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**A SUBMISSION BY THE SOCIO-ECONOMIC RIGHTS PROJECT OF THE
COMMUNITY LAW CENTRE, UNIVERSITY OF THE WESTERN CAPE**

TO

**THE JOINT AD HOC COMMITTEE ON DEMOCRACY AND GOOD
POLITICAL GOVERNANCE**

AFRICAN PEER REVIEW MECHANISM PROCESS

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OBJECTIVE THREE: PROMOTION AND PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS ENSHRINED IN THE BILL OF RIGHTS AND OTHER AFRICAN AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

THE RIGHT TO HAVE ACCESS TO ADEQUATE HOUSING

1. Introduction

The Community Law Centre (the Centre) of the University of the Western Cape is a research and educational institute working towards realising the democratic values and human rights enshrined in South Africa's Constitution.

The Socio-Economic Rights Project (the Project) of the Centre works towards contributing to the protection and promotion of socio-economic rights. The Project seeks to use socio-economic rights framework as a tool to improving the living conditions of people living in poverty generally. One of the Project's areas of research is housing rights in South Africa.

2. International and constitutional obligations

The State's obligations with regard to the promotion and protection of the right to adequate housing include: first, recognising this right through the ratification and domestication of international instruments and the inclusion of housing rights in the Constitution, and second, preventing violations of the right.¹

2.1 Recognising the right to adequate housing

South Africa is party to a number of international instruments guaranteeing the right to adequate housing. These include: The Universal Declaration of Human Rights, 1948 (UDHR), art 25; the Convention on the Elimination of All Forms of Discrimination against Women, 1967 (CEDAW), art 14(2)(h); the Convention on the Elimination of All Forms of Racial Discrimination, 1965 (CERD), art 5(e)(iii); the Convention on the Rights of the Child, 1989 (CRC), art 27(3); and the African Charter on Human and Peoples' Rights, 1981 (African Charter)². In addition, South Africa has signed but yet to ratify the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), art 11(1).³

¹ Preventing discrimination, arbitrary evictions and ensuring an independent judiciary and access to courts are the elements of preventing violations (Urban Sector Network, *Expanding Socio-Economic Rights and Access to Housing*, 29 October 2003).

² Although the right to housing is not explicitly provided for under the African Charter, the African Commission on Human and Peoples' Rights (African Commission) has found that the right is implicit in arts 14, 16 and 18(1) read together (Communication 155/96, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, (2001) *African Human Rights Law Reports* 60 (ACHPR 2001), para 60.

³ Under international law, South Africa's signing of the Covenant is an indication that it will abide by the provisions enshrined in that instrument.

Section 26 of the Constitution of the Republic of South Africa Act 108 of 1996 provides for the right to have access to adequate housing. Other relevant provisions of the Constitution include section 28, which guarantees every child the right to basic shelter and section 35 that requires adequate accommodation to be provided to detained persons, including sentenced prisoners at state expense. In addition, section 25(5) dealing with access to land is relevant, as realising the right of access to adequate housing also requires available land.⁴

Furthermore, the government has put in place a number of measures, legislative and otherwise, towards the realisation of the right to have access to adequate housing. The legislative measures include: the Housing Act 107 of 1997, Housing Amendment Act 4 of 2001, Home Loan and Mortgage Disclosure Act 63 of 2000, Disestablishment of South African Housing Trust Limited Act No 26 of 2002; Rental Housing Act No 50 of 1999; and Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998 (PIE). Other measures include policies and programmes that have been instituted at both the national and provincial levels. The programmes at the national level include the following:

- Medium Density Housing, which looks at the identification and development of well-located state-owned land, where public transport and appropriate employment are accessible.
- The Rental Housing Policy Framework, the aim of which is to provide access to rental housing for low- and middle income groups who wish to live in temporary tenure arrangements.
- Social Housing that is aimed at improving the quality of life and the integration of communities by providing affordable, high standard, subsidised housing that will regenerate the area where the housing stock is located.
- The National Home Builders Registration Council (NHBRC)'s Warranty Scheme, which provides protection to housing consumers in respect of the failure of home builders to comply with their obligations in terms of the Housing Consumers Protection Measures Act No 95 of 1998. Housing consumers can submit complaints to NHBRC if there are defects in their housing units and the builder is registered with NHBRC.
- The Human Settlement Redevelopment Programme (HSRP) that aims at improving the quality of human settlement through the identification and correction of imbalances and dysfunctions in such settlements. It funds projects and activities that cannot be funded through formal, established government programmes.
- The Emergency Housing Policy Framework that aims to assist groups of people that are deemed to have urgent housing problems, owing to circumstances beyond

⁴ Section 25(5) does not use the explicit language of a ‘right to land’ or a ‘right to have access to land’. It merely enjoins the state to “take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis”.

their control (for example, disasters, evictions or threatened evictions, demolitions or imminent displacement or immediate threats to life, health and safety).

At the provincial level, the focus is mainly on the implementation of existing programmes at the national level. In addition, several provinces have issued their own legislation, for example, the Western Cape Housing Development Act 6 of 1999, the Mpumalanga Housing Act 15 of 1998, the North West Province Housing Development Act 11 of 1998 and the KwaZulu-Natal Housing Act 12 of 1998.

2.2 Beneficiaries and vulnerable groups

The government has deliberately shifted its policies from the rural poor to the urban poor, due to difficulties in accessing land in the rural areas. Beneficiaries of the current housing policies are mainly the urban poor, including those with low, and in some cases, regular income (for example, rental housing), families with earnings of between R1500 and R7500 per month (social housing).

The rural poor are therefore still vulnerable to housing crisis. For instance, those that are still vulnerable to evictions, despite the frameworks (legislative and otherwise) in place include informal settlement dwellers, unlawful occupiers, tenants whose occupation become unlawful due to their inability to pay rents, ex-mortgagors, people with special needs, and women (as they are discriminated against in terms of security of tenure, land ownership and inheritance rights), including young single mothers under 21 years of age (as the housing subsidy rules excludes them).

3. Effectiveness of legal provisions and mechanisms in place

No government can claim to have satisfied in full their existing legal obligations arising out of the right to adequate housing.⁵ Hence, to some extent, the government has fulfilled its obligations (the obligations to respect, protect, promote and fulfil imposed by section 7(2) of the Constitution). The aspects which have to be taken into account as stipulated by the United Nations Committee on Economic, Social and Cultural Rights (CESCR) in determining whether the state has fulfilled its obligations include security of tenure, availability of services, materials, facilities and infrastructure, affordable housing, habitable housing, location and culturally adequate housing.⁶ However, some of these aspects are still lacking.

The history and approach to planning and township establishment, duplication of housing institutions and funding mechanisms, multiplicity of legislation dealing with housing, land / services and the lack of unidentified land are identifiable constraints on solving the housing crisis in South Africa. The following are therefore some concerns with regard to the legal provisions, mechanisms and state of housing in South Africa in general:⁷

⁵ Urban Sector Network, *Expanding Socio-Economic Rights and Access to Housing*, 29 October 2003.

⁶ General Comment No 4, 13/12/1991, UN doc E/1992/23, para 8.

⁷ These areas of concern are highlighted in academic research papers, recent court cases on housing, press statements and see generally, South African Human Rights Commission (SAHRC), *5th Economic and Social Rights Report 2002/200: Housing* (2004).

- Sections 10A and 10B of the Housing Amendment Act 4 of 2001, which were included to restrict the voluntary and involuntary sale of state-subsidised housing, are difficult to implement. They are unjust in relation to persons wishing to improve their living conditions, or relocate due to factors such as change to employment, reluctance of financial institutions to offer loans to persons falling within the category protected by 10A and 10B, as they have no guarantees of recovering their risks.⁸
- PIE was adopted as a means of overcoming abuses and ensuring that evictions take place in a manner that is consistent with the values of the new constitutional dispensation.⁹ It provides a framework within which unlawful occupation can be prevented and at the same time ensuring dignified and individualised treatment of unlawful occupiers with special consideration for the most vulnerable. However, since its inception, landowners have viewed it with disfavour contending that it interferes with their common law right to instantly evict unlawful occupiers from their land, as the procedural and substantive requirements of PIE make it difficult, if not impossible, for them to evict such occupiers.¹⁰ The PIE is currently under revision and the proposed amendments are problematic, as they expose ex-tenants and ex-mortgagors to evictions. It is hoped that these groups will be protected when the amendments are finalised.
- The emergency housing policy framework, which also caters for those who are evicted or threatened with imminent eviction from land or unsafe buildings raises a number of concerns. The following are questionable: the sustainability of the programme itself, the quality of the houses and delivery within a reasonable period of time (in sum, how successful will it be implemented?). Further, the definition of “emergency circumstances” excludes some people in desperate need, for example, those in informal settlements for whom the housing subsidy scheme is not immediate enough or is inadequate; abused women who are forced to leave their homes. There is need for these persons to be covered, as they live in intolerable situations and for the effectiveness of such measures to be monitored.
- The rental housing policy framework does not cater for the vulnerable groups with no source of income (or irregular incomes), as they are not eligible for it.¹¹
- There is under expenditure on housing (with regard to budgets of provincial departments), resulting in, for example, failure to secure suitably located land and slow release of land, and delay in housing delivery (which has led to a housing backlog), as some identified land for housing development is under the subject of land restitution claims.
- The beneficiaries of the current housing programmes (or communities) are not fully involved, or not involved, in the planning and sustainability of the housing

⁸ South African Human Rights Commission (SAHRC)’s *5th Economic and Social Rights Report 2002/2003: Housing* (2004).

⁹ *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC), para 11.

¹⁰ Annette Christmas, *Proposed Amendments to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act: A setback for vulnerable occupiers*, 5(3) *ESR Review* 6 (2005).

¹¹ UN HABITAT also raised this concern, see *Rental Housing: An essential option for the urban poor in developing countries* (2003) <www.unhabitat.org>.

processes. Fear of delaying the process has been advanced as an explanation for non-consultation.¹² Moreover, the Minister of Housing has acknowledged that poor communication is the cause of protests about the slow pace of housing delivery.¹³ Generally, there is the lack of detailed information in the public domain both on policy itself and on progress with implementation of policies.

- Inadequate services necessary for the enjoyment of the right to housing, such as the lack of space for key amenities (for example, laundry, parking and refuse, poorly considered water and electric meters), large amounts of decay in the fabrics of buildings, and the lack of community and social space) is a matter of concern. Moreover, where services have been provided, the maintenance of such services has been problematic, as has been the case in, for example, Wallacedene in the Western Cape.
- Houses do not conform to the Department of Housing's construction and safety standards. This is compounded by the lack of a good monitoring system for housing projects. Moreover, the housing subsidy beneficiaries lack the necessary education to empower them to identify quality problems and make use of the complaints procedures of the NHBRC.¹⁴
- Corruption still remains a challenge, as manipulations of housing waiting lists continues.¹⁵

4. The eviction problem

Evictions have worsened the housing crisis in South Africa. They have deprived many of their right to have access to adequate housing. As a result of the slow release of land¹⁶ or delay in housing delivery, people have been forced to occupy land illegally or move into so-called "bad" buildings (for lack of any real alternatives), leading to their eviction. With regard to the slow delivery of land, the problem is not one of lack of resources, as the state has, most of the times, failed to spend the budget allocated for land reform. Slow delivery with regard to land redistribution has been associated to staffing problems, complex and often inappropriate planning procedures and reliance on market mechanisms to acquire land.¹⁷

The South African legislative framework and jurisprudence is to the effect that an eviction cannot take place without a court order. Section 26(3) of the Constitution explicitly prohibits arbitrary. Also, section 25(5) enjoins the state to "take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis". Section 25(6) protects vulnerable groups by reinforcing security of tenure. Land rights, the right to access to adequate housing and the right not to be arbitrarily evicted are intertwined –

¹² J Pienaar, "The Housing Crisis in South Africa: Will the Plethora of Policies and Legislation Have a Positive Impact?" (2002) 17 *SAPR* 336, 362.

¹³ 'Poor Communication Could be Blamed for Housing Protests' SABC News, 3 June 2005.

¹⁴ SAHRC, *5th Economic and Social Rights Report 2002/2003: Housing* (2004).

¹⁵ *Id.*

¹⁶ Land is being released at a scale that does not meet the demand.

¹⁷ SAHRC, *5th Economic and Social Rights Report 2002/200: Land* (2004).

“the stronger the right to land, the greater the prospect of a secure home”.¹⁸ Furthermore, PIE reinforces the court order requirement by prohibiting arbitrary evictions. It thus protects vulnerable groups such as unlawful occupiers of land or buildings rendered homeless upon eviction.

However, evictions are prevalent in the country. Thousands of people were affected by eviction in Johannesburg alone between 2004 and 2005.¹⁹ The complexity of legislation on eviction, more often than not, results in evictions taking place without adherence to the procedural and substantive requirements. For instance, the poorest and most vulnerable members of the society are evicted without given adequate notice or an opportunity to present their case in court (or oppose the eviction) or notice of when the eviction order will be carried out; with some of the eviction orders executed at night.²⁰ Others have been evicted without the provision of alternative accommodation. For instance, the recent evictions on Bree Street (14 July 2005) and in Hillbrow (20 September 2005) in Johannesburg left many desperately in need of a home, which is a serious breach of South Africa’s constitutional duty to respect, protect and fulfil the right of access to adequate housing. Generally, the jurisprudence of South African courts is to the effect that an eviction cannot take place without a court order and the provision of alternative accommodation for vulnerable groups (those in desperate need), even if temporary.

The eviction problem is compounded by the lack of security of tenure, which is an indispensable pillar of the right to adequate housing. There is a real threat of eviction without security of tenure. One of the consequences that have been highlighted of not having security of tenure is that homeowners become reluctant to invest in their homes as they face the chance of eviction at some point. There is lack of a mechanism, from a housing perspective, through which all persons can possess a degree of security of tenure which guarantees legal protection against forced eviction.

5. The enforcement of the court orders in major cases of violations

The South African Constitutional Court has decided a number of eviction cases that provide significant insight into the judicial enforceability of the right to have access to adequate housing. While judicial enforcement of the right to have access to adequate housing, and socio-economic rights in general, is assured, the actual implementation of court orders on this right remains questionable. The importance of a court order is that it “defines what the court requires to be done or not done”,²¹ thus directly enforceable and places specific obligations on the parties concerned. However, generally speaking, the delay by the South African executive branch of government in implementing decisions of the judiciary that have the impact of changing its policies is a matter of concern.²²

¹⁸ *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC), para 19.

¹⁹ COHRE, *Evictions Monitor – Focus on Africa*, Vol 1 No 3, August 2005.

²⁰ COHRE, *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa*, 17 February 2005.

²¹ L van Winsen, AC Cilliers & C Loots *The Civil Practice of the Supreme Court of South Africa* (1997) 690.

²² T Thipanyane ‘The Courts vs Policy Makers: Who Sets the Pace? The Courts as Policy Makers in the Realisation of Socio-Economic Rights: Implications for the Doctrine of Separation of Powers’ 7, available at < <http://www.ffc.co.za/conf/papers/courts-policy.pdf>>.

Two examples of cases that highlight the difficulties that those vulnerable to eviction continue to face, even after favourable court judgments are: *Government of the Republic of South Africa and Others v Grootboom and Others*²³ and *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others*²⁴(summaries annexed).

The *Grootboom* judgment has been hailed for its use of international law, as a great victory for the homeless and landless people of South Africa, and for its contribution to the development of the jurisprudence on the nature of the state's obligation to progressively realise a specific socio-economic right.²⁵ Despite this, "today, all that the site of Grootboom has to show for [their] victory is the smelly ablution block built in a donga that had served as a latrine for the squatters who went to court".²⁶ Five years after the judgment, the state is yet to adequately enforce the interlocutory and declaratory orders. Challenges to the enforcement of the *Grootboom* orders that have been highlighted by the South African Human Rights Commission include, but are not limited to: the community's lack of understanding of legal and technical matters relating to housing; lack of skills (as most members of the community are illiterate); inadequate communication and consultancy between government and the community leading to non-consultative decision making and a lack of understanding by the community of the government's plans; and non-maintenance of services provided, leading to their deterioration.²⁷

With regard to the *Modderklip* court order pertaining to the occupiers, the government has enforced the court order to the extent that it has made a decision to relocate the occupiers, identified alternative land for the purpose of housing and will soon be moving the occupiers. Notwithstanding, the right to have access to adequate housing requires more than just the provision of land. It also includes the provision of appropriate services such as the provision of water and the removal of sewage and the financing (and maintenance) of all these.²⁸ Therefore, an adequate enforcement of the court order requires that there must be 'appropriate' functioning services and dwelling, in order to guarantee the occupiers' rights to have access to adequate housing. Apparent obstacles to the enforcement of the order include inadequate access to information,²⁹ lack of genuine consultation, and inadequate understanding by the occupiers of legal and technical matters pertaining to housing and the administrative

²³ 2001 (1) SA 46 (CC), hereinafter referred to as *Grootboom* (CC)

²⁴ 2005 (8) BCLR 786 (CC), hereinafter referred to as *Moddeklip* (CC).

²⁵ K Pillay, "Implementing Grootboom: Supervision Needed" (2002) 3(3) *ESR Review* 13.

²⁶ B Schoonakker 'Treated with Contempt' *Sunday Times*, 21 March 2004, available at <http://www.queensu.ca/msp/pages/In_The_News/2004/March/23.htm>.

²⁷ Some of the challenges in enforcing the *Grootboom* orders are highlighted in SAHRC, *5th Economic and Social Rights Report 2002/2003: Housing* (2004); and K Pillay 'Implementation of Grootboom: Implications for the Enforcement of Socio-Economic Rights' (2002) 6 *Law, Democracy and Development* 255.

²⁸ *Grootboom* (CC) para 35.

²⁹ Although the Ekurhuleni Metropolitan Municipality (EMM) has stated that the occupiers have been told in specific terms the conditions of the resettlement in the alternative land, including individual title, water, sanitation and infrastructure in terms of the existing National Housing Standard, our visit to the Modderklip farm on 22 July 2005 revealed that the occupiers lacked complete (detailed) information on the relocation process and the conditions in the alternative land. They had no information on, for instance, the time of the relocation, where the alternative land is or at least the housing situation in it - the specific social amenities to be provided and the size of land (stand) for each household.

hick-ups that affect negatively the implementation of court orders relating to housing.³⁰

6. Recommendations towards addressing the housing crisis

The Socio-Economic Rights Project strongly recommends the following:

6.1 Court orders have to be implemented timeously

The government's obligations with regard to realising to right of access to adequate housing require that it implements court orders timeously. Linked to this is the need for the government to report on the extent of enforcement of court orders, as reporting obligations are often used as an enforcement mechanism of human rights norms at the United Nations, regional and some national levels.³¹ To ensure efficient and adequate enforcement of court orders in socio-economic rights cases, as Thipanyane rightly suggests, parliament and respective provincial legislatures have to be more active in holding the executive branch of government to account for delays in implementing decisions of the judiciary.³² Also, it is important that courts consider monitoring, continuously and consistently, the implementation of their orders. Although this is a debatable method of ensuring enforcement, considering the separation of powers principle, it has been used successfully in, for example, India.³³

6.2 The emergency housing framework should be implemented

As the reasonable standard built into section 26 of the Constitution applies to both the formulation and implementation of programmes, the implementation of the emergency housing programme is crucial considering that there are many people living in intolerable conditions especially in informal settlement that can be included in the framework.

6.3 Government departments should collaborate in addressing the housing crisis

There is need for various departments to collaborate in addressing the housing crisis in South Africa. The Department of Housing in one of its protocols to the South African Human Rights Commission reported that it believes that the provision of shelter for the homeless people is a primary responsibility of the Department of Social

³⁰ The occupiers are certain that they will be relocated within a short period of time. They indicated that since the government has told them they will be moved soon, that is what is going to happen. They have to sit and wait for it to happen. This is unsettling as their relocation or the complete compliance with the order could be soon or longer than expected, if one considers the extent of implementation of the *Grootboom* judgment.

³¹ N Ntlama, 'Monitoring the Implementation of Socio-Economic Rights in South Africa: Some Lessons from the International Community' (2004) 8 *Law, Democracy and Development* 207, 219.

³² Thipanyane supra note 22.

³³ S Muralidhar "Implementation of Court Orders in the Area of Economic, Social and Cultural Rights: An Overview of the Experience of the Indian Judiciary", paper presented at the First South Asian Regional Judicial Colloquim on Access to Justice, New Delhi, 1-3 November 2002 <<http://www.ielrc.org>>.

Development.³⁴ Looking at the obligations of the former in terms of the Housing Act, it should be the primary responsibility of both Departments and not just one to ensure that the right of access to adequate housing of the homeless is fulfilled.

6.4. Documents, for example policies or reports by municipalities on housing, should be made easily accessible

The role access to information can play in achieving socio-economic rights has been recognised by many writers.³⁵ Regrettably, generally, the state does not live up to its information access laws.³⁶ A huge obstacle to people being able to engage with government regarding their right of access to adequate housing, especially at the local level, is the lack of information. This has also been an obstacle to the enforcement of court orders.

6.5 There should be consultative decision making and adequate communication between the government and affected communities

The lack of, or inadequate, communication between the government and affected communities has contributed to the housing crisis in South Africa. The beneficiaries of housing programmes, and the public at large, have to be involved in the whole process as this will improve the effectiveness of housing development.

6.6 Applications for urgent eviction orders should be restricted

There is the need to restrict the practice of seeking urgent eviction orders without prior and full exploration of all alternatives such as suitable accommodation and without giving adequate notice to those to be evicted.

6.7 The government should review current legislation and policies before adopting new ones that could result in duplication

There is need for current legislation and policies to be reviewed, so as to cater for those whose right to adequate housing is not protected by current legislation and policies.

³⁴ South African Human Rights Commission (SAHRC)'s *5th Economic and Social Rights Report 2002/200: Housing* (2004). The Commission in its report also highlights other instances in which there has been lack of collaboration between government departments or policy incoherence in addressing the housing crisis.

³⁵ See for example, J Klaaren, "A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights" (2005) 27 *Human Rights Quarterly* 539.

³⁶ W Hartley 'State not Living up to Information Access Laws, Study Shows' *Business Day*, 28 September 2005.

Annexure I - *Grootboom* case

Facts

The applicants, including a number of children, had moved onto private land from an informal settlement owing to the "appalling conditions" in which they were living. They were evicted from the private land that they were unlawfully occupying. Following the eviction, they camped on a sports field in the area. However, they could not erect adequate shelters as most of their building materials had been destroyed. They applied to the Cape High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. The order was granted pursuant to section 28(1)(c) of the Constitution, which guarantees the right of children to, among other things, shelter.

On appeal by all three spheres of government (national, provincial and local) to the Constitutional Court, the South African Human Rights Commission and the Community Law Centre (University of the Western Cape) intervened as amici curiae in the case. Although the parties to the case focused their arguments on section 28(1)(c) (the right of every child to shelter), the amici broadened the issues to include a consideration of section 26 of the Constitution, which provides for the right of access to housing. They essentially argued that all members of the community, including adults without children, were entitled to shelter because of the minimum core obligation incurred by the State in terms of section 26.

The Decision

1. According to the Constitutional Court, the question was not whether socio-economic rights were justiciable under the Constitution, "but how to enforce them in a given case." This could not be decided in abstract, but would have to be "carefully explored on a case-by-case basis." (para 20)
2. The Court held that the state had an obligation to ensure, at the very least, that the eviction was executed humanely. The fact that the eviction was carried out a day earlier and that the possessions and building materials of the respondents were destroyed and burnt amounted to a breach of the negative obligation embodied in the right of access to adequate housing recognised under section 26(1) of the Constitution.
3. Housing "entails more than bricks and mortar". It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have "access to" adequate housing all of these conditions must be met: "there must be land, there must be services, there must be a dwelling." (para 33)
4. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of housing, "but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing." The state's duty is to "create the

conditions for access to adequate housing for people at all economic levels of our society." (para 35)

5. The Court rejected the contention that section 26(1) created a minimum core obligation to provide basic shelter enforceable immediately upon demand. It held that section 26(1) should be read together with subsection 2, which enjoins the state to realise this right progressively within available resources.
6. Thus, in any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), "the question will be whether the legislative and other measures taken by the state are reasonable." The Court emphasised that it would not enquire "whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent". (para 41) The housing programme must include measures that are reasonable both in their conception and in implementation.
7. A given measure will pass the reasonableness test if it is comprehensive and well coordinated; is capable of facilitating the right in question albeit on a progressive basis; is balanced, flexible and does not exclude a significant segment of society; and responds to the urgent needs of those in desperate circumstances.
8. The Court interpreted the phrase "progressive realisation" in section 26(2) to impose a duty on the state to progressively facilitate the accessibility of housing by examining legal, administrative, operational and financial hurdles and, where possible, lowering these over time. Housing should be made accessible "not only to a larger number of people but to a wider range of people as time progresses." (para 45)
9. The phrase "within available resources" was interpreted to mean that "both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources". (para 46) According to the Court, section 26 "does not expect more than is achievable within (the state's) available resources". (para 46)
10. In the present case, it was held that, although the programme satisfied all the other requirements of the reasonableness test, it was nevertheless unreasonable in that "no provision was made for relief to the categories of people in desperate need". The state was therefore found to be in violation of section 26(2) of the Constitution. Accordingly, a declaratory order was made requiring the government to act to meet the obligations imposed on it by section 26(2), which included the obligation to devise, fund, implement and supervise measures aimed at providing relief to those in desperate need.
11. The Court found no violation of the right of children to shelter in terms of s 28(1)(c), contrary to the High Courts decision, holding that that the State incurs an immediate obligation to provide shelter only in respect of those children who are removed from their families. The primary duty to fulfil the

children's socio-economic rights in section 28(1)(c) rests on the parents or family and only, failing such care, on the State. As children in this case were under the care of their parents or families, the Court did not grant any relief based on section 28(1)(c).

However, the court emphasised that this did not mean that the state incurred no obligation to children who were being cared for by their families. The state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28.

In addition, the state is required to fulfil its obligations to provide families with access to land in terms of section 25, access to adequate housing in terms of section 26 as well as access to health care, food, water and social security in terms of section 27. These sections require the state to provide this access through "on a programmatic and coordinated basis, subject to available resources."

Annexure II - Modderklip case

Facts

A group of about 400 people had moved onto private land owned by Modderklip Boerdery (Pty) Ltd owing to the overcrowding and shortage of land in the nearby Daveyton and Chris Hani informal settlement. On 12 April 2001, the Johannesburg High Court ordered an eviction against them. The occupiers failed to vacate within the two months period given by the court. Meanwhile, their numbers continued to increase. At the time the matter was heard in the Transvaal Provincial Division (TPD), it was estimated that they were 40 000 occupiers on the land.

In the TPD, the landowner attempted to get state assistance for the execution of the eviction order. Eviction by that time was estimated to cost of about R2.2 million, as it would require the services of private contractors. The landowner was unwilling to spend this amount. The TPD ruled that the State was in breach of its obligation to the landowner and of its constitutional obligations to the unlawful occupiers' rights of access to adequate housing. As such, it ordered the State to devise a comprehensive plan that would end the occupation of the land.

The State appealed against this decision to the Supreme Court of Appeal (SCA). The SCA held that the state, by failing to provide land for the occupiers, infringed the rights of Modderklip as provided in s7(2), 9(1) and (2), and 25(1). The rights of occupiers to have access to adequate housing in s26(1) of the Constitution had also been infringed. The SCA ordered that the landowner was entitled to payment of damages by the Department of Agriculture and Land Affairs in respect of the occupied land, and directed that these damages be calculated in terms of section 12(1) of the Expropriation Act 63 of 1975. As for the occupiers, the SCA ordered that they were entitled to stay on the land until alternative land was made available to them.

The state appealed against the SCA decision to the Constitutional Court and made two key contentions: Firstly, that Modderklip's right to property and the occupiers' rights to have access to adequate housing had been breached. Secondly, that Modderklip was not entitled to the relief it claimed because it had neglected to apply for an urgent eviction order timeously (in other words that Modderklip was to blame for the problem). They also raised the question of whether or not section 25(1) [the property clause] has the horizontal application (i.e. if it can be invoked to govern relations between private parties).

The Decision

1. The Court did not find it necessary to make conclusions on any of the above contentions by made by the State.
2. It found that it was unreasonable for a private entity such as Modderklip to be forced to bare the burden which is on the state of providing the occupiers with accommodation. Modderklip would have not met the stringent requirements for an urgent eviction order in terms of section 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (1998). The Court found Modderklip's claim was based on the fact that it had been deprived the right

of ownership of the land. Its conduct of trying to involve the state was "prudent and reasonable in the circumstances" and accordingly cannot be blamed.

3. The Court found that, by failing to do anything to stop the occupation of land and assist in enforcing the eviction order, the State infringed Modderklip's right to an effective remedy as required by the rule of law and entrenched in section 34 of the Constitution.
4. The Court also found it unnecessary to decide whether or not a court can order the expropriation of property. It stated however that, given the circumstances of this case, the award of compensation made by the SCA was the most appropriate remedy. Accordingly, it held that should the state wish to expropriate the land on Modderklip's farm, the sum of compensation must be calculated in accordance with the Expropriation Act.

The Court set aside the order of the Supreme Court of Appeal and replaced it with an order declaring that

1. By failing to provide an appropriate mechanism to give effect to the eviction order, the state violated the right of Modderklip Boerdery to access to courts (s34) read with the principle of the rule of law in section 1(c) of the Constitution.
2. Modderklip is entitled to payment of compensation by the Department of Agriculture and Land Affairs in respect of the occupied land, and that the compensation must be calculated in terms of the Expropriation Act.
3. The residents are entitled to occupy the land until alternative land is made available to them by the state or the provincial or local authority that the landowner.