contention of the Court that the Constitution requires the Executive to become actively involved in the execution of an eviction order in civil proceedings.

Furthermore, the state argues that the Court erred in ordering the government to provide alternative accommodation for the unlawful occupiers as the applicant had failed, in both its founding papers and heads of arguments, to pray for this specific relief. In the absence of evidence that the existing housing policies and programmes are inadequate, the state argues that in this case the issue of alternative accommodation for the unlawful occupiers does not arise.

The community has also been given leave to argue their petition to the SCA for leave to appeal against the original eviction judgment. At the time of writing, it is uncertain whether the community will succeed in obtaining leave to appeal, and if they are successful, whether the two appeals will subsequently be consolidated.

Proposed amicus intervention

The issues raised on appeal in this case may have far-reaching implications for how similar eviction cases are dealt with by the courts in future. The Nkuzi Development Association, together with the Community Law Centre (UWC) and the Programme for Land and Agrarian Studies will be applying for leave to intervene as amici curiae in this matter. The main concern of the proposed intervention relates to whether an eviction order should be upheld if the unlawful occupiers will be left homeless as a result of the execution thereof.

If admitted, the amici will seek to argue that it would be anomalous if the courts placed a duty on the state to assist landowners in executing eviction orders without also ordering it to comply with its Grootboom obligations in relation to the persons to be evicted. The reality that these occupiers currently face is that there are no programmes that serve the short-term housing needs of people in crisis situations living within the Ekurhuleni Municipality’s jurisdiction. The execution of the eviction order would leave this community homeless, and in a crisis situation.

The speedy adoption of the Programme for Housing Assistance in Situations of Exceptional Housing Urgency could go a long way to alleviating the plight of not only the Modder East community, but all vulnerable communities who find themselves in urgent need of land and housing. It is hoped this policy will also fulfill the promise of the landmark Grootboom judgment.

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Seven million left homeless as forced evictions double in two years

Press release, 19 June 2003

Centre on Housing Rights and Evictions

Geneva, Switzerland

The worldwide rate of forced evictions has practically doubled in the last two years, leaving nearly seven million people ejected - often violently - from their homes, according to new research by the Centre on Housing Rights and Evictions (COHRE) in Geneva, Switzerland.

This alarming trend has emerged despite a strengthening of international law provisions condemning forced evictions as violations of human rights. The vast majority of forced evictions, many of which are a direct result of government-led development projects, violate human rights laws which most of the world’s governments have formally agreed to respect.

COHRE Executive Director, Scott Leckie said: “Although we now have a situation where international institutions such as the UN, the World Bank, and even some large corporations are much more wary about supporting projects which may involve forcibly evicting people, it seems governments simply haven’t got the message yet. They cannot be allowed to sign up to international law which forbids forced evictions on the one hand, while flagrantly violating it on the other.”

COHRE’s Global Survey of international forced evictions in 60 countries found that 6.7 million people were