# The right to housing

## *Grootboom v Oostenberg Municipality*

### The facts

Mrs Grootboom was part of a group of 390 adults and 510 children living in appalling circumstances in an informal settlement in the Cape Metropolitan area. The group moved to nearby land, earmarked for low-cost housing, and illegally occupied the land. They were forcibly evicted, their shacks were bulldozed and burnt and their possessions destroyed. They could not go back to their original settlement.

They asked the Court to order the state to provide them with basic shelter. They based their argument on their constitutional right of access to housing (s 26(2)) and the children's right to shelter (s 28(1)(c)). In *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277, the Cape High Court ordered the government to provide the applicants with basic shelter (see *LGL Bulletin* 2000(1), p. 4).

The case was then taken on appeal to the Constitutional Court. The Human Rights Commission and the Community Law Centre were accepted as *amici curiae* ('friends of the court') and submitted arguments to assist the Court.

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### The judgment

In its judgment (*Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169), the Constitutional Court distinguished between the negative obligation *to refrain from impairing* the right to housing and the positive obligation *to take measures* to provide access to housing. This case tested the latter part of the right of access to housing, namely the measures that the state had taken.

The Court made it clear that it was not for the judiciary to enquire whether better measures could have been adopted but rather to determine whether or not the state had violated the right of access to housing of the people concerned. It sought to do this by asking the following question: Were the measures taken by the state reasonable?

The 'measures' called for by section 26(2) involve more than legislation alone and have to be supported by appropriate policies, programmes and budgetary support. In determining the 'reasonableness' of the measures taken by the state, the resources it has at its disposal are an important factor. The Constitution does not expect more than the state can afford.

The Court examined the state housing programme and concluded that what had been done so far was a major achievement. The programme at national, provincial and local level represents a systematic response to a pressing social need. Considerable thought, energy and resources have been devoted to housing delivery and the overall programme is aimed at realising access to housing for all. Its long- and medium-term objectives could not be criticised.

However, the Court found that the state had neglected the short-term aspect. It was clear that no real policy existed which could be applied to people in need of housing in crisis situations. Apart from the normal channels, namely application for low-cost housing, which normally takes years, there was no relief for Mrs Grootboom, her children and her peers. There was no provision in any policy, whether national, provincial or local, that applied to her desperate situation.

The Court said that in order for a policy to be reasonable, it cannot ignore those whose needs are most urgent. A policy aimed at providing access to housing cannot be aimed at long-term statistical progress only. Those in desperate need must not be ignored. Their immediate need can be met by 'second-best' facilities, which might fall short of acceptable housing standards, but which nevertheless provide a basic form of shelter.

The Court also stressed that its judgment must not be seen as an approval of land invasion in order to 'jump the queue'.

### The court order

In the order, the Court declared that the comprehensive housing programme, called for by section 26(2) of the Constitution, must include measures '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'. The state housing programme that applied in the area of the Cape Metropolitan Council at the time of the launch of the application fell short of this obligation.

### Comments

This case dealt with the right to housing. Housing is a competency of national and provincial government. The Court placed the onus on national government to ensure that the appropriate legislative and budgetary framework is in place for the implementation of the right to housing. The Court affirmed that the responsibility for implementation is generally given to the provinces. However, the Court also said that '[a]ll levels of government must ensure that the housing programme is reasonably and appropriately implemented... [e]very step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.'

This judgment is also important with regard to other socio-economic rights where local government is even more closely involved, such as the provision of water. The provision of potable water is clearly one of a municipality's critical competencies. The *Grootboom* case makes it clear that when local governments deal with issues such as the provision of water or basic municipal health care, they cannot ignore the needs of the people in desperate situations simply to achieve a better statistical result in the long term. Short-term needs of the most disadvantaged cannot be ignored. If they are, local governments will be at risk of violating the Bill of Rights.

# Disconnection of water supply

## *Manquele v Durban Transitional Metropolitan Council*

### The facts

The applicant, a 35-year-old woman with seven children in her care, failed to pay for water consumed in excess of the free six kilolitres per month provided by the Durban Transitional Metropolitan Council (DTMC). In accordance with its by-law on water supply, the DTMC gave the applicant written notice and allowed for representations to be made, before disconnecting her water supply. The applicant approached the Court for an order declaring the disconnection illegal.

The main arguments in *Manquele v Durban Transitional Metropolitan Council* Case No. 2036/2000 were based on the applicant's right to basic water supply. Section 3 of the Water Services Act 108 of 1997 stipulates that everyone has a right of access to basic water supply and basic sanitation. Every water services institution must take reasonable measures to realise these rights (s 3(c)). Procedures for the disconnection of water services must be fair and equitable (s 4(3)(a)) and must not result in a person being denied access to basic water supply where that person proves that he or she is unable to pay (s 4(3)(c)).

The applicant argued that the said by-law was inconsistent with the Water Services Act in that the discontinuation resulted in her being denied access to basic water services while she was not able to pay for basic services.

In terms of the Water Services Act, 'basic water supply' is 'the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene'. The term 'prescribed' indicates that regulations made under the Act must give further content to the term 'basic water supply'. No such regulations exist.

The Court said that, in the absence of the regulations prescribing the minimum standard of water supply, it could not enforce the right to basic water supply in terms of the Act. The judgment call, necessary for interpreting section 3 and 4(3) of the Act without the regulations, concerns 'policy matters which fall outside the purview of my role and function', according to the judge.

Furthermore, the Court was satisfied that the procedures used by DTMC, in accordance with its by-law, did not fall foul of section 4(3)(a) or (b) of the Act. The by-law provided for written notice and for the opportunity to make representations. Another factor considered by the Court was that the applicant permitted tampering with the service during a previous disconnection.

With regard to the argument that the disconnection resulted in the applicant and her children being

denied access to basic water supply, the Court further considered that the applicant 'chose...not to limit herself to the water supply provided to her free of charge but to consume additional quantities...'. It is because of the non-payment for this water supply that the service was discontinued. This, according to the Court, removes her out of the ambit of being a person who can prove that he or she is unable to pay for 'basic services'.

### Comments

It is regrettable that, because of the arguments placed before it, the Court could not entertain section 27(1)(b) and section 28(1)(c) of the Constitution. These sections enshrine the constitutional right of access to water and the children's right to basic nutrition. Had the applicant based her argument on these provisions, the absence of regulations could not have prevented the Court from considering the scope of 'basic water supply'. This is because the constitutional right of access to basic water exists independently from the question whether or not regulations in terms of the Water Services Act exist. The *Grootboom* precedent would have required a more detailed and useful analysis in which the circumstances of the applicant, such as the fact that she was caring for seven children, should have played an important role.

However, it is interesting to note that at first the Court avoided giving content to the term 'basic water supply' without the said regulations. However, towards the end of the judgment, the Court concludes that six kilolitres per month free of charge constitutes 'basic services' in terms of section 4(3)(c) of the Water Services Act. This indicates that the Court, even though it did not want to determine the scope of 'basic water supply' itself, was prepared to test the DTMC's interpretation of 'basic water supply'. This is exactly what is required from a Court when confronted with these kinds of challenges: not to take policy decisions but to assess whether or not rights have been violated on a case by case basis

**In the absence of the regulations prescribing the minimum standard of water supply, the Court could not enforce the right to basic water supply in terms of the Act.**

The conclusion, albeit hesitantly, of the Court that six kilolitres per month constitutes "basic water supply" begs the following question: if the DTMC provides six kilolitres per month for free as standard practice and has the means to do that, is the non-payment of the applicant for excess usage good enough reason to deprive her of even that first six kilolitres? The Court could have argued that the basic water supply should continue if the applicant proves that she is unable to pay for the excess usage. Another argument could be that free basic water supply is completely dependent on income out of excess usage and that the two cannot be separated. Unfortunately, the Court did not entertain these arguments and an opportunity was missed to give further content to the right to basic water supply.

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