

# The right to

## Grootboom vs Oostenberg Municipality

The limits of section 26 of the Constitution (the right of access to adequate housing) and section 28(1)(c) (children's rights to shelter) were recently tested in the case of *Grootboom and Others v Oostenberg Municipality, Cape Metropolitan Council, Premier of the Province of the Western Cape, National Housing Board and Government of the Republic of South Africa* (unreported at the time of writing).

## The facts

The applicants were squatters who initially lived in Wallacedene. As a result of their poor living conditions, they moved to vacant, private land in the Oostenberg municipality, from which they were evicted on 18 May 1999. In the course of the eviction, their structures were demolished and building materials were destroyed. The homeless applicants then attempted to erect temporary structures on the Wallacedene sports field. However, these proved to be wholly inadequate and provided no protection against the elements, particularly for their children. On 4 June, a temporary order was granted for the respondents to make the Wallacedene Community Hall available free of charge, for the accommodation of the children of the applicants and one parent/adult for each child requiring supervision. The application was argued in full before Justices Comrie and Davis. (See *LGL Bulletin*, 99 (4), for an overview of the facts of the case.)

## The arguments

The applicants relied on sections 26 and 28 of the Constitution to support their contention that the respondents have a duty to provide them and their children with shelter. The respondents argued that in spite of an extremely limited budget, they were implementing a rational housing programme to redress the housing shortage. The applicants contended that the right of access to adequate housing must be interpreted to include a minimum core entitlement to shelter during the period in which the longer term programme to provide adequate housing is being implemented. In support of this argument, they made reference to international law. The respondents submitted

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that such an obligation to provide some form of shelter whilst the State's duties under section 26 were being implemented, would dilute scarce resources away from the implementation of rational housing programmes.

The applicants further relied on section 28(1)(c) of the Constitution. They submitted that children have an unqualified right to shelter which imposes a duty on the respondents to provide such shelter to the children of the applicants. Relying on section 28(2) of the Constitution, the applicants also submitted that it is in the best interests of a child to remain with his or her parents. Children's shelter rights, the applicants argued, should accordingly be extended to parents so that children could remain in a family unit.

The respondents submitted that if shelter was interpreted to mean housing in a family context, it would render the provisions of section 26 nugatory. They argued that it would effectively mean that everyone who has a child would enjoy an enforceable claim against the State to be provided with housing on demand which would have a dramatic impact on the respondent's budget.

## The judgement

The Court held that the primary duty to provide shelter for children rests with their parents. However, in the event that parents are unable to provide shelter for their children, the Court noted that section 28(1)(c) places an obligation on the State to do so. The Court further recognised that shelter is a more rudimentary form of protection against the elements than is provided by housing. It emphasised that section 28(1)(c) envisages a concept of temporary shelter. The Court also accepted that the provision of shelter under section 28(1)(c) should be of such a nature that parents may live with their children in the shelter provided. It explained that this interpretation does not mean that parents then become the bearers of this right in section 28(1)(c) which is

expressly provided for children. Instead, the Court acknowledged that an order which enforces a child's right to shelter should take account of the need for children to be accompanied by their parents. Such an approach, it noted, would take account of the best interests of the child (section 28(2)) and the overall spirit and purport of section 28 of the Constitution. The Court also noted that if shelter rights in this case were provided only for children where they would be denied the psychological comfort and social support of their parents, it would be permitting the break-up of family life of a kind which the new Constitution is determined to prevent.

The Court concluded by noting that a denial of shelter to the 276 infants in the present case as well as the other children, would be incongruent with the Constitution which envisages the establishment of a society based on freedom, equality and dignity.

## A limitation

The Court also accorded some attention to the potential consequences of this interpretation of section 28(1)(c). In particular, it referred to the possible flood of applications by other squatters that shelter be provided for their children, and also for them as parents of those children. The Court noted the concern that in this way, the respondents may be forced to provide inadequate housing under the guise of shelter, thereby disrupting the housing programme and delicate decisions about resource allocation. The Court accordingly outlined the following limitations which are implicit in the judgement:

- The children of the applicants in the present case are homeless (or will be when the temporary order is lifted) and thus in need of shelter. This may not always be the case for all children who belong to or live with squatter families;
- The parent applicants in the present case are unable to provide the requisite shelter for their children, which

is their primary duty to provide.

This may not always be the case.

- In the present case, it is in the best interests of the children applicants to be accompanied by their parents, though not necessarily by extended families.

The Court held that the appropriate organ or department of State is obliged to provide the applicant children and their parents with shelter until such time that the parents are able to shelter their own children. Although the Court was not prescriptive about the exact nature of such shelter, it did note that provisionally, tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum. The Court further held that the respondents must present under oath a report to the Court on its implementation of the aforementioned within a period of three months, whereafter the applicants have one month to deliver their commentary.

## Assessment

This decision can be heralded as a landmark decision in the area of socio-economic rights. Although the Court held that the applicants had failed to make out a case for adequate housing pursuant to section 26 of the Constitution, it accepted that the applicants had, in principle, made out a case for shelter under section 28(1)(c). The decision clearly recognises that the State bears an obligation to provide shelter to children whose parents are unable to do so and, as a result are left without shelter. It further recognises that parents of such children have a right to be accommodated with their children for this is in the best interests of the child.

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**[Please note that this case is being taken on appeal to the Constitutional Court – Editor.]**