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Implementation of Housing Rights in South Africa: Approaches and Strategies

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Implementation of Housing Rights in South Africa: Approaches and Strategies

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Assurer un accès adéquat au logement, en particulier pour les personnes défavorisées et désavantagées de la société, y compris celles qui font face à des expulsions et des déplacements, constitue un défi global constant. La situation demeure critique en Afrique du Sud, où plusieurs ménages vivent dans des conditions difficiles, faisant face au risque d'expulsion et au manque d'accès à un logement adéquat. Cela est le cas malgré la kyrielle de lois, de jurisprudence, de politiques et de programmes qui existent en Afrique du Sud, en matière de logement. Nonobstant les défis auxquels le pays fait face relativement au fait d'assurer la mise en œuvre adéquate du droit au logement, tel que le démontre le présent article, nous pouvons tirer des leçons de ses approches et stratégies de mise en œuvre.

Ensuring access to adequate housing, especially for the poor and disadvantaged in society, including those faced with evictions and displacement, continues to be a global challenge. The situation remains critical in South Africa, with many poor households living in difficult conditions, facing the risk of eviction and unable to access adequate housing. This is despite the myriad of progressive housing laws, jurisprudence, policies and programs that exist in South Africa. Notwithstanding the challenges that the country faces in ensuring the effective realization of the right to adequate housing, as illustrated in this article, lessons can be learnt from its approaches and strategies to implement this right.

THE PROTECTION OF PEOPLE against the negative effects caused by homelessness on their livelihoods and well-being is at the core of the right to housing.[1] Recognition and effective implementation of this right is therefore vital to improved well-being, better livelihoods and in strengthening the enjoyment of human rights. South Africa is hailed for its progressive housing laws, jurisprudence, policies and programmes. The country's housing policy and strategy is aimed at transforming "the extremely fragmented, complex and racially based South African human settlement environment."[2] Apartheid laws and policies contributed to this fragmented and racially based human settlement environment, especially as they facilitated, among other things, unequal approaches to housing for each race group and the eviction[3] and relocation of people to racially defined areas. The vision of the current housing

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[1] Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Cape Town: Juta, 2010) at 270 [Liebenberg, *Socio-Economic Rights*].

[2] Department of Human Settlements, *Annual Report 2012-2013* (2013) at 18, RP165/2013, online: Department of Human Settlements <http://www.dhs.gov.za/sites/default/files/annual_reports/DHS_Annual_Report_2012-13_FULL_DOCUMENT.pdf> [Department of Human Settlements].

[3] The word eviction bears a corresponding meaning to the word "evict" as stipulated in one of South Africa's legislation on eviction, the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998 ("PIE Act")*. The Act provides in section 1 that "'evict' means to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and 'eviction' has a corresponding meaning."

policy is thus "to promote the achievement of a non-racial, integrated society through the development of sustainable human settlements and [to] promote quality household life."[4]

However, housing crisis (comprising backlogs, evictions, removals and inadequate housing, amongst others) is still a reality in the country. South Africa is still faced with a "critical nationwide housing backlog."[5] In June 2013, the housing backlog reportedly stood at 2.1 million units (affecting over eight million people).[6] In 2012, 54.5 per cent of households were living in informal settlements.[7] In terms of achieving a non-racial integrated society, South Africa is still seen as a "grossly unequal society in which the (overwhelmingly black) poor majority population is disproportionately denied adequate housing opportunities and basic amenities."[8] It has been reported that despite the government's commitment to realize housing rights through the range of policies and programmes, "many poor households remain unable to access some form of adequate housing, often having to live in difficult conditions in informal settlements and inner city 'slum buildings' and subject to the constant risk of eviction."[9]

The government remains committed to addressing the housing crisis and aims to eliminate the housing backlog by 2030 through building two hundred thousand housing units per year.[10] In 2013, the government indicated that allocation of funding aimed at improving human settlements has been increased from R26.2 billion to R30.5 billion—this will apply over three years and includes R1.1 billion to facilitate the upgrading of informal settlements in mining towns.[11] An additional R685 million was allocated to social housing.[12] In 2014, the government committed to building "216 000 houses," allocated billions of rands for what it termed special initiatives such as "managing the human settlements function," "human settlements Upgrading Support Programme in 53 municipalities" and "settlement upgrading in mining towns."[13] Over the past five years, government "[s]pending on human settlement

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[4] Department of Human Settlements, *supra* note 2.

[5] *Ibid.*

[6] See "Sexwale: Housing Backlog at 2.1m", *News24* (7 June 2013), online: News24 <http://www.news24.com/SouthAfrica/News/Sexwale-Housing-backlog-at-21m-20130607> ["Sexwale: Housing Backlog"].

[7] This represents an increase, as the figure in 2002 stood at 52.9 per cent of households living in informal settlements. See Kaelo Engage, "Addressing the Housing Backlog in South Africa", *SANGONeT* (11 October 2013), online: SANGONet <http://www.ngopulse.org/article/addressing-housing-backlog-south-africa>. "Informal settlements," sometimes referred to as "slums," are generally comprised of communities or individuals housed in self-constructed shelters on land that they do not have legal claim to or occupy illegally. The question of whether slums and informal settlements are the same has been raised by the South African Constitutional Court, but the majority of the Court found the distinction between slums and informal settlements to be untenable, (see *Abahlali Basemjondolo Movement SA v Premier of KwaZulu-Natal* [2009] 4 BCLR 422 (CC) [*Abahlali*] at paras 104-06; see also paras 46-48 in which Yacoob J argues the contrary).

[8] Michael Clark, "Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government" *The Socio-Economic Rights Institute of South Africa* (November 2013) at 3, online: Abahlali baseMjondolo <http://abahlali.org/wp-content/uploads/2008/04/Evictions_Jurisprudence_Nov13.pdf>.

[9] *Ibid*.

[10] "Sexwale: Housing Backlog," *supra* note 6**.**

[11] Parliament of South Africa, Pravin Gordhan, *Budget Speech* (27 February 2013) at 27, online: National Treasury <http://www.treasury.gov.za/documents/national%20budget/2013/speech/speech.pdf>.

[12] *Ibid*. Social housing in the South African context refers to "rental or co-operative housing option for low income persons at a level of scale and built form which requires institutionalised management and which is provided by accredited social housing institutions or in accredited social housing projects in designated restructuring zones" (see Department of Human Settlements, "Social Housing Policy", Part 3 of the *National Housing Code* (2009) at 17). The extent of the poor that can be covered by this housing option is limited to those with household incomes of between R1 500 and R7 500.

[13] Parliament of South Africa, Pravin Gordhan, *Budget Speech* (26 February 2014) at 6, 16, online: National Treasury <http://www.treasury.gov.za/documents/national%20budget/2014/speech/speech.pdf> ["Gordhan,

programmes amounted to R70 billion … contributing to 590 000 houses being built."[14] If the government keeps to its commitment, then this number would increase. At present, it remains a matter of wait and see.

Notwithstanding the challenges still faced by South Africa in effectively realizing the right to adequate housing, there are lessons to be learnt from South Africa's approaches and strategies to the implementation of housing rights, including how the courts have enforced housing rights, as access to justice for housing rights is a critical dimension of housing strategies. The subsequent paragraphs[15] consider the approach to recognition of the right, accountability structures and the courts' approach to enforcing the right, and the interactions between litigation and social mobilization in the process of enforcing the right. It should be emphasized that this paper does not attempt to comprehensively discuss existing housing rights cases in the South African context. The focus is to highlight trends in relation to themes identified in the paper, relating to the approaches to enforcing housing rights in South Africa. In addition to the relationship between litigation and social mobilization mentioned above, the themes dealt with in the paper include meaningful engagement, reasonableness concept, approaches to competing interests in the realization of housing rights, judicial enforcement of housing rights, the impact of litigation and, to a limited extent, its contribution to social change.[16] The trends that can be deduced from these themes are captured in the relevant sections below as well as in the concluding section.

I. APPROACH TO RECOGNITION OF THE RIGHT

Though the socio-economic rights provisions in South Africa's *Constitution* of 1996 (the *Constitution*) [17] are modelled on the *International Covenant on Economic, Social and Cultural Rights* of 1966 (*ICESCR*),[18] the right to adequate housing provision in the *Constitution* is phrased differently. The right to housing is recognised in section 26 of the

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Budget Speech (26 February 2014)"]. In February 2015, government indicated that "R290 million [has been] approved for informal settlement upgrading" in four provinces, namely Mpumalanga, North West, Gauteng, Northern Cape, Limpopo and the Free State; "One hundred and thirty three (133) informal settlements are being assessed or prepared for upgrading through the National Upgrade Support Programme;" and "[t]hirty two (32) settlements are being upgraded and eighty seven (87) housing projects are being implemented across the prioritised mining towns." See Jacob Zuma, *State of the Nation Address 2015* (12 February 2015), online: South African Government http://www.gov.za/president-jacob-zuma-state-nation-address-2015 ["Zuma: *State of the Nation Address 2015*"].

[14] Gordhan, *Budget Speech* (26 February 2014)" at 11. In February 2015, government indicated that delivery of housing continued and that "[b]y 30 September 2014, a total number of more than 50 000 houses were delivered in the subsidy and affordable housing segments." See "Zuma: *State of the Nation Address 2015*."

[15] Parts of this paper draw directly from parts of Lilian Chenwi, "Enforcing the Right to Adequate Housing: Learning from the South Africa Experience" in Subhram Rajkhowa & Stuti Deka, eds, *Economic, Social and Cultural Rights*, Vol. 1 (Guwahati: EBH Publishers, 2012) at 153-191 [Chenwi, "Learning from the South Africa Experience"].

[16] Social change or social transformation, as explained elsewhere, implies transforming the South African society from one based on economic deprivation to one based on equal distribution of resources. On the one hand, it means an undoing of the injustices of colonial and apartheid rule in the political, social, economic and cultural realms. On the other hand, it means the building of a new and better society, founded on democratic values, social justice and fundamental human rights. See Lilian Chenwi, "Socio-Economic Gains and Losses: The South African Constitutional Court and Social Change" (2011) 41 Social Change 428 at 429 [Chenwi, "South African Constitutional Court and Social Change"].

[17] *Constitution of the Republic of South Africa*, 1996, No 108 of 1996, sections 9, 10, 11, 33, 25(5), 27 [*Constitution of South Africa*].

[18] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p 3.

Constitution, which "has created a powerful constitutional foundation for transforming evictions law" in the country.[19]

Before considering the facets of this provision, it is important to note that based on the principle of interdependency of rights, which the Constitutional Court has acknowledged in relation to housing rights in the *Grootboom* case,[20] the right to housing has been interpreted in the light of other constitutional provisions on equality, dignity, life, right to just administrative action, access to land, right to health care, food, water and social security, amongst others. *Grootboom* concerned the right to adequate housing in the context of an eviction. It involved a group of children and adults who lived in shacks in an informal settlement. Due to their intolerable conditions, they moved onto private land earmarked for formal low-cost housing, without the consent of the owner. Following their eviction from the private land, they camped on a sports field in the area and approached the courts to enforce their right of access to adequate housing.[21]

In relation to the interdependency of housing and other rights, the Constitutional Court held that "the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter," adding that:

> The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.[22]

A. PHRASING OF THE RIGHT

The first distinctive feature in terms of the approach to the recognition of the right in South Africa's *Constitution* is the way in which the right to housing is phrased. Section 26(1) provides for "the right to have *access* to adequate housing."[23] The *Constitution* does not therefore use the language of a "right to adequate housing" envisaged under the *ICESCR*. Notwithstanding this difference in phraseology, a "right of *access* to adequate housing," as distinct from the "right to adequate housing" implies that housing entails more than just "bricks and mortar" and that for a person to have *access* to adequate housing, they need to have access to land, appropriate services like water and sewage removal and the house itself.[24]

B. PHRASING OF THE STATE'S OBLIGATION

The second distinctive feature is seen in section 26(2) of the *Constitution*, on the obligation of the state to "take *reasonable* legislative and other measures, within its available resources, to

[19] Liebenberg, *Socio-Economic Rights*, *supra* note 1 at 270.
[20] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 at paras 23-24 [*Grootboom*].
[21] *Ibid* at paras 3-7.
[22] *Constitution of South Africa*, *supra* note 17, s 23-24.
[23] *Ibid* [emphasis added].
[24] *Grootboom*, *supra* note 20 at para 35.

achieve the progressive realisation of this right." The language of "appropriate" measures, including legislation, used under the *ICESCR* is not used in the South African context. The "reasonable" terminology, as seen subsequently, has contributed to the development of the "reasonableness approach" to enforcing socio-economic rights.

C. PROHIBITION OF ARBITRARY EVICTIONS

Section 26 goes further in subsection (3) to recognize the right not to be arbitrarily evicted. This provision prohibits the impairment or prevention of people's access to housing. It exhibits special constitutional regard for people's home. The provision is not a blanket prohibition on evictions. Thus, evictions may still take place even if it results in homelessness. The provision, however, includes eviction prerequisites. It requires the state and other agents that seek to evict people to first obtain a court order, and in granting the order, the court has to consider "all relevant circumstances."[25]

Section 26(3) has given rise to the adoption of other legislation containing more detailed procedural and substantive requirements to give effect to section 26(3) of the *Constitution*. These include the *Prevention of Illegal Eviction From and Unlawful Occupation of Land Act No 19 of 1998* (*PIE Act*), aimed at ensuring that evictions take place in a manner that is consistent with the values of the *Constitution*.[26] The *PIE Act* reinforces the court order requirement in section 26(3) of the *Constitution*. Other relevant legislation that section 26(3) gave rise to is the *Extension of Security of Tenure Act 62 of 1997* (*ESTA*), which acknowledges the effect of apartheid discriminatory laws and practices; it rendered South Africans vulnerable to evictions by leaving many of them with no secure tenure of their homes and the land which they use. Similar to the *Constitution*, *ESTA* requires a landowner to get a court order before evicting unlawful occupiers.[27]

The difference between *ESTA* and the *PIE Act* is that the former provides protection only to unlawful occupiers who previously had some form of consent or right to occupy the land in question while the latter provides protection for occupiers who did not have previous consent or right to occupy the land in question. The *PIE Act* thus closes a gap in *ESTA* as well as provides some legislative texture to guide the courts in determining the approach to eviction required by the *Constitution*. It should be noted that there are additional pieces of

[25] An eviction would thus be "arbitrary" if eviction prerequisites are not met. The terminology "arbitrary eviction" bears the same meaning as "forced evictions," which the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) defines as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, *without the provision of, and access to, appropriate forms of legal or other protection*" [emphasis added]. See *Committee on Economic, Social and Cultural Rights*, General Comment 7, Forced Evictions, and the Right to Adequate Housing, 16th Sess, Annex Agenda Item 4, UN DOC E/1998/22 (1997) at 113 at para 4.

[26] For example, section 4(6) of the *PIE Act* requires that before granting an eviction order, the courts must be of the opinion "that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women."

[27] *ESTA*, section 9. An "occupier" is defined in section 1 of *ESTA* as a person living on land which belongs to another person, and who has on or since 4 February 1997 had the consent (permission) of the owner or another right in law to live there. In addition, a person shall be deemed to be an occupier if that person who lived on or used land on 4 February 1997 with the consent of the owner and such consent was lawfully withdrawn before the above date but the person continued to live on or use the land. The *PIE Act*, in section 1, defines an "unlawful occupier" as "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996)," *supra* note 3.

legislation as well as policies and programmes that form part of the legislative framework on housing rights.[28]

D. HOUSING RIGHTS OF CHILDREN AND DETAINED PERSONS

The *Constitution* also recognizes housing rights in relation to two categories of persons– children and detained persons. Section 28(1)(c) guarantees children's right to shelter. What is distinctive about the provision's approach is that children's right to shelter is not qualified by access, progressive realization or available resources. Notwithstanding this, the Constitutional Court has clarified that the obligation to provide children and their parents with housing does not exist independently of the general obligation to take reasonable legislative and other measures under section 26(2) as well as section 25(5) on access to land.[29] Section 28(1)(c) can be further contrasted with section 26 in that the former uses the term "shelter" while the latter uses "housing". Despite the difference in terminology, "shelter" in section 28(1)(c) does not bear any different meaning from the term "housing" in section 26 –"[h]ousing and shelter are related concepts and one of the aims of housing is to provide physical shelter. But shelter is not a commodity separate from housing."[30] Also, the term "embraces shelter in all its manifestations"—that is, it is not limited to basic shelter alone since the provision does not include any requirement that it should be basic shelter.[31] While the state is the primary duty bearer under section 26, parents or family bear the primary responsibility to provide shelter under section 28(1)(c) and only alternatively on the state.[32] With regard to detained persons (including sentenced prisoners), section 35(2)(e) of the *Constitution* provides for their right to adequate accommodation at state expense. The provision is also not qualified by the term access.

E. HOUSING RIGHTS OF OTHER VULNERABLE GROUPS

Though the *Constitution*, in addition to the protection guaranteed to those faced with evictions, includes additional housing rights provisions in relation to children and detained persons, other vulnerable groups are not excluded as the right to housing is guaranteed to everyone. Other legislation and policy frameworks as well as jurisprudence aim to protect the housing rights of other vulnerable groups.

Under the housing subsidy programme, for example, there exists individual housing subsidy for persons with disabilities. Persons with disabilities who earn less than R3 500 per month as well as meet other criteria can apply for housing subsidy under the housing subsidy scheme. Persons with disabilities or persons who have financial dependents with disabilities

[28] These include, amongst others: the White Paper on Housing, 1994; National Housing Code (revised in 2009); Housing Act 107 of 1997; Rental Housing Act 50 of 1999; HIV/AIDS Housing Framework, 2003; Housing subsidy scheme, 1995; Social Housing Policy, 2003; Comprehensive Plan on Sustainable Human Settlements, 2004 (BNG); Upgrading of Informal Settlements Programme, 2004; Emergency Housing Programme, 2004; and Special needs housing (provincial level, as a comprehensive national policy on this is yet to be adopted).

[29] *Grootboom*, *supra* note 20 at para 74.

[30] *Ibid* at para 73.

[31] *Ibid*. The Court further added that "it does not follow that the Constitution obliges the state to provide shelter at the most effective or the most rudimentary level to children in the company of their parents."

[32] The Constitutional Court stated in *Grootboom* (*supra* note 20) that section 28(1)(c) "does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families." But the state has an obligation to "provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28" and 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" (at paras 77-78).

can qualify for extra funds, in addition to the subsidy amount in order to cover any reasonable accommodation measures. The programme focuses on persons with physical disabilities.[33]

Also, South Africa's social housing programme has as one of its target groups, special needs groups such as persons with disabilities living with HIV/AIDS.[34] It should be noted that whether disability should be read as a separate category or be read in addition to other vulnerabilities such as HIV/AIDS is unclear. Further, a housing response to HIV/AIDS led to the adoption in 2003, by the national housing department, of the HIV/AIDS housing framework, which emphasises the need for housing delivery models to be reviewed in order to address the housing needs of people living with HIV/AIDS. Lastly, special needs housing would benefit poor people who are further disadvantaged because they live with disabilities, or are old and infirm, homeless on the street, infected or affected by HIV/AIDS, victims of domestic abuse and violence, critically ill or because they are orphans and vulnerable children. Unfortunately, there is currently no national framework on special needs housing. However, some provinces have made provision of this.[35]

With regard to jurisprudence, the courts have sought to protect women's housing rights, particularly in relation to their right to property and inheritance rights. The Constitutional Court has found the customary law rule that women are not fit or competent to own and administer property to be unconstitutional and constituting a violation of their rights to dignity and equality.[36] It has also found non-recognition of women's right to ownership, including access to and control of family property, upon dissolution of a customary marriage, to be unfair discrimination on grounds of gender.[37] A High Court has also, taking into consideration section 26(1) of the *Constitution* and the principle of non-discrimination, overturned a pre-constitutional certificate giving housing rights to the brother of a deceased, and granted them to the customary-wife of the deceased.[38]

Having a comprehensive legislative framework in place would only result in real change on the ground if accountability structures exist to ensure their effective implementation. The subsequent section thus considers accountability structures in the South African context that play a role in ensuring effective realisation of the right to adequate housing, with specific emphasis on the courts.

II. ACCOUNTABILITY STRUCTURES

A. THE COURTS

A socio-economic right that is frequently litigated in South Africa is the right to adequate housing. Thus, South African courts are key accountability structures and have played a vital role in enforcing the right to housing. Among the reasons for this frequent housing litigation are: first, the "pervasive realities of housing backlogs, evictions and removals"; and second, the fact that "as a negative infringement of the right to housing, impending eviction, does not

[33] See generally, Department of Human Settlements, "Individual Subsidies" Part 3 of the *National Housing Code* (2009). It is important to note that the notion of 'independent living' in relation to persons with disabilities is recognised in South Africa's White Paper on Disability, 1997.

[34] Department of Human Settlements, "Social Housing Policy" Part 3 of the *National Housing Code* (2009) at 30.

[35] See Lilian Chenwi, "Taking Those with Special Housing Needs from the Doldrums of Neglect: A Call for a Comprehensive and Coherent Policy on Special Needs Housing" (2007) 11 L, Democracy and Development 1 at 1-18.

[36] *Bhe and Others v Magistrate, Khayelisha and Others* [2005] 1 BCLR 1 (CC).

[37] *Gumede v President of the Republic of South Africa and Others* [2009] 3 BCLR 243 (CC) at paras 34-36 [Gumede].

[38] *Nzimande v Nzimande and Another* [2005] 1 SA 83 (W).

require the same degree of proactive legal mobilisation that, for example the crisis around inadequate education, does."[39]

Generally, courts can contribute to social change[40] and litigation is often pursued by many as a strategy to bring about social change, especially in relation to issues such as inequalities and access to services by the poor.[41] The contribution of courts to social change can be direct, where they provide a space for the concerns of marginalized groups to be raised as legal claims and provide legal redress in ways that have implications for law, policy and administrative action, as well as protect existing pro-poor institutional arrangements and reinforcing pro-poor state policies. Where courts enable marginalized groups to effectively fight for social transformation in other arenas through securing their rights of political participation and to information and passively provide a platform for claims to be articulated, then they can contribute, indirectly, to social change.[42]

Cases on housing rights in South Africa have been brought by individuals as well as groups, in some instances represented by non-governmental organizations. Apart from bringing cases, non-governmental organizations or institutions have influenced the approach to and outcome of housing rights cases through intervening in the cases as *amicus curiae*. The rules of the Constitutional Court and the High Court Uniform Rules make provision for *amicus curiae* to be admitted in proceedings before the courts. In addition to having an interest in the proceedings, the submissions to be advanced by the *amicus* must be relevant to the proceedings and must raise new contentions that may be useful to the Court.[43] Litigating through amicus briefs has been an important strategy in South African housing rights cases. The strategy is important in that the *amicus* can act in the interest of a broader group than arguing on behalf of one of the parties. The *Grootboom* case is instructive, as the *amici*'s intervention[44] shifted the narrow focus of the case (which was on the particular needs of the community and whether the government could provide housing to the community if they do not have housing) to the broader implications of the case. The important role of the *amici* in the case has been described in the following words:

> This *amicus* intervention swung the debate dramatically. Most of the preceding arguments had failed to really look socio-economic rights in the eye. There had been technical arguments and attempts to frame the case in terms of children's rights but [the *amici*] forced us to consider what the nature of the obligations imposed by these rights was. Although we didn't accept the entire argument of the *amici*, this wasn't vital. What was important was the nature of the discourse. It was placing socio-economic rights at the centre of our thinking and doctrine.[45]

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[39] Clark, *supra* note 8 at 3.

[40] Siri Gloppen, "Courts and Social Transformation: An Analytical Framework" in Roberto Gargarella, Pilar Domingo and Theunis Roux, eds, *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor*? (Aldershot/Burlington: Ashgate Publishing Limited, 2006) 35 at 38 [Gloppen, "Courts and Social Transformation"].

[41] Christopher Mbazira, *You are the "Weakest Link" in Realising Socio-Economic Rights: Goodbye - Strategies for Effective Implementation of Court Orders in South Africa*, Socio-Economic Rights Research Series 3 (Cape Town: Community Law Centre, 2008) at 5-6.

[42] Gloppen, "Courts and Social Transformation," *supra* note 40.

[43] *Fose v Minister of Safety and Security* [1997] 3 SA 786 (CC) at para 9. See also *Hoffmann v South African Airways* [2001] 1 SA 1 (CC) at para 63, where the court describes who an *amicus* is, and *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC) at para 5, where it clarifies the role of an *amicus*.

[44] The *amici* were the South African Human Rights Commission and the Community Law Centre intervened in the Constitutional Court as amici curiae, represented by the Legal Resources Centre.

[45] Albie Sachs, "Commenting on the Panel Discussion" (2007) 8 ESR Rev at 18-19.

In a nutshell, through litigation, the courts have been able to address both individual and systemic violation. Effective or timely enforcement of the decisions of the courts, however, remains an ongoing challenge.

B. OTHER ACCOUNTABILITY STRUCTURES

In addition, rental housing tribunals exist that deal with rental housing issues, and are able to hear cases and issue decisions.

Another relevant institution is the South African Human Rights Commission (SAHRC), which monitors realization of the right to housing (among other socio-economic rights) as required by the *Constitution*.[46] Organs of state are required to report yearly on measures taken to give effect to housing rights.[47] The SAHRC also considers complaints, has looked into questions around access to services in informal settlements, and has monitored enforcement of decisions, such as the *Grootboom* decision, where it went as far as submitting a report to the Constitutional Court on the government's progress, though a report-back obligation was not placed on it.

Informal community-based structures or street committees are also seen to play a vital role in housing, though their role in some communities has consisted mainly of informal dispute resolution, advice and referral to service providers.[48] Such structures in fact "have the potential to exert far more influence to reduce women's and girls" vulnerability to domestic violence and HIV/AIDS' in the context of access to housing.[49]

It should be noted that through its role of representing the people and facilitating their participation in the management of public affairs, Parliament can play an important role in ensuring effective implementation of housing rights.[50] The South African Parliament has an opportunity to promote implementation of housing rights, as it is required to scrutinize and oversee government actions.[51]

III. THE COURTS' APPROACH TO ENFORCEMENT OF THE RIGHT

I focus in this section on the reasonableness approach to rights adjudication, which is relevant in relation to the enforcement of positive housing rights duties,[52] the emerging concept of meaningful engagement, and the approach to competing interests in housing cases. It should be noted that the approach of South African courts has also involved giving due weight to relevant international law in the enforcement of housing rights. This is made possible through the *Constitution*'s recognition of the role of international law in rights implementation.[53]

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[46] *Constitution of South Africa*, *supra* note 17, section 184(3).
[47] *Ibid*.
[48] See generally Heléne Combrinck & Lilian Chenwi, *The Role of Informal Community Structures in Ensuring Women's Right to Have Access to Adequate Housing in Langa, Manenberg and Mfuleni* (Cape Town: Community Law Centre, 2007).
[49] *Ibid* at 36.
[50] For a general discussion of the South African Parliament's role to promoting rights and the opportunities within its mandate to do so, see generally Lilian Chenwi, "Using International Human Rights Law to Promote Constitutional Rights: The (Potential) Role of the South African Parliament" (2011) 15 L Democracy and Development 311 at 311-38.
[51] *Constitution of South Africa*, *supra* note 17, sections 42(3), 55(2).
[52] For the court's approach to enforcing negative duties, see Chenwi,"Learning from the South Africa Experience," *supra* note 15 at 172-77.
[53] South African courts have an obligation to consider international law when interpreting the rights in the *Constitution of South Africa*, *supra* note 17. See section 39(1), which also permits the courts to consider foreign

A. REASONABLENESS APPROACH

The courts have adopted the reasonableness approach as a means of giving leeway to the political branches of government to make the necessary and appropriate policy choices to meet their socio-economic rights obligations (thus, including housing rights obligations), so that the role of courts will then be to consider whether the choices fall within the bounds of "reasonableness." Put differently, the approach requires the courts to consider whether the measures taken are reasonable, as opposed to questioning "whether other more desirable or favourable measures could have been adopted, or whether public money could have been well spent."[54] This approach thus limits the potential of housing rights adjudication being seen as encroaching on the principle of separation of powers, considering that in enforcing housing rights, like with other socio-economic rights, the courts "scrutinise, evaluate and, if necessary, order changes to social and economic policy, or the reshaping of … rights and doctrine to extend access to resources to socio-economically marginalised groups," a function that is "traditionally" reserved for "the executive and legislative branches of government."[55] The approach further creates the on-going possibility of challenging socio-economic deprivations in the light of changing historical, social and economic contexts, as it is context sensitive and applied on a case-by-case basis.

The reasonableness approach requires that measures aimed at housing rights implementation must: be comprehensive, coherent, inclusive, balanced, flexible, transparent; be properly conceived and properly implemented; make short-, medium- and long-term provision for those in desperate need or in crisis situations and housing needs; not exclude a significant segment of society; not ignore those whose housing needs are the most urgent and whose ability to enjoy all human rights is most in peril; clearly set out the responsibilities of the different spheres of government and ensure that financial and human resources are available for their implementation; be tailored to the particular context (for example, urban or rural context) in which they are to apply; take account of different economic levels in the society, including those who can afford to pay for housing and those who cannot; allow for meaningful or reasonable engagement with the public or affected people and communities; and be continuously reviewed.[56]

In the *Grootboom* case where this approach was first conceptualized, the Court found the state's housing programme not to be reasonable on the basis that it did not make reasonable provision for people in desperate need of housing, who had no roof over their head, no access to land, and were living in intolerable conditions or crisis situations. The Court ordered the state to adopt, implement and supervise a comprehensive and coordinated programme that addresses effectively the situation of those desperately in need of housing.[57] The reasonableness approach has, subsequently, been applied in other housing rights cases[58] as well as other socio-economic rights cases. The reasonableness approach is influenced by

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law in addition to international law, and section 233 requiring the courts to give preference to any reasonable interpretation of legislation that is consistent with international law.

[54] *Grootboom*, *supra* note 20 at para 41.

[55] Liebenberg, *Socio-Economic Rights*, *supra* note 1 at 67.

[56] *Grootboom*, *supra* note 20 at paras 37, 42-44; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* [2005] 8 BCLR 786 (CC) at para 49 [*Modderklip*], *Port Elizabeth Municipality v Various Occupiers* [2004] 12 BCLR 1268 (CC) at para 19 [*PE Municipality*]; *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* [2008] 5 BCLR 475 (CC) at paras 17-18 [*Olivia Road*], *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] 9 BCLR 847 (CC) at para 378 [*Joe Slovo*].

[57] *Grootboom*, *supra* note 20 at para 99.

[58] See Chenwi, "Learning from the South Africa Experience," *supra* note 15 at 171-72.

progressive realization and the availability of resources. The approach, arguably, has some elements of minimum core obligations.[59] It accentuates the obligation to not leave people in desperate need without any form of assistance, to take immediate interim measures of relief for those in desperate need, and the obligation to, at the very minimum, meet short-term needs, thus essentially implying recognition of minimum core.[60] It is worth noting that requiring a state to take immediate measures or to meet short-term pressing needs, does not release the state of its obligation to provide for medium and long-term needs. South Africa's housing rights jurisprudence points to the fact that providing temporary alternative housing[61] does not relieve the state of its obligation to make provision for permanent housing, as temporary alternative housing is provided pending the provision of suitable permanent housing, in consultation with those involved.[62]

B. MEANINGFUL ENGAGEMENT[63]

The notion of meaningful engagement is relevant to housing rights enforcement and has been referred to mainly in housing rights cases. It refers to mandatory consultation processes between the parties to a case, ordered by courts, in the course of enforcing housing rights as well as socio-economic rights in general. The approach of ordering meaningful engagement has been used in the process of adopting and implementing remedial measures to realize housing rights.[64] Through the use of meaningful engagement, the courts exercise their

[59] It should be noted that South African courts have, thus far, been reluctant to endorse the minimum core obligations approach (see, for example, *Grootboom, supra* note 20 at paras 27-29). The Constitutional Court has stated that "it is not possible to determine a minimum threshold for the progressive realisation of the right to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right." This is because groups are differently situated and have varying social needs. However, "there may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable" (see *Grootboom*, *supra* note 20 at paras 27-29, 32-33).

[60] See, generally, Sandra Liebenberg, "Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate" in Stu Woolman & Michael Bishop, eds, *Constitutional Conversations* (Pretoria: Pretoria University Law Press, 2008) 303 at 303-29. Also see, David Bilchitz, *Poverty Reduction and Fundamental Rights: The justification and Enforcement of Socio-Economic Rights* (New York: Oxford University Press, 2007) at 149, and Redson Edward Kapindu, "From the Global to the Local: The Role of International Law in the Enforcement of Socio-Economic Rights in South Africa," (2009) (Paper for the Socio-Economic Rights Project, Community Law Centre, University of the Western Cape) at 46, online: Community Law Centre <http://communitylawcentre.org.za/projects/socio-economic-rights/Research%20and%20Publications/Research%20Series/From%20the%20global%20to%20the%20local%20-%20The%20role%20of%20international%20law%20in%20the%20enforcement%20of%20socio-economic%20rights%20in%20South%20Africa.pdf/download>.

[61] "Temporary housing" is used to refer to housing that is basic, simple in form and easy to construct. The South African Supreme Court of Appeal has made it clear that any alternative temporary accommodation provided should consist of a place where the evicted persons can live without the threat of another eviction and in a waterproof structure that is secure against the elements and with access to basic services such as basic sanitation, water and refuse services (see *City of Johannesburg v Rand Properties (Pty) Ltd and Others* [2007] 6 BCLR 643 (SCA) at para 78(2.1) [*Rand Properties*].

[62] Lilian Chenwi, "Monitoring the Progressive Realisation of Socio-Economic Rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court" (Research paper for Studies in Poverty and Inequality Institute, 2010) [published] at 37.

[63] This section draws directly from parts of Lilian Chenwi, "'Meaningful engagement' in the Realisation of Socio-Economic Rights: The South African Experience" (2011) 26 SAPL 128 at 128-56, which provides a more detailed understanding of the concept, highlights relevant jurisprudence that has referred to meaningful engagement and identifies challenges in the various approaches to the use of meaningful engagement.

[64] The constitutional basis for meaningful engagement is section 152(1), on the obligation to provide democratic and accountable government for local communities, provide services in sustainable manner and encourage involvement of communities and community organizations in matters of local government; section 7(2) on the obligations to respect, protect, promote and fulfil rights; the Preamble's recognition of the need to improve the

remedial powers in a way that not only allows for democratic processes of consultation and dialogue in housing rights enforcement but also mitigates the effects of a negative court ruling. Also, individuals and communities can influence and shape, *inter alia*, policies and priority setting in relation to the provision of housing through meaningful engagement. The ordering of meaningful engagement is important as participation is a fundamental, constitutional right in itself, an important aspect of democracy, and an important component of efforts to uplift and empower the poor in society.

Meaningful engagement is guided by the following principles: the parties must act reasonably, in good faith, proactively, with honesty and equality of voice for all concerned, and understand and accommodate each other's concerns; the process should be transparent and not be shrouded in secrecy—complete and accurate account of the process has to be provided; the engagement process must be tailored to particular circumstances, be structured and consistent, be coherent and adequate, and be done both individually and collectively; *ad hoc* engagement may be appropriate for small municipalities where an eviction or two might occur each year but is inappropriate in large municipalities; the needs of particular occupiers in relation to alternative accommodation should be given specific consideration in the process; the engagement process should, preferably, be managed by careful and sensitive people in order to ensure meaningful participation by poor, vulnerable or illiterate people; structures that are staffed by competent and sensitive council workers who are skilled in engagement must be put in place; "civil society organisations that support the people['s] claims should preferably facilitate the engagement process in every possible way," and a top-down approach where individuals and communities are not involved as partners in the decision-making process itself should not be used in the engagement process.[65]

Examples of instructive cases in relation to understanding the approach of ordering meaningful engagement are *Olivia Road* and *Joe Slovo*.[66]*Olivia Road* was a case in which residents of an allegedly unsafe building in Johannesburg approached the Court to halt their proposed eviction. The constitutionality of provisions of the *National Building Regulations and Building Standards Act 103 of 1977* (*NBRSA*) that empowered local authorities to issue a notice to occupiers to vacate premises when they deem it necessary for the safety of any person was at issue.[67] If an occupier fails to comply with the notice, it will constitute a criminal offence for which the occupier can be fined up to R100 for each day of noncompliance.[68] The residents argued, among other things, that the relevant authorities had not fulfilled their constitutional obligations to progressively realize the right to have access to adequate housing and that their right to just administrative action has been breached due to the failure to afford them a hearing prior to taking a decision to evict them. The case thus involved reconciling respect for the inadequate accommodation which people living on the margins have secured for themselves, and the statutory powers and duties of local authorities to ensure that conditions of accommodation do not constitute a threat to the safety of these persons.

Joe Slovo, on the other hand, was a case in which a large and settled community (an informal settlement) in Cape Town approached the Court to halt their eviction from their homes in order to facilitate housing development, aimed at upgrading the informal settlement. The community were not against the upgrade itself but the approach to it and concerns

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quality of life and free potential of people; section 26(2)'s reasonable measure obligation and the need to dignity and life.

[65] *PE Municipality*, *supra* note 56 at paras 30, 39; *Olivia Road*, *supra* note 56 at paras 14-15, 19-21; *Joe Slovo*, *supra* note 56 at paras 244, 301-02, 304, 378.

[66] It should be noted that the courts' reference to engagements is not limited to the two cases considered here.

[67] *NBRSA*, section 12(4)(b).

[68] *Ibid*, section 12(6).

around housing allocations following the development, and the reality that not all of the residents would benefit from the houses that would be built in the settlement. The government was not willing to do an in situ upgrade, which would not imply eviction.

In *Olivia Road*, the Constitutional Court ordered meaningful engagement after hearing arguments but before handing down its judgment.[69] The parties subsequently reached a comprehensive settlement and submitted it to the Court.[70] The Court's judgment was issued subsequent to this agreement. The challenge with ordering engagement before the judgment is issued is that the parties go into the engagement without any knowledge of their entitlements and without any guarantees of respect and vindication of their rights in the process and outcome. This could result in an unsuccessful engagement due to participatory disparity stemming from the unequal bargaining power between the state and disadvantaged groups. However, this was not the case in *Olivia Road* as this effect was mitigated (in fact eliminated) by the lawyers that represented the occupiers during the engagement process. Notwithstanding, it is important to define the normative parameters so that the engagement process does not become a process of settling a local dispute that is "normatively empty" and "unprincipled."[71]

Conversely, meaningful engagement in *Joe Slovo* was ordered as one of the mitigating aspects to render the eviction just and equitable.[72] The structured order requiring engagement, including the Court's detailed specifications on the alternative accommodation to be provided upon eviction, had a positive impact as seen below.[73] What *Joe Slovo* confirms is that the approach of ordering meaningful engagement would be adequate where normative parameters have been substantively articulated and a reporting obligation placed on the parties in relation to the engagement process.

C. APPROACH TO COMPETING INTERESTS[74]

In the implementation of housing rights, a number of interests could compete with each other, especially in the context of evictions. The competing interests include housing rights versus property rights and rights of landowners, and the government's constitutional obligations versus the interests of surrounding communities. The approach of South African courts has been to balance these interests rather than prioritize one over the other. In fact, one of the objectives of the *PIE Act* has been to strike a balance between a landowner's right to evict unlawful occupiers and the occupiers' right to have access to adequate housing and be protected from arbitrary eviction.

The case of *Grootboom* acknowledges the fact that where there's a clash between housing and property rights, courts have to ensure a balance between both rights and the state has a duty to seek to satisfy both rights.[75]

In the *Kyalami Ridge* case,[76] the Constitutional Court held that the interests of both the flood victims and the environmental and property interests of the residents have to be

[69] Interim Order, dated 30 August 2007, reproduced in *Olivia Road*, *supra* note 56 at para 5.
[70] Agreement, signed on 29 October 2007, referred to in *Olivia Road, supra* note 56 at paras 24-26.
[71] Sandra Liebenberg, "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagement'" (2012) 2 AHRLJ 1 at 19.
[72] *Joe Slovo*, *supra* note 56 at paras 7(5), 338.
[73] Liebenberg, *supra* note 71 at 26.
[74] This section draws directly from parts of Lilian Chenwi, "Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions" (2008) 8 HRLR 105 at 134-36.
[75] *Grootboom*, *supra* note 20 at para 74.
[76] *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*, [2001] 7 BCLR 652 (CC).

taken into account in the decision-making process.[77] The case concerned the decision of the government to house a group of flood victims on land belonging to it. Severe floods displaced people in Alexandra Township. As a temporary measure, the government wanted to assist the affected people by establishing a transit camp on state-owned land, with the aim of moving the people to permanent housing once it became available. This plan was made without discussions with residents near the area of the transit camp. The residents' association challenged the government's plan on the ground that it was not supported by legislation, and that it contravened a town planning scheme, land and environmental legislation. The challenge was brought by residents in the vicinity. The Court found the decision by government to establish a temporary camp to be lawful as it was intended to give effect to its constitutional obligation to provide access to adequate housing.

In *PE Municipality*[78] the Constitutional Court emphasised the need to consider the interest of both landowners and unlawful occupiers. The case concerned an eviction application by the Port Elizabeth Municipality against a group of adults and children, who had illegally occupied private undeveloped land within the municipality's jurisdiction. The municipality had argued that giving alternative land to the occupiers concerned would be preferential treatment, would disrupt the existing housing programme, and would be "queue-jumping." The Court observed that despite the complexities in balancing interests, courts should not establish a hierarchical arrangement between the different interests involved—they cannot privilege in an abstract and mechanical way property rights over the housing rights of those affected. Instead, courts must "balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each case."[79]

The clash between property rights and housing rights was evident in the *Modderklip* case.[80] The case concerned a private landowner's efforts to execute an eviction order granted by the High Court against a community occupying its land. The landowner was unsuccessful in getting various organs of the state to assist him in enforcing the eviction order. The Supreme Court of Appeal in the case was of the view that the state's failure to provide alternative accommodation to the occupiers upon eviction not only breached the occupier's housing rights but also the landowner's rights.[81] The Constitutional Court found it unreasonable to force the landowner to bear the state's burden of providing the occupiers with accommodation and that the state's failure to provide alternative accommodation to the occupiers breached the landowner's right to an effective remedy,[82] thus confirming that rights have to be balanced.

IV. OUTCOME OF HOUSING RIGHTS LITIGATION: THE *GROOTBOOM*, *OLIVIA ROAD* AND *JOE SLOVO* EXAMPLES

If litigation is to result in improvement of the rights situation on the ground and effect social change, the relevant authorities must comply with judicial decisions and political action must be taken to implement court orders.[83] Thus, one of the variables that can affect the transformative potential of litigation is the question of compliance, specifically the extent to

[77] *Ibid* at paras 103,105-06.
[78] *PE Municipality*, *supra* note 56.
[79] *Ibid* at paras 23, 37.
[80] *Modderklip*, *supra* note 56.
[81] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boedery (Pty) Ltd*; *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* [2004] 8 BCLR 821 (SCA) at para 52.
[82] *Modderklip*, *supra* note 56 at para 45, 51.
[83] Gloppen, "Courts and Social Transformation," *supra* note 40 at 53.

which court decisions are politically authoritative and whether political branches comply with them and implement and reflect them in legislation and policies.[84] Litigation can thus fail to drive social change or drive it as rapidly as expected if political branches fail to effectively implement judicial decisions or are slow in implementing them. In the South African context, as explained elsewhere,[85] though the Constitutional Court has laid down a number of pro-poor principles and rules, compliance with these has been an issue of concern, with the consequence being that successful litigants are unable to benefit fully from the orders arising from their victories. Consequently, they continue to live in poverty and socio-economic deprivation.

The subsequent sections consider the outcome of three key housing rights cases in South Africa. A consideration of the outcome of these cases provides an indication of the extent to which they have effected real changes on the ground and real social change.

A. *GROOTBOOM*

The *Grootboom* decision 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 realize a specific socio-economic right.[86] However, there were delays in the enforcement of the decision, attributed 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, among other challenges.[87]

Before the case was decided, there was an initial settlement (the interlocutory order initiated by the government), which took months to be put in place.[88] Though implementation of this initial settlement was slow, it did result in some improvement of the conditions of the community.

Further, in 2004, the Emergency Housing Programme[89] was adopted in response to the court's order, which provides a safety net in situations where communities are faced with

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[84] To understand this point in the context of the transformative potential of courts, see *ibid* at 36-37, 43, where differences in courts' transformation performance is explained in terms of variations at the four stages of litigation—voice, responsiveness, capability, compliance. Also, at 54-55, Gloppen identifies factors that influence compliance with judicial decisions, some of which have accounted for the slow implementation of court decisions in South Africa as seen subsequently. Gloppen identifies the following: (a) factors within the judicial system such as the professionalism and capacity of the judges to devise acceptable legal remedies, and whether the decisions include enforcement mechanisms such as mandatory or supervisory orders or contempt of court orders in cases of noncompliance; and (b) factors outside the legal system such as the political and economic context, the legitimacy of the court in various sectors of the society, and the capacity of the government to implement the decisions.

[85] Chenwi, "South African Constitutional Court and Social Change," *supra* note 16 at 440.

[86] Kameshni Pillay, "Implementing Grootboom" (2002) 3 ESR Rev 13 at 13.

[87] For more discussion on the challenges in enforcing the *Grootboom* orders, see generally South African Human Rights Commission, "Housing: 5th Economic and Social Rights Report 2002/3" (21 June 2004), online: SAHRC <http://www.sahrc.org.za/home/21/files/Reports/5th_esr_environment.pdf>; Kameshni Pillay "Implementation of Grootboom: Implications for the Enforcement of Socio-Economic Rights" (2002) 6 L, Democracy and Development 255 at 255.

[88] Gilbert Marcus and Steven Budlender, *A Strategic Evaluation of Public Interest Litigation in South Africa* (The Atlantic Philanthropies, 2008) at 61 [Marcus and Budlender, *Strategic Evaluation*].

[89] Department of Human Settlements, "Emergency Housing Programme", Part 3 of the *National Housing Code* Vol. 4 (2009).

evictions that will leave them in crisis. In particular, the programme aims to assist groups of people faced with urgent housing problems, such as evictions, floods, and fires, by providing temporary assistance in the form of municipal grants. Such grants would enable the Municipality to respond to emergencies by providing secure access to land, boosting infrastructure and basic services, and improving access to shelter through voluntary relocation and resettlement. Though the implementation of the programme is slow, the existence of the programme increases the possibility of those in desperate need to receive relief or assistance from the government, thus providing a safety net in situations where communities are faced with evictions that will leave them in crisis. Prior to *Grootboom*, the government had shown no sign of putting such a programme in place.

Other outcomes linked to the case include the adoption of the Upgrading of Informal Settlements Programme[90] and the allocation of a fixed percentage of the annual national housing budget, by National Treasury Department, for the provision of emergency housing services (what has been referred to as "the *Grootboom* allocation").[91] Also, the reasonableness approach, first conceived in the case, has been useful in enforcing socio-economic rights[92] and the constitutional duty to provide temporary alternative has been reinforced and strengthened in subsequent housing rights cases. Hence, despite delays in providing permanent housing to the community and upgrading the informal settlement, the case has had some positive outcome.

It must be noted that the Constitutional Court, in the case, did not make any specific order for the community to be given permanent housing. Therefore, the fact that Irene Grootboom died without having received permanent housing or the general delay in provision or non-provision of permanent housing to the community cannot be seen as a drawback in terms of enforcement of the remedy in the case. Notwithstanding this, her situation is reflective of the state of housing issues in South Africa, and the human cost of poverty and social change. Subsequent to her death, her family received a house. Also, some of the community members have been relocated to permanent housing.

B. *OLIVIA ROAD*

The agreement in *Olivia Road* that was reached following the ordered engagement contained interim measures to secure the safety of the building and provide the occupiers with alternative accommodation in the inner City of Johannesburg. The interim measures to improve the conditions in the two buildings pending relocation to the alternative accommodation included the provision, at the City's expense, of toilets, potable water, waste disposal services, fire extinguishers, and a once-off operation to clean and sanitize the properties. The City and the occupiers agreed that the alternative accommodation would consist of, at least, security against eviction, access to sanitation, access to potable water, and access to electricity for heating, lighting and cooking. It was further agreed that, once

[90] Department of Human Settlements, "Upgrading of Informal Settlement", Part 3 of the *National Housing Code* Vol. 4 (2009).

[91] Malcolm Langford & Steve Kahanovitz, "Just Tick the Boxes: Judicial Enforcement in South Africa" (2010) Think Piece/Emerging Paper 7 [unpublished], online: International Network for Economic, Social & Cultural Rights <http://www.escr-net.org/sites/default/files/Langford_and_Kahanovitz_-_South_Africa_0.pdf> [Langford & Kahanovitz, "Judicial Enforcement in South Africa"].

[92] The *Grootboom* decision has generally had a huge impact on subsequent socio-economic rights cases through their reliance on the principles laid down in *Grootboom*. For example, in the *Minister of Health and Others v Treatment Action Campaign* [2002] 5 SA 721 (CC) [*TAC*], the reasonableness review approach was used to achieve a major victory in the provision of drugs for the prevention of mother-to-child transmission of HIV/AIDS. The case concerned a challenge to the state's policy on the prevention of mother-to-child transmission of HIV, which was challenged as inconsistent with the right to have access to health care services.

relocated, the occupiers would occupy the temporary shelter until suitable permanent housing solutions were developed for them. It was also agreed that the nature and location of permanent housing options would be developed by the City in consultation with the occupiers.

Despite the positive outcomes, with the question of permanent housing still to be discussed, *Olivia Road*, however, misses the opportunity to pronounce on potentially transformative issues such as whether the right to housing requires a consideration of location in the provision of alternative accommodation and whether the municipality's inner city housing plans' failure to make provision for the poor was unconstitutional. The Court did not develop the right to housing jurisprudence beyond its decision in *Grootboom* and therefore "failed to tackle the policies and practices at the core of the vulnerability of poor people living in locations earmarked for commercial developments" and "to establish critical rights-based safeguards for extremely vulnerable groupings."[93]

C. *JOE SLOVO*

The ordering of structured meaningful engagement as a condition for eviction (including the detailed specifications on the alternative accommodation to be provided to the residents) had a positive impact, as the government has subsequently decided to proceed with in-situ upgrading of the *Joe Slovo* settlement,[94] an approach to the upgrading that the government as well as the Court initially saw as unattainable. Following the judgment, the residents now knew their legal entitlements, and were thus more empowered than before the litigation process. The eviction order has been discharged because no engagement took place, the possibility of an engagement was unlikely, and the government has chosen to pursue in situ upgrading of the settlement. The report-back requirement in the engagement order was thus useful in providing the court with an opportunity to reconsider its initial conclusions in light of the subsequent delays and change in circumstances.

V. INTERACTIONS BETWEEN LITIGATION AND SOCIAL MOBILIZATION

Though litigation has been effective in enforcing housing rights in South Africa, it is certainly not sufficient in achieving social change (of course, noting that there could be instances where properly used litigation results in marginalized or poor groups achieving successes and impacts). This is because litigation can either lead to improvements, limited or no improvements, in the lives of the poor. In the South African context, the weakness of remedies ordered or the normative construction of socio-economic rights has resulted in litigation being followed by minimal or no improvements in some instances, as the previous section illustrates.

Litigation, in itself, is therefore generally seen, not only in the South African context but, for example, the Indian context as well, as insufficient to bring about social change.[95] Social mobilization, advocacy and education are also crucial in ensuring effective implementation of housing rights. In fact, a combination of strategies is crucial. It is also stated that "rights generally are most effectively asserted by social movements" and litigation

[93] Jackie Dugard, "Courts and the Poor in South Africa: A Critique of Systematic Failure to Advance Transformative Justice" (2008) 24 SAJHR 214 at 237-38.
[94] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2011 ZACC 8 at para 30, 723 BCLR (CC) [*Joe Slovo II*].
[95] Marcus and Budlender, *Strategic Evaluation*, *supra* note 88 at 104-05.

cannot be used to substitute social mobilization on rights issues, particularly because the assertion of rights has to take place inside and outside the courts.[96] Rather, "it is the combination of social mobilisation and litigation that has the greatest potential to alter laws and policies" and these are thus seen as "complementary strategies."[97] It should be noted that, while litigation and social mobilization can be seen as complementary, they can also be in tension "if recourse to the courts leads to resources being devoted only to litigation, at the expense of other strategies, leading to demobilization" and "lawyers and intellectuals taking the lead in devising strategies and making key decisions, at the expense of decision-making by communities or their representatives."[98] Therefore, litigation needs to be part of a broader strategy to achieve social mobilization and social change; otherwise, the social impact of litigation becomes limited.[99]

A key case in the South African context on the interactions between litigation and social mobilization is the *TAC* case.[100] Though this case is not specifically on housing rights (hence the reason why I do not discuss it further here), it is important to note the case as a good example, illustrating the assertion of rights inside and outside the courts. The strategy in the case is summed up in the following words: "The TAC saw its litigation as one facet of its much bigger political fight over the availability of AIDS drugs and for years before the case commenced, the TAC had been engaging in substantial social mobilization of its members and the broader public in an effort to put pressure on the government."[101]

Social mobilization in the context of housing rights has been limited until recently. When the *Grootboom* case commenced, there was some social mobilization and protest prior to the launch of litigation, which turned out to be weak and temporary. The *Grootboom* situation can, however, be contrasted with the *TAC* one in that, social mobilization in the former dissolved once litigation commenced, resulting in a weakening of the community's initially strong position in actively asserting and enforcing their rights. *TAC* mobilization, on the other hand, commenced prior to litigation and even continued post litigation in order to ensure effective enforcement of the judgment.

With the increased activism of Abahlali baseMjondolo, a shack-dwellers' movement, which was born out of the concern over lack of participatory democracy at the local level and a shortage of formal housing and land, the solidification of social mobilization in the housing context is becoming evident. This movement advocates for access to land and housing, access to basic services such as water, sanitation and electricity for informal settlement dwellers, and meaningful participatory democracy. The movement has been faced with resistance from the government, which has prohibited protest marches, and has unlawfully arrested and tortured members of the movement, among other attacks.[102] The movement has made significant inroads in relation to the protection of housing rights. Its strategy is rights-based, counter-hegemonic, self-empowerment and effective organization.

For example, it successfully challenged the *KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007* (*Slums Act*), legislation aimed at eliminating and preventing the re-emergence of slums.[103] The Act encouraged evictions,

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[96] *Ibid* at 104, 107.
[97] *Ibid* at 111.
[98] *Ibid* at 106.
[99] *Ibid*.
[100] *TAC*, supra note 92.
[101] Marcus and Budlender, *Strategic Evaluation*, *supra* note 88 at 107.
[102] Tshepo Madlingozi, "Post-apartheid Social Movements and Legal Mobilisation" in Malcolm Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi, eds, *Symbols or Substance: The Role and Impact of Socio-Economic Rights Strategies in South Africa* (2013) [forthcoming], online: Academia <http://www.academia.edu/2067839/Post-Apartheid_Social_Movements_and_Legal_Mobilisation>.
[103] The *Slums Act* was challenged before the Constitutional Court in *Abahlali*, *supra* note 7.

made it mandatory for landowners to institute eviction proceedings, and made opposing evictions a criminal offence. It required the Member of the Executive Council for Local Government, Housing and Traditional Affairs (MEC) of the province of KwaZulu-Natal to, through a notice, obligate an owner or person in charge of land or a building to institute eviction proceedings against unlawful occupiers, with this obligation shifting to the municipality where the owner fails to comply.[104] The Constitutional Court found this to be inconsistent with section 26(2) of the *Constitution* and other housing and eviction legislation and polices, such as the *PIE Act* that does not compel an owner to evict unlawful occupiers.[105] The compulsion "erodes and considerably undermines the protections against arbitrary institution of eviction proceedings" and the MEC's power is "overbroad and irrational," as well as "seriously invasive of the protections against arbitrary evictions" in section 26(2) of the *Constitution* read with the *PIE Act* and national housing legislation.[106] This case is not just a victory to shack dwellers but to other vulnerable groups faced with evictions, considering its emphasis on the requirements of meaningful engagement. State authorities have thus been forced to consult with shack dwellers in relation to housing development and issues. The movement is widely regarded as the most successful local movement.[107]

Though social mobilization in the housing sector commenced on a dire note with the *Grootboom* case, the use of social mobilization and litigation in subsequent housing cases, as seen from the *Abahlali* example above and as explained below, has had positive impact, including in the post-litigation phase. Of course, there is still need to strengthen the use of litigation and social mobilization as combined strategies in the housing sector.

In addition to the *Abahlali* example, the degree of mobilization of social movements or NGOs or communities has affected enforcement of subsequent housing rights decisions in South Africa. For example, the communities in the *Modderklip*, *Olivia Road* and *Joe Slovo* cases were highly organized, worked closely with social movements, NGOs and lawyers, had governance structures that were representative, hardworking and organized. This contributed to them achieving more than the *Grootboom* community, which was divided.[108]

It should be noted that mobilization is also relevant in relation to influencing policy development. For example, based on first-hand experience, groups working on women's rights and domestic violence issues have been able to mobilize and coordinate their efforts in their engagement with municipalities, such as the City of Cape Town, on access to housing for women, especially those faced with domestic violence and on an effective special needs housing policy.

VI. CONCLUSION

Litigation, or the threat of litigation, can force a government to reconsider its housing policies. However, though litigation has been a key strategy in South Africa, it is not the only strategy in enforcing the right. Advocacy, social mobilization, education, improved participation (meaningful engagement) are also relevant. Attention must be paid not only to courts but the role of civil society as well. It is important to employ different strategies to enforcing the right to housing. Ensuring effective implementation of the judgment is often a

[104] *Slums Act*, section 16.
[105] *Abahlali*, *supra* note 7 at paras 9, 91, 112, 128-29.
[106] *Ibid*, at paras 112, 118. Section 16 was thus found to be inconsistent with the constitutional and legislative framework for the eviction of unlawful occupiers that establishes that housing rights should not be violated without proper notice and the consideration of all alternatives (at paras 116, 118, 122).
[107] Madlingozi, *supra* note 102.
[108] Langford & Kahanovitz, "Judicial Enforcement in South Africa," *supra* note 91 at 4.

greater challenge. The general slow pace of implementation of court orders in socio-economic rights cases in South Africa has resulted in calls for the use of structural interdicts as a means of ensuring compliance.[109] While enforcement of decisions has been a problem in some cases, it has been enforced within a comparatively short period of time in others, for example, in *Olivia Road* and *Modderklip*. Giving meaning to the positive obligations while upholding rights at the same time, and finding appropriate remedies are also challenges. Resistance from the government could limit efforts but as the *Abahlali* movement illustrates, such resistance can be countered by persistence from civil society.

[109] See Geoff Budlender, "The Role of the Courts in Achieving the Transformative Potential of Socio-Economic Rights" (2007) 8 ESR Review 9 at 11, online: Community Law Centre <http://communitylawcentre.org.za/projects/socio-economic-rights/Research%20and%20Publications/ESR%20Review/May%202007.pdf>; Mbazira, *supra* note 41 at 17.