

A perspective on local government's role in realising the right to housing and the answer of the *Grootboom* judgment

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1 INTRODUCTION

This article examines the responsibilities of the three spheres of government with regard to implementing the right of access to housing and in particular, the responsibility of local government. First, it sketches a conceptual framework – based on section 7 of the Constitution¹ – that can assist in bringing together the constitutional allocation of responsibilities and the fundamental rights that people can claim against ‘the state’. Second, it then applies this to the responsibilities of local government when it comes to the right of access to housing. Third, it outlines and comments on the Constitutional Court’s approach to the issue in its judgment in *Government of the Republic of South Africa and Others v Grootboom and Others*.²

2 A FRAMEWORK FOR BRIDGING THE ALLOCATION OF RESPONSIBILITIES AND RIGHTS AGAINST ‘THE STATE’

2.1 General: Obligations on the state with regard to fundamental rights

Section 7(2) of the Constitution imposes four different types of obligations on the state when it comes to the fundamental rights entrenched in the Bill of Rights: the obligations to *respect*, *protect*, *promote* and *fulfil*. These obligations exist with regard to rights of both a civil and a political nature, and with regard to economic, social and cultural rights. The obligation to *respect* these rights means that the state must refrain from interfering

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1 Constitution of the Republic of South Africa Act 108 of 1996.

2 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) (hereafter *Grootboom*).

with their enjoyment.³ The obligation to *protect* means that the state must prevent violations by third parties.⁴ The obligation to *promote* fundamental rights means that the state must encourage and advance the realisation of these rights, which includes ensuring public awareness. The obligation to *fulfil* fundamental rights means that the state must take appropriate legislative, administrative, budgetary, judicial and other measures towards their realisation.⁵ In an individual case of an infringement of a right, the question is whether all three spheres of government, which make up 'the state', are jointly responsible for all four of these obligations or whether distinctions can be made between them. This issue is important, especially with regard to the social, economic and cultural rights, which often require positive state action with substantial budgetary consequences.

2.2 Who must do what?

Principle 6 of the Limburg Principles, which reflect a great proportion of existing international law on economic, social and cultural rights, reads that

... the achievement of economic, social and cultural rights may be realized in a variety of political settings. There is no single road to their full realization. Successes and failures have been registered in both market and non-market economies, in both centralized and decentralised political structures.⁶

International law is not concerned with the question which sphere, organ or structure within the state is responsible for the realisation of economic, social and cultural rights. National government can devolve powers and decentralise the effort to realise economic, social and cultural rights, but it remains fully accountable to its citizens for their realisation. In the same vein, the trend in many countries has been to rely more and more on measures related to the market economy to resolve problems in socio-economic development. Despite this, the state can and should be held accountable for the realisation of socio-economic rights and is obliged to provide basic social services to fulfil them.⁷ In the domestic arena the issue is not as straight forward. The South African Constitution contains an intricate system of allocation of responsibilities to various spheres of government. Yet the state must uphold and promote these rights. Who must do what and which sphere is responsible for the realisation of which socio-economic right? Do provincial and local governments bear the same unqualified burden with regard to their realisation as the national government? Is it possible and, more importantly, desirable, to make such a qualification?

3 Van Boven *et al* 1998: 4; Liebenberg 1999: 41-28.

4 Van Boven *et al* 1998: 4.

5 *Ibid* 4. See also *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* (2002) JOL 9513 (W) at par 13.

6 Own emphasis. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, formulated at Limburg University (Netherlands), in June 1986.

7 Van Boven *et al* 1998: 16.

It is submitted that, in the first place, provincial and local governments are, together with national government, jointly responsible for the realisation of economic, social and cultural rights. However, the issue that comes to the fore is whether a qualification can be made, along the lines of the four types of obligations on the state referred to above. Provincial and local governments derive their power from the decentralised state. The Constitution allocates powers to the three spheres and protects these powers. The power to amend that constitutional allocation is regulated in section 74 of the Constitution. Provinces have a say in an amendment to the Constitution, as stipulated in subsections (3) and (8), but local governments do not. They do not have a vote in an amendment to the constitutional allocation of powers to them.⁸ Thus, when it comes to its constitutionally protected set of competencies, the local sphere of government depends on an allocation of powers on which it does not have decision-making or voting powers. Therefore, with regard to the realisation of the fundamental rights entrenched in the Constitution, it is important to have regard to local government's constitutional mandate. It can be argued that a qualification must be made along the lines of *respecting, protecting, promoting* and *fulfilling* these rights.

Local government shares with provincial and national government the responsibility to *respect, protect* and *promote* all the fundamental rights of the Bill of Rights, including the economic, social and cultural rights. This is the consequence of the elevation of local government from an administrative arm of central and provincial government to a component of the government proper;⁹ a new order, the reality of which has been affirmed by the Constitutional Court in the *Fedsure* case.¹⁰ Local authorities are obliged, just as much as national and provincial governments, to refrain from interfering with these rights, to protect against their violation by third parties and to advance their realisation. However, when it comes to *fulfilling* an economic, social or cultural right in terms of taking legislative, administrative, budgetary, judicial or other similar measures, local government's hands might be tied by the mandate it has received from the Constitution. Local government's aggregate budget consists mainly of moneys raised by the municipalities themselves and supplemented by national government grants and payments for the performance of agency functions.¹¹ Local authorities raise revenue and receive grants, *based on their powers and functions determined by the Constitution*. As Mastenbroek and Steytler put it, the Financial and Fiscal Commission, tasked with advising governments on the division of revenue, establishes what it would cost local government to do *what the Constitution instructs it to do* and then determines the extent to which the national fiscus is obliged to assist local government.¹²

8 Except that the local sphere has a constitutionally entrenched mouthpiece in Parliament in the form of representation by organised local government in the National Council of Provinces (ss 67 and 163(b)(ii) of the Constitution).

9 Mastenbroek & Steytler 1997: 245.

10 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC). See also Steytler & De Visser 1999: 6.

11 Mastenbroek & Steytler 1997: 247

12 *Ibid.*

There are fundamental rights, such as for example the right to basic education (section 29(1)(a)), in relation to the realisation of which local government simply does not have the power to take legislative, administrative or budgetary measures. That, of course, does not mean that local authorities do not have the obligation to *respect*, *protect* and *promote* the right to education. When local authorities deal with matters related to education, such as the provision of municipal services (for example water, electricity, sewerage) to schools, the making of provisions in town planning schemes for schools or the making available of municipal land for that purpose, the local authorities must be guided by those obligations. For example, the decision to cut off a school from the provision of electricity must be guided by different principles than the decision to disconnect electricity supply in the case of business premises.

2.3 Linking local government's powers to section 7

Section 156(1) of the Constitution deals with the powers and functions of municipalities. It reads:

- (1) A municipality has executive authority in respect of, and has the right to administer:
- (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
 - (b) any other matter assigned to it by national or provincial legislation.

Subsection (2) affords municipalities the power to make and administer by-laws for the administration of those matters that it has the right to administer. In other words, local government derives *legislative* powers from first, the competencies listed in Schedule 4B and Schedule 5B, and second, the assignment of other matters to local government by national or provincial government.

If section 7(2), dealing with the four obligations pertaining to fundamental rights, is 'placed over' the constitutional allocation of powers between spheres of government, it can be submitted that a local authority is responsible for the *fulfilment* of a socio-economic right in terms of taking legislative, administrative or budgetary measures only if the subject matter first, falls within the competencies set out in Schedules 4B and 5B of the Constitution, or second, has been assigned to local government by national or provincial legislation.

3 THE RIGHT OF ACCESS TO HOUSING

The second part of this article applies the above test to the issue of housing in the Western Cape. Section 26 of the Constitution states that everyone has the right of access to adequate housing and that the state must take measures to achieve the realisation of this right. The question is: which sphere of government carries the primary obligation for taking administrative, legislative and budgetary measures with regard to the right to housing? It is argued below that the primary obligation does not rest on the local sphere. The question then arises as to what the obligations of local government are, seen in the context of the 'remaining' constitutional obligations to *respect*, *protect* and *promote* the fundamental rights of the

Constitution. A determination has to be made whether or not local government has the obligation to *fulfil* the right to housing of section 26. The relevant question here should be *whether any of local government's constitutional obligations make local government the sphere primarily responsible for realising the right to housing*. To answer that question, first, local government's competencies in terms of Schedules 4B and 5B need to be examined for linkages with the right to housing; and second, any national or relevant provincial legislation that assigns to local government any matter pertaining to the right to housing should be scrutinised.

3.1 Local government's competencies in terms of the Schedules

The Schedules to the Constitution provide insight into the question of which sphere carries the primary obligation for the fulfillment of the right to housing. Schedule 4A lists housing as a concurrent competency of the national and provincial spheres. Schedules 4B and 5B of the Constitution do not confer on local government any function that can be seen to place the onus on it to be the primary responsible organ for the implementation of the right to housing. Although many of the listed functions and powers relate to housing (building regulations, potable water, sanitation, electricity and waste disposal, for example, clearly relate to housing), they do not place the primary obligation to take the requisite measures for the fulfillment of the right to housing on local government.

3.2 Assigned functions of local government

If the municipal competencies in terms of the Schedules of the Constitution do not render local government the primary responsible organ for the fulfillment of the right to housing, has housing then been assigned? In other words, is there any national or provincial legislation that assigns the subject matter to local government?

3.3 Local government's competencies in terms of the Housing Act

The national Housing Act¹³ (hereafter HA 1997) provides the national framework for housing, including the roles and responsibilities of the three spheres of government.¹⁴ It provides insight into government's strategy as far as the allocation of responsibilities is concerned and sheds more light on the scheme of things put forward in Schedules 4 and 5 of the Constitution. Further, it could contain assignments to local government in terms of section 156(1)(b).

3.3.1 National government

The national Minister of Housing has the overall responsibility for a sustainable national housing development process, in consultation with all the provincial MECs for housing and the national organisations representing municipalities.¹⁵ Section 3(2) of the HA 1997 says that it is the

13 Housing Act 107 of 1997.

14 See also Gutto 1999: par 18.

15 HA 1997, s 3(1).

Minister's task to determine policy, norms and standards in respect of housing development. The Minister must ensure that the national department has delivery goals but must also facilitate provincial and local delivery goals. Aside from monitoring national performance, the Minister must assist provinces to develop their capacity to facilitate housing development and also support the capacity of municipalities to do the same.

The Act puts the Minister in charge of the establishment of the necessary national institutional and funding frameworks,¹⁶ as well the negotiation of allocations. In that regard, the Act has a number of important powers in store for the Minister. For example, the Minister can allocate funds for national housing programmes to provincial governments, including funds for national housing programmes administered by municipalities in terms of section 10 of the Act. He or she can also allocate funds for national facilitative programmes for housing development. Provincial and local governments are required to furnish the Minister of Housing with reports, returns and other information, which he or she would require for the purposes of the Act.¹⁷ The Minister must develop, adopt and publish a National Housing Code,¹⁸ a comprehensive national housing policy that must be used by all three spheres of government.¹⁹ This Code can include administrative or procedural guidelines in respect of the effective implementation and application of national housing policy.²⁰ Every member of the national Cabinet as well as the South Africa Local Government Association (SALGA) must be consulted on this. Every provincial government and municipality receives a copy of the Code.²¹

3.3.2 Provincial government

Provinces must do everything in their power to promote and facilitate the provision of adequate housing within the framework of national housing policy.²² The Act requires them to consult with the provincial organisations representing municipalities. There must be a provincial policy in respect of housing development. Provinces must co-ordinate housing development in the province and promote the adoption of their own legislation to ensure effective housing delivery. Provinces are specifically instructed to support and strengthen the capacity of municipalities to perform their duties in respect of housing development effectively. Indeed, when a municipality fails to perform a duty imposed by the HA 1997, provincial government must intervene by using section 139 of the Constitution to ensure its performance.

3.3.3 Local government

Sections 9 and 10 of the Act are critical for reviewing government's strategy on the role of local government. In section 9, the Act places

16 *Ibid* s 3(4).

17 *Ibid* s 3(7).

18 *Ibid* s 4.

19 *Ibid* s (1).

20 *Ibid* s 4(2)(b).

21 *Ibid* s 4(3).

22 *Ibid* s 7(1).

housing development squarely within the realm of each municipality's integrated development plan (IDP). In fact, housing development will undoubtedly be one of the most pertinent areas of each municipality's IDP. Municipalities must take all reasonable and necessary steps *within the framework of national and provincial housing legislation* to achieve the following:

- enabling residents of the municipal area to have access to adequate housing on a progressive basis;
- preventing or removing conditions that are not conducive to health and safety; and
- providing a package of water, sanitation, electricity, roads, stormwater drainage and transport services in an economically sustainable way.

Further, the municipality must set housing delivery goals for its area and designate land for housing development.²³ It must plan and manage land use and development and create and maintain a public environment conducive to housing development, which is also financially and socially viable.

The municipality is best placed to solve local housing disputes and is therefore instructed by the Act to promote the resolution of these conflicts. The Act further expects municipalities to initiate, plan and co-ordinate appropriate housing development in their area of jurisdiction.²⁴ Any municipality may participate in a national housing programme. It can do so in a variety of ways. For example, it can enter into a joint venture with a developer or establish a business entity for a housing project.²⁵ It can also administer a national housing programme in its area in accordance with section 10 of the HA 1997. A municipality can apply to its MEC for Housing to be accredited for the purposes of administering a national housing programme.²⁶ If it complies with the criteria, the municipality must be accredited.²⁷ An accredited municipality can administer the programme and for that purpose exercise the powers and perform the duties of the provincial housing development board. However, the municipality remains subject to the directions of the MEC. The MEC can, after consultation with the provincial housing development board, allocate money for the administration of the national housing programme to an accredited municipality. The municipality must maintain separate accounts of that money. The municipality has a reporting duty towards the provincial accounting officer.²⁸ The MEC regularly reviews the performance of an accredited municipality and can intervene if it fails to so perform.²⁹

23 Subject to certain conditions, such as approval by the MEC, a municipality may appropriate any land required by it for the purposes of housing development in terms of any national housing programme (s 9(3)).

24 HA 1997, s 9(1).

25 *Ibid* s 9(2).

26 *Ibid* s 10(1).

27 *Ibid* s 10(2)(a).

28 *Ibid* ss 10(4) and 12(2)(b).

29 *Ibid* s 10(3); see also s 10(5) in this regard.

3.4 Western Cape Housing Development Act

Provincial legislation can also assign matters to local government. The Western Cape Province, for example, enacted the Western Cape Housing Development Act³⁰ (hereafter WCHDA 1999), which came into operation on 1 January 2000. In its preamble, it states that, *inter alia*, it determines general principles applicable to housing in the province of the Western Cape, defines the role of the provincial and local spheres of government in housing development, establishes a Provincial Housing Development Board and a Provincial Housing Development Fund and ensures that housing development is integrated with all other facets of development in a holistic way. The role for local government, envisaged by the WCHDA 1999 is in line with the national HA 1997. It reiterates most of the provisions of the latter relating to local government's duties.³¹ It also follows the provisions of the HA 1997 in regulating the accreditation of local authorities for administering national or provincial housing programmes, the concomitant reporting duties of the municipalities and the powers of review and intervention by the provincial government.³² It further regulates the transfer of funds from the Western Cape Housing Development Fund to local authorities for the purpose of administering national or provincial housing programmes. In relation to this, the Act provides that the officer heading the department responsible for housing remains the accounting officer in respect of any of such moneys transferred to a local authority.³³ The accounting procedures applicable to funds paid to local authorities must also conform to the HA 1997.³⁴

3.5 Assessing national and provincial legislation

The HA 1997 establishes a division of responsibilities with regard to housing. It states explicitly that the national sphere carries the overall responsibility for the housing development process. Policy is set at national level: the Minister is responsible for the National Housing Code, which must be used at national, provincial and local level. Provinces and local authorities must furnish the Minister with reports, returns and any other information that he or she requires. Perhaps most importantly, national government is responsible for the allocation of funds for national housing programmes to provincial governments. These include the funds that municipalities use for their administration of national housing programmes. Critical in the responsibilities of the provinces is their duty to support and strengthen the capacity of municipalities with regard to their housing duties and their power to intervene by means of section 139 of the Constitution if a municipality fails to perform any of its duties imposed by the HA 1997. The functions of municipalities in terms of the HA 1997 are twofold:

30 6 of 1999.

31 *Ibid* s 15(1).

32 *Ibid* ss 15(2) and 16.

33 *Ibid* s 17, read together with s 1.

34 *Ibid* s 18.

1. The Act, in section 9, imposes certain duties related to housing directly to municipalities; and
2. municipalities can administer national and provincial housing programmes.

The first set of duties deal mostly with functions that can be called 'ancillary' to housing and concern the duty to deal with water, sanitation, electricity, roads, stormwater drainage, bulk engineering services and revenue generating services, where necessary. These functions fall within local government's competencies listed in Schedules 4B and 5B of the Constitution and are therefore not 'assignments' in terms of section 156(1)(b) of the Constitution.

The other functions that section 9 of the Act allocates to municipalities centre around local government's capacity as 'point of delivery' when it comes to housing. Municipalities have the duty to make land available for housing development, to manage land use and development, to ensure the access of their inhabitants to adequate housing on a progressive basis, to create and maintain a public environment that is conducive to housing development, to set housing delivery goals and promote the resolution of conflicts around housing. These duties are assigned to local government in terms of section 156(1)(b).

That local authorities are entirely dependent on national and provincial governments in their efforts to contribute to the realisation of the goals of the HA 1997 is made clear by section 9 which states that these duties can only be exercised "within the framework of national and provincial housing legislation and policy". This means that local authorities, in dealing with such assigned matters, must act within the perimeters of national and provincial policies.

The second set of local government functions relate to the administration of national housing programmes by municipalities. In this regard, municipalities function as 'administrators' of national housing programmes, have powers and perform duties that are necessary for that function and are subject to review and intervention by the province. Crucial is that these housing programmes are funded through the relevant province, by the national government and that (an official within) *the province* (in the case of the Western Cape: the Head of the Department responsible for Housing) is the accounting officer for the funds used by local authorities for the implementation of those programmes. It is therefore safe to say that the administration of housing programmes by local authorities does not take place in terms of an assignment, contemplated in section 156(1)(b) of the Constitution, but rather on an agency basis. The WCHDA 1999 is in line with this scheme and does not assign any additional matters to local government.

In conclusion, the scheme of allocating powers and functions laid down in the HA 1997, and followed by the WCHDA 1999, does not assign to local government the authority and right to administer any matter which would render local government the primary responsible sphere for the *fulfillment* of the right to housing.³⁵

35 Gutto remarks: "With regard to housing and building control, the responsibilities lie at national and provincial levels, with building control also falling into the sphere of local government" (1999: par 7).

3.6 What then are local government's obligations?

If one concludes that local government does not bear the primary obligation to *fulfil* these rights, what, then, are its obligations with regard to housing, given the fact that it does bear the obligation to *respect, protect* and *promote* them? It is clear from the Constitution that local authorities cannot simply 'shrug off' any responsibility for the right to housing or for children's right to shelter. The obligations to *respect, protect* and *promote* these rights are there for local authorities to uphold. Section 9 of the HA 1997 is instructive here. It makes clear that local government has distinct duties with regard to housing. These duties exist notwithstanding the facts that local government is not the sphere primarily responsible for housing and that it can participate in national housing programmes. They flow directly from the obligation to *promote* the right to housing. The HA 1997 instructs local authorities to contribute to the realisation of the right to housing, *within their constitutional mandate*, by making land available, by ensuring provision of services such as water, sanitation, electricity, roads, stormwater drainage and transport, by ensuring access to housing for its inhabitants etc. Without local government performing these tasks, the right to housing is meaningless. The inclusion of these functions in the HA 1997 is meant to combine the efforts of national and provincial governments with the efforts of local government to realise a meaningful right to housing. These duties are also relevant in the context of realising children's right to shelter, because many of these more or less ancillary aspects relate to the meaningfulness of both the right to housing and children's right to shelter.

The *minimum* obligations of local government in the process of realising the right to shelter therefore include matters such as:

- making land available; a 'site' on which the provision of shelter can take place – in many cases, municipalities have greater access (through ownership) than provinces to land in their jurisdiction that is appropriate for causes like these;
- providing basic water services;
- providing basic sanitation; and
- facilitating the realisation of the right to shelter, by:
 - facilitating communication between the residents and the provincial housing department, including the resolution of conflicts; and
 - assisting the provincial housing department on any relevant matter – this may include playing a co-ordinating role in the implementation of the realisation of the right to shelter.

These *minimum* obligations flow directly from local government's obligation to *promote* the right to housing and shelter. The local authority is therefore not only responsible for ensuring the provision of these services, but must also carry the cost for them, within its available resources.

4 THE GROOTBOOM JUDGMENT

The importance of this issue came to the fore in the groundbreaking *Grootboom*³⁶ case before the Constitutional Court. The Court's landmark judgment in this case has forever changed the jurisprudence around social and economic rights in South Africa, and the right to housing in particular. Inasmuch as most of the discussion took place around the interpretation of the right of access to housing, the Court also had to deal with the question of how the obligations with regard to this right are allocated between the various spheres of government.

4.1 The facts

Mrs Grootboom was part of a group of adults and children living in appalling circumstances in Wallacedene informal settlement. They then illegally occupied nearby land earmarked for low-cost housing but were forcibly evicted: their shacks were bulldozed and burnt and their possessions destroyed. Their previous places in Wallacedene had been occupied by others and in desperation they settled on a sports field and an adjacent community hall. They applied to the Cape of Good Hope High Court for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief. Their argument was based on the right to housing³⁷ and on children's right to basic shelter.³⁸ The High Court found that the children and, through them, their parents, were entitled to shelter under section 28(1)(c) and ordered the national and provincial governments, the Cape Metropolitan Council and the Oostenberg Municipality, to immediately provide them with tents, portable latrines and a regular supply of water.³⁹ Importantly, the Court also ordered the respondents (national, provincial and local government) to return to the Court with a settlement among themselves on which sphere of government would be responsible for what. This was because, as Davis J stated:

... it is less than clear upon which of the respondents within the hierarchy of government the duty to provide shelter, as envisaged in this judgment, rests. At first blush it would appear to be the third respondent (the Province of the Western Cape). But that too is a provisional conclusion. That the duty lies wholly or in part among the respondents cited (which includes the national government, the fifth respondent) is clear. It is to be hoped that the report, which the respondents will have to place before this Court, will clarify this aspect of the matter.⁴⁰

The decision of the High Court formed the basis for the appeal to the Constitutional Court.

36 *Grootboom*, *supra* fn 2.

37 S 26 of the Constitution.

38 *Ibid* s 28(1)(c).

39 *Grootboom and others v Oostenberg Municipality and others* (2000) JOL 5991 (C).

40 *Ibid* 25.

4.2 The judgment

In its judgment,⁴¹ 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. 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.⁴²

4.3 Responsibility of 'the state' for housing

In terms of who is responsible for what, the judgment deals with a number of important questions. One aspect deals with the content of the right of access to housing. The Constitutional Court stated clearly that the right of access to 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 need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26.⁴³

It is therefore clear that access to land cannot be seen as separate from the right of access to housing. Neither can access to basic services, such as water and sewage removal, be divorced from the right to housing. With regard to the responsibility of the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right" the Court made important remarks around the constitutional scheme with respect to the responsibilities of the three spheres of government in relation to housing by saying that housing is a function shared by both provincial and national government.⁴⁴ But the Court also emphasised that local governments have the obligation to ensure that services are provided in a sustainable manner to the communities they govern.⁴⁵ Housing is one such service. The reasonable measures that the state takes must therefore:

41 *Grootboom, supra* fn 2.

42 *See De Visser 2001: 15.*

43 *Grootboom, supra* fn 2, par 35.

44 Sch 4 of the Constitution.

45 *Grootboom, supra* fn 2, par 39.

... clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.⁴⁶

The Court continued:

... each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state's section 26 obligations ... It should be emphasised that national government bears an important responsibility in relation to the allocation of national revenue to the provinces and local government on an equitable basis.⁴⁷

4.4 State responsibility for 'crisis housing'

How did the Court see this issue with regard to provision for those in desperate need of temporary housing? The Court made clear that for crisis housing, too, national government cannot devolve responsibility without making the concomitant funds available:

The national government bears the overall responsibility for ensuring that the state complies with the obligation imposed upon it by section 26. The nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the state must provide for relief for those in desperate need. *They are not to be ignored in the interests of an overall programme focussed on medium- and long-term objectives.*⁴⁸

For example, in assessing the Accelerated Managed Land Settlement Programme of the Cape Metropolitan Council, (aimed at releasing land for crisis housing), the Court said that:

... this programme on the face of it, meets the obligation which the state has towards people in the position of the respondent in the Cape Metro.⁴⁹

Even more importantly, the Court made it clear that the programme deserves support from national government:

Effective implementation requires at least adequate budgetary support by national government. This, in turn, requires recognition of the obligation to meet immediate needs in the nationwide housing programme.⁵⁰

5 ASSESSMENT

The Constitutional Court did not distinguish between the obligations of the various spheres on the basis of the terminology in section 7 of the Constitution. The Court has not interpreted the system of co-operative government to mean that responsibilities, functions and powers must be strictly divided and separated between the spheres of government. The reality, which is recognised in co-operative government, is that various spheres of government will perform various parts of a particular 'line function' of government and therefore a strict separation is usually not possible.⁵¹

46 *Ibid* par 39 (emphasis added).

47 *Ibid* par 40.

48 *Ibid* par 66 (emphasis added).

49 *Ibid* par 67.

50 *Ibid* par 68.

51 Sieytler 2002: 5.

However, the Court's remarks about the division of responsibilities between the various spheres raise some important issues around intergovernmental relations. The Court made it clear that all spheres of government are equally responsible for the realisation of the fundamental rights of Chapter 2 of the Constitution. The fact that municipalities are organs of state means that they, too, attract this responsibility towards the bearers of those rights. However, the Court also urges national government, as the sphere of government that is primarily responsible for the setting of policy and allocation of resources, to ensure that local government is enabled to meet this constitutional mandate. The *Grootboom* judgment places an onus on national government to make emergency housing for those in desperate need of shelter part of its policy and to make certain that the necessary funds are devolved to local government.

Thus, the Court has made it clear that in a national housing policy, short-term relief for those in deplorable situations cannot be ignored and that policies adopted at local level to meet those needs require adequate budgetary support from national government. The judgment offers opportunities for local governments to devise policies and schemes for the provision of relief for those in desperate need of emergency housing and claim support for their implementation from national government.

It must also be emphasised, however, that the issue of adequate budgetary support from national government regarding emergency housing has no bearing on the application of the right *between the individual and the state* (read: *municipality*). In other words, the municipality cannot absolve itself of the responsibility it has to provide basic services to its residents by claiming that adequate budgetary support is not forthcoming from national government. The courts are not likely to entertain such a defence since it would mean that the most vulnerable in society become victims of failing intergovernmental relations.

5.1 The corollary of the Court's argument

The corollary the Court's argument that functions cannot be strictly separated between spheres is also important for other socio-economic rights where local government has a more 'primary' function. It can now be argued that these rights can be invoked against national government and provincial government, as much as against local government. For example, the delivery of potable water supply is one of local government's 'original' competencies.⁵² Clearly, this does then not absolve the other spheres of government when it comes to the realisation of the right of access to water.⁵³ However, the first port of call for disgruntled residents and communities will no doubt be the municipality and not the Department of Water Affairs. This issue has become pertinent in respect of government's policy to deliver free basic water services. Many municipalities, especially the cash-strapped rural municipalities, regard this policy as

52 Sch 4B of the Constitution.

53 S 27(1)(b).

an unfunded mandate: communities are pressurising them to make good on the promise of free basic water, but they lack the resources to implement this policy. It is submitted that a failure of a municipality to implement this policy must be seen as a failure of national government as much as it is a failure of that particular local authority.

The *Grootboom* judgment did not necessarily clarify the impact of inter-governmental relations on the realisation of socio-economic rights but it has definitely put the ball back into the government's court and it has left it to the national sphere of government to serve.

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