LIFE IN THE SUBURBS AFTER *GROOTBOOM:* THE ROLE OF LOCAL GOVERNMENT IN REALISING HOUSING RIGHTS IN THE EASTERN CAPE

A thesis submitted in fulfilment of the requirements for the Degree of

MASTER OF LAWS

of

Rhodes University

by

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January
2008

ABSTRACT

When the Government of National Unity took office in 1994, it inherited a country with severe inequalities in resource distribution and land ownership. In particular, it inherited a housing crisis which was, to a large extent, caused by apartheid legislation and policies. This research focuses on the housing crisis post-1994 by considering the impact and effect of the constitutional right to have access to adequate housing, especially for those living in intolerable conditions. It does so by utilising a social-scientific approach to the law. This approach acknowledges that the housing right must exist alongside other social phenomena and as a part of every-day life in South Africa. Accordingly, the implementation of the housing right by three local municipalities in the Eastern Cape is examined.

Following an initial overview of the history of housing and local government in South Africa, the study focuses on the current legislative framework for housing and the interpretation of the housing right (and other socio-economic rights) in certain court decisions. These decisions are discussed, not only because of the impact they have had on communities living in intolerable situations, but, as importantly, because they have developed standards against which policy and planning should be measured. These standards are used in the study to evaluate housing provision in three municipalities. The evaluation (by means of interviews and assessment of planning documentation) demonstrates that the recognition of the housing right in the Constitution and by the courts does not necessarily translate into effective recognition and implementation by the state. The research shows that the failure to plan proactively, lack of co-operative governance and inadequate controls over financial and human resources thwart the realisation of the housing right by local government. It is recommended that, in order to make the housing right a reality, research into the housing right (and indeed other socio-economic rights) should scrutinise the management of financial and human resources of the state in the context of the policy, planning and implementation environment. Where research is able to show evidence of unspent budgets, insufficient planning and mismanagement of resources, courts would be able to focus on the implementation aspect of the housing right, and ensure that it may yet have a meaningful impact on the lives of millions of some of the most vulnerable people in society.

To me a Constitution is like a house,
carefully designed, built and handed over for use.
Whether it becomes a happy family home
or a house of ill fame
depends on its inhabitants

-- Professor RH Christie 'Editorial' (1968) *RLJ* 3

These restless broken streets where definitions fail – the houses the outhouses of white suburbs, two-windows-one-door, multiplied in institutional rows; the hovels with tin lean-tos sheltering huge old American cars blowsy with gadgets; the fancy suburban burglar bars on mean windows of tiny cabins; the roaming children, wolverine dogs, hobbled donkeys, fat naked babies, vagabond chickens and drunks weaving, old men staring, authoritative women shouting, boys in rags, tarts in finery, the smell of offal cooking, the neat patches of mealies between shebeen yards stinking of beer and urine, the litter of twice-discarded possessions, first thrown out by the white man and then picked over by the black – is this conglomerate urban or rural? No electricity in the houses, a telephone an almost impossible luxury: is this a suburb or a strange kind of junk yard? The enormous backyard of the whole white city where categories and functions lose their ordination and logic … a 'place'; a position whose contradictions those who impose them don't see, and from which will come a resolution they haven't provided for.

-- Nadine Gordimer *Burger's Daughter* (1979)

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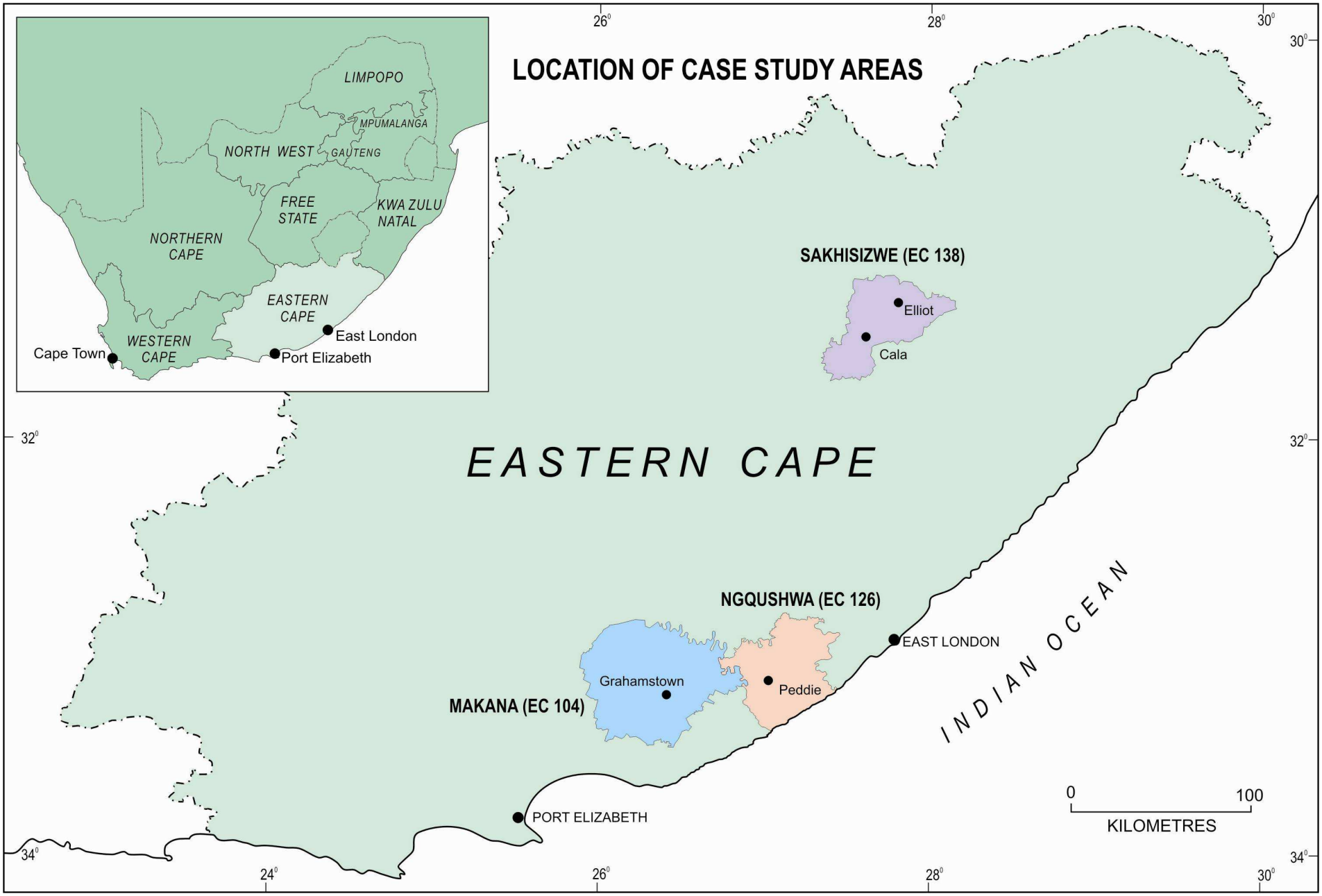
Tables

ACKNOWLEDGMENTS

I would like to acknowledge my colleagues at the Faculty of Law who endured me during the writing of this dissertation, especially my supervisor Rob Midgley (for his encouragement and attention to detail) and my inspiration, Judge Clive Plasket (for his passion for human rights). I am also most indebted to both Steve Kahanowitz of the Legal Resource Centre in Cape Town and Neil Overy formerly of the Public Service Accountability Monitor for their insightful comments and sharing of experience. Finally, I am indebted to Jay - who encouraged me to leave that sceptred isle and register for an LLM in Grahamstown. Apart from the obvious advantage of being forced to fish every weekend while I worked on this research, his unfailing love and support saw me through to the final line of the final chapter.

This dissertation is dedicated to those who, in Joe Slovo's words, have yet to find an essential piece of dignity in their lives, the dignity that comes from having a solid roof over their head, running water and other services in an established community.


LOCATION OF CASE STUDY AREAS
LIMPOPO
MPUMALANGA
NORTH WEST
GAUTENG
FREE STATE
KWA ZULU NATAL
NORTHERN CAPE
EASTERN CAPE
WESTERN CAPE
Cape Town
East London
Port Elizabeth
SAKHISIZWE (EC 138)
Elliot
Cala
EASTERN CAPE
NGQUSHWA (EC 126)
EAST LONDON
Grahamstown
Peddie
MAKANA (EC 104)
INDIAN OCEAN
PORT ELIZABETH
0
100
KILOMETRES
26°
28°
30°
32°
34°
24°

Chapter 1:
Introduction

1.1 The general purpose of this study

The main purpose of this dissertation is to identify the meaning and content of the constitutional right to have access to adequate housing, as implemented by local government in the Eastern Cape. In particular, the dissertation focuses on the provision of housing for those people who have no roof over their heads, and who are living in intolerable conditions or crisis situations. The reasons for this study will become apparent from the narrative below, which provides a context for the research.

On 18 April 2002, a court ordered the eviction of Kholisile Kam Kam and 37 others and also authorised the demolition of their shacks. His story is simple:

> 'I started living in the Hooggenoeg Squatter Camp … during October of last year. I had previously resided on a farm at "Assegaai Bos" situated alongside the Port Elizabeth road. I moved to the Hooggenoeg Squatter Camp as I am 101 years of age and it is difficult for me to access my old age welfare grant from Assegaai Bos. In addition, I had begun to require medical care more frequently and it was difficult for me to get to the Provincial Hospital from Assegaai Bos. I also feared that living at Assegaai Bos, I could become too ill to take myself to hospital and there were no other people living in the nearby vicinity who would then be able to assist me in my plight. I currently live in a shack made out of mud wood and zinc.'[1]

Kholisile is one of about 9.1 million people who lack access to adequate housing and secure tenure in South Africa.[2] He is among South Africa's

[1] Supporting Affidavit of Kholisile Kam Kam in the unreported proceedings of *Davies and others v Makana Municipality* (case no 391/02 ECD) paras 3 and 4.
[2] '9.1 million awaiting houses – Minister' *The Herald* 26 May 2004.

poorest who live in urban shack settlements, in backyards,[3] under stairs,[4] dangerously close to railway lines,[5] and under highway bridges.[6] Tenure in these situations is precarious and conditions are often intolerable. Kholisile chose to live in these appalling conditions because of his need to access his welfare grant and obtain regular medical attention. Owing to high levels of unemployment and relatively low wage levels, those younger than he often choose to live in these places because they are located close to formal job opportunities or points of entry into the informal economy.[7]

Kholisile's right to have access to adequate housing is protected in terms of the Constitution of the Republic of South Africa, 1996 (the Constitution). Section 26 of the Constitution states:

> '(1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

[3] For example, in Diepsloot (near Johannesburg) alone, about 16 000 families, or 150 000 people, live in backyard shacks, many of them assembled from scrap metal, wood, plastic or cardboard. Dlamini, quoted in Atkinson (2006) 2.

[4] See, for example, the Respondent's heads of argument in *City of Cape Town v Rudolph and others* (2003) 11 BCLR 1236 (C): 'The 21st respondent and his wife and two children … were literally thrown out of a property they had rented because of their inability to pay rent. They were then sneaking into the Parkville school and *sleeping under the stairs*, until they were told by the teachers to leave. Before they moved to the property [from which the applicant sought to evict them], they were "strolling". They would sleep in the school premises, at the back of the clinic, and near the dumping area. As a result, the children were continuously sick.' *Rudolph* heads of argument at para 12.10. My italics.

[5] See *SARCC v Unlawful occupants of the Western Cape commuter Area between Nolungile and Nonkqubela Stations, Khayelitsha* (unreported case no 2452/03 CPD) where the South African Rail Commuter Corporation (SARCC) sought to evict persons living within the rail reserve in Khayelitsha. The SARCC alleged *inter alia*: that an informal dwelling had been erected entirely enclosing a substation and access could be obtained only through the informal dwelling itself. In addition, it alleged that children played on and in the proximity of the railway track resulting in 5 deaths and 73 injuries along the railway line. See the SARCC founding affidavit at para 4.3 and 4.6 respectively. See also *City of Cape Town v The various occupiers of the road reserve of the applicant parallel to Sheffield Road, Phillipi* (unreported case no A5/03 CPD) in respect of occupation of a road reserve. These cases are discussed in chapter 4 below.

[6] See *Transitional Metropolitan Substructure of Cape Town v The occupants of erven 182, 183, 194 and 195 Cape Town* (unreported case no 1791/1996 CPD) where the local authority sought to evict people living under a bridge at the foreshore of Cape Town.

[7] In the municipality where Kholisile lived (*viz.* Makana Local Municipality), the 1996 and 2001 censuses record that unemployment continues to increase with unemployment figures almost doubling from 8912 to 14489 people respectively, with a group of 21 054 people classed as 'not economically active'. (IDP Review Process: Makana Local Municipality June (2004) 10).

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

What does this right actually mean to Kholisile? In other words, what would Kholisile's options have been when faced with eviction?

1.1.1 Housing Subsidy

One of the options available to Kholisile would be to apply for a state housing subsidy to meet his housing needs. These subsidies are available to people who earn less then R3 500 a month.[8] For someone who earns less than R800 per month and is aged or disabled like Kholisile, the full subsidy would be payable.[9] If Kholisile qualified in terms of the criteria set by the National Housing Department, he would be entitled to such a subsidy and the local government where Kholisile lived (*viz.* Makana Local Municipality) would add him to their housing waiting list. Kholisile would then have to wait his turn.

However, the problem with Kholisile waiting his turn is that, given the huge housing backlogs across the country, he would have to wait a long time – too long for a 101-year-old man – before he received a state-subsidised house. Despite the construction of over 1.5 million houses across South Africa between 1994 and 2003,[10] huge housing backlogs across the country remain. In Makana Local Municipality, Kholisile would be placed 12 001 on an

[8] In 2002 (the year of Kholisile's intended eviction), Kholisile would have been entitled to a housing subsidy of R20 300. McLean 55-6 notes that the housing subsidy was originally set at a maximum of R16 000 for the poorest households, which was then increased in 2002 to R20 300. It currently stands at R36 528 per household. See chapter 3 and Annexure B below.

[9] Apart from the income requirements, beneficiaries for housing subsidies must not have benefited from the housing benefit scheme (nor their spouses or partners). In addition, beneficiaries must also be:

- married, cohabiting, or have at least one proven financial dependent;
- a lawful resident of South Africa;
- twenty-one years or older; and
- a first time property owner.

(see Housing Code para 2.2.1).

[10] Gardner, quoted in COHRE Report 7.

outdated housing waiting list.[11] In addition, he would have no hope of getting a house until well after 2007/2008, given that in 2005 the Eastern Cape Department of Housing, Local Government and Traditional Affairs (the Provincial Department) communicated with all municipalities in the Eastern Cape that no new housing projects would be approved until 2007/2008.[12]

Notwithstanding the long waiting list, the housing backlog and the provincial moratoriam on new housing projects, Kholisile would face further problems once he finally receives his house. While he would enjoy security of tenure and a house of bricks and mortar, the subsidised house would, in all likelihood, be situated on the urban periphery, far from the main transport routes and access to the Provincial hospital.[13]

1.1.2 Informal settlement accommodation

Another option would be for Kholisile to erect a shack in another of Makana's informal settlements. However, Kholisile is likely to face the same risks and disadvantages as he faced in Hooggenoeg Squatter Camp.[14] Before he finishes building his shack in an informal settlement in Grahamstown, it is

[11] Telephone interview with Housing Manager, Makana Local Municipality (4 December 2006). According to this communication, the municipality assessed its housing backlog at 12 000 families in 2003 and has not made another assessment since then. This outdated figure is repeated in an Eastern Cape Growth and Development Summit District Profile Report (2007) at 15 with its source recorded as: 'Information as provided by LMs [Local Municipalities], 2006'. In the circumstances, it is highly likely that the municipality does not have accurate information about its housing backlog. See chapter 6 for a discussion of these statistics.

[12] Provincial Circular 1 of 2005 set out that the provincial government would not be considering applications for funding of any housing projects until 2007/2008. The reasons for this circular will become apparent in chapter 6.

[13] McLean 55-16 notes that most new housing developments are located far from the main economic centres. See generally L Royston 'On the Outskirts: Access to Well-Located Land and Integration in Post-apartheid Human Settlement Development' in F Khan and P Thring (eds) *Housing Policy and Practice in Post-Apartheid South Africa* (2003) 234.

[14] The Fifth SAHRC Report set out (at 14) that many of those living in informal settlements are in 'a crisis situation' and 'living in intolerable situations'. In *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 (1) SA 78 (W); 2006 (6) BCLR 728 (W), the Court suggested that many informal settlements were flood and fire hazards where people were in danger of losing their lives (para 64). See chapter 4 below.

probable that a contractor would be called by the municipality to dismantle the structure.[15]

Kholisile, like so many others, is locked into very difficult circumstances. He needs to live near the urban centre to access hospital facilities and welfare grant payouts, yet he cannot afford secure tenure or adequate housing. Private sector housing providers are too expensive and there is no NGO-run housing within the municipality. In other words, there is no immediate prospect of relief from the state despite his undisputed right to have access to adequate housing.

1.2 Dissertation questions

The situation in which Kholisile found himself raises a number of crucial, interlinked questions which form the subject of this dissertation, such as: why is there a housing crisis in South Africa?; what measures has the state taken to address this housing crisis – specifically for those in desperate need?; how reasonable are these measures?; and how have these measures been implemented by local government?

1.3 Structure and methodology

Chapter 2 of the dissertation seeks to answer the first question set out above by reviewing the history of housing provision in South Africa which led to the inclusion into the Constitution of a right to have access to adequate housing. The history of housing is preceded by a review of the housing right's international context and followed by a discussion of the justiciability of socio-

[15] Some local government institutions seek to manage the growth of informal settlements by dismantling structures that people have started to build in the area. The idea is that a half-built structure cannot theoretically be called a 'building or structure' in terms of the definition in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and, as a result, the provisions of PIE would not apply, and the municipality would not have to follow court processes to secure the person's removal. In Grahamstown (the municipal seat of Makana Local Municipality), the dismantling of structures is carried out by independent contractors named *Mayibuye.* In Johannesburg, this job is carried out by the municipality's so-called 'rapid response teams'. See Makana interview 12 and COHRE Report 8.

economic rights insofar as it is necessary for a proper understanding of the housing right. This review adopts a qualitative approach by drawing on various literary sources, including books, journal articles and discussion papers, white papers and legislation, reported and unreported cases.

Since the aim of this dissertation is not purely historical, chapter 2 will not comprise an exhaustive rendition of the history of housing in South Africa. Instead, the chapter will focus on four areas, namely, international context in respect of the International Covenant on Economic, Social and Cultural Rights 1996 (the ICESCR), housing after unification (*viz.* 1910) and under apartheid, housing under the first year of the Government of National Unity and justiciability of socio-economic rights in general.

Chapter 3 seeks to answer the second question set out above by explaining the legislation and policy framework for housing provision. Chapter 4 seeks to answer the third question in its consideration of court decisions in socio-economic and eviction proceedings. This part of the research seeks to clarify the content of the housing right with reference to case law and legislation and policies enacted to give effect to the right. Literary sources are again used to answer this question. In addition, this research draws on the work being done at the Legal Resource Centre (LRC)[16] in Cape Town in defending parties affected by evictions – with particular regard to the pleadings drawn up by the LRC and organs of state in both reported and unreported eviction proceedings.

Chapter 5 and 6 move away from strict desktop research and a case study method is adopted in order to answer the final question set out above. The courts have continually focused on the need for policies to be reasonable not only in their conception, but also in their implementation.[17] Thus, case studies are considered a useful mechanism in focusing on the implementation of

[16] The LRC is an independent, client-based, non-profit public interest law clinic. www.lrc.co.za (accessed 4 June 2005). For an interesting history of the LRC, especially in Grahamstown, see M Delaney *Rights to Reality – The Right to Social Security with particular emphasis on the Legal Resources Centre's Welfare Project in the Eastern Cape* (2003) unpublished Master's dissertation, Rhodes University.

[17] *Grootboom* para 41. See chapter 4 for a discussion of this requirement.

housing for those in desperate need. To do so, three local municipalities in the Eastern Cape are considered, namely:

- Makana Local Municipality;
- Sakhisizwe Local Municipality; and
- Ngqushwa Local Municipality.[18]

The particular history and socio-economic context of each case study area is canvassed in chapter 5, while provision for housing and its efficacy is considered in chapter 6. While these case studies cannot provide a generalisation of the state of local government within South Africa,[19] they provide unique insight into common issues facing local government at the level of implementation – especially within the Eastern Cape.[20] The research spans the 2005/2006 and 2006/2007 period, but with the emphasis being on plans and interviews as at October 2006.

The dissertation will then end with a chapter which seeks to bring together the conclusions made throughout the research.

1.3.1 Rationale for case study approach

The rationale for the case study approach within this dissertation originates from a growing concern amongst researchers[21] that the trend in socio-economic research is to pay more attention to theoretical questions relating to

[18] The Urban Sector Network produced an insightful source paper in October 2003 for the Department of Housing's Policy and Research Agenda headed: 'Expanding Socio-Economic Rights and Access to Housing'. This report made use of interviews as a means of ascertaining the views of local government and the rights agenda of South African civil society. Unfortunately (for our purposes), the paper focused on the role of national government programmes and policies, and interviews were conducted only on a national level.

[19] Yin (at 10) points out that a common concern raised among social researchers about case studies is that they provide little basis for scientific generalisation. Whilst this may be true in particular instances, Yin stresses that case studies, like experiments 'are generalisable to theoretical propositions and not to populations or universes.' In the context of this research then, these case studies are set out to assess whether obligations arising from the housing right (*viz.* the theoretical proposition as elucidated by the courts) have indeed been progressively realised by local government as required by the Constitution.

[20] Cohen, Manion and Morrison comment (at 181) that case studies provide 'a unique example of real people in real situations, enabling readers to understand ideas more clearly than presenting them with abstract theories or principles.'

[21] These legal commentators include Newman, Fernando, Kennedy and Cotterrell.

the fulfilment of socio-economic rights, rather than researching practical questions relating to their implementation. Researching practical questions is necessary, according to Newman, because 'if social and economic rights are to mean anything to human lives, they cannot exist only at an abstract level.'[22]

The case study approach recognises that an understanding of the right to have access to adequate housing requires not only systematic analysis of housing legislation and case law, but also an understanding of the social environment within which this legislation and case law must operate.[23] The question posed here is: supposing the court does interpret the right to have access to adequate housing, what effect will the judgment have on the conduct of life outside the courtroom? Cotterrell comments:

> 'Very often, surprisingly little may be known by judges and lawyers about the law's potential or actual social effects. Perhaps even more surprisingly, rarely is any systematic attempt made by them to find out.'[24]

This case study seeks to 'find out' about the actual effects of measures adopted to realise the housing right. In these circumstances then, the case study model provides a framework within which the right to have access to

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[22] Newman 191. Newman's concerns echo those of the late Pierre Elliot Trudeau, Prime Minister of Canada, at the opening of the 1976 United Nations Conference on Human Settlements in Vancouver: 'Human Settlements are linked so closely to existence itself, represent such a concrete and widespread reality, are so complex and demanding, so laden with questions of rights and desires, with needs and aspirations, so racked with injustices and deficiencies, that *the subject cannot be approached with the leisurely detachment of the solitary theoretician.*' My italics. See http://www.housing.gov.za/ (accessed 11 December 2006).

[23] McLean 55-1 notes that, until recently, most writing on housing law and policy, and s26, has been undertaken either by legal academics *or* by housing practitioners. The result, she states, is that legal academics tend to focus on the jurisprudence of socio-economic rights and the Constitutional Court's seminal decision in *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC), while the housing practitioners tend to be preoccupied with the practical implementation of the state housing policy, unaware of its nuanced legal interpretations. Recognising the problems that can result from such a one-dimensional approach, this dissertation attempts to combine both discourses.

[24] Cotterrell 1.

adequate housing is seen 'in actual, live conditions'.[25] The case study model also provides insight into whether the interpretation of the housing right by the courts has precipitated concrete changes in housing provision at local government level.[26]

The case studies in this dissertation rely on both primary data in the form of semi-structured interviews[27] and secondary data.[28] The interview method is used as it is considered to be one of the most important sources of case study information.[29]

Key officials and project consultants operating within each municipality were interviewed within each case study area with the purpose of gaining information on the process of implementing housing policies at local government level. Interviews with local government officials and project consultants took the form of semi-structured interviews with open-ended

[25] See Chaskalson 202-205 for a discussion on the link between constitutional values and positive action to realise socio-economic rights. See also Moseneke 318 where he advocates that 'transformative jurisprudence needs to contextualise violations in actual, live conditions.'

[26] See Liebenberg 233 where she queries whether rights can precipitate concrete changes in social policies and laws especially 'so that they are responsive to the needs of the poor.' Yin comments (at 13) that the case study approach is very effective where the researcher wants to cover contextual conditions – believing that they might be highly pertinent to one's phenomenon of study. Similarly, Cohen, Manion and Morrison (at 181) comment that one of the strengths of the case study approach is that case studies can observe effects in real contexts, recognising that context is a powerful determinant of both causes and effects. The fact that the local municipalities chosen for this study were previously part of three different government systems can thus be taken into account.

[27] Questionnaires are also seen by social scientists as an acceptable method of research within a case study. In addition to interviewing people at a national level, the Urban Sector Network (see footnote 18) attempted to use a questionnaire format at local level, largely unsuccessfully: out of 40 municipalities representing all provinces and most major cities, six municipalities responded despite a covering letter from the Department of Housing accompanying such questionnaire. Given the likelihood of a similar low return rate of questionnaires, the interview method was seen as a far better option.

[28] This secondary data consists of:

- Statistics provided by the Eastern Cape Socio-Economic Consultative Council (ECSECC);
- Integrated Development Plans of three Eastern Cape Local Municipalities;
- Selected annual reports of the Eastern Cape Department of Housing, Local Government and Traditional Affairs;
- Selected audit reports by the Auditor-General;
- Selected reports by the South African Human Rights Commission;
- Selected reports by the Public Service Accountability Monitor; and
- Media reports and political speeches.

[29] Yin 89. Yin concludes at 92: 'Overall, interviews are essential sources of case study evidence because most case studies are about human affairs.'

questions. This particular type of interview (*viz.* semi-structured) was chosen because of the perceived advantages of such a method, namely, openness in character and flexibility.[30] This method allowed for follow up questions and, in some instances, led to other persons being identified and interviewed.[31]

In preparing for the interviews, interview guides were compiled and sent to various interviewees at least one week before the interview took place (see Annexure A). The guides displayed general themes on housing provision using the reasonableness test developed by the Constitutional Court and clarified in this dissertation. Owing to the character of each interview situation (i.e. form of interview applied, role of informant in relation to local government, co-operation between the interviewer and the interviewee), the interview guide served as a structuring tool for the dialogue, as well as a device to ensure that the same themes were targeted in each interview.

During the initial stages of the research, it became clear that the provincial government plays a vital part in the ability of local government to implement the housing right.[32] Therefore, the study also considers the role of the Department of Housing, Local Government and Traditional Affairs in the Eastern Cape (the Provincial Department) insofar as it assists local government in implementing the housing right. This section of the research relies mainly on official statistics and quantitative data[33] such as the annual reports of the Provincial Department, the Auditor-General's reports and

[30] Kvale quoted in Lind 33. Clarke 72 endorses this view in the context of interviews in evaluation research. He comments that semi-structured interviews include both standardised questions and open-ended questions which are designed to elicit more quantitative information than a formal interview. This allows the interviewer to depart from his or her predetermined sequence of questions, should this prove necessary within the context of the individual or the interview. Clarke also comments that the semi-structured interview method also allows the interviewer to probe for more information by encouraging the person being interviewed to digress and expand upon their answers.

[31] Yin 90 points out that the semi-structured interview allows the person interviewed to provide the case study investigator with sources of corroboratory or contrary evidence – and also initiate access to such sources.

[32] This is confirmed by De Visser 21 who comments that the Constitution and the Housing Act 107 of 1997 both emphasise the need for co-operation between the levels of government, especially between provincial and local government.

[33] Since the Constitutional Court directed the state (including local government) to enact policies that are reasonable, the information provided in these documents and statistics would go some way to gauging compliance with this standard.

reports on the performance of the Provincial Department by the Public Service Accountability Monitor (PSAM), a civil society organisation situated in Grahamstown.[34] It also relies on one interview with the acting senior manager for policy planning and research for the Provincial Department, as well as the testimonies of several senior officials given during a recent Commission of Inquiry into the Finances of the Eastern Cape (the Pillay Commission).[35]

1.4 Scope of study

1.4.1 Eastern Cape Province

Apart from the obvious geographical location of Rhodes University, the research focus on the Eastern Cape Province is due to a unique combination of factors.

Firstly, the Eastern Cape's history and composition highlight the significance of apartheid legislation on social and economic rights and local government.[36] The province, being one of South Africa's new provinces since 1994, is an amalgamated territory of two former Bantustans, the Transkei and Ciskei, and the eastern part of the former Cape Province, which formed part of 'white' South Africa prior to 1994. Therefore, three different state systems previously operated within the province.

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[34] The PSAM is an independent monitoring and research organisation based at Rhodes University, Grahamstown. Its stated vision is to 'to build African institutions and social relationships of accountability which ensure government responsiveness to socio-economic rights and the effective use of public resources' www.psam.org.za (accessed on 3 April 2006).

[35] This Commission was established by the Premier of the Province of the Eastern Cape, acting in terms of s127(2)(e) of the Constitution. See Provincial Gazette, Proclamation No 1440, GN 4, 7 October 2005 which established the Commission and Provincial Gazette, Provincial Notice 39, 7 October 2005 which set out its terms of reference.

[36] Kriegler J makes this point in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 121 where he notes '[T]he impact of the apartheid system is particularly evident in the area of local government.' He goes on to state: 'Nowhere is the contrast in existential reality more stark than in the residential areas of the cities, towns and villages of South Africa. In this case we are concerned with the vast conurbation that developed in the economic heartland of the country. More specifically we are concerned with the consequences, primarily socio-economic but ultimately political, of the vastly inferior living conditions imposed on the majority of residents, merely by reason of their skin colour.'

The three municipalities chosen for the case studies (*viz.* Makana, Sakhisizwe, and Ngqushwa) are geographically located in the areas where the Transkei, Ciskei and the Cape Provincial Administration previously operated. Choosing municipalities as case studies from different parts of the province (and thus originating from three differing state systems) introduces another dimension to the dissertation, *viz.* do local and regional factors of the chosen three municipalities influence the implementation of the housing right, despite being situated within the same province?

The second reason for the research focus is that the Eastern Cape was the only province to attribute its under-spending in housing to insufficient capacity at municipal level in both the Fourth and Fifth Annual Economic and Social Rights Report commissioned by the South African Human Rights Commission (SAHRC).[37] At provincial level, the Eastern Cape Province was reported to have under-spent its budget vote by almost one-third, despite an estimated 976 160 families still without housing in the Eastern Cape.[38]

Thirdly, current research on topics of the housing right and local government has tended to focus on the metropolitan areas.[39] These areas are mainly Johannesburg, Cape Town and Durban[40] with the marginal and poorer urban areas such as smaller municipalities within the Eastern Cape receiving less attention.[41]

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[37] Fourth SAHRC Economic and Social Rights Report (no page numbers) and Fifth SAHRC Economic and Social Rights Report 25. In terms of s184(1) of the Constitution, the SAHRC is responsible for promoting respect for human rights and a culture of human rights, promoting the protection, development and attainment of human rights and monitoring and assessing the observance of human rights in South Africa. Section 184(2) of the Constitution gives the SAHRC the power 'to investigate and to report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to carry out research; and to educate.' In particular, the SAHRC 'must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of rights in the Bill of Rights concerning housing, health, care, food, water, social security, education and the environment.' The SAHRC Annual Economic and Social Rights Reports therefore serve as a good point of departure in considering the measures taken by the government with specific reference to those living in desperate need.

[38] *Ibid.*

[39] This is not surprising given that in 2003 the National Spatial Development Perspective stated that the biggest demand for housing in South Africa was in the metropolitan areas.

[40] See generally COHRE Report and Beall.

[41] For an interesting political-geographical angle on housing, see Lind.

1.4.2 Local Government

This dissertation narrows its focus on housing by considering the participation of local government in housing provision. The enhanced status of local government post-1996, manifested in the Constitution, together with official policies and legislation regarding the provision of housing,[42] provides an interesting basis for this research. Under the apartheid legal order and even in terms of the interim Constitution of South Africa,[43] local government was the lowest tier of government in a strict hierarchical structure. It had no constitutional standing on its own but derived its powers from two superior tiers of government, national and provincial.[44] This subordinate position was done away with by chapter 3 (Co-operative Government) of the Constitution which articulated the new position of government:

> 'In the Republic, government is constituted as national, provincial and local spheres of government, which are *distinctive, interdependent and interrelated.*'[45]

From its previous subordinate position, local government has been catapulted into a new model of developmental local government where local government is given responsibilities emanating from the Constitution itself instead of acquiring such functions from national and provincial government. This new role was affirmed by the Constitutional Court in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council.*[46] Local government's role has thus changed from mere functionary to an autonomous constitutional institution. In other words, local government is no longer simply an administrative arm of central and provincial government but is a component of the government proper.[47] Given this change of role, this

[42] See Steytler and Mastenbroek 292.
[43] Act 200 of 1993 (the interim Constitution).
[44] See De Visser and Bekink for a general discussion on local government's new status.
[45] My italics. Section 40(1) of the Constitution.
[46] 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).
[47] Mastenbroek and Steytler (1997) 245.

research considers how local government has managed to implement the housing right for those in desperate need. [48]

1.4.3 Case study areas

In order to remain within the parameters of a Master's dissertation, only three local municipalities were chosen as case studies, namely, Makana Local Municipality, Ngqushwa Local Municipality and Sakhisizwe Local Municipality. As explained above, these local municipalities were chosen specifically because each municipality was subject to a different administration at one stage, namely, the Cape Provincial Administration and the administrations of the self-governing homelands of the Ciskei and Transkei respectively. The interviews in each case study area were conducted from over the period of July – September 2006.[49]

1.4.4 Provision of housing for those people who have no roof over their heads, and who are living in intolerable conditions or crisis situations

In *Government of the Republic of South Africa and others v Grootboom and others,*[50] the Constitutional Court found that the housing programme was a salutary attempt to meet the housing needs of South Africans.[51] However, the Court found that the housing programme was unreasonable in that it failed to cater for persons in society 'who have no roof over their heads, and who are living in intolerable conditions or crisis situations'.[52] While much research is undertaken in the housing field, the provision of housing assistance in so-called emergency situations does not receive the attention it deserves.[53] This problematic aspect of housing is highlighted whenever people are evicted – from a variety of situations including backyards,[54] road or rail reserves,[55]

[48] See chapter 3 of this dissertation which discusses the effect this has had on legislation.
[49] The housing information in each case study is therefore accurate as at these dates.
[50] 2001 (1) SA 46 (CC); 2000 (11) BCLR 883 (CC).
[51] *Grootboom* para 53.
[52] *Grootboom* para 52.
[53] Van Wyk 35.
[54] See Makana interview 13 (discussed in chapter 6 below).

under bridges,[56] public property[57] or private property.[58] This research then, focuses on the provision of housing in emergency situations.[59]

[55] *SARCC v Unlawful Occupants of the Western Cape Commuter Area between Nolungile and Nonkqubela Stations, Khayelitsha* (unreported case no 2452/03 CPD);
[56] *Transitional Metropolitan Substructure of Cape Town v The occupants of erven 182, 183, 194 and 196* (unreported case no 1791/96 CPD).
[57] *Grootboom.*
[58] *Port Elizabeth Municipality v Various occupiers* 2004 12 BCLR 1268 (CC), 2005 (1) SA 217 (CC) and *President of the Republic of South Africa & another v Modderklip Boerdery (Pty) Ltd (Agri SA & others, amici curiae)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC).
[59] As Van Wyk clarifies at 35, 'emergency' is a term variously and widely defined and interpreted. In its widest sense, it is related to the term 'disaster' in terms of the Disaster Management Act 57 of 2002. In the confines of this research, provision for those falling under the Disaster Management Act is not considered. The focus of this research is rather placed on *foreseeable* emergencies; that is, evictions from, for example, land earmarked for development, privately-owned land and from unsafe buildings.

Chapter 2:

International and historical context of housing in South Africa

2.1 Introduction

A discussion of the housing right would not be complete without setting out why such right was included in the South African Bill of Rights in the first place. This chapter therefore seeks to place the housing right in the context of South Africa's turbulent history.

Generally, it is acknowledged that most bills of rights arise out of times of struggle, with the object of preventing those conditions which led to the struggle never to be allowed to occur again.[1] These bills of rights are therefore designed to ensure against conditions brought about by myopic or mistaken decisions in ordinary politics.[2]

What is the decision which led to the adoption of a bill of rights and the inclusion of the housing right in particular? In short, the Constitutional Court has stated that apartheid is that myopic or mistaken decision.[3] In more general terms, Budlender and Latsky comment on the myopic decision known as apartheid in the following language:

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[1] Brand and Heyns 1. These bills of rights have been termed 'transformative' in the sense that they set out certain aspirations that are emphatically understood as a challenge to long-standing practices. See Sustein 4. This theme runs throughout the decisions of both the Constitutional Court and other courts. In *Soobramoney v Minster of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) para 8, the Court stated that a 'commitment … to transform our society … lies at the heart of a new constitutional order.' In *The Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) para 21, the Court stated: 'The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance.' See also the Constitutional Court decisions of *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) paras 39 and 40 and *City of Pretoria v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) para 73. Courts other than the Constitutional Court have also referred to the Constitution's transformative role, most notably *Holomisa v Khumalo* 2002 (3) SA 38 (T) para 55, *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C) para 100 and *City v Johannesburg v Rand Properties (Pty) Ltd and others* 2006 (6) BCLR 728 (W) paras 51-52.

[2] Sustein 4.

[3] See *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (*Grootboom)* para 6: 'The cause of the acute housing shortage lies in apartheid.'

> 'It is the kind of labyrinthine complexity which cannot and did not arise from a single flash of misguided brilliance. Rather, it is the result of generations of legal tinkering, of piecemeal and painstaking technical embellishments of structures created, on the one hand, in the service of the grand apartheid plan and on the other hand, in response to ideological, development and economic realities from time to time and from area to area.'[4]

Following Budlender and Latsky's framework, the purpose of this chapter is to review the historical context of housing – especially as created in the service of the grand apartheid plan. This review of housing is important to this research for three reasons:

1. It provides the historical context in which the housing right was conceived and included in the South African Constitution.[5]
2. It foreshadows the emphasis that the courts have placed on the need to interpret legislation within its historical context in the new democratic era.[6]
3. It complements the local government historical context provided in chapter 5 especially as it relates to the three specific case study areas chosen for this research.

However, before the historical context of housing is discussed, it is important to consider the direction given by international law as to the content and

[4] Budlender and Latsky 155.

[5] While this context is all important, this chapter is not intended to paint a 'master-narrative' of history, but rather to highlight important aspects of the development (or lack of development) of housing. On the dangers of using history as a master-narrative, see de Vos 'A Bridge Too Far? History as Context in the Interpretation of the South African Constitution' (2001) 17 *SAJHR* 1.

[6] In many court decisions of the pre-democratic era, judges avoided any reference to historical or international context in decisions on the pretext that the common-law principles that they applied were neutral, apolitical or acontextual. See *Chetty v Naidoo* 1974 (3) SA (A) 20A. In the context of evictions, Van der Walt 14 comments that this kind of attitude allowed the apartheid government to use the eviction principles to justify the evictions and forced removals that entrenched fundamentally unequal land holdings along race lines.

meaning of the housing right. This exercise is both helpful and imperative in the task of interpreting any of the rights protected by the Constitution.[7]

2.2 International law context

In South Africa, the right to have access to adequate housing is protected in terms of s26 of the Constitution.[8] Section 39 of the Constitution obliges a court to consider international law as a tool for the interpretation of the Bill of Rights. In addition, s233 of the Constitution states that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Socio-economic rights, and specifically the right to adequate housing, are included in numerous treaties and declarations as fundamental human rights.[9] Amongst these instruments, it is the Universal Declaration of Human Rights of 1948 (the Declaration)[10] and the International Covenant on Economic, Social

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[7] Yacoob J quotes Chaskalson P (as he then was) in *Grootboom* para 26 as stating: '[P]ublic international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide the framework within which [the Bill of Rights] can be evaluated and understood.' Yacoob J adds a qualifier to this statement in the same para: 'The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.'

[8] The other reference to accommodation (ie. not 'housing' *per se*) is to be found in s28(1) where it is stated: 'Every child has the right … (c) to basic nutrition, *shelter,* basic health care services and social services.' My italics. This is discussed in more detail in chapter 4. Section 35(2)(e) of the Constitution also makes reference to 'adequate accommodation'. It provides every detained person with the right to 'conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of *adequate accommodation*, nutrition, reading material and medical treatment'. My italics.

[9] These instruments were conveniently summarised by the Centre for Human Rights, University of Pretoria in November 2000 in their 'Economic and Social Rights Series' under 'A Compilation of Essential Documents on the Rights to Accommodation, Housing and Shelter'. In addition to some of those instruments mentioned in that compilation, the European Social Charter should be added to counter the perception that the right to housing is only a 'third world' right. The European Social Charter affirms the right of the family to social, legal and economic protection by means of providing family housing (Article 16).

[10] For an interesting discussion of the status of a 'right to housing' in international law prior to the Declaration, see Craven in S Leckie (ed) *National Perspectives in Housing Rights* (2003) Kluwer Law International: London 45*ff.* Craven calls this discussion a 'pre-history' of the right to housing given his belief (at 45) that 'the most notable feature of international activity prior to 1945 is the almost total absence of serious contemplation of anything in the nature of a "right to housing"'.

and Cultural Rights of 1996 (the ICESCR) which have had the most pervasive effect on the conception of the housing right in South Africa.[11] Article 25(1) of the Declaration states:

> 'Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, *housing* and medical care, necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.'[12]

The ICESCR[13] was drafted to give effect to the socio-economic rights in the Declaration and the right to housing is explicitly protected in terms of Article 11(1) which elaborates on the above-quoted clause:

> 'The State Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and *housing* and to the continuous improvement of living conditions. The State Parties will take appropriate steps to ensure the realisation of this right recognising to this effect the essential importance of international co-operation based on free consent.'[14]

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[11] The South African National Action Plan for the Protection and Promotion of Human Rights (NAP) lists South Africa's international obligations with regard to housing and shelter as being guided by Article 25 of the Universal Declaration of Human Rights and Article 11 of the ICESCR. It also refers to 'the objectives, principles and recommendations contained in the [UN-Habitat's] Global Urban Observatory Programme and Habitat Agenda.' See Urban Sector Network Report 10 and McLean 55-31. According to the Centre on Housing Rights and Evictions (COHRE) the ICESCR is 'the most legally significant universal codification provision recognising this right and has been subject to the greatest analysis, application and interpretation of all international sources of housing rights.' NAP was drawn up in terms of the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in Vienna. See Urban Sector Network Report 11. For information on the Habitat Agenda, see http://www.unescap.org/huset/habitat.html (accessed 7 December 2006).

[12] My italics.

[13] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force 3 January 1976, in accordance with Article 27.

[14] My italics.

Noteworthy in these provisions is the extent to which housing rights are bundled with livelihood rights, recognising the interconnectedness of socio-economic needs.[15]

While the African Charter on Human Rights does not expressly recognise the right to housing, the African Commission has read this right into the Charter in the matter of *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*.[16]

The right to housing is also recognised in Article 20 of the African Charter on the Rights and Welfare of the Child, Article 21 of the Convention relating the Status of Refugees and its 1967 Protocol,[17] Article 5(e)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination,[18] Article 14 of the Convention on the Elimination of Discrimination Against Women,[19] Article 27 of the Rights of the Child,[20] Article 17.1 of the International Convention on Civil and Political Rights, and Article 43 of the International Convention on the Protection of Rights of All Migrant Workers and Members of their Families.[21] Although a Draft International Convention of Housing Rights[22] has been prepared by the United Nations Special Rapporteur[23] on

[15] See COHRE Report generally. The recognition in international law that livelihood rights are interconnected with housing is not without controversy in South Africa, especially in light of an impending appeal to the Constitutional Court against the decision of the Supreme Court of Appeal (SCA) in *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 SCA 25 (*City of Johannesburg II*). One of the grounds of the appeal is that the SCA ought to have found that 'the applicants were entitled to have their current access to jobs, livelihoods and social services taken into account in any plan to relocate them'. See para 20.9 of the applicants' founding affidavit and para 14 of the applicants' replying affidavit. This appeal (CCT24/07) will be heard by the Constitutional Court on 28 August 2007. See chapter 4, footnote 189 for a fuller discussion of the court *a quo* and SCA decision.

[16] African Commission on Human and Peoples' Rights, Communication No 155/96; (2001) AHRLR 60 (ACHPR 2001). The Commission derived the right to adequate housing, including a right not to be unjustifiably evicted, from a combined reading of articles 14, 16 and 18(1) of the African Charter on Human and Peoples' Rights (1981).

[17] Ratified by South Africa in 1996.

[18] Ratified by South Africa in 1999.

[19] Ratified by South Africa in 1996.

[20] Ratified by South Africa in 1995.

[21] This treaty has not yet entered force and South Africa has not yet signed it.

[22] E/CN.4/Sub.2/1994/20. The preamble to the Draft Convention of Housing states as follows: 'The non-fulfilment of housing rights is a widespread and growing phenomenon and no single country can claim to have satisfied in full their existing legal obligations arising our of the right to adequate housing.'

[23] Special Rapporteurs are persons appointed by the United Nations bodies with a mandate to examine and report on specific countries or themes. For more information on the status and

Housing Rights in August 1994, such Convention has yet to be adopted by the United Nations General Assembly.[24]

In 1985, the Committee on Economic, Social and Cultural Rights (the Committee) was established to carry out the monitoring functions assigned to the United Nations Economic and Social Council in Part IV of the ICESCR.[25] The mandate of the Committee, which consists of 18 independent experts, is to assist the Economic and Social Council in carrying out its responsibilities relating to the implementation of the ICESCR. The Committee seeks to achieve three principal objectives:

> '(1) developing the normative content of the rights recognised in the Covenant; (2) acting as a catalyst for state action in developing national 'benchmarks' and devising appropriate mechanisms for establishing accountability, and providing means of vindication to aggrieved individuals and groups at the national level; and (3) holding states accountable at the international level through the examination of reports.'[26]

All state parties (ie. those countries which have ratified the Covenant) are obliged to submit regular reports to the Committee on how the rights are being implemented. State parties must report initially within two years of ratifying the Covenant and thereafter, every five years. The Committee examines

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position of Special Rapporteurs, see http://www.unhchr.ch/html/menu2/xtraconv.htm (accessed 30 October 2006). The current UN Special Rapporteur on Adequate Housing (appointed in 2000) is Mr Miloon Kothari. See http://www.unhchr.ch/html/menu2/7/b/tm.htm (accessed 30 October 2006) regarding his appointment to the position.

[24] In addition to these conventions, charters and covenants are what are known as United Nations declarations. These declarations are accorded less legal weight but they are important political documents that represent the commitment of States towards a particular goal. The Habitat II Agenda (1996) and Agenda 21 (1992) are two significant United Nations declarations in respect of the housing right. The Habitat Agenda II was adopted by the second UN Conference on Human Settlements at Istanbul in 1996 and Agenda 21 was adopted by the UN World Conference on Environment and Development (UNCED) held in Rio de Janeiro in 1992.

[25] Established under ECOSOC Resolution 1985/17, 28 May 1985.

[26] Steiner and Aston 305-306.

each report and addresses its concerns and recommendations to the state party in the form of 'concluding observations'.[27]

Another part of the Committee's work is to issue General Comments which have authoritative status under international law.[28] These General Comments are official interpretations or elaborations on a specific right enumerated in an international instrument.[29] It is in these comments that the idea that socio-economic rights each contain a 'minimum core' obligation has been developed. Such an obligation requires every state party to fulfil certain minimum essential levels of the rights and failure to do so constitutes a *prima facie* failure to discharge its obligations under the Covenant.[30]

General Comments 3,[31] 4[32] and 7[33] published by the Committee are relevant to housing rights. General Comment 3, adopted in 1990, first introduced the notion of the concept of 'minimum core obligation' as characterising the nature of state duties under the Covenant. The idea in this General Comment is that implicit in each right is a minimum set of specific benefits and protections that the state party to the Covenant must provide to all rights-bearers.[34]

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[27] See http://www.ohchr.org/english/bodies/cescr/ (accessed 2 November 2005). See Steiner and Alston 306-312 for an interesting case study of the Committee's examination of a report by Nigeria. Their case study focuses on the right to adequate housing with the purpose of considering (1) the types of reports that the Committee has sought to elicit through its guidelines; and (2) the use it has made of general comments to develop the content of the right. For example, in response to reports of forced evictions in Nigeria, Steiner and Alston quote the then Chairperson of the Committee, asking the government delegation from Nigeria: 'What measures was the Government taking to remedy the situation of those persons?' and: *'Had the Government taken into account the provisions of General Comments 4 and 7 of the Committee*, which required prior consultation, compensation and resettlement of the victims of evictions, and would it take them into account in the event of future evictions?' My italics. See UN Doc. E/C.12/1998/SR. 8, 4 May 1998, quoted in Steiner and Alston 309. In chapter 4, the need for consultation with victims of evictions is discussed as a central theme in the decisions of the Constitutional Court (*Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC)) and the Witwatersrand Local Division (*City of Johannesburg v Rand Properties (Pty) Ltd and others* 2006 (6) BCLR 728 (W)).

[28] See paras 20-21 of the *Grootboom amici* heads of argument.

[29] See the Limburg Principles of 1986, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 1997 and the Bangladore Declaration and Plan of Action 1995 which have also been a source of guidelines in the interpretation of socio-economic rights.

[30] See para 24*ff* of the *Grootboom amici* heads of argument.

[31] 'The Nature of States Parties' Obligations' UN Doc. E/19991/23.

[32] 'The Right to Adequate Housing' UN Doc. E/1992/23.

[33] 'The Right to Adequate Housing: Forced Evictions' UN Doc. E/1998/22.

[34] COHRE Report 24.

The standard of review set by this General Comment is high. For example, in paragraph 10 of the Comment 3, the Committee states:

> 'In order for a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.'

Paragraph 12 of the Comment 3 requires that even if the state parties can demonstrate a lack of resources, 'vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.'

General Comment 4, adopted in 1991, attempts to give content to the terminology of the housing right, focusing on what 'adequate housing' really means. In respect of 'housing' (used interchangeably with 'shelter' in the comment), the Committee rejected a narrow or restrictive definition, preferring to link housing with the inherent dignity of the human person.[35] The Committee, quoting with approval the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000, stated:

> 'Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost.'[36]

In respect of 'adequacy' (in the sense of 'adequate housing') the Committee, while recognising that this definition is determined in part by social, economic, cultural, climatic, ecological and other factors, nevertheless set out seven aspects of 'adequacy' that must be taken into account in any particular context. These are:

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[35] Para 7, General Comment 4, 1991.
[36] *Ibid*.

1. Legal security of tenure. An emphasis is placed on conferring legal security of tenure upon those persons and households currently lacking such protection (e.g. informal settlements).
2. Availability of services, materials, facilities and infrastructure. This includes sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.
3. Affordability. Housing must be sufficiently spacious, safe and healthy.
4. Habitability. Housing must protect persons from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors.
5. Accessibility. Adequate housing must be accessible to those entitled to it.
6. Location. Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities.
7. Cultural adequacy. Housing must be constructed so as to enable the expression of cultural identity.[37]

The words 'adequate housing' are also found in s26 of the Constitution. Since this aspect of 'adequacy' strikes at the heart of most of the cases heard in South Africa regarding the housing right and eviction proceedings, the details of such aspect included in the General Comment are repeated here in full:

> 'Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy

[37] Para 8, General Comment 4, 1991.

should take fully into account the special housing needs of these groups. Within many states parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement.'[38]

General Comment 7, adopted in 1997, deals with what the Committee regards as the biggest obstacle to giving effect to the right to adequate housing, namely, failure to provide secure tenure resulting in forced evictions.[39] Forced evictions are defined in Article 3 of General Comment 7 as:

'[t]he permanent or temporary removal against their will of individuals, families and/or communities from their homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.'

Paragraph 15 of General Comment 7 thus sets out eight requirements for an eviction to be procedurally just. These are:

'(a) an opportunity for genuine consultation with those affected;
(b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
(c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
(d) especially where groups of people are involved, government officials or their representatives to be present during an eviction;
(e) all persons carrying out the eviction to be properly identified;

[38] Para 8(e) of General Comment 4, 1991.
[39] This is integral to the first aspect of the Committee's definition of 'adequacy', namely, legal security of tenure.

(f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;

(g) provision of legal remedies; and

(h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.'

Since South Africa has signed but not ratified the Covenant,[40] it is not obliged to comply with the ICESCR reporting requirements but must (as a signatory) 'refrain from acts which would defeat the object and purpose of the treaty'.[41] This effectively means that there is no duty for South Africa to submit reports. Despite various organisations calling on the government to ratify the agreement, the government has not done so to date.[42]

2.3 Historical context of housing in South Africa

It is impossible to understand the housing right in the Constitution or post-Constitution court proceedings without reference to the effects of previous apartheid legislation on housing and the issues the housing right seeks to address.[43] This part therefore describes the legislation directly affecting

[40] The ICESCR was signed by Nelson Mandela on 2 October 1994.

[41] Article 18 of the Vienna Convention on the Law of Treaties of 1969 states as: 'A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.' In addition, Article 26 of the Convention sets out a general duty to act in 'good faith'.

[42] For example, it was reported in 2000 that the Socio-Economic Rights Project at the Centre for Human Rights was involved in lobbying government for the urgent ratification of the ICESCR. See Mashava 2 and Pillay 3. In 2003, the Urban Sector Network commented that the failure of South Africa to sign the Covenant was an 'inexplicable gap'. One of the recommendations of the report was that there should be a renewed attempt to have the ICESCR ratified by South Africa as 'this ratification would make the legal duties of the State with regards to the right to adequate housing clearer.' See Urban Sector Network Report 51 and 59.

[43] In his influential analysis of the interim Bill of Rights, Mureinik (at 31) emphasised the need to understand the past as a mechanism to deal with the future: 'What is the point of our Bill of Rights? The Bill is Chapter 3 of the interim constitution, which declares itself to be aspiring to be "a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex." 'If this bridge is successfully to span the open sewer of violent and contentious transition, *those who are entrusted with its*

housing and its impact. However, it should be noted at this stage that South Africa's history of housing cannot be described in any meaningful sense without recourse to both the peculiar racial and economic ideologies underpinning previous housing legislation, especially as it related to labour and influx control.[44]

2.3.1 Housing, local government and apartheid

Armed with bulldozers
they came
to do a job
nothing more
just hired killers
We gave way
there was nothing we could do
although the bitterness stung in us
and in the earth around us[45]

By the time the Government of National Unity took office in 1994 it inherited a country with severe inequalities in land, resource distribution and ownership. These issues were as a direct result of apartheid policies that sanctioned forced and brutal removal from land and required that black South Africans live only in officially-mandated settlements that were run down, cramped and

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upkeep will need to understand very clearly what it is a bridge from and what a bridge to.' My italics.

[44] This is in keeping with Budlender and Latsky's emphasis on ideological, development and economic realities mentioned in the main text above. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC), Kriegler J commented on the economic issues relating to labour control at para 123 as follows: 'The genius lay in the system of apartheid zoning: major commercial and industrial areas were located in the white areas and fell within the jurisdiction of white local authorities. Not only did this impose a cost burden on those who had to commute the distance to and from these centres of economic activity, but the bulk of the tax base was located in the white city. Black people came and went, and worked and spent, leaving behind their labour and money. Despite the racial segregation "(t)his . . . exploitative logic . . . held the apartheid city together as a single interdependent urban system".' Original footnotes omitted.

[45] 'The day they came for our house' *Azanian Love Song* quoted in Du Plessis 126.

without utilities.[46] The housing crisis that the government faced was not only about homelessness *per se*, but rather about the varying degrees of squalor and overcrowding that millions of South Africans were forced to endure in informal settlements.[47] Arguably, nowhere is South Africa's past more starkly illustrated than in the housing sector's institutional and funding confusion:

> 'By the early 1990s there were seven Ministries and Departments of Housing, an additional five national departments directly involved in housing and thirteen statutory funds through which housing-related funds were channelled. Also, four provincial authorities, six 'self-governing' homeland authorities and over sixty national and regional state corporate institutions were involved in housing delivery and facilitation delivery. … With decision-making authority vested in so many locations, fundamentally different housing policies and delivery strategies were being implemented, depending on race and/or geographic location of the intended beneficiaries.'[48]

While it is acknowledged that some of the causes of the housing crisis in South Africa are common to many third-world countries (eg. poverty and the application of inappropriate standards), it is without doubt that the legislation and policies that the South African government enacted in pursuance of apartheid throughout the 1900s, have been a fundamental cause of most present and past housing problems.

Apartheid, however, was not the sole cause of land inequality and homelessness in South Africa. Discrimination was evident even before the founding of the Union of South Africa in 1910[49] and some of the most damaging pieces of legislation were passed in first half of the 1900s,

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[46] For a more comprehensive analysis of apartheid policies affecting land and resource distribution and ownership, see Scoping Study 49-59. See also: O'Regan (1990) 127, O'Regan (1991) 119 and Wickeri.
[47] Robinson 509.
[48] Gardner 87-88.
[49] In terms of the South Africa Act 1909. For example, Rutsch 139 points out that the policy of segregation along racial lines can be traced to the early days of white occupation, particularly in British-ruled Natal.

institutionalising segregation and the unequal division of property and resources. It was during this time that the Native Land Act[50] and the Native Trust and Land Act[51] were passed. In terms of these Acts, the acquisition of property or property rights by blacks in urban areas was prohibited. In addition, the Acts created 'reserves' for black South Africans, formalising the separation of black and white.[52] The fundamental demand behind the Land Acts was expressed by a then Member of Parliament who stated simply that the black African had to be told 'that it was a white man's country, that he was not going to be allowed to buy land there, and that if he wanted to be there he must be in service.'[53]

In the context of this research, it is important to note that certain areas in two of the three case studies were declared native reserves in terms of these Acts. These areas were sections of the Peddie and Zwelitsha districts (forming part of what is now known as Ngqushwa Local Municipality) and the Xhalanga district (forming part of what is now known as Sakhisizwe Local Municipality). In these particular areas then, the measures set out below regarding both housing and local government did not apply. Instead, a system of headmen operating in the reserves until the commencement of tribal authorities, described more fully in chapter 5 below.

While the Land Acts dealt with land distribution, no central state policy dealing with housing was in place until 1920.[54] However, a serious influenza epidemic throughout South Africa changed this policy standpoint and drew attention to the deplorable conditions in the slums and locations of urban

[50] Act 27 of 1913. The Act scheduled 34 750 miles of land for the exclusive use of Black South Africans. Jaichand 10*ff* comments that this constituted 7% of all land in South Africa. For more detail on the effect of this Act and Act 18 of 1936, see Jaichand 10*ff.*
[51] Act 18 of 1936.
[52] Robertson describes the Native Land Act in two separate publications as one of the 'linchpins of apartheid' (even though it preceded the first Nationalist Government by thirty-five years) and 'the foundational law of South Africa's racial order.' He also described Act 18 of 1936 as the 1913 Act's 'sister' from which grew the black homeland system with its modern successors. See Robertson (1988) 285-217 and Robertson (1987) 120 respectively.
[53] Quoted in Chanock 365.
[54] Hendler, Mabin and Parnell 196 comment that housing for the poor during this time remained the voluntary responsibility of local authorities.

blacks. As a result, the Public Health Act[55] was passed. From a housing point of view, the Act was more about public health control than a measure to deal with housing shortages. Nevertheless, it was the first Act to contain a chapter dealing with factors associated with what is now the 'housing right' in South Africa. The chapter, entitled 'Sanitation and Housing' fixed upon local authorities the duty of maintaining the areas under their jurisdiction in a clean and sanitary condition, and of preventing dangers to health from unsuitable dwellings. At this early stage then, local government was responsible for aspects of housing.

This Act was soon followed by the first Housing Act[56] enacted in 1920.[57] The Act marked the beginning of financial assistance by the state in the provision of housing. While no subsidies were contemplated in the Act, grants were made available to local government to carry out approved housing schemes for specific race groups.[58] The principle guiding the state's policy at this early stage was that provision of housing was a function of local government, and the grants contemplated in the Act were merely there to assist local government in this function.[59] Despite two commissions reporting on the deplorable conditions in mainly urban black locations,[60] the powers given to

[55] Act 36 of 1919.
[56] Act 35 of 1920.
[57] The Act was passed after a commission, the Influenza Commission, (appointed soon after the epidemic) recommended that housing shortages be dealt with. In response to its recommendations, a Housing Committee was appointed with the following terms of reference: 'Whether it is advisable for the government to give financial aid or other assistance in urban areas for persons of limited means including coloured persons and natives, and, if so, the best method of doing so.' See Baldocchi 84.
[58] Given the distinction between race groups in the Act, Hendler, Mabin and Parnell 197 suggest that 'working-people were residentially segregated by the state through its control of housing funds' even *before* more specific racist legislation.
[59] Baldocchi 85.
[60] Both the Tuberculosis Commission 1914 and the Influenza Epidemic Commission 1918 urged the government to pay attention to the locations. The Tuberculosis Commission found *inter alia,* that the dwelling in the locations were 'a disgrace, and the majority quite unfit for human habitation.' In particular, it found that, 'speaking generally, the dwellings are mere shanties, often nothing more than hovels, constructed out of bits of packaging case lining, flattened kerosene tins, sacking and other scraps and odds and ends.' The Tuberculosis Commission noted that despite the deplorable conditions in these locations, some municipalities were actually making a profit out of the levies charged in the locations. See Morris 16 and 22. The Housing Committee (set up as a result of the recommendations of the Influenza Commission) reported that it found a large amount of indifference by local authorities towards the housing needs of blacks. Its terms of reference are recorded by Baldocchi 84: 'Whether it is advisable for the government to give financial aid or other

local government in the Act in respect of black and coloured housing, were reported as 'little used'.[61]

In addition to precipitating the passing of both the Public Health Act and the Housing Act, the influenza epidemic also pressurised the government into finalising its policy on the role of local government and the position of urban blacks. Up until this point, the arrangements for local government[62] excluded participation by the black population in totality. This arrangement was premised on central government's insistence that it was the only policy maker with regard to 'blacks' and that their presence in cities was to be regarded as temporary.[63] As a result, the system of local government awarded no rights to blacks to participate in or benefit from its structures.

In an attempt to finalise its policy, the government appointed the Transvaal Local Government Commission under Colonel Stallard. This Commission established the principle of the impermanence of the black South African in white urban areas.[64] This policy, which later became known as the Stallardist doctrine, had a major effect on the state's policy of housing. Given that blacks were not to be regarded as permanent inhabitants in urban areas, housing policy was directed towards ensuring the reproduction of labour-power and the restriction of movement of the black population, rather than concern for the black population's social and economic welfare.[65] These premises were evident in the deliberations of a Select Committee appointed to investigate the Draft Natives (Urban Areas) Bill and the Draft Native Registration and Protection Bill. The debate of this Select Committee centred on two issues, namely; (1) whether to control movement of blacks in 'white' towns, and (2) whether or not blacks should be granted freehold tenure.[66] The Select

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assistance in urban areas for persons of limited means including coloured persons and natives, and, if so, the best method of doing so.'

[61] Hellman 242. See also Morris 22 and Lodge 55. Lodge gives an example of the inaction of the local authority in East London which constructed no housing *at all* between 1926 and 1940.

[62] As set out in the South Africa Act 1909.

[63] De Beer and Lourens 28.

[64] Morris 18.

[65] See Lea 198.

[66] Morris 18.

Committee took the decision to restrict movement and not to grant freehold rights to black South Africans. Although there are no records of the Select Committee's discussions on the matter, its main reasons for these decisions seem to have been:

- a fear that, were freehold rights to be granted, black South Africans would cease to recognise that they were in the urban areas primarily for employment;
- if black South Africans were given the right to property they would also want the right to vote; and
- it was convenient for locations to be near towns so that servants could go home early in the evening and be back at work early in the morning. With the extension of 'European' areas, it would be easier to move locations if no freehold rights existed.[67]

Following the Select Committee's decision, the Black (Urban Areas) Act[68] was enacted and made provision for the granting of leasehold in respect of sites in black villages and locations only to 'qualified persons'.[69] In addition, the Act sought to restrict the entry and duration in the 'white' cities by black South Africans. Landowners were prohibited from allowing black South Africans (other than their employees) to reside on their property within five kilometres of a proclaimed urban area. Furthermore, the Act empowered local authorities to deport black South Africans from the area if they were 'habitually unemployed' or did not 'possess the means of honest livelihood' or led an 'idle, dissolute or disorderly life'.[70]

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[67] These reasons are gleaned from the representations made to the Select Committee. See Morris 20 and 143. Chanock 403 records that a representative from the Eastern Cape Municipalities (ie. the area where case studies in this research take place) observed from his so-called experience: 'It is difficult for the Municipality to retain control of these areas once you give the title deed. The native is more amenable to discipline if he is merely a leasehold proprietor. … Once he has a title deed there is no shifting him without trouble.'

[68] Act 21 of 1923.

[69] A qualified person (in terms of the later Native (Urban Areas) Consolidation Act 25 of 1945) was a black who was a South African citizen, and any descendant of such black person.

[70] Act 21 of 1923. The Act was amended in 1930, 1937 and 1945 to tighten influx control measures further. Some of these further restrictions dealt with the right of African women to enter an urban area (1930) and reducing the days allowed to black South Africans to seek employment. The 1945 amendment (set out in s10 of the Native (Urban Areas) Consolidation Act 25 of 1945) further restricted a black South Africa to claim permanent residence in an urban area. The section provided that no black South African could be in a place outside his reserve for more than 72 hours unless he had resided there continuously since birth, had

On the housing front, local authorities continually failed to make use of the grants available in terms of the Housing Act, preferring to set aside plots where blacks could erect their own houses on a monthly tenancy.[71] Given the immense housing shortages during this time,[72] the government sought to encourage local authorities to access loan facilities by amending the Housing Act in 1944[73] and introducing the Housing (Emergency Powers) Act.[74] The former Act provided for a National Housing and Planning Commission (NHPC) and introduced a new financial basis for housing loans to local authorities. The latter Act gave power to the newly-constituted NHPC to undertake a housing scheme where local authorities were unable or unwilling to do so.[75] As a result of these Acts, the volume of loan funds granted to local authorities increased by a small amount. However, the NHPC failed to use the powers granted to it by the Housing (Emergency Powers) Act[76] and by 1949 the housing problem was 'far from solution'.[77]

The failure of government (and local authorities in particular) to deal with the housing shortage during this time can be ascribed largely to the inherent contradiction in the legislation and the Stallardist doctrine upon which the legislation was drafted. In effect, this contradiction made local authorities

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lawfully resided there for fifteen years, or had worked there for the same employer for ten years. See Gelderblom and Kok 33 and Meyer 43.

[71] Morris 26 opines that local authorities were 'afraid to risk the experiment of establishing a permanent native community or relaxing the very strict regulations applicable to locations.' In addition, Hellman 244 notes that due to World War II, there was a shortage of manpower and materials, hence a virtual stoppage of housing provision. Pienaar 338 states that housing 'was completely halted' during World War II which resulted in the proliferation of various squatter movements due to acute overcrowding where blacks were forced to crowd into any available accommodation.

[72] In 1943, the Social and Economic Planning Council estimated that 185 000 houses needed to be built to deal with the housing shortage (60 000 for 'Europeans' and 125 000 for 'Non-Europeans'). In 1947, the Department of Native Affairs undertook a survey which identified that 154 000 houses needed to be built and accommodation for 106 900 blacks provided. See Hellman 244.

[73] Housing Amendment Act 49 of 1944.

[74] Act 45 of 1945.

[75] Section 2(1)(p) of the Housing (Emergency Powers) Act.

[76] The then Minister of Housing was quoted as saying at the time: 'Although the Housing Directorate had been given wide powers to alleviate the shortage, it was entirely a different matter to apply these powers. … We cannot ride roughshod over local authorities in furthering our building plans. … In a democratic state in times of peace, a Government must be circumspect.' See *The Star* 10 July 1946, quoted in Hellman 17.

[77] Hellman 17.

hesitant to accept responsibility for their black population in terms of housing. On the one hand, local authorities were expected to access funds and set up permanent housing schemes for blacks; yet on the other hand, the politics and ideology that informed legislation during this time saw blacks as a temporary presence with no right to own the land they lived on.[78] The housing problem was also inextricably linked to the wage structure for black labourers which was too low to afford adequate housing and which, in turn, increased local authorities' financial responsibilities for these apparent 'temporary sojourners':

> 'Housing is obviously enough the lynchpin of the urban Native problem. The local authorities are required to provide accommodation for the Natives resident in their area, and this housing is by implication supposed to conform to certain standards of decency. But as the vast majority of Africans do not earn a wage sufficient to ensure reasonable standards of living, the great majority cannot pay an economic rent. Furthermore, as the economic and social structure in the Union pegs Africans to the unskilled occupations and maintains the present wide gulf between skilled and unskilled wage levels, there is no reason to expect the earning powers of the bulk of the African urban workers to reach a stage in the immediate future which will enable them to bear the costs of economic rentals without having to sacrifice expenditure on items such as food. Hence their housing has to be subsidised, and recognition of this necessity is afforded by the facilities afforded by the central government for loans on which it is prepared to incur a heavier loss than the local authority. But the use of such facilities pre-supposes an ability on the part of the local authority to bear a loss. In the case of some smaller municipalities there is apparently no ability to bear any loss. The larger municipalities are now seriously concerned

[78] This very issue was canvassed as early as 1935 by the Young-Barrett Committee. Its findings were not released as they were seen as hostile to the policy envisaged by the government at the time (see Morris 29-30). From extracts published in Hansard, it is clear that the Committee doubted whether the concept of 'the black as a temporary worker' was practicable, ie. 'the proposition that every municipal location ought to be regarded purely as a reservoir of Native labour, from which the worn-out labourer must be required to depart when he no longer ministers to the needs of the white man.' See Morris 29.

as to the magnitude of the loss they will be called upon to bear if they are indeed to fulfil their housing obligations to Africans.'[79]

While discriminatory laws affecting land and housing issues were passed before National Party rule, the system of unequal division of property and resources became official policy when the National Party came into power in 1948 – a policy called 'separate development'.[80] The legislative programme which followed has been branded as 'more thoroughgoing, more grotesque perhaps, than anything the country or the world had yet seen'.[81] In a report commissioned in 1948 to deal with the 'native question',[82] it was concluded that the migration of blacks to the city was a natural economic phenomenon and although it could not be reversed, it could be controlled and regulated.[83] This was sought primarily through the Group Areas Act,[84] initially passed in 1950 as Act 41 of 1950 and later consolidated by Act 36 of 1966. Under this Act, a small percentage of land in South Africa was divided into 'Bantustans' for black South Africans to occupy. These Bantustans were basically racial enclaves along assumed ethnic and linguistic lines.[85] The Land Acts had the

[79] Hellman 248 is quoted here in full as she captures the circular nature of the problem. Based on this argument, she comes to the conclusion that housing subsidies were in fact camouflaged subsidies to employers of Native labour '…because if wages had reached an adequate level there would be no need to subsidise housing.' See Hellman 249.

[80] Apartheid was the basis of Prime Minister Malan's election manifesto in 1948 and entailed a system of separating the race groups to safeguard the racial privileges of the whites. See Jaichand 6.

[81] Roux quoted in Plasket 14 (at footnote 42). Plasket further quotes Roux's observation that '[r]acial laws and segregation there had always been, but after 1948 racism became a political creed or ideology transcending all other creeds and providing the motive for a sustained program of legislation by the party in power.' Similarly, Browett commented (at 21) in 1982: 'What distinguishes the apartheid legislation is that the previous *ad hoc* segregationist measures were amended, supplemented and combined within a political ideology that has been pursued with a single-mindedness of purpose.'

[82] The Native Law Commission Report 1948.

[83] See Pienaar 338. This Commission was followed by a commission in 1954 which looked at the socio-economic development of the Bantu Areas within the Union of South Africa (the Tomlinson Report). One of the startling methods recommended to curb urbanisation was 'the promotion of planned parenthood'. Whilst there appeared to be some doubt expressed in the report as to the success attainable by such a campaign, it recommended that 'the efficacy on the means that can be used for family limitation' be investigated. See Tomlinson Report 30.

[84] For a discussion of the Group Areas Act, see Rutch.

[85] The National Party's homelands policy aimed at separating South Africans along lines of exaggerated ethnic difference. Four quasi-independent 'homelands' and seven 'self-governing territories' scattered in a crescent stretched from South Africa's northern borders and along its eastern and southern seaboards. The Bantustans gave the apartheid state somewhere in which it could 'repatriate' Africans who were in surplus to the labour needs of 'white' cities and farming areas and, as a result, fell foul of its tightened influx controls. See

effect of setting aside only thirteen percent of the land for black South Africans who were estimated to make up eighty-two percent of the population.[86]

In response to the rising numbers of squatters,[87] the government passed the Prevention of Illegal Squatting Act (PISA)[88] in 1951 which focused on the criminalisation of squatting, the eviction of those persons and the establishment of emergency camps.[89] In particular, PISA allowed landowners to demolish structures on their land and to evict people without a court order.[90] While PISA was purportedly non-racial, its inevitable links with the historical effects of influx control and the Group Areas Act and Land Acts ensured that it targeted the black population.[91] It is estimated that approximately 3.5 million people were forcibly removed from their homes over the period 1960 to mid-1983.[92] Forced relocations often happened at gunpoint and the evictions of that time were characterised by bulldozing, the burning and demolition of shacks; the termination of the community's water supply; and arrests of residents for trespass.[93]

At approximately the same time that PISA was passed, the government passed the Black Building Workers Act[94] and the Black Services Levy Act[95] in

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chapter 5 for a more detailed discussion of the legislative structure of these Bantustans as they related to housing and local government.

[86] Rutsch 140.

[87] Pienaar 338 noted that by 1951, the numbers of black persons living in squatter areas rose to 20 000.

[88] Act 51 of 1952.

[89] See *R v Phiri* 1954 (4) SA 708 (T); *Lolwana v Port Elizabeth Divisional Council* 1956 (1) SA 379 (E); R *v Press* 1956 (3) SA 89 (T) and *R v Zulu* 1959 (1) SA 263 (A) as examples of how PISA was enforced against unlawful occupiers.

[90] For commentary on this aspect of PISA, see *Despatch Municipality v Sunridge Estate & Development Corporation (Pty) Ltd* 1997 (4) SA 596 (SE).

[91] Robertson 1987 112-113.

[92] Platzky and Walker 9. This figure, as quantified by the Surplus People Project, does not take into account those people moved within the Bantustans for the implementation of betterment planning. Betterment planning was initiated by means of Proclamation 31 of 1939 and involved a 'piecemeal expansion in agricultural extension schemes and an emphasis upon the introduction of better crops, methods of production and livestock strains.' Letsoalo and Rogerson 308 point out that this practice resulted in a number of forced removals of whole communities. Unfortunately, betterment planning falls outside of the scope of this research.

[93] Robinson 509. See *Grootboom* and *Western Cape Provincial Government and others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and another* 2001 (1) SA 500 (CC) for judicial commentary of the way in which evictions took place.

[94] Act 27 of 1951.

[95] Act 64 of 1952.

conjunction with the promotion of site-and-service[96] and home-ownership schemes. While these schemes attempted to introduce access to a housing market, one of the main aims of the government was to decrease its overall expenditure on 'temporary urban blacks.'[97] In any event, most municipal housing proved to be too expensive for the ordinary black South African.[98]

After 1948, the idea began to gain ground that the homelands should not merely become depositaries for the surplus rural population but should also provide accommodation for black South Africans working in adjacent 'white' areas.[99] However, it was only in the late 1950s that the government started taking active measures to implement this idea.[100] The emphasis on this homeland ideology saw Parliament pass the Promotion of Bantu Self-Government Act[101] in 1959, with the Transkei becoming the first of the homelands to be granted self-government. In conjunction with this legislation, the South African government promoted the development of the homelands seriously by spending massive amounts of money on physical development and housing[102] and resettling large numbers of black South Africans from 'white' areas in homeland towns. As a result, the promotion of leasehold rights and the provision of family housing in South Africa's urban areas, introduced in the 1950s were effectively reversed, the powers to evict were

[96] In addressing the 28th Annual Conference of the Union's Native Advisory Boards, Dr Eiselen, the then Secretary of Native Affairs, stressed the need for the black community 'to shed its sub-economic mentality and to play an active part in remodelling itself on orderly and progressive lines,' in proposing the introduction of self-help site and service schemes. See Morris 48.

[97] See Pienaar 338 and Morris 60. It should be noted that these schemes involved home-ownership but never site-ownership by black South Africans.

[98] Morris 68 notes that the combination of relatively high housing standards and the provision of economic (rather than sub-economic) loan funds to local authorities had the effect that most tenants were unable to pay their rents. For example, a municipal survey in Durban at the time showed that only 18% of black families could afford to pay rent and some 43% could not even afford to pay the site rental. Similarly, the amount of rent in arrears in Port Elizabeth was equal to one month's rental for all the houses in the township. See Morris 45-46 and 69. See also Bekker and Humphries 83.

[99] Smit, Olivier and Booysen 96. See also Lemon 82.

[100] Bekker and Humphries 6.

[101] Act 46 of 1959.

[102] See Smit, Olivier and Booysen 96. The Riekert Commission recorded that the change of policy was clearly reflected in the allocation of funds for black housing in white areas in the annual budget of the Minister of Finance from 1968: 'Whereas the allocation to the Department of Community Development of funds for black housing – from which the boards obtain their allocation – declined since 1968, the allocations to the Development Trust and to the governments of black states rose sharply so that the total funds for black housing for the country as a whole also rose fairly sharply.' Riekert Commission (1979) para 4.387.

increased, influx regulations were tightened and opportunities to obtain permanent residence restricted.[103] For example, a General Circular[104] to local authorities required them to obtain approval from the Department of Bantu Administration and Development before initiating any new black housing schemes. The Department of Bantu Administration and Development in turn, only granted such approval if it deemed such developments (especially family housing) essential, and that accommodation could not be provided in the adjacent homeland.[105]

In reflecting on this situation in 1979, the Riekert Commission (a one-man commission which reported to the government in mid-1979[106]) commented:

> 'The official [housing] policy from 1968 was, in regard to black workers in white areas, to provide family housing in the black states as far as possible rather than in the black residential areas surrounding the white cities and towns where they worked.'[107]

In a bid to further increase control over black urban areas, the government transferred the administration of urban black areas from white local government and placed such control into the hands of twenty-two Administration Boards established in terms of the Administration of Bantu Affairs Act.[108] These boards consisted of white South Africans who took over the important areas of black labour and housing as well as the administration of black urban areas.[109] In so doing, housing and other specified 'black

[103] Pienaar 339.
[104] General Circular 27 of 1967.
[105] Lemon 82. See chapter 5, para 5.4.1 regarding the failed applications by the local authority of Grahamstown (now the Makana Local Municipality) to build residential housing in its area.
[106] See Morris 11. The Riekert Commission's terms of reference were to inquire into, report on and make recommendations in connection with certain legislation, including the Bantu (Urban Areas) Consolidation Act 25 of 1945, the Administration of Bantu Affairs Act 45 of 1971, the Community Councils Act 125 of 1977, as well as various provincial ordinances and local authority by-laws.
[107] See Riekert Commission (1979) para 4.387.
[108] Act 45 of 1971. These boards were later renamed and reduced in 1984 to 14 'development boards.'
[109] In terms of local government for coloureds and Indians, Ordinance 6 of 1963 made provision for separate local government bodies for both the coloured and Indian population.

affairs' was removed from the jurisdiction of white local government to a centralised body acting under the National Department of Bantu Affairs.[110]

Whereas central government policy up to the late 1970s had been to discourage housing for blacks in urban areas, the Riekert Commission found that urbanisation was inevitable, and the best way of dealing with such urbanisation was to accept it and control it.[111] One perceived method of controlling urbanisation (as well as placating heightening political unrest and boycotts) was the introduction of black local government.[112] The reasons for the new system were spelt out by Dr Riekert himself in a later publication:[113]

> 'These local authorities will serve to defuse pent-up frustrations and grievances against the administration in Pretoria. Local authorities will affect the daily existence of these black people more directly and intimately than the more removed activities of central government. In the war in which South Africa is involved and the total onslaught against the country, defusion of this kind has become an urgent necessity which cannot be postponed any longer.'[114]

As is clear from the quotation above, the establishment of black local authorities was portrayed by the government as a concession to black political aspirations and resistance. The introduction of black local government was also seen as an attempt by government to compensate partially for the exclusion of the black population from the tri-cameral system introduced by

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Until 1993, the number of management committees in the Cape Province amounted to 211. See De Beer and Lourens 30.

[110] Riekert 147.

[111] See Riekert Commission 1979 para 4.204 (d) and (f).

[112] It should be noted that Community Councils had existed since 1977 as a form of local government for black residents. However, these Councils were purely advisory in nature and had hardly begun before local authorities contemplated in the Black Local Authorities Act 102 of 1982 replaced them. Manona reports that the imposition of an unrepresentative community council in Grahamstown (now part of Makana Local Municipality) in 1978 led to 'other difficulties' – one of these difficulties was their shared responsibility with the Eastern Cape Administration Board to enforce the demolition of backyard houses leading to making the severe shortage of housing worse. See Manona 108.

[113] At the time of writing these comments, Riekert was the Chief Director of the Western Transvaal Administration Board.

[114] Riekert 156.

the Constitution Act[115] in 1983. However, the attempt by government to 'compensate' and to 'defuse' the situation did not prove successful. Despite greater powers being given to these authorities, local government had no power over housing and labour – two major sources of discontent. In particular, housing for black South Africans remained in the hands of the Administration Boards. Black authorities (set up in terms of the Black Local Authorities Act[116]) had no powers in terms of the Housing Act to raise loans for housing schemes. Black local government thus still suffered from the same deficiencies as those institutions before them, namely, inequality, illegitimacy and lack of financial support.[117] A clear distinction could be drawn between the well-serviced and financially-able local authorities in the white areas, and the underdeveloped, under-serviced and financially-deficient 'non-white' areas.[118] In addition, black activists saw the establishment of these authorities as a symbol of disenfranchisement, not least because of the limited franchise rights given to the coloured and Indian populations.[119] The frustrations and grievances of the black population escalated into protests and violence in many areas, often in the form of physical attacks on black councillors.[120] The combination of political illegitimacy and economic

[115] Act 110 of 1983. This Act provided for limited power sharing with coloureds and Indians. The government sought to achieve this by classifying matters to be dealt with by Parliament and the state departments in two groups, namely:

- *General affairs* (which included black municipal affairs) to be legislated upon in unison by the three houses of Parliament and administered by the state department and other public institutions entrusted to ministers who were members of the cabinet; and
- *Own affairs* of coloureds, Indians and whites to be legislated upon by each of the relevant Houses of Parliament (House of Representatives, House of Delegates, and House of Assembly, respectively) and administered by state departments, which constituted the administration of the Houses – one administration for each House. See Cloete 13.

[116] Act 102 of 1982.

[117] Given these deficiencies, it is difficult to believe Riekert's conclusion at 165 that '[t]he Black Authorities Act is an honest attempt to extend constitutional development in the RSA to Blacks at the level of local government.'

[118] See *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC).

[119] Friedman 6.

[120] Pieterse (2002) 16 comments that the Black Local Authorities were 'beleaguered institutions from their inception' due to the militant opposition from the black community and a well-established reputation for inefficiency, graft and collaboration with white interests. As stated in the main text, the failure of past and present forms of local government was a lack of financial resources. In terms of the Black Local Authorities, the problem was that no extra sources of revenue were provided for the financing of these new institutions, despite increases in expenditure resulting from greater powers. In an effort to finance township services, black local authorities were forced to increase rent and service charges (up to 100%) of township residents. Revenue of these bodies was also affected by a boycott of rent

desperation led to a sustained urban revolt, one of whose features was a boycott of municipal service charges.[121] In response, the government attempted to intervene by setting up a system of *ad hoc* intergovernmental grants to channel resources to collapsing townships.[122] In addition, the apartheid government, realising that the urbanisation of cities by black South Africans was inevitable (and fearing the growing informal settlements on the outskirts of cities), passed The Abolition of Influx Control Act[123] in 1986 which effectively disbanded the forced removal policy and introduced the new concept of 'orderly' urbanisation.[124] This new policy, which mandated settlements where black South Africans could live, was supposed to be more ordered, planned and directed than the government's previous piecemeal attempts to deal with urbanisation and housing.[125] As recorded in the White Paper on Local Government,[126] these interventions were 'too little too late'.[127]

Despite mandating settlements, the government did very little in terms of developing housing for those black South Africans who had begun to return to the cities.[128] PISA was used more frequently during this time to ensure that

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and service charges in protest against the increases. See the case studies in chapter 5 for a closer look at the results of these boycotts.

[121] *Ibid.*

[122] In order to manage and channel these intergovernmental grants, Regional Services and Joint Services Boards were established in terms of the Regional Services Councils Act 109 of 1985. They consisted of representatives of white local government, black local government, coloured committees and Indian committees. See Pieterse (2002) 16-17 for a discussion of the problems of these Boards in the Cape Town area.

[123] Act 68 of 1986.

[124] O'Regan (1991) 119 (citing the White Paper on an Urban Strategy for the Republic of South Africa 1986). Before this Act was passed, the government, following recommendations in the Riekert and Viljoen Commission, announced in 1983 that greater emphasis would be placed on self-help and the private sector. The government acted on the following basis: the sale of rental accommodation, the upgrading of existing townships and controlled squatting. See Pienaar 339.

[125] Friedman 6 suggests that the establishment of black local authorities was a move that was meant to lend support to the idea of 'orderly urbanisation' by attempting to stabilise African urban settlements by partially recognising the permanence of their residents. The fact that local government and urbanisation cannot be easily separated makes this suggestion a plausible one.

[126] Published in March 1998.

[127] Section A.

[128] Wickeri 8.

'orderly urbanisation' took place[129] by evicting all those living in backyards or any other land, regardless of whether or not they were paying rent.

The result of this morass of legislation and policy was a housing crisis during the 1980s which threatened the very edifice of apartheid. By the late 1980s, the government reacted against the increasing unrest over housing and land for blacks in urban areas by repealing the Native Land Act and Group Areas Act and introducing new legislation which ensured that blacks could own and occupy some land that was previously only reserved for whites.[130] Whilst these measures lessened control over some aspects of the housing crisis, PISA, with its summary powers of demolition, remained largely untouched and evictions continued throughout this time. However, a growing number of cases heard by sympathetic judges in the beginning of the 1990s proved successful in challenging evictions under this Act.[131]

The year 1990 marked the beginnings of major political and social transformation. In that year, political prisoners were released and former banned political organisations (including the African National Congress) were unbanned. In addition, the National Party government committed itself to negotiate a new Constitution with all participating parties.[132] A National Housing Forum was established in 1992 as a 'think tank' for all major stakeholders to develop a housing strategy and policy for South Africa. As an interim measure, the Housing Arrangements Act[133] was passed in an effort to ensure that housing provision could proceed while a detailed future housing policy was being developed. This Act made provision for the establishment of a National Housing Board (with representation from housing suppliers, consumers and regulators) to advise government on issues of national policy.

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[129] O'Regan (1991) 119 calls the Act during this time a 'key control measure' creating powers of removal and demolition and also establishing informal settlement areas.
[130] The new legislation included the Abolition of Racially Based Land Measures Act 108 of 1991, the Less Formal Township Establishments Act 113 of 1991, and the Upgrading of Land Tenure Rights Act 112 of 1991.
[131] See, for example, *George Municipality v Vena* 1989 (2) SA 263 (A)*; Luwvalala v Port Nolloth Municipality* 1991 (3) SA 98 (C) and *Kayamandi Town Committee v Mkhwaso and others* 1991 (2) SA 630 (C).
[132] Cameron 81.
[133] Act 155 of 1993.

It established four Regional Housing Boards in the four provinces to adjudicate the allocation of fiscal resources to projects at the provincial level. The Act also provided for the amalgamation and joint operation of housing funds and certain housing institutions of old own affairs administrations by April 1994.[134] Despite these interim measures, there was still a significant degree of overlap and duplication within the housing sector. It was abundantly clear that new legislation was needed to rationalize existing housing legislation. This then set the background to the first era of the Government of National Unity rule.

2.3.2 Housing under the first era of Government of National Unity (the GNU)[135]

Prior and during the 1994 elections, the African National Congress ('the ANC') ran an election campaign that promised to build one million homes, provide running water to over a million families and to electrify two and a half million rural and urban homes within five years of taking office.[136] Housing was a major platform of their campaign. When the ANC won a landslide victory in 1994, the newly-appointed Housing Minister, Joe Slovo, announced:

> 'It is our task to give millions of South Africans an essential piece of dignity in their lives, the dignity that comes from having a solid roof

[134] This Act was amended many times during the period 1993-1996 so as to extend its application to the entire national territory and to all South Africans without distinction on the basis of race. See Housing Amendment Act 101 1993, General Law Second Amendment Act 108 1993, Housing Matters Amendment Act 191 1993, Housing Second Amendment Act 33 1994, Housing Amendment Act 6 1996. For an overview of this period, see Housing White Paper para 3.5 and Gutto 6.

[135] Between April 1994 and February 1997, South Africa was governed under the terms of an interim Constitution Act 200 of 1993 (the interim Constitution). The interim Constitution provided for a democratically elected GNU led by a political coalition for a five-year transition. Section 88 of the interim Constitution required that any party holding twenty or more seats in the National Assembly could claim one or more cabinet portfolios and enter the government. In the April 1994 election, the African National Congress ('the ANC') obtained the majority of seats in the National Assembly with 62.65% of the vote, and thus could form the government on its own. The two chief parties who made use of the provision for a GNU were the National Party and the Inkatha Freedom Party, both of which obtained cabinet portfolios for their leaders and other Members of Parliament.

[136] ANC Election Manifesto 1994 at www.anc.org.za/ancdocs/policy/manifesto.html (accessed 3 June 2005).

over your head, running water and other services in an established community.'[137]

Given the institutional and funding confusion in the housing sector, this task was never going to be easy.[138] Nonetheless, in 1994 a White Paper on Housing[139] announced that 'the time for delivery [of housing] has arrived'.[140] The GNU inherited a disaster. In 1994, eighteen percent of South Africans were living in squatter settlements, backyard shacks or overcrowded conditions with no formal rights to their homes. Approximately twenty-five percent of all urban households in the country had no access to potable water, sixteen percent of households had no kind of sanitation system, and almost forty-seven percent of all households had no electricity.[141]

The specific history and approach to planning and township establishment led undoubtedly to a wasteful settlement structure that resulted in overlapping, duplication and confusion.[142] Instead of an overall housing strategy dealing with housing, land and services, housing institutions were duplicated in terms of race (previous own affairs administrations) and in terms of geography (for example, between former national states and self-governing territories). The structures set up by the apartheid policy also left an urban landscape of black townships and settlements on the peripheries of cities alongside so-called coloured and Indian areas which served as a 'buffer' for wealthier white areas.[143] In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional*

[137] Quoted by Cohen 134.
[138] The preamble to the Housing White Paper stated as follows: 'Housing the Nation is one of the greatest challenges facing the Government of National Unity. The extent of the challenge derives not only from the enormous size of the housing backlog and the desperation and impatience of the homeless, but stems also from the extremely complicated bureaucratic, administrative, financial and institutional framework inherited from the previous government.' See also Gardner 87-88.
[139] The New Housing and Policy Strategy for South Africa: White Paper, GN 1376 in GG 16178, 23 December 1994 (Housing White Paper).
[140] Housing White Paper para 1.
[141] Housing White Paper para 3.1.4.
[142] Pienaar 347.
[143] Wickeri 10 comments that this apartheid structure also included a poor white 'buffer' which protected the wealthy white areas from the coloured and Indian settlements and further down the line, black areas.

Metropolitan Council,[144] Kriegler J captures the tragic and absurd results of such structures:

> '[S]prawling black townships with hardly a tree in sight, flanked by vanguards of informal settlements and guarded by towering floodlights, out of stonethrow reach. Even if only a short distance away, nestled amid trees and water and birds and tarred roads and paved sidewalks and streetlit suburbs and parks, and running water, and convenient electrical amenities … we find white suburbia.'[145]

The situation was made worse for the ANC by their very own tactic in the 1980s – that of encouraging a 'culture of non-payment' of services by black South Africans during apartheid to cripple the state.[146] This culture continued in the informal settlements.

The new government thus sought to address these issues in a 1994 housing summit that brought together representatives of the government, the homeless, the financial sector and NGOs.[147] The goals set out in the ANC's election manifesto (*inter alia* the delivery of one million new housing units within five years) were to be met by the Reconstruction and Development Programme that aimed to build and deliver low-cost housing to the very poor.[148]

The housing crisis was so acute that the right to have access to adequate housing was constitutionalised in the final Constitution of South Africa in 1996[149] and both the courts and a new body created by the Constitution,

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[144] 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).
[145] *Fedsure* para 122.
[146] Cohen 134. See also Friedman 6.
[147] This housing summit resulted in the signing of the National Housing Accord (known as the 'Botshabelo Agreement') by a range of stakeholders. See McLean 55-3.
[148] Housing White Paper para 3.1.5.
[149] The drafters of the interim Constitution did not include housing as a right in its Bill of Rights. Since there was no direct housing right in the interim Constitution, it is interesting to see how the interim Constitution was used to defend occupiers from being evicted. In *The Transitional Metropolitan Substructure of Cape Town v The occupants of erven 182, 183, 194 and 195, Cape Town* (unreported case no 1791/1996 CPD) the occupiers relied on s24 of the interim Constitution. It was alleged that the local authority's decision to evict the occupiers

namely, the SAHRC, were given roles in enforcing socio-economic rights in South Africa.[150] However, the inclusion of the housing right, and indeed all socio-economic rights, was preceded by a debate about the wisdom and practicality of entrenching socio-economic rights in the final Constitution and on the possible forms such constitutionalisation could take.[151]

2.4 Inclusion and justiciability of socio-economic rights

Much of the debate on the inclusion and justiciability of socio-economic rights turned on institutional issues.[152] Those arguing against their inclusion posited that there was a danger that the doctrine of separation of powers would be infringed. This infringement would happen, so the argument went, because decisions on socio-economic rights required judicial involvement in functions which ordinarily resided in the legislature and the executive. These kinds of functions were characterised by significant policy and budgetary impact.[153] This potential involvement with policy and budget decisions dramatically departed from 'traditional' conceptions of the judicial role.[154] At this time, most

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from their homes constituted an administrative action which detrimentally affected their fundamental rights, particularly, s9 (right to life), s10 (right to dignity), s11 (right to freedom and security of the person) and s13 (right to privacy). In addition, the respondents contended that the occupiers enjoyed a legitimate expectation that their occupation would not be terminated without reasonable prior notice. See paras 18 and 19 of respondents' affidavit (Maphike).

[150] A technical committee advising the Constitutional Assembly on the Bill of Rights undertook a survey of international and comparative law finding that socio-economic rights, such as the right to housing, were included within the concept of 'universally accepted fundamental rights' for the purpose of Constitutional Principle II, IC, Schedule 4. However, in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR (CC) (*First Certification)*, the Court held at para 76 that housing *per se* was not a universally accepted fundamental right but nonetheless, found that the housing right was justiciable 'at least to some extent'.

[151] The 1992 *South African Journal of Human Rights* (Issue 4) features some important articles in this now-celebrated debate. See for example Davis, Mureinik and Haysom.

[152] Pieterse 383.

[153] Pieterse argues that the provisions of the 1996 Constitution require a dramatic reconceptualisation of both the operation of separation of powers generally and of the role played by the judiciary within the doctrine. This argument is similar to Liebenberg's editorial in (1999) 1 *ESR Review* where she argues that there is a need to move away from formalistic conceptions of the doctrine of separation of powers in order to promote a 'co-operative dialogue' between different public institutions. This would pave the way for creative and effective remedies to deal with violations of socio-economic rights without one branch of government usurping the powers and functions of another.

[154] Traditional conceptions of the role have been described as dealing with individuals rather than general cases.

countries had confined themselves to the constitutional entrenchment of civil and political rights. Those countries which had included socio-economic rights included them as 'guiding principles'. These 'guiding principles' assisted courts in the interpretation of the properly enforceable civil and political rights, rather than making socio-economic rights directly enforceable.[155] By making socio-economic rights directly enforceable, it was feared that courts 'might become too much like government'.[156]

This led to objectors then (and even now) raising the issue of the justiciability[157] of socio-economic rights. The focus, typically, was on their legitimacy (ie. whether their nature and content is suitable for inclusion in a constitution) and on whether the courts were institutionally competent to enforce them.[158] Legitimacy-based arguments, similar to those regarding the separation of powers doctrine, claimed that socio-economic rights were 'choice-sensitive' issues that were better left to political rather than legal deliberation.[159] Competency-based arguments rested on the institutional competence of the judiciary and the limited processes of adjudication. These arguments referred to the fact that judges are not economists or public policy experts and courts are regarded as ill-suited to evaluate and choose between various – equally valid and equally complex – policy options; a weakness exacerbated by their lack of political accountability.[160] Another problem

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[154] See Rycroft (1988) 268.

[155] Iles 448-449. For example, India, Namibia and Uganda have constitutions with guiding principles. Today, most national constitutions provide for some socio-economic rights. Only a handful of states in Africa – notably Botswana, Nigeria and Tunisia – do not explicitly guarantee any socio-economic rights. For a short but interesting discussion on the effect of colonial traditions on the inclusion of socio-economic rights, see Viljoen 7.

[156] Rycroft (1988) 268.

[157] Scott and Macklem 17 broadly define justiciability as 'the extent to which a matter is suitable for judicial determination'. 'Justiciability' should be distinguished from the implementation of a court's decision. In this context, Viljoen 6 notes: 'A court may, for example, declare that people are entitled to basic housing, but these people remain without houses if the government does nothing to give effect to that order.'

[158] Pieterse 389.

[159] Davis 478-479. This argument is similar to the fear expressed by Rycroft *viz.* that the judiciary might 'become too much like government.' It was also argued that the socio-economic rights typically related to broader ideological concerns on redistribution of wealth and state intervention in market economies. See Pieterse 389.

[160] See Mureinik 466-468 regarding problems posed by 'polycentricity'. Lon Fuller used this term to describe decisions that affect an unknown but a potentially vast number of interested parties and that have many complex and unpredictable social and economic repercussions, which inevitably vary for every subtle difference in the decision. See Pieterse 392-393. See

identified was the fact that the judiciary was seen as unable to execute its findings itself. In these circumstances, the judiciary would have to be dependent on executive co-operation for its judgments to have any credibility or impact on reality.[161]

Responses to these issues have been wide and varied. For the purposes of this research, these responses are confined to those raised by the Constitutional Court during the certification process of the Constitution and thereafter. In the *First Certification* judgment, the South African Institute of Race Relations, the Free Market Foundation and the Gauteng Association of Commerce and Industry[162] raised the separation of powers, legitimacy and competence arguments.

In response, the Court pointed out that the enforcement of many civil and political rights such as equality, freedom of speech and the right to a fair trial also often had budgetary implications and the inclusion of such rights would not automatically result in a breach of the doctrine of separation of powers.[163] The fact that socio-economic rights will 'almost inevitably give rise to budgetary implications' is not 'a bar to their justiciability. At a minimum, socio-economic rights can be negatively protected from proper invasion.'[164] However, the court did observe that socio-economic rights 'are, at least to some extent, justiciable.'[165] This opaque observation by the court resulted in the issue being raised again by parties in *Minister of Health and others v Treatment Action Campaign and others* (*TAC*) despite Yacoob J's statement in an earlier matter:

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also O'Regan (1999) 2 where she uses Fuller's metaphor of a spider's web to describe the concept of polycentricity.

[161] Pieterse 394. In response to the concerns about the 'support structure' for socio-economic rights, Tushnet 4 submits that civil society can sometimes supply this. He gives the example of the *TAC* case (*Minister of Health and others v Treatment Action Campaign and others* 2002 (5) 721 (CC); 2002 (10) BCLR 1033 (CC) which was litigated in the name of the Treatment Action Campaign, described by some as South Africa's most well-organised civil society group.

[162] Liebenberg 33-4.

[163] *TAC* para 77.

[164] *First Certification* para 78.

[165] *First Certification* para 78.

> 'The issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the Certification judgment.' [166]

In *TAC*, the Court's response to this issue was to describe the role of the courts by holding that although the courts are 'ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community', nevertheless, 'the Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.'[167] The Court further held that such determinations of reasonableness may have budgetary implications, but that they are not, in themselves, directed at rearranging budgets, and in this way 'the judicial, legislative and executive functions achieve appropriate constitutional balance.'[168]

It appears from the reasoning of the Constitutional Court in the *First Certification* and the *TAC* judgments that the budgetary implications of enforcing socio-economic rights are not, in themselves, a reason for judicial abstention, but may influence the standard of review applied in particular cases.[169] In *Khosa and others v Minister of Social Development and others; Mahlaule and another v Minister of Social Development and others* (*Khosa*)[170] Mokgoro J set out the circumstances where such budgetary implications may affect the standard of review applied:

> 'When the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights, they have to be taken into account along with the availability of human and financial resources in

[166] *Grootboom* para 20.
[167] *TAC* para 38.
[168] *TAC supra.*
[169] Liebenberg 33-5.
[170] 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

determining whether the state has complied with the constitutional standard of reasonableness'[171]

2.5 Conclusion

Where do these contextual discussions lead us? First, any meaning and content to the housing right would need to take international law into account when interpreting the Bill of Rights.[172] It can be concluded that the meaning given to a housing right by the ICESCR Committee (in General Comments 3, 4 and 7) is a vital tool to the state in drafting legislation, and any court when attempting to give meaning to the South African housing right. It is also clear from the international law that affirming the dignity of the individual is paramount in any attempt to interpret the housing right.

Second, the particular historical background of the housing right plays an important role in its interpretation. A purposive interpretation will therefore take into account a provision's history and the desire not to repeat that history when determining the meaning of a constitutional provision.

Third, budgetary implications and other objections may be taken into account by the courts where such budgetary implications affect the rights to life, dignity and equality. In a short overview of the history of housing, it is clear that housing for the majority of the population was undignified, unequal and, at times, life threatening. In these circumstances, it is imperative that the standard of review applied to the housing right take budgetary implications into account where appropriate – especially when dealing with those in desperate need.

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[171] *Khosa* para 44. For example, see Scott and Macklem 1, Sachs 1381 and Kende 617. The views expressed in this debate fall along a spectrum from complete agreement to complete disagreement. One view is that socio-economic rights are superior to civil and political rights in the hierarchy of values. The opposing view is that civil and political rights are the only legitimate rights and that socio-economic rights undermined individual freedom, interfered with free markets by justifying massive state intervention in the economy, and provided an excuse to ignore or even violate civil rights. This opposing view has largely been rejected in South Africa, as set out in the text above.

[172] Section 39(1)(b) of the Constitution provides that a court, tribunal or forum must consider international law when interpreting the Bill of Rights.

In *Khosa*, Mokgoro J held: 'In dealing with the issue of reasonableness, context is all important'.[173] It is, therefore, with these two contextual factors in mind that we turn back to the question of the meaning and content given to the housing right by the state in chapter 3 and, importantly, by the courts in chapter 4.

[173] *Khosa* para 40.

Chapter 3:
National legislative and policy framework for housing

3.1 Introduction

Before the new political dispensation in 1994, several different Acts based on racial grounds governed housing. By the early 1990s, the Housing Act[1] was the principle statute regulating housing, while the Community Development Act,[2] as well as several other Acts,[3] regulated housing for black South Africans. These separate pieces of legislation were blatantly discriminatory and cumbersome. It was clear that new legislation and policies were needed to give effect to the new housing right as contained in the new Constitution. Indeed, the Constitution required the state 'to take reasonable *legislative and other measures*, within available resources, to achieve the progressive realisation of this right.'[4] This legislation and policy framework is set out in this chapter, with particular emphasis on the role of local government in realising the housing right. Measures adopted to budget for and spend on the housing right are also set out, as such legislation is integral for the housing right to be realised.

3.2 A New Housing Policy and Strategy for South Africa (White paper)[5]

The main legislative and policy instruments drafted to give effect to the s26(1) and s26(2)[6] of the Constitution and related provisions, post-1996, were the

[1] Act 4 of 1966.
[2] Act 3 of 1966.
[3] Development and Housing Act 103 of 1985; Housing Act (House of Representatives) 2 of 1987; Development Act (House of Representatives) 3 of 1987; and Housing Development Act (House of Delegates) 4 of 1987.
[4] Section 26(2) of the Constitution. My italics.
[5] 23 December 1994, GG 16178.
[6] The legislation enacted to ensure that no-one may be evicted from his or her home (in terms of s26(3) of the Constitution) is recognised as an important facet of the housing right, especially the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. However, given the focus of this dissertation, this legislation is considered only in chapter 4 insofar as it is necessary to understand the context of the housing right and the eviction proceedings.

Housing Act[7] and the National Housing Code enacted thereunder.[8] However, before the housing right was constitutionalised, the December 1994 Housing White Paper contained many of the principles, goals and strategies of international law described above, and the Housing Act to come.

This was the first time in the history of the country that an overall vision, strategy and plan for housing applicable to all, was developed for the nation.[9] The White Paper committed government to establishing viable socially and economically integrated communities, situated in areas that allow convenient access to economic opportunities as well as health, educational and social amenities. The White Paper further asserts that all South Africa's people 'will have access to a permanent residential structure with secure tenure ensuring privacy and providing adequate protection against the elements; potable water; and sanitary facilities including waste disposal, and domestic electricity supply.'[10] This assertion was later included in the Housing Act and affirmed in the National Housing Code, with minor changes.[11]

The White Paper envisaged that the national sphere of government would, *inter alia,* set broad national housing delivery goals, determine a broad national housing policy, adopt or promote legislation to give effect to national housing policy and establish a national institutional and funding framework for housing.[12] Provincial government would play a critical role in ensuring effective and sustained delivery, setting provincial housing delivery goals,

[7] Act 107 of 1997.
[8] In terms of s4 of the Housing Act, the National Minister of Housing is under a statutory duty to develop, adopt, and publish a national housing code – a comprehensive housing policy that must be used at national, provincial and local government levels.
[9] Gutto para 11.
[10] White Paper para 4.2.
[11] 'Housing development' in the Housing Act is defined as: 1(vi) '… the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to: (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and (b) potable water, adequate sanitary facilities and domestic energy supply.' The National Housing Code affirms this definition by stating that this definition 'is our National Housing Vision'. See National Housing Code para 2.1.
[12] White Paper para 5.2.1.

determining provincial housing policy and playing an oversight role.[13] In respect of local government, the White Paper specifically recognised that the physical processes of planning and housing is 'very much a local community matter'[14] and 'should essentially be driven at a local and municipal level'.[15] It also recognised that local government has an important role to play in enabling, promoting and facilitating the provision of housing to all segments of the population in areas under its jurisdiction. Interestingly, the White Paper warned that 'the absence of legitimate, functional and viable local authority structures will jeopardise both the pace and quality of implementation of housing programmes.'[16]

3.3 Housing Act 107 of 1997

The Housing Act legislates and extends the provisions set out in the White Paper. Its point of departure is prioritising the needs of the poor,[17] consulting with individuals and communities affected by housing development[18] and regulating affordable and sustainable housing development[19] through the principles of co-operative government.[20] While the Housing Act lays down these general principles for housing development, it is the Housing Code (enacted under s4 of the Housing Act) which details the actual provision of housing.[21]

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[13] White Paper para 5.2.2.
[14] White Paper para 5.2.3.
[15] White Paper para 4.1.
[16] White Paper para 5.2.3.
[17] Housing Act s2(1)(a).
[18] Housing Act s2(1)(b).
[19] Housing Act s2(1)(c).
[20] Housing Act s2(1)(h)(ii).
[21] The Housing Act contains no information on the actual provision of housing and, after reading the Act, a lay person will be none the wiser as to how housing delivery is carried out – this being set out in a separate policy document: the Housing Code. McLean 55-4 (correctly in my opinion) raises the following concern: 'The authorisation, by the Housing Act, for virtually all rules pertaining to housing to be contained in the Housing Code – whose terms can be altered by ministerial fiat – is undesirable.' She opines that this results in 'the inversion of the usual relationship between policy and legislation.' In addition, she questions whether it is democratically and constitutionally appropriate that most, if not all, of the housing development framework is contained in policy rather than in legislation. This issue is most apparent when attempting to ascertain the status of a refined and renovated housing policy: 'Breaking New Ground: The Comprehensive Plan for the Creation of Sustainable Human Settlements' introduced in 2004. This policy has significant implications for the Housing Act and the Housing Code but at the date of writing, both the Housing Act and the Housing Code

The Housing Code in turn, sets out the national housing programmes, including the Housing Subsidy Scheme (HSS), the Discount Benefit Scheme and the Hostel Redevelopment Programme.[22] In terms of this Code, low-income housing development mostly takes place through the HSS, predominantly in the form of a once-off capital grant through which developers provide housing to be allocated to beneficiaries who meet the qualifications set out in the Housing Code.[23] Currently, this housing subsidy is set at R36 528 per household.[24] Importantly, the Code was revised in 2004 to include housing programmes dealing with 'emergency housing circumstances'[25] and 'upgrading informal settlements'. The former programme (which was included in housing policy as a direct response to *Government of the Republic of South Africa and others v Grootboom and others*[26]) is discussed in chapter 4 below.

While s2(1)(h)(i) of the Housing Act states that *all levels* of government must respect, protect, promote and fulfil the rights in chapter 2 of the Constitution, the primary focus of the Act is on the role to be played by each sphere of government in the provision of housing. The Act sets out that parts 2, 3 and 4 of the Housing Act set out the roles and responsibilities of national, provincial and local government respectively. This role definition in the Act confirms the fact that local government is an important role player in realising s26 and is repeated in the Housing Code as follows:

> 'A critical policy challenge for the governance of housing is to facilitate the maximum devolution of functions and powers to provincial and local government spheres, while at the same time, ensuring that national

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have yet to be revised to take this new policy into account. Given the focus of this dissertation on housing for those in dire need, no attempt has been made in this study to interrogate this new policy. In any event, it is noted in the Summary Report on Rapid Assessment of Service Delivery and Socio-Economic Survey (2007) at 13 that the Eastern Cape has not used this new policy due to capacity constraints and will, in all likelihood, not fully utilise this new policy 'over the next three years'.

[22] Housing Code (http://www.housing.gov.za/ accessed on 9 December 2006).

[23] *Ibid.* See also McLean 55-6. For a list of qualifications for the latest HSS, see chapter 1.

[24] See Annexure B which sets out the different types of subsidies and subsidy bands.

[25] Known as the National Housing Programme: Housing Assistance in Emergency Circumstances (ECP).

[26] 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

processes and policies essential to a sustainable national housing development process are in place. The Housing Act … determines roles in respect of such devolution, and defines key national and provincial responsibilities with respect to empowerment at the provincial and local spheres of government.'[27]

The roles for each sphere of government are set out as follows:

- National government must formulate a sustainable housing policy and monitor implementation through the promulgation of the National Housing Code and the establishment and maintenance of a national housing data bank and information system.[28]

- Provincial government must create an enabling environment by doing everything in its power to promote and facilitate the provision of adequate housing in its province within the framework of national housing policy. Provincial government, through Provincial Advisory Councils,[29] must allocate housing subsidies to municipalities and support those municipalities. It also facilitates the transfer of ownership of council housing to occupiers.[30]

- Part 4 of the Act addresses the functions of local government and requires every municipality to set out housing delivery goals, to identify and designate land for these purposes and to initiate, plan, co-ordinate, facilitate, promote and enable appropriate development in its jurisdiction.[31] The Act makes it clear that any reference to a municipality in the Act

[27] Housing Code 8.
[28] Part 2, ss 3-6 of the Housing Act.
[29] Section 8 of the Housing Amendment Act 4 of 2001 replaced the original Provincial Housing Development Boards with Provincial Housing Advisory Councils. The establishment of these councils is discretionary. For the situation in the Eastern Cape, see chapter 6 below.
[30] Part 3 of the Housing Act.
[31] This 'decentralisation' seems to be in line with the Habitat Agenda which refers to the need for governments to 'strive to decentralise shelter policies and their administration to subnational and local levels within the national framework' and 'provide institutional support for facilitating participation and partnership arrangements at all levels.' See Habitat Agenda para 66*ff.*

includes a local council, a metropolitan council, a metropolitan local council, a rural council and a district council.[32]

In terms of s9(1) of the Act, the responsibilities listed above in respect of housing must be included in every municipality's process of integrated development planning (IDP).[33] Municipalities must, as part of their IDP process, take reasonable and necessary steps within the framework of national and provincial housing legislation to fulfil a number of specific duties. Local government must ensure that:

- the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
- conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed; and
- services in respect of water, sanitation, electricity, roads, storm-water drainage and transport are provided in a manner which is economically efficient.[34]

In addition to these duties, a municipality needs to:

- set housing delivery goals in respect of its area of jurisdiction;
- identify and designate land for housing development;
- create and maintain a public environment conducive to housing development which is financially and socially viable;
- promote the resolution of conflicts arising in the housing development process;

[32] The definition of municipality in the Act refers to 'municipality' as defined in s10B of the Local Government Transition Act 209 of 1993. Section 10B states that reference to a 'municipality' includes a local council, a metropolitan council, a metropolitan local council, a representative council, a rural council and a district council.
[33] See also s2(1)(c)(iii) of the Housing Act which sets out that national, provincial and local government must ensure that housing development is based on integrated development planning. See para 3.4 below for an explanation of the concept of integrated development planning.
[34] Section 9(1)(a)(i)-(iii) of the Housing Act.

- initiate, plan, coordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction;
- provide bulk engineering services, and revenue generating services in so far as such services are not provided by specialist utility suppliers; and
- plan and manage land use and development.[35]

Section 9(2)(a) allows any municipality to participate in a national housing programme in accordance with the rules applicable to such programme by promoting a housing development project by:

- promoting a housing development project by a developer;
- acting as developer in respect of the planning and execution of a housing development project on the basis of full pricing for cost and risk;
- entering into a joint venture contract with a developer in respect of a housing development project;
- establishing a separate business entity to execute a housing development project;
- administering any national housing programme in respect of its area of jurisdiction in accordance with s10;
- facilitating and supporting the participation of other role players in the housing development process.[36]

In addition, s10 allows a municipality to administer any national housing programme in respect of its area of jurisdiction, upon application to the MEC.

The vast and specific powers enumerated above clearly illustrate an overall responsibility by local government for the management and co-ordination of housing development within its area of jurisdiction. This approach appears in line with local government's developmental mandate, as well as local

[35] Section 9(1)(b)-(h) of the Housing Act.
[36] Section 9(2)(a)(i)-(vi) of the Housing Act.

government's specific knowledge and interaction with its community.[37] Thus, the principle behind the allocation of roles in the Act is that the sphere 'closest to the people' should perform government functions. Undoubtedly, a strong local government with appropriate capacity is needed to fulfil the responsibility given to it by the legislation.

3.4 Integrated Development Planning of local government (IDP)

Since part 4 of the Housing Act requires the housing responsibilities of local government to be included in the IDP process, it is necessary to consider the legal framework for such planning and how housing should feature in such a plan.[38]

Section 23 of the Municipal Systems Act[39] states:

'(1) A municipality must undertake developmentally-oriented planning so as to ensure that it—

(a) strives to achieve the objects of local government set out in section 152 of the Constitution;

(b) gives effect to its developmental duties as required by section 153 of the Constitution; and

[37] The IDP Guide Pack, Guide V, para 4.2.8 sets out that local government is best suited to assess the needs, opportunities, capacities and resources available so as to set appropriate housing delivery goals.

[38] The process of integrated development planning was first launched in the White Paper on Local Government in March 1998 and included as a central tenet of the Municipal Systems Act 32 of 2000. In the White Paper, the IDP process was presented as one of the most important tools for municipalities to fulfil their developmental mandate, particularly in regard to the need to coordinate planning between the three spheres of government. In the Integrated Development Planning for Local Authorities: A User-friendly Guide (Department of Constitutional Development) Integrated Development Planning is seen (at 2-6) as a process by which future development is achieved in an orderly, sensible and manageable manner, and financial resources for such development are allocated in a disciplined and responsible way.

[39] Act 23 of 2000. This Act replaced The Local Government Transition Act 209 of 1993 which also required municipalities to prepare integrated development plans and financial plans in respect of their powers, functions and priorities.

(c) together with other organs of state, contributes to the progressive realisation of the fundamental rights contained in sections 24, 25, *26*, 27 and 29 of the Constitution.'[40]

Section 24 of the Municipal Systems Act requires that planning undertaken by a municipality must be aligned with, and complement, the development plans and strategies of other affected municipalities and other organs of state so as to give effect to the principles of co-operative government contained in s41 of the Constitution, specifically national and provincial development programmes as required in s153(b) of the Constitution.[41]

The drafting of an IDP is specifically addressed in the Municipal Systems Act due to its status as the 'principle strategic planning instrument'[42] of a municipality. The council must adopt a document that sets out how it intends to go about drafting, adopting and reviewing the IDP. The drafting process must follow this document in terms of time frames and must allow for the local community to be consulted and be allowed to participate in identifying needs and priorities of the municipality. Significantly, the process must identify all provincial and national plans and planning requirements that are binding on the municipality (*viz.* part 4 of the Housing Act). Section 29 of the Municipal Systems Act sees the planning document as more than simply a 'plan of action' as it envisages that provincial government can use it to check whether the municipality has made provision for sufficient mechanisms for consultation with provincial government in the IDP formulation.

In terms of regulation 2 of the Local Government: Municipal Planning and Performance Management Regulations 2001,[43] a municipality must review its IDP annually in accordance with its system of performance management.[44]

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[40] My italics.
[41] See De Visser 220 where he states that the need for co-operation and the need to be developmentally orientated distinguish IDP planning from general strategic planning models that are usually used by government and the corporate sector.
[42] Section 35(1) of the Municipal Systems Act.
[43] GG 22605, 24 August 2001.
[44] The regulations require that each municipality have a system of performance management, according to which the municipality assesses whether the goals of the IDP have been met. This is done by a method of setting general key performance indicators for a municipality

Once the IDP has been approved by the municipal council, s31(c) of the Municipal Systems Act provides for the submission of IDPs to each province's MEC for local government.[45] It envisages that the MEC assesses a particular IDP to check, *inter alia*, whether the IDP is aligned with the strategies of other municipalities, and those of the provincial government or national government. Should the IDP conflict with any of these strategies, the Act provides that the MEC can request that the municipality change its IDP in accordance with his or her proposals.[46]

3.5 Legislation and policies regulating spending on housing

In its Third Annual Economic and Social Rights Report, the SAHRC stated:

> 'It is incumbent that the state devises sound macroeconomic, fiscal and monetary policies so as to maximise the revenue pool earmarked for the delivery of socio-economic rights [and to] manage public finances in an efficient and accountable manner so as to maximise the ability of the service agencies to deliver services.'[47]

Thus measures adopted to budget for socio-economic rights (i.e. the legislation and policies that relate to budget spending) should also be discussed and reviewed. This, it is submitted, is a correct and pragmatic approach to realising socio-economic rights, especially in light of the fact that the fiscal system itself is set out in the Constitution.[48] Without reviewing

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which the Minister will compile and publish in a report on the performance of municipalities in terms of these indicators.

[45] In terms of housing and the Eastern Cape, this section takes on an added significance as the MEC for local government is also the MEC for housing (under the title: MEC for Housing, Local Government and Traditional Affairs).

[46] Should the municipality refuse, s33 of the Act provides for a dispute resolution procedure. There have been no reported instances where such dispute resolution has taken place.

[47] Third SAHRC Report 384.

[48] Ajam and Murray 2-3 point out that most other countries have not considered it necessary to craft specific fiscal constitutions, and fiscal policy is generally governed mainly by ordinary budget laws and regulation. It is thus significant that the framers of the Constitution thought it necessary to include the fiscal system in the Constitution. According to Ajam and Murray: 'The fiscal constitution itself provides the context for analysing the interaction between courts and the intergovernmental fiscal system.' In particular, Ajam and Murray 6 (correctly in my opinion) assert: 'Because intergovernmental fiscal structures and processes are outlined in

measures to control the budgeting and planning for the housing right, the realisation of the housing right by the state (and local government in particular) could remain an empty promise.[49] As a result, a review of legislation affecting the housing right cannot exclude measures adopted to budget for such right and the spending of such budget.[50]

Chapter 13 of the Constitution sets out the fiscal system of South Africa and binds all spheres of government to the commitments of equity, transparency, accountability and operational efficiency in this fiscal system. These commitments are important, given the requirement in many socio-economic rights that these rights are to be progressively realised 'within available resources'.[51]

Section 214 and s227(1) of the Constitution require an Act of Parliament to provide for the equitable division of nationally raised revenue among national, provincial and local governments. This Act is the Division of Revenue Act (DORA) which is enacted annually, with the budget, to give effect to the Constitution.[52] The Act sets out the equitable allocations for each sphere of government, the division of revenue between the nine provinces, and detailed schedules of all other allocations from national departments to provinces and municipalities. Both the Financial and Fiscal Commission (FFC)[53] and the

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the Constitution, and because the rights enshrined in the Bill of Rights are justiciable, both fall within the jurisdiction of the court system and, finally, the Constitutional Court.' Thus, it is submitted that the intergovernmental fiscal system must ensure co-operative service delivery in support of the progressive realisation of socio-economic rights.

[49] To this end, the Constitution provides that the Auditor-General must audit and report annually on the 'accounts, financial statements and financial management of all government departments' so as to ensure that government departments are properly managed and that their resources 'are procured economically and utilised efficiently and effectively.' See s20(3) and s28(2)(a) of the Public Audit Act 25 of 2004. See also s10(4)(g) and s12(2)(e) of the Housing Act which set out that the Auditor-General must audit the books and balance sheets of the various organs of state involved in housing, specifically municipalities.

[50] This approach is not novel. Ajam and Murray 18 note that the German courts seem to have been extremely active in their intergovernmental fiscal system.

[51] For example, s26(2), s27(2) and s29(1)(b) of the Constitution.

[52] See, for example, Division of Revenue Act 1 of 2007.

[53] The FFC is an advisory body established in terms of s220 of the Constitution. Its mandate is to make recommendations on financial and fiscal matters to Parliament, the provincial legislatures, and any other institutions of government when necessary. It is also mandated to facilitate co-operative government on intergovernmental fiscal matters. The powers and functions of the FFC are contained in the Constitution and the Financial and Fiscal Commission Act 99 of 1997.

South African Local Government Association (SALGA)[54] are consulted in the preparation of DORA.

In particular, the Housing Code requires national and provincial government to develop a multi-year plan called the medium term expenditure framework.[55] This provides a plan for the delivery of houses that is mindful of housing demand and potential supply, in terms of available funds for a period of three years. The Minister of Housing thereafter prepares a multi-year plan on the basis of multi-year plans prepared by provincial governments.

In addition to the Housing Code, it is important to note the key pieces of legislation governing the efficient and effective delivery of socio-economic rights (and public service delivery in general). These are the Public Finance Management Act (PFMA)[56] and the Municipal Finance Management Act (MFMA).[57] In addition, supporting regulations and implementation guidelines regulate the public expenditure management and accountability.[58] In the

[54] SALGA is an organisation recognised by the Organised Local Government Act 52 of 1997 as a representative of organised local government. This is in pursuance of s163 of the Constitution which provides that an Act of Parliament must cater for the recognition of national and provincial organisations representing municipalities, and determine procedures by which local government may consult the national and provincial government, designate representatives to participate in the National Council of Province (NCOP) and nominate persons to the FFC.

[55] Housing Code para 3.2.

[56] Act 1 of 1999.

[57] Act 56 of 2003. In terms of the public finance framework, each provincial department has to produce an effective strategic plan. The process of drawing up this plan involves identifying the most pressing social needs of the area, identifying programmes and activities to practically address these needs and then proposing a budget and identifying service delivery indicators for implementing programme activities. It is the task of the provincial legislature to endorse such strategic plan and it is the task of provincial treasury to allocate a budget to that department. See PSAM Submission 11.

[58] The Intergovernmental Fiscal Review for 2003 at 161 assists in understanding the respective roles of provincial and local government in regard to practicalities of providing housing in a particular province. In relation to provincial government, it states that provincial government is responsible for 'developing provincial housing policy within the national framework' which means that the provincial government must 'legislate on housing matters that fall within their provincial boundaries … promote and coordinate housing development and implement national and provincial housing programmes within the framework of national housing policy. *They approve housing subsidies and projects and provide support for housing development to municipalities*'. My italics. In terms of local government responsibilities, the Review states: 'Municipalities ensure that, within the framework of national and provincial legislation and policy, constituents within their jurisdictional areas have access to adequate housing. They initiate, plan, coordinate and facilitate appropriate housing development within their boundaries … they provide bulk engineering services like road, water, sanitation and electricity … prepare local housing strategy and set goals … set aside, plan and manage land for housing.'

housing sphere, these regulations and implementation guidelines seek to ensure that the requirements of the Housing Act are met; namely, that housing development is 'economically, fiscally, socially and financially affordable and sustainable,'[59] and is 'administered in a transparent, accountable and equitable manner, and uphold the practice of good government.'[60] These sections basically require that a Provincial Department plans and spends the funds reasonably. The question is thus: has the state spent its 'available resources' (using the terminology of s26(2) of the Constitution) reasonably and, in so doing, progressively realised the housing right?

What would be reasonable in the circumstances? It is clear that the Provincial Department needs to monitor and account for the transfer of housing subsidies to local government so as to ensure the efficient and effective use of its resources. This naturally follows from the Provincial Department's responsibility for transferring and monitoring funds (received by the National Department of Housing) in both the Housing Act and supporting policy (including the ECP). More specifically, a Provincial Department has to follow the DORA framework.[61] In terms of DORA, the Public Finance Management Act (PFMA)[62] and the Housing Act, a Provincial Department assumes certain responsibilities for monitoring resources set aside for housing subsidies. Local government also assumes certain responsibilities for monitoring and accounting for housing subsidy resources.

Once the financial year begins and money has been transferred to various provincial departments, treasury regulations[63] promulgated in terms of s76 of the PFMA require all departments to submit regular monthly monitoring reports (also known as in-year monitoring reports – IYMs) to the Housing MEC and the Provincial Treasury.[64] This mechanism ensures that the

[59] Section 1(c)(ii) of the Housing Act.
[60] Section 1(c)(iv) of the Housing Act.
[61] See also s30(1)(i) of the PFMA read with regulation 8.4.1 of the Treasury Regulations (as amended) and Treasury Instructions K5.1 and 5.4.
[62] Act 1 of 1999.
[63] See Government Notice R225, Government Gazette 27388, 15 March 2005.
[64] National Treasury: Best Practice Guidelines 8.

Department complies with the Division of Revenue Act (DORA) framework.[65] More specifically, these IYMs ensure that Provincial Treasury can make adjustments to the consolidated budgets of all the departments throughout the year to avoid either over- or under-expenditure in the Province. The IYM process also allows for remedial steps to be put in place at an early stage.[66] However, to measure over- or under-expenditure requires that actual expenditure reported to the Provincial Treasury is accurate and comparable and is accounted for in the appropriation accounts of the Department. The IYMs are also to keep track of actual expenditure made on transfer payments which, in the case of the Provincial Housing Department, consists mainly of housing subsidies. In other words, the Provincial Housing Department has to account for how much money has been transferred to a municipality, how much of that money has been spent, how much is unspent, etc. In addition to the safeguard mechanism provided by the process of IYM reports, DORA requires that all conditional allocations (which include housing subsidies by virtue of schedule 5 of DORA) are subject to strict reporting to National Treasury and other oversight mechanisms.[67] If this reporting is not complied with or the management of funds is unreasonable and affects the implementation of the housing programme, it is submitted that such mismanagement would constitute a breach of s26 of the Constitution.

3.6 Section 26 and the responsibility of the state

Section 26(2), s7(2) and s8(1) in the Bill of Rights all refer to the 'state' as the responsible agent for realising the right to have access to adequate housing either in:

[65] Act 1 of 2007. In terms of National Treasury: Best Practice Guidelines 9, these monthly reports must set out the following:

- The actual revenue and expenditure for that month in the format as determined by the national treasury.
- Projections of anticipated expenditure for the remainder of the current financial year in the format determined by the national treasury.
- Information of conditional grants received and actual spending against them.
- Information of all transfers.
- Any material variances and a summary of actions to ensure that the projected expenditure and revenue remain within the budget.

[66] Pillay Commission, Papadakis 44.

[67] See for example, ss10, 12 and 13 of DORA which indicate the elevated and restricted status of conditional allocations set out in schedule 5 of that Act.

(a) taking reasonable legislative and other measures within its available resources to achieve progressive realisation of this right;[68]

(b) respecting, protecting, promoting and fulfilling the rights in the Bill of Rights;[69] or

(c) simply by being bound by the Bill of Rights.[70]

None of the sections mentioned above prescribes the duty of housing (or any of the fundamental rights) to a particular sphere of government. Indeed, s239 defines 'organs of state' as including the national, provincial and local spheres of government.[71] No sphere of government can thus escape the general responsibility for realising the right to have access to adequate housing.

However, the question is: what is the extent of the duty of local government (which together with provincial and national government makes up the 'state'

[68] Section 26(2) of the Constitution: 'The *state* must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.' My italics.

[69] Section 7(2) of the Constitution: 'The *state* must respect, protect, promote and fulfil the rights in the Bill of Rights.' My italics. In *Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) (a matter concerning s27(1)(b) – the right to have access to sufficient food and water) Budlender AJ stated that the terms in s7(2) each has a specific meaning. The obligation to respect is a negative one that requires the state to refrain from infringing on existing socio-economic rights. In the context of housing this would mean that the state must not limit or take away people's existing access to housing, without good cause and without following proper legal procedure (see Brand 9-10). Where such limitation is unavoidable, the state must take steps to find alternative accommodation and must not place undue obstacles in the way of people gaining access to adequate housing. The obligation to protect requires the state to ensure that a framework exists to enable citizens to enjoy their rights without interference from others. De Vos comments that 'the obligation [to protect] is not to act positively in the sense of providing money or resources directly to individuals, but to protect individuals by creating a framework in which they will be able to realise their protected rights without interference from others' (see De Vos (1997) 83). Brand argues that the duty to protect is extended to the duty of the courts, through their powers of developing the common law and interpreting legislation, to strengthen existing remedies or developing new remedies for protection against private interference in the enjoyment of the right. Finally, the obligation to promote and fulfil both, comprise the duty to create an enabling environment for the enjoyment of socio-economic rights. This may require positive state action to assist and make provision for those that do not have the means to access basic services (Brand 10-11).

[70] Section 8(1) of the Constitution: 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and *all organs of state.*' My italics.

[71] Section 239: 'In the Constitution, unless the context indicates otherwise – … 'organ of state' means –
Any department of state or administration in the *national, provincial or local sphere of government.*' My italics.

referred to in s26(2), s7(2) and s8(1)) to realise the right to have access to adequate housing?

The answer ostensibly lies in Schedules 4 and 5 of the Constitution which set out the particular functional areas where each sphere of government has legislative competence. Section 156(1) of the Constitution sets out that a municipality has executive authority in respect of, and has a right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5, and any other matter assigned to it by national and provincial legislation. Schedule 4, Part B and schedule 5, Part B set out particular functional areas where local government has legislative competence. Local government's responsibilities include the provision of basic services such as water and sanitation services, electricity, refuse removal and public places. Housing, on the other hand, is *not* listed as a functional area of local government. It is listed as a functional area within the concurrent legislative competence of national and provincial government.[72]

Effectively, this means that housing priorities are set at national and provincial level. Given that housing does not fall within the competency set out in Part B of either Schedule 4 or 5, one may deduce that local government has no role in realising s26. On this basis, it may well be concluded that local government has a limited role to play in realising s26. However, the courts and most commentators agree that the Constitution does, in fact, impose a duty on local government for four reasons, namely,

- the principles of co-operative governance;
- the responsibility of local government for basic services;
- the nature of local government's developmental mandate;[73] and

[72] Housing delivery takes place on the basis of subsidy applications by local government to their respective provincial governments who judge these applications against their standards.
[73] The White Paper on Local Government in March 1998 effectively translated the objects of s152 and 153 of the Constitution into the term 'developmental local government' and defined the mandate of local government (at 17) as 'local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives.'

- the provisions setting out local government housing duties in supporting housing legislation and policy.

3.6.1 The principles of co-operative government

Despite the fact that housing forms only part of the national and provincial spheres' list of concurrent competencies, the Constitutional Court held in *Government of the Republic of South Africa and others v Grootboom and others*[74] that the duty to provide housing fell on all three spheres of government – national, provincial and local. Instead of attempting to delineate the responsibilities of the various spheres of government, the Constitutional Court reasoned that in view of the principles of co-operative government set out in Chapter 3 of the Constitution, policies and actions of all three spheres must be coordinated to give effect to s26.[75]

The principles of co-operative government set out that the three spheres of government are distinctive, interdependent and interrelated.[76] Co-operative government further requires that all three spheres must co-operate with one another in mutual trust and good faith by co-ordinating their action and legislation.[77] The Constitutional Court stated in *Grootboom*:

> 'All levels of government must ensure that the housing programme is reasonable and appropriately implemented. … Every step at every

[74] 2001 (1) SA 46 (CC); 2000 (11) BCLR 883 (CC) (*Grootboom).*
[75] *Grootboom* para 39*ff.*
[76] Section 40(1) of the Constitution. In *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at para 26, the Constitutional Court interpreted the words 'interdependence' and 'interrelated' as follows: 'All the spheres are interdependent and interrelated in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other. They are all interrelated. None of these spheres of government or any of the governments within each sphere have any independence from each other. Their interrelatedness and interdependence is such that they must ensure that while they do not tread on each other's toes, they understand that all of them perform governmental functions for the benefit of the people of the country as a whole. Sections 40 and 41 are designed in an effort to achieve this result.'
[77] Section 41(1)(h)(iv) of the Constitution.

level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.'[78]

The reality is thus: various spheres of government will perform various parts of a particular 'line function' of the government. As such, a strict separation of responsibilities and functions is usually impossible. It follows then, that subsequent jurisprudence in the High Courts[79] interprets local government's role in housing against a background of co-operative government.[80]

3.6.2 The responsibility of local government for basic services

International law recognises that services such as the provision of water, sanitation, electricity, refuse disposal and site drainage are inextricably bound to the provision of housing.[81] It will be recalled from chapter 2 that the International Committee on Economic, Social and Cultural Rights (ICESCR) defined 'adequate housing' to include sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.[82] In *Grootboom* the Court stated that the right to housing entailed more than 'bricks and mortar' and includes 'appropriate services such as the provision of water and the removal of sewerage.'[83] Most of these provisions are the responsibility of local

[78] *Grootboom* para 82. On the other hand, the Constitutional Court did sketch in broad terms the responsibilities of each sphere of government. It remarked that the national sphere is ultimately responsible for the provision of finances; the provincial government is responsible for the implementation of a housing programme; and local government needs to play a supportive role.
[79] See chapter 4 below.
[80] Co-operative government has also been reiterated in s3 of the Municipal Systems Act 32 of 2000. Section 3(3) of the Municipal Systems Act states: 'For the purpose of effective co-operative government, organised local government must seek to (a) develop common approaches for local government as a distinct sphere of government; (b) enhance co-operation, mutual assistance and sharing of resources among municipalities; (c) find solutions for problems relating to local government generally; and (d) facilitate compliance with the principles of co-operative government and intergovernmental relations.
[81] See chapter 4 below.
[82] In *City v Johannesburg v Rand Properties (Pty) Ltd and others* 2007 (1) SA 78 (W); 2006 (6) BCLR 728 (W) the Court stated at para 49: 'Housing forms an indispensable part of ensuring human dignity. "Adequate housing" encompasses more than just the four walls of a room and roof over one's head.'
[83] *Grootboom* para 35.

government as per Schedule 4, Part B and Schedule 5, Part B of the Constitution. The nature of these services is such that they cannot be performed without recourse to the right to housing.[84] In 2000, the national Department of Housing recognised the link between the provision of basic services and housing in its description of adequate housing in the National Housing Code:

> 'The establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to:
>
> - permanent residential structures with secure tenure, ensuring internal and external privacy and *providing adequate protection against the elements*; and
> - *potable water, adequate sanitary facilities and domestic energy supply.'*[85]

In the light of the link between basic services (the scheduled domain of local government) and housing (the scheduled domain of national and provincial government), it is inevitable that local government has a vital role to play in realising s26 of the Constitution.

[84] In *Ex Parte: Speaker of the Kwa-Zulu Provincial Legislature: In re Kwa-Zulu Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex Parte: Speaker of the Kwa-Zulu Natal Provincial Legislature: In re Payment of Salaries, Allowances and other Privileges to the Ingonyama Bill of 1995* 1996 (4) SA 563 (CC), the Constitutional Court found that items listed in the schedules also include matters incidental thereto. If basic services are inextricably bound to the provision of housing, then there may well be an overlap of functions. However, the court did not comment on what happens when items overlap with items ascribed to other spheres and cannot therefore assist in the area of housing.

[85] My italics.

3.6.3 Local government's developmental mandate

The notion of 'developmental local government' is closely linked to the realisation of socio-economic rights in the Constitution. The Constitution sets out a number of developmental objectives of local government in ss 152, 153 and 156.

Section 152

Section 152 of the Constitution specifies that local government must seek, *inter alia,* to promote social and economic development[86] and a safe and healthy environment.[87] Amongst local government's developmental duties is the duty to 'structure and manage its administration and budgeting and planning processes, to give priority to the basic needs of the community, and to promote the social and economic development of the community'.[88]

Meeting the 'basic needs of the community' is also the primary concern of socio-economic rights.[89]

Section 153

Section 153(a) of the Constitution explicitly requires that local government gives priority to the basic needs of the community. Adequate housing is not only a critical basic need but is also required for the satisfaction of other basic needs. This is evident in the comments made by the Committee on Economic, Social and Cultural Rights. Both the Housing Act[90] and the

[86] Section 152(c) of the Constitution.
[87] Section 152(d) of the Constitution.
[88] Section 153(a) of the Constitution. The final Constitution differs vastly from the interim Constitution in terms of duties of local government. In terms of the interim Constitution, the duty of local government was to effect service delivery only. In terms of ss152 and 153 of the Constitution, these duties now include the promotion of democracy, sustaining and improving an adequate standard of living, promoting a safe and healthy environment and the imperative to participate in national and provincial development programmes (i.e. co-operative government).
[89] Steytler (2004) 164.
[90] Act 107 of 1997.

Municipal Systems Act[91] support this contention. In the former Act, the preamble recognises that shelter as adequate housing fulfils 'a basic need'. The latter Act (which provides a broad normative framework for municipal service delivery of social and economic needs)[92] requires that the council of a municipality 'must undertake developmentally-orientated planning so as to ensure that it … together with other organs of state, contributes to the progressive realisation of the fundamental rights contained in ss24, 25, *26*, 27 and 29 of the Constitution.'[93]

De Visser goes as far as to argue that facilitating access to adequate housing is 'the *most fundamental aspect* of development'.[94] If this is true, the developmental mandate of local government *must* have housing as a central tenet.

3.6.4 Schedules 4 and 5 of the Constitution

The Constitution clearly provides that the state has a fundamental role and responsibility to implement legislative and other measures that will ensure that everyone will have access to adequate housing on a progressive basis. While schedules 4 and 5 set out the *legislative competence* of each sphere, the actual *role* of each sphere is contained in supporting housing legislation and policy where national government has assigned certain aspects of the housing right to local government. The allocation of this role in the Act is based on the principle that government functions should be performed at the lowest possible sphere, closest to the people. Notwithstanding the supporting housing legislation and policy, it is useful to consider recent commentary regarding the problematic nature of schedules 4 and 5 of the Constitution.

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[91] Act 32 of 2000.
[92] The preamble to this Act states that its objective is: 'To provide for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all.' De Visser 119 states that the Act is 'the ultimate translation of developmental local government into institutional reality.'
[93] My italics.
[94] De Visser 119. My italics.

In 2003 the Human Sciences Research Council was commissioned by the Department of Provincial and Local Government to consider changes to the schedules. Unfortunately, this review has been marked confidential.[95] However, judging from academic commentary on the schedules, it is inevitable that housing was discussed as a problematic area. Nothing (in the form of amendments to the schedules) has come from that review. Atkinson suggests that one of the reasons for the general lack of service delivery by municipalities is the fact that schedules 4 and 5 of the Constitution do not mention many of the new functions that municipalities have to perform, with the result that the allocation of powers and functions have depended on very loosely-articulated national and provincial departmental ideologies.[96] This could be true of the housing function where local government is expected to perform a range of functions without budget or capacity. Steytler contends that this results in 'not one of the responsible governments providing the service, to the prejudice of the citizens.'[97] This then further results in the national, provincial and local spheres of government pointing fingers at one another and shirking responsibility for lack of service delivery.[98] This attitude resonates in the affidavits submitted by state officials in the matter of *South African Rail Commuter Corporation v Unlawful Occupants of the Western Cape Commuter Area between Nolungile and Nonqkubela Stations, Khayelitsha,*[99] discussed in chapter 4.

Atkinson provides an example of this 'passing the buck' by citing a statement by the National Department of Housing in June 2005. In this statement, the Department of Housing acknowledged that protests were aimed at local government's apparent lack of service delivery regarding housing. However, the National Department of Housing pointed out that it 'has no jurisdiction over

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[95] See http://www.hsrc.ac.za/Research_Publication-3761.phtml (accessed on 12 February 2006).
[96] Atkinson (2006) 17.
[97] Steytler (2005) 278.
[98] *Ibid*. In Steylter's words, this results in 'a neat case of passing the buck.'
[99] See chapter 4 where the supporting affidavit of the City in this matter stated that any constitutional breaches were due either to lack of funding *or to breaches by other spheres of government.* An official from the provincial government in turn, argued in his supporting affidavit that it was bound by national policy alone and he was unable to do anything beyond that.

local government.'[100] This is, Atkinson opines, a remarkable statement since 'it creates the impression of far more municipal autonomy than exists in practice'.[101] The housing function has never been formally assigned to municipalities; with the result that there is a great deal of ambiguity regarding who is actually in charge of housing.[102]

Given these problems, De Visser suggests that housing should be a Schedule 4, Part B competency (i.e. falling under local government) given the developmental nature of housing.[103] However, he qualifies this statement by adding that provincial and national government should retain the supervisory framework through the application of s155(7) and s 155(6)(a).[104]

3.7 Conclusion

This chapter has sought to clarify the legislative framework set up by the state in order to realise s26. In particular, the related functions, powers and duties set out in legislation and policies were set out, particularly with regard to local government's duties. Measures adopted by the state to budget for s26 were also discussed as a necessary corollary to the realisation of the right.

While this chapter was largely descriptive, one major issue regarding local government emerges; that is, the location of the housing function in the

[100] This statement was made despite a resolution by the Housing MinMec that, until municipalities have the necessary capacity, 'provinces would remain fully in charge of the provision of housing, assisted by municipalities.' The Housing MinMec is not a statutory body but instead, is constituted in terms of the Housing Code, Part 2. It comprises the Minister of Housing and the nine MECs responsible for housing, as well as representatives of the organisation representing municipalities at national level, namely SALGA. Woolman, Roux and Bekink 14-26 describe a MinMec as an intergovernmental relation committee.
[101] Atkinson (2006) 17.
[102] *Local Government Briefing* June 2005.
[103] De Visser 119.
[104] Section 155(7) provides that the national government, subject to s44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in s156(1). Section 155(6) (a) sets out that each provincial government must provide for the monitoring and support of local government in the province.

Constitution is an 'area of discontent'.[105] As a result, commentators opine that this 'location' leads to the misconception that local government has either no role or an extremely limited role to play in implementing s26. Whether this misconception affects the actual implementation of the housing right by local government in 'real, live conditions,' is a subject which will be addressed in the case studies set out in chapter 6 of this dissertation.

[105]De Visser 118. Steytler (2004) 271. Steytler describes the situation as one which is subject to the 'curse of concurrent competencies'. Steytler ascribes this term to a senior official who attended Steytler's training workshop on the Municipal Finance Management Bill (as it then was).

Chapter 4:
Section 26 in the Courts

4.1 Introduction

The starting point to any discussion on the content and meaning of the housing right in the courts, is the Constitutional Court decision of *Government of the Republic of South Africa and others v Grootboom and others.*[1] It is the first case heard by the Constitutional Court regarding the housing right, and the second case brought before Constitutional Court seeking to deal with socio-economic rights enshrined in the 1996 Constitution.[2] An important factor to emerge from *Grootboom* was the need for the housing programme (and indeed all programmes dealing with socio-economic rights) to include a component that responds to the urgent needs of those in desperate situations.[3]

In turn, the interpretation of the housing right in *Grootboom* (and specifically the urgent needs factor) has been used and developed in a number of subsequent decisions involving eviction proceedings and other socio-economic rights. These decisions utilise the unique approach of the Constitutional Court in respect of socio-economic rights; namely, that of

[1] 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (*Grootboom*).
[2] The first case was *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC). In this matter, a 41-year-old man, Thiagraj Soobramoney, a diabetic with ischeamic heart disease, contended that the state was obliged to provide him with access to kidney dialysis treatment. This obligation, he contended, arose from s11 (right to life) and s27(3) (right not to be refused emergency medical treatment). By denying him emergency medical treatment, the Constitutional Court created the impression that it would not lightly interfere with the state's obligations with regard to socio-economic rights in circumstances where the state pleads that the required resources are not available. However, as will become clear later in this chapter, *Soobramoney* and *Grootboom* represent the opposite ends of the 'spectrum' of social and economic claims under the Constitution. *Soobramoney* was a claim for high-tech 'tertiary' care; it challenged an identifiable, rational and considered decision on the allocation of resources and the relief could, at best, provide temporary benefit. On the other hand, the *Grootboom* claim was for the most basic and fundamental need: it challenged unidentifiable, arbitrary and misconceived decisions on the allocation of resources (if any conscious decision was ever made) and the relief could substantially transform the lives of some of the most vulnerable members of our society. See *amici* Heads of Argument in *President of the Republic of South Africa and another v Modderklip Boerdery (Pty) Ltd (Agri SA and others, amici curiae)* 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) para 142.
[3] See Liebenberg 33-34.

reasonableness review. These cases are set out in detail for a number of reasons.

First, most eviction proceedings invariably deal with the poor and those who are[4] or who were[5] living in intolerable situations. Since *Grootboom* highlighted the lack of planning to provide for those living in these very conditions, these proceedings are important to establish how the state has responded (or not responded) to the guidelines in *Grootboom* in respect of those in desperate need.[6]

Second, these eviction proceedings consolidate two principles developed by the Constitutional Court. The first principle is that, for the time being, the courts will not interpret the right to housing as containing a 'core minimum content' as developed by the United Nations Committee on Social, Economic and Cultural Rights.[7] The second principle is that the 'real question'[8] that the

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[4] See *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2006 (6) BCLR 728 (W); 2007 (1) SA 78 (W); (and the appeal of that decision in *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 SCA 25 (RSA)). In this matter the occupiers had occupied unsafe buildings in inner city Johannesburg for a considerable period of time.

[5] Many people *leave* the intolerable situations in informal settlements in an attempt to better their situation. However, the place they move to is often simply *less* intolerable. This was the case in *Grootboom*, *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) and *City of Cape Town v Rudolph and others* 2004 (5) SA 38 (C); 2003 (11) BCLR 1236 (C), [2003] 3 All SA 517 (C) all of which are discussed below. McLean 55-8 notes that the private land occupied by the community in *Grootboom* was 'all things being equal, an improvement upon the deplorable conditions of their previous settlement.'

[6] Eviction proceedings are necessarily included in this research because, in the words of Liebenberg (2005) 1, evictions are frequently 'a reflection of unjust socio-economic circumstances in which communities experience widespread homelessness.' See also *Jaftha v Schoeman; Van Rooyen v Scholtz* 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) where the Court commented at para 28 that any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in s26(1).

[7] For the purposes of this research, the vexing question of whether a court should prefer the minimum core approach over the reasonableness standard cannot be adequately addressed. The adoption of the reasonableness approach over the minimum core approach has been both condoned and criticised, with several scholars arguing that the courts should adopt the minimum core approach favoured by the UN Committee on Social, Economic and Cultural Rights. See the debate between Bilchritz and Wesson for an insight into the merits of each approach (D Bilchritz 'Giving Socio-Economic Rights Teeth: The minimum core and its importance' (2002) 119 *SALJ* 484, D Bilchritz 'Towards a reasonable approach to the minimum core' (2003) 19 *SAJHR* 1, D Bilchritz 'Placing basic needs at the centre of socio-economic rights jurisprudence' (2003) 4 *ESR Review* (www.communitylawcentre.org.za/Projects/Socio-Economic-Rights/esr-review/esr-previous-editions/esr-march-2003.pdf accessed 2 June 2005) and M Wesson '*Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *SAJHR* 284). See also Wickeri who condones the reasonableness approach and Roux (2003) who criticises it. It is noted that prior to *Grootboom*, scholars argued in

courts will seek to answer in socio-economic matters will be whether the policy, laws and administrative measures adopted by the state to fulfil a particular right, is reasonable. Third, it is submitted that the interpretation of the housing right and guidelines developed in these proceedings should provide the state with a constitutional standard against which to measure its planning and budgetary processes.[9]

This chapter takes its form from the final reason mentioned above. Its point of departure is a discussion of *Grootboom.* A list of preliminary guidelines based on the interpretation of the housing right in *Grootboom* is then drafted. This list is revisited after a discussion of subsequent socio-economic cases and eviction proceedings. In conclusion, a list of comprehensive guidelines is drawn up that takes into account all the necessary elements that a plan or programme should include in order to comply with constitutional obligations. These guidelines are then condensed to address the particular issues of this research, namely:

- provision for those living in dire need; and
- the role of local government.

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favour of an implied minimum core obligation in s26 and s27 – see Scott and Macklem, De Vos (1997), G van Bueren 'Alleviating Poverty through the Constitutional Court' (1999) 15 *SAHJR* 52 and Scott and Alston 16.

[8] *Grootboom* para 33.

[9] In this regard, eviction proceedings are particularly insightful in terms of determining what planning and budgetary processes have been put in place by the state. Budlender notes that, since *Grootboom,* when local government seek to evict homeless people, 'they no longer obtain a court order for the asking – courts increasingly ask the councils what they have done, and what they are going to do, to meet their *Grootboom* obligations in respect of the people concerned.' See Budlender in S Leckie (ed) *National Perspectives in Housing Rights* (2003) Kluwer Law International: London 217. It is interesting to note that there is an appeal pending against the SCA decision in *City of Johannesburg II* (see footnote x below) which questions whether the SCA truly understood what the council had done, and what they were going to do, to meet their *Grootboom* obligations. See Applicant's Heads of Argument *Occupiers of 51 Olivia Road and another v City of Johannesburg and others* para 6, 7 and 154*ff.*

4.2 *Government of the Republic of South Africa and others v Grootboom and others*[10]

4.2.1 Background

Irene Grootboom was one of several hundred people, most of whom were children,[11] who lived in an informal squatter settlement devoid of running water, electricity, proper sewerage works and refuse removal services.[12] Some members of the community had applied for a grant of subsidised low-cost housing from the local municipality but received no indication as to when accommodation would be provided.[13] In the light of these conditions and the uncertainty of future accommodation, Grootboom and the rest of the group left the informal settlement where they lived (Wallacedene) and moved onto vacant private land earmarked for low-income housing. They called the land 'New Rust' (meaning 'New Rest'). Three months after moving onto the land, the owner obtained an eviction order[14] and, despite an initial refusal to move, the applicants were evicted from New Rust on 18 May 1999. The Wallacedene community would contend later that the structures they had erected on the land were bulldozed and burnt, without giving them any opportunity to remove their personal possessions.[15] This occurred during a cold, windy and rainy Western Cape winter.[16] No alternative site had been

[10] 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).
[11] The applicants comprised 390 adults and 510 children (276 of them under the age of 8). See *Grootboom* para 4.
[12] In her affidavit to the Court, Grootboom described the living conditions as unsatisfactory, referring to the limited space available to families and health concerns due to a 'water table problem' in the area (quoted in Schneider 51).
[13] Wickeri 14 records that some had been waiting for low-cost housing for 7 years.
[14] The application for eviction was heard and granted in the Magistrate's Court, Kuilsriver, on 8 December 1998 without any of the applicants or their legal representatives being present in Court. When the applicants refused to move, a *rule nisi* was issued in the same court, ordering the applicants to show cause why they should not be removed from the land. After postponements and an attempted negotiation, a final order was granted whereby the applications were ordered to dismantle their structures. While the order made provision for a 'bemiddelingsproses' (Afrikaans for 'mediation process'), there was dispute as to what this meant.
[15] *Grootboom* para 10.
[16] The Constitutional Court noted that the eviction was 'done immaturely and inhumanely: reminiscent of apartheid style evictions' (*Grootboom* para 10). In chapter 2 it was noted that Robinson 509 characterised apartheid evictions and forced relocations by 'bulldozing, burning and demolition of shacks; termination of the community's water supply; and arrests of residents for trespass.' Certain similarities with the eviction of the Wallacedene community

designated for the applicants before the eviction and, left to their own devices, the group moved to a nearby municipal sports ground.[17] The applicants, without building materials, attempted to build temporary structures out of plastic. These structures proved wholly inadequate at the first rainfall within the first week of the structures being erected.[18] The municipality declined to give them assistance in any real sense[19] and on 31 May 1999, the community lodged an urgent application to the Cape High Court directing all levels of government[20] forthwith to provide:

- shelter for the applicant children; and
- accommodation for the applicant children's parents in the aforegoing shelter.[21]

Josman AJ heard an initial application and, after conducting an inspection of the sports field 'community', he ordered the five respondents 'jointly and severally … to make available to the applicants, free of charge the Wallacedene Community Hall on a continuing basis in order to provide temporary accommodation to the various children of the applicants and in the case of the children who require supervision, one parent/adult for each child.'[22] The parties agreed to postpone the full hearing and three weeks later, Comrie and Davis JJ heard the matter.

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cannot be ignored: at para 10 of the judgment, Yacoob J states that their structures were 'bulldozed and burnt' and their personal possessions destroyed.

[17] *Grootboom* para 11.

[18] *Grootboom v Oostenberg Municipality and others* 2000 (3) BCLR 277 (C) 282 E-F.

[19] Schneider 52 records that a letter was written by the community's attorney to the municipality requesting assistance. The municipality replied 10 days later stating that it had supplied food and shelter at the local community hall and had approached the provincial government for assistance. However, the local hall could house only eighty people.

[20] The respondents to this action were cited as follows: The local municipality (first respondent), Cape Town Metropolitan Council (second respondent), Province of the Western Cape (third respondent), National Housing Board (fourth respondent) and the Government of the Republic of South Africa (fifth respondent).

[21] See para 2 of the order. For a discussion of this order, see Schneider 53.

[22] *Grootboom v Oostenberg Municipality and others* 2000 (3) BCLR 277 (C) 280.

4.2.2 Decision in the court *a quo*

Although the right to have access to adequate housing had been in the Constitution for eighteen months by this time, the application by the Wallacedene community was the first time where a Court was asked to interpret the section directly. In deciding the matter, the High Court concentrated on the application, and interaction of two provisions of the Constitution, namely s26 and s28.[23]

Davis J first considered the claim in terms of s26 of the Constitution and found that the applicants had not shown that they were entitled to the relief requested. Davis J, in rejecting the argument based on s26, was convinced that the respondents had produced 'clear evidence' that a rational housing programme was in place and was implemented to the extent that the government had the resources to do so. He based this finding on the interpretation of the words 'progressive implementation' by the Constitutional Court in *Soobramoney*[24] and the express wording of s26(1) and s26(2).[25]

The second part of the judgment addressed the claim of the children for shelter in terms of s28(1)(c). He found that, as opposed to s26, the question of 'progressive realisation' and budgetary limitations were not applicable to the determination of rights in terms of s28. Davis J found that s28(1)(c) placed the primary obligation of providing shelter for children on their parents. The state had to provide that shelter if the parents could not. The shelter to be provided, according to this obligation, was a significantly more rudimentary form of protection from the elements than was required by the housing right and fell short of the adequate housing requirement in s26. The Court concluded that 'an order which enforces a child's right to shelter should take

[23] Section 28 (1)(c): Every child has the right to basic nutrition, shelter, basic health care services and social services.
[24] Both Chaskalson P (as he then was) and Sachs J in the judgment of *Soobramoney* cautioned against an excessively generous approach to socio-economic rights, emphasising the need for deference to the legislative and executive in these matters. See *Soobramoney v Minister of Health, KwaZulu-Natal* discussed above.
[25] Davis J found, upon the express wording of the section, that it could not be said that the respondents had not taken reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right.

account of the need of the child to be accompanied by his or her parent. Such an approach would be in accordance with the spirit and purport of section 28 as a whole.'[26]

In the result, the Court ordered the national and provincial governments, as well as the Cape Metropolitan Council and the Oostenberg Municipality, to provide children and their parents immediately with tents, latrines and a regular supply of water until the parents were able to find appropriate accommodation for their children. In addition, the Court required the government to report back to it within three months of its decision.

4.2.3 Application to appeal, admission of *amici curiae* and the offer by the municipality

The state challenged the correctness of the Davis J's judgment in respect of the s28 ruling and was granted leave to appeal by the Constitutional Court. The South African Human Rights Commission (SAHRC) and the Community Law Centre of the University of the Western Cape (CLC) were successful in their application to be admitted as *amici curiae*. After the Court granted the application, the CLC and the SAHRC asked the Legal Resources Centre (LRC) to argue the case on their behalf.

While the written arguments of both the appellants and respondents initially concentrated on the meaning and import of the shelter component of s28(1)(c), the *amici* brief[27] sought to broaden the issues by introducing the notion of the housing right containing a minimum core obligation. The appellants and respondents did not object to this broadening of issues in their further written contentions.[28]

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[26] *Grootboom* para 18.

[27] The Constitutional Court acknowledged these heads of arguments in *Grootboom* para 18 of the judgment and characterised them as being 'a detailed, helpful and creative approach to the difficult and sensitive issues involved in [this] case.'

[28] Schneider 54 records in an interview with one of the state attorneys involved in the case that when oral argument commenced 'we [the state] immediately realised … the Court was not interested in s28. They wanted s26.' In the circumstances, Schneider records that the state's lead advocate had to argue s26 'on his feet'. Given that there were no written

Before oral arguments were heard, the Western Cape Provincial Government and Oostenberg Municipality made an offer 'in the interests of humanity and pragmatism'[29] to the community concerned. This offer, which was accepted, was to consist of temporary accommodation constituting roofs, sanitation and water, until housing could be made available through the provincial housing programme. Four months after the agreement was reached, however, the community made an urgent application to the Court, alleging that the agreement had been breached. This meant that the Court handed down two orders: an order directed specifically at the reinstated urgent application, and a general order to dispense with the case.

4.2.4 The Constitutional Court Decision

The Constitutional Court heard oral argument from 11 to 13 May 2000 and delivered judgment on 4 October 2000, some five months thereafter. Instead of setting the decision in a s28 milieu as the High Court had done, the Court decided the matter on the basis of s26 and considered the obligations imposed upon the state by s26 under the same three contexts considered in chapter 2 above, namely: justiciability,[30] historical context,[31] and the relevant international law and its impact.[32]

4.2.4.1 Justiciability

In respect of the justiciability of the housing right, the Court accepted as its starting point the *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa,* 1996[33] and *Soobramoney* decisions. The Court held that socio-economic rights were justiciable despite their budgetary implications, but that the Court would not

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objections to the *amici* heads of argument before oral argument, it is difficult to understand how the state did not prepare itself for this possibility.

[29] *Grootboom* para 91.

[30] *Grootboom* para 19*ff.*

[31] *Grootboom* para 6 and 25.

[32] *Grootboom* para 26*ff.*

[33] 1996 (4) SA 744 (CC);1996 (11) BCLR 1419 (CC) (*First Certification).*

interfere with rational decisions taken in good faith by political organs whose responsibility it is to deal with the matters before it.[34]

4.2.4.2 Historical Context

The Court emphasised the need to interpret the s26 right in both a textual, social and historical context. In respect of the latter, the Court stated very simply that 'the cause of the acute housing shortage lies in apartheid'[35] and that 'the cycle of the apartheid era, therefore, was one of untenable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor to the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removals.'[36]

In emphasising this historical context, the Court repeated Chaskalson P's description of this context in *Soobramoney*[37] and by so doing, set out the task of the Court as essentially transformative when interpreting the content of the housing right in the Constitution:[38]

> 'We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity,

[34] *Grootboom* para 35.
[35] *Grootboom* para 6. See chapter 2 for a description of housing during apartheid.
[36] *Grootboom* para 6. See also *Western Cape Provincial Government and others: in re DVB Behuising (Pty) Ltd v North West Provincial Government and another* 2001(1) SA 500 (C) for a description of housing and planning during apartheid.
[37] See also the comments of Mahomed DP in *Azanian Peoples Organisation (AZAPO) and others v President of the Republic of South Africa and others* 1996 (4) SA 672 (CC); 1996 (8) BCLR 1015 (CC) para 43, albeit in a different context.
[38] See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) para 54; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA); 2002 (3) All SA 741 (SCA) para 17 and *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA); 2002 (4) All SA 346 (SCA) para 12 regarding the transformative nature of the Constitution.

freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist, that aspiration will have a hollow ring.' [39]

4.2.4.3 Relevant international law and its impact

The Court noted that parties appearing before it attached considerable weight to the value of international law when interpreting s26 and they argued that the Court should take guidance from the interpretation given to such rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR), an interpretation that the Court is bound to consider, but not bound to adopt.[40] The *amici* pointed to a number of General Comments made by the United Nations Committee for Social and Economic Rights responsible for the interpretation and application of the Covenant.[41] In particular, the *amici* argued that in interpreting s26, the Court should adopt an approach similar to the Committee's approach that socio-economic rights contain a minimum core.[42]

In responding to these submissions, the Court pointed out certain problems with this interpretation. First, the Court recognised that it should not apply any principle that exists in international law unless such principle is applicable in a South African context.[43] Thus, when construing the right to have access to adequate housing, the Court will be mindful of these textual differences.[44] Yacoob J suggested that the difference in the language of s26, and the

[39] *Soobramoney* para 8.
[40] Even though South Africa has not ratified the ICESCR to date, it must not do anything to undermine the values of the treaty in accordance with the Maastricht Treaty. See also s39 of the Constitution: 'When interpreting the Bill of Rights, a Court, tribunal or forum … must consider international law.'
[41] See paras 20*ff* of the *Grootboom amici* heads of argument. Such an obligation requires every state party to fulfil certain minimum essential levels of the rights and failure to do so constitutes a *prima facie* failure to discharge its obligations under the ICESCR.
[42] This approach was adopted by the Committee in para 10 of General Comment 3, 1990. See footnote 7 above.
[43] *Grootboom* para 26.
[44] See S Khoza's article 'Realising the Right to Food in South Africa: Not by Policy Alone – A Need for Framework Legislation' (2004) 20 *SAJHR* 664 at 668 where he uses the 'textual differences' interpretation found in the *Grootboom* judgment to predict how the Constitutional Court is likely to interpret the right to food, another socio-economic right protected by the Constitution.

wording of the parallel right in article 11(1)[45] of the ICESCR, created two different rights. While the ICESCR provides *a right to adequate housing*, s26 provides a right to have *access* to adequate housing. According to Yacoob J, the significance of this formulation (*viz* 'access to') is twofold.[46] In the first place, it implies that the scope of the right entails more than just the physical structure. Second, the formulation makes it clear that the state is not the only provider of the right. The state should enable other agents in society to provide access to the housing right. The ICESCR furthermore requires *all appropriate steps to be taken*[47] while s26 of the Constitution requires *reasonable measures*. In the light of these differences, so Yacoob J reasoned, the minimum core standard test would be an inappropriate test to use in assessing the constitutionality of the government's housing policy.[48]

Secondly, Yacoob J suggested that the determination of a minimum core presented difficult questions. These difficult questions included whether the definition of a minimum core should be directed at specific groups of people or generally, and whether such a definition would serve the diverse needs of people in the context of access to adequate housing. In order to determine the minimum core of the right, Yacoob J held that one must first identify the needs and opportunities for the enjoyment of such right (which will vary according to factors such as income, unemployment, poverty etc). He emphasised that the Committee had developed the concept of minimum core over many years of examining the reports by reporting states. The Court did not have the benefit of comparable information where it could determine a minimum core obligation and, while it may be possible and appropriate to

[45] As set out in chapter 2 above, article 11(1) of the Covenant provides that the parties 'recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of housing conditions'. Hence, the 'parties will take appropriate steps to ensure the realisation of the right'.

[46] *Grootboom* para 35.

[47] A more general provision of the ICESCR (article 2.1), applicable to all relevant rights, makes a promise 'to take steps … to the maximum of its available resources, with a view of achieving progressively the full realisation of the rights recognised in the Covenant by all appropriate means, including the adoption of legislative measures.'

[48] *Grootboom* para 28. However, Liebenberg 33-22 argues that the significance of the difference in the formulation is more apparent than real. She surmises this from the similar obligations that the UN Committee reads into the right to adequate housing in respect of facilitating access to private housing (in terms of article 11 of the ICESCR).

have regard to the content of the minimum core obligation, it was not necessary to determine whether it is appropriate in the context before them.[49]

Thus, instead of involving itself in a 'brick-and-mortar versus tent' debate,[50] the Court moved the interpretation of the right from the 'minimum core obligation' model to a model based on a reasonableness review.[51] In terms of this review, the Court commented: 'The real question in terms of our Constitution is whether the measures taken by the State to realise the right afforded by section 26 are reasonable.'[52]

4.2.4.4 Analysing s26: reasonable measures and progressive realisation

In its interpretation of s26(2), the Court departed from international jurisprudence by setting a reasonableness standard as a baseline requirement for policies to be considered constitutional.[53] Yacoob J started his analysis by stating that s26 contains both a negative and positive obligation. The negative obligation placed upon the state and all other entities and persons consists of the duty to desist from preventing or impairing the right to have access to adequate housing, including the right not be arbitrarily evicted. The state's negative obligation is therefore to 'unlock the system', providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and providing access to financing. Such a

[49] McLean 55-41 argues convincingly that the issue of evidence is a 'red herring' since the Committee of the ICESCR has laid down a minimum standard in interpreting the meaning of adequate housing, which could be applied, irrespective of local conditions.
[50] The idea here is that the Court would have to determine what the 'minimum core' of the right is. Is it a house, a tent, a piece of plastic sheeting? The order of the Court *a quo* set out that tents, latrines and a regular supply of water should be provided (in terms of s28(1)(c)) by the national and provincial governments, as well as the Cape Metropolitan Council and the Oostenberg Municipality. This implies that the Court thought that the provision of these items would constitute 'the minimum' of a child's right to shelter in s28(1)(c). However, the Constitutional Court avoided such an approach in respect of s26.
[51] See also Liebenberg (2004) 8. The Urban Sector Network has characterised the approach of the Constitutional Court as one that is focused on collective rights to a 'reasonable' policy, rather than individual rights to a minimum core entitlement. See Urban Sector Network Report 18.
[52] *Grootboom* para 33.
[53] Liebenberg 33-22 describes this as 'one of the most contentious issues in the development of South Africa's jurisprudence on socio-economic rights.'

negative obligation requires the state to address issues of development and social welfare especially amongst vulnerable groups such as the poor.[54]

The positive obligation contained in s26, so Yacoob J reasoned, was to be found in s26(2). The words 'reasonable measures' and 'progressive realisation' required positive action in the sense that all three spheres of government had to determine a comprehensive and co-ordinated state housing programme in consultation with each other as contemplated by Chapter 3 of the Constitution.[55]

The Court emphasised that the relevant enquiry regarding these positive obligations would be whether the legislative and other measures taken by the state are reasonable.[56] In determining whether a set of measures is reasonable, the Court noted that it was necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme.[57] The Court considered that a reasonable programme was one that was 'comprehensive',[58] 'coherent',[59] and 'balanced and flexible'.[60] Significantly, a programme that 'excludes a significant segment of society' and one which fails to provide for 'those whose needs are most urgent and whose ability to enjoy all rights is therefore most at peril'[61] will not pass the reasonableness standard. Reasonableness, the Court went on to say, should be assessed not only with regard to legislation and policy, but also to the implementation of the policy.[62] While the Court emphasised that the term 'progressive

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[54] *Grootboom* para 36.

[55] Chapter 3 of the Constitution sets out the principles of co-operative government. See chapter 3 above for a more detailed discussion of these principles.

[56] Despite rejecting the minimum core question as the central consideration in assessing state policy, the Court did envisage that questions around minimum core could play a role: '[T]here may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether measures taken by the State are reasonable' (*Grootboom* para 33).

[57] *Grootboom* para 43. This again ties in with factors discussed in the previous chapter.

[58] *Grootboom* para 40.

[59] *Grootboom* para 41.

[60] *Grootboom* para 43.

[61] *Grootboom* para 44.

[62] *Grootboom* para 42. This is an important aspect of the judgment which Tushnet seems to have ignored. Tushnet (2003) 813 argues that all that *Grootboom* requires is that the government submit a plan for public housing that contains a component dealing with the desperately needy. That is, the government can fully comply with *Grootboom* by accepting a plan that it has no intention of implementing. The plan, he says, would be like the Soviet five-

realisation' in s26(2) clearly showed that even though it was contemplated that the right could not be realised immediately, the state must take steps to meet the needs of all in our society.[63]

Finally, the Court emphasised the balance between the goal and means, stating that the measures must be 'calculated to attain the goal expeditiously and effectively,'[64] but that the availability of resources is an important factor in determining what is reasonable.

4.2.4.5 Description and evaluation of the state housing programme

After describing the state housing programme, the Court asked whether the measures adopted were reasonable within the Court's interpretation of s26.

In answering this question, the Court lauded the state, noting that what had been done to date in execution of its housing programme was a major achievement. The Court noted that large sums of money had been spent and a significant number of houses had been built.[65] The Court stated that the programme was not haphazard and represented a systematic response in terms of long- and medium-term planning to a pressing social need. The Court went so far as to say:

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year plans, existing on paper but having no beneficial real-world impact. In the light of Yacoob J's explicit statement on the importance of implementation, this criticism seems unjustified. The Constitutional Court also specifically commented on a programme not yet implemented in the Cape Metro area (AMLSP) regarding the rapid release of land, stating at para 67 that 'what remains is implementation of the programme by taking all reasonable steps that are necessary to initiate and sustain it. And it must be implemented with due regard to the urgency of the situation it is intended to address.' Moving further down the timeline, the Fifth SAHRC Report at 13 commented that the emergency programme developed by national government was possibly unreasonable in the *Grootboom* sense due to questions of sustainability. These factors tend to lessen the impact of Tushnet's analogy to Soviet five-year plans.

[63] *Grootboom* para 45.

[64] *Grootboom* para 46.

[65] The Court noted at para 53 (footnote 47) that some 362 160 houses were built or under construction between March 1994 and September 1997, while an overall total of some 637 190 subsidies had been allocated for projects in various stages of planning or development by October 1997.

> 'Considerable thought, energy, resources and expertise have been and continue to be devoted to the process of effective housing delivery. It is a programme that is aimed at achieving the progressive realisation of the right of access to adequate housing.'[66]

Despite these praises, the Court held that the Constitution required that everyone be treated with 'care and concern'[67] and that, since the state did not provide short-term relief to those in desperate need, the programme failed to fulfil the constitutional requirement that 'the basic necessities of life are provided for all'.[68] The Court thus found no express provision in the state's housing programme to facilitate access to relief for people who have 'no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods or fires, or because their homes are under threat of demolition.'[69] The Court held that if the nationwide programme resulted in affordable housing for most people within a reasonably short time, the absence of this component might have been acceptable.[70] However, given the scale of the problem and the years it would take to rectify it, the Court held that the state fell short of the requirements of s26(2)[71] in that 'no provision was made for relief to those in desperate need'.[72]

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[66] *Grootboom* para 53. Although not acknowledged in the judgment, the approval of most aspects of the national housing plan almost mirrors the UN Committee's emphasis on formulating a transparent, participatory strategy and plan of action for the progressive realisation of the relevant socio-economic rights (General Comment 4, 1990).

[67] *Grootboom* para 44. This requirement to treat people with 'care and concern' is taken up again by Sachs J in *Port Elizabeth Municipality* para 37 where he refers to the law's 'compassion.'. Jajbhay J, in the *City of Johannesburg* case para 52*ff* goes one step further by translating this requirement into the spirit of *ubuntu*. For a discussion of this requirement, see footnote 195 below.

[68] *Grootboom* para 44.

[69] *Grootboom* para 52.

[70] In an article for *Business Day* 24 October 2005 ('Court meets needs of homeless wanderers through a torturous route') Jonny Steinberg recorded a poignant moment in the Constitutional Court during oral argument in the *Grootboom* matter. Jeremy Gauntlett, counsel for the government, told the Court that his client was slow in fulfilling its constitutional obligation, but that in the long run, 'everyone would be housed.' 'In the long run,' Chaskalson JP replied, citing John Maynard Keynes, 'we are all dead. What about people who are homeless here and now? Are you saying they must wander from place to place until they find land from which no one will evict them?'

[71] It should be noted that the Court found that the reasoning of the High Court in relation to s28(1)(c) produced an anomalous result. People with children could have a direct and enforceable right to housing under s28(1)(c) while those without children were not entitled to housing under that section no matter how old, disabled or otherwise deserving they may be.

4.2.5 Response to Breach and Test Developed

The Court's response to the state's breach of s26 was to set a reasonableness test regarding state policies and programmes related to socio-economic rights generally. In doing so, the Constitution rejected the minimum core approach. Instead, it set out certain guidelines throughout the judgment as to what would constitute a reasonable policy for the realisation of a socio-economic right. These guidelines should, however, always be seen against the background of the following statement made by the Court early on in the judgment:

> 'A court considering reasonableness will not enquire whether more desirable or favourable measures could have been adopted, or whether public money could have been better spent. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirements of reasonableness. Once it is shown that the measures do so, the requirement is met.'[73]

Liebenberg, taking into account the features of reasonableness described by the court, has summarised the guidelines inherent in this standard or test. Given Liebenberg's attention to most aspects of the judgment, this summary is repeated verbatim:[74]

In the light of this interpretation, the Court found all that the section required was for the State to provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s28. Since the children involved in the case were cared for by their parents, there was no obligation upon the state to provide shelter. The Constitutional Court therefore held that the High Court had erred in making the order it did on the basis of the section. In an interview with Schneider in 2001, the then attorney for the Wallacedene community (Julian Apollo) candidly spoke about his rationale for relying on s28: 'We, I think, rather cleverly thought that if we use the kids as pawns we will ultimately get the extension of the rights as far as the parents are concerned as well.' See Schneider 53.

[72] *Grootboom* para 69.

[73] *Grootboom* para 41.

[74] Liebenberg 33-34. It is interesting to note how Liebenberg has refined this set of factors since she first attempted a list of essential components in 2002. See Liebenberg (2002) 1 where she sets out that the state's programmes and policies must:

- Be comprehensive, coherent and effective;
- Be reasonable within the social, economic and historical context of widespread deprivation, and within the availability of the state's resources;

'1. The programme must be a comprehensive and co-ordinated one, which clearly allocates responsibilities and tasks to different spheres of government and ensures that 'the appropriate financial and human resources are available.'[75] Although each sphere of government is responsible for implementing part of the programme, national government has the overarching responsibility for ensuring that the programme is adequate in meeting the state's constitutional obligations.[76]
2. The programme 'must be capable of facilitating the realisation of the right.'[77]
3. Policies and programmes must be reasonable 'both in their conception and their implementation.'[78]
4. The programme must be 'balanced and flexible and make appropriate provision for attention to housing crises and to short-, medium- and long-term needs.'[79] A reasonable programme cannot exclude 'a significant segment of society.'[80]
5. The programme must include a component that responds to the urgent needs of those in desperate situations. Thus, a reasonable programme, even though it is statistically successful in improving access to housing, cannot 'leave out of account the degree and extent of the denial of the right they endeavour to realise.'[81]

- Give special attention to the needs of those most vulnerable;
- Be aimed at lowering the administrative; operational and financial barriers over time;
- Allocate responsibilities and tasks clearly to all three spheres of government;
- Be implemented reasonably, adequately resourced and free of bureaucratic inefficiency or onerous regulations.

It is submitted that even though this summary is perfectly adequate, the factors in Liebenberg's later summary are better divided and refined.

[75] *Grootboom* para 39.
[76] *Grootboom* para 39.
[77] *Grootboom* para 40.
[78] *Grootboom* para 41.
[79] *Grootboom* para 42.
[80] *Grootboom* para 43. Wesson 102 argues that it is this very principle that 'underpins, precedes and justifies the Court's finding that those whose needs are most basic should not be excluded from the state's socio-economic programmes.'
[81] *Grootboom* para 44.

Effectively, it is the last guideline which is the subject of this research (as seen in the case of Kholisile Kam Kam in chapter 1). This last guideline translates into an obligation on the state to 'plan, budget and monitor the fulfilment of immediate needs and management of crises'.[82] Failure to do so, as happened in *Grootboom*, would render the policy unreasonable.[83]

4.3 Post-*Grootboom*: Development of the reasonableness test in socio-economic cases and other relevant Constitutional Court cases[84]

While the Constitutional Court has not been directly confronted with the right to housing since *Grootboom*,[85] it has clarified and applied the reasonableness test formulated in 2000 in three subsequent cases, *Minister of Health and others v Treatment Action Campaign and others* (*TAC*),[86] *Khosa and others v Minister of Social Development and others; Mahlaule and another v Minister of Social Development and others* (*Khosa*)[87] and *President of RSA and another v Modderklip Boerdery (Pty) Ltd and others* (*Modderklip*).[88] These cases demonstrate an application of the reasonableness test, as well as adding certain factors which, under relevant circumstances, should be considered in applying the reasonableness test. *Modderklip,* in particular, is considered under this section, notwithstanding that the Constitutional Court declined to assess the matter on the housing right. It dealt with the eviction of

[82] *Grootboom* para 68.
[83] In addition to the factors set out above, the Court indicated that the reasonableness test might further require consideration of a wide range of social programmes adopted by the state. The Court indicated that, in the context of the housing right, considerations that could be relevant were steps 'to make the rural areas of our country more viable so as to limit the inexorable migration of people from rural to urban areas in search of jobs.'(*Grootboom* para 34). On a local government level, this factor is especially important given its developmental mandate set out in the Constitution and supporting statutes. See chapter 3 for a discussion of this mandate. The main statutes that set out this developmental mandate (apart from the Constitution itself) are the Housing Act and the Municipal Systems Act.
[84] While the focus of this section is on the development of the reasonableness test in cases involving other socio-economic matters, an eviction matter (*Modderklip*) heard by the Constitutional Court is considered here for ease of reference.
[85] However, see *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC), 2005 (1) SA 217 (CC) where the Constitutional Court was indirectly confronted with the right to housing.
[86] 2002 (5) SA 721 (CC); 2002 (10) BCLR 1075 (CC).
[87] 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).
[88] 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC).

large numbers of people from privately-owned land and, as such, is still useful to consider in light of the Constitutional Court's remarks on the reasonableness test and the right to housing therein. For the purposes of this section, the facts of each case are set out briefly, followed by a discussion of the principles developed and how these principles can inform the reasonableness test.

4.3.1 *Minister of Health and others v Treatment Action Campaign and others* (*TAC*)

In the *TAC* case, the court took a very similar approach to reasonableness as it did in *Grootboom*. In this matter, a number of organisations and individuals in civil society concerned with the treatment of people living with HIV/AIDS approached the High Court for relief relating to the state's programme of preventing or reducing mother-to-child transmission of HIV. The relief requested included a request that the state be compelled to make the anti-retroviral drug, Neviroprine, available to pregnant women with HIV/AIDS where it is medically indicated. The state had, at this point, set up only certain research sites within the country where Neviroprine was available.

The High Court ruled in favour of the applicants. Applying the *Grootboom* reasonableness test, Botha J found that a programme that is 'open-ended and that leaves everything for the future cannot be said to be coherent, progressive and purposeful.'[89] The respondents took the matter on appeal to the Constitutional Court.

The Constitutional Court, again using the same reasoning as *Grootboom*, held that the measures taken by the state cannot leave out those whose needs are most urgent and thus whose ability to enjoy all rights is most at peril.[90] While the government had set up research sites for Neviraprine (described as a

[89] *Treatment Action Campaign and others v Minister of Health and others* 2002 (4) BCLR 356 (T) 385F. The reference to 'open-ended' was in response to the state's unwillingness to give an unqualified commitment in its plan regarding when and at what rate it was going to extend its programme. See 385D-E.
[90] *TAC* para 68.

'simple, cheap and potentially lifesaving medical intervention'[91]) for preventing mother-to-child transmission of HIV/AIDS, the state failed to provide for the poor who fell outside these catchment areas and who probably suffered the most.[92] The Court thus found the policy to be unreasonable for its inflexibility and its 'policy of waiting for a protracted period' before making any decisions regarding the use of Nevirapine beyond the research sites. Importantly, the Court introduced a new dimension to the reasonableness test, a requirement of transparency:

> 'Indeed, for a public programme such as this to meet the constitutional requirements of reasonableness, its contents must be known appropriately.'[93]

4.3.2 *Khosa and others v Minister of Social Development and others; Mahlaule and another v Minister of Social Development and others*[94]

In *Khosa*, the applicants were Mozambican citizens living in South Africa as permanent residents. As 'non-citizens', they were excluded from receiving social grants in terms of the Social Assistance Act.[95] They argued that their exclusion not only violated s27(c) that confers the right to such assistance on 'everyone', but also violated their rights to equality, life and dignity.

In finding that the state's actions were unreasonable, the Constitutional Court considered (for the first time in a matter concerning socio-economic rights) the violation of the right to equality as one factor in determining whether or not the

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[91] *TAC* para 73. This accords with s32(1) of the Constitution which sets out that 'everyone has a right of access to any information held by the state and any information that is held by another person that is required for the exercise or the protection of any right.'
[92] *TAC* para 70.
[93] *TAC* para 123. The court held that for a programme to be 'implemented optimally' its contents must be known to stakeholders. The fact that national government and six provinces had not disclosed any programme to extend access to the Nevirapine treatment was seen by the Court to affect the reasonableness of the state's policy as a whole.
[94] 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC)..
[95] Act 59 of 1992. In particular, the applicants were denied old age grants and the child-support grants and care-dependency grants reserved for South African citizens.

manner of the implementation of the right was reasonable or not.[96] The Court also took into account the financial considerations of the applicants in the distribution of social assistance and came to the conclusion that such costs would amount to only a small proportion of the total costs of providing social grants in general. Thus, the costs were held out to outweigh the impact that excluding the applicants, would have on their fundamental rights to dignity and equality.[97]

4.3.3 *President of RSA and another v Modderklip Boerdery (Pty) Ltd and others*[98]

This Constitutional Court case originated from a long and complicated legal battle that began in October 2000 in the Johannesburg High Court. The case concerned eviction proceedings which were instituted by a private individual against unlawful occupiers. Two issues relevant to this research came before the Court. First, the reluctance of the state to assist in the eviction. Second, the state's lack of planning for such circumstances.

In this case the applicant, acting in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[99] (PIE), successfully obtained an eviction order against a large group of occupiers who unlawfully settled on a portion of the farm 'Modder East' on the East Rand. The court *a quo* granted the eviction order and authorised the sheriff to enlist the assistance of the police in carrying out the evictions. The order was never complied with because the sheriff required a deposit of R1,8 million which the applicant was not in a position to pay. A prolonged battle ensued where the applicant attempted to gain assistance from the state in executing the eviction order.

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[96] However, it should be kept in mind that what made this case different from previous socio-economic cases was that the policy put in place by the state in this matter was also directly related to unfair discrimination. The exclusion of the applicants was not a temporary measure in the state's attempts to progressively realise the right to social assistance. See para 44*ff.*

[97] *Khosa* para 52.

[98] 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) (*Modderklip*). For an interesting analysis of both the SCA decision (*President of the Republic of South Africa & another v Modderklip Boerdery (Pty) Ltd (Agri SA & others, amici curiae)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) and the Constitutional Court decision, see A J van der Walt: 'The state's duty to protect property owners v the state's duty to provide housing: thoughts on the *Modderklip* case' (2005) 21 *SAJHR* 144.

[99] Act 19 of 1998.

The state, however, refused to intervene in what it considered to be a civil matter. Modderklip (a limited company) thus applied to the Pretoria High Court for an order compelling the state to enforce the eviction order.

The Pretoria High Court found that the state had breached the constitutional rights of both Modderklip and the occupiers. In respect of the occupier's rights, the Court found that the state had failed to take reasonable steps within the available resources to progressively realise their right of access to adequate housing in terms of s26(1) and s26(2) as read with s25(5) of the Constitution.[100] The High Court therefore ordered the state to devise a plan that would end the unlawful occupation of the land in question and vindicate the rights of both Modderklip and the occupiers. The state appealed against this decision to the Supreme Court of Appeal (SCA). The SCA confirmed the findings of the Pretoria High Court. In particular, the Court held that in the context of the facts before the court, the state has an obligation in terms of s26 of the Constitution to ensure that, at the very least, evictions are executed humanely. In this context, it was held that the state cannot be said to be in compliance with this obligation unless it provides alternative land for the occupiers' relocation.[101] The SCA therefore ordered that the occupiers could remain on the land until alternative land was found. While the existence of the housing right was not in issue before the court, Harms JA confirmed that the provision for those in dire need formed an important component of the housing right:

[100] The Court found that, by failing to provide alternative accommodation to the occupiers, and by allowing them to continue to occupy the company's land unlawfully, the state essentially sanctioned the expropriation of the applicant's land. This was in violation of s25(1) of the Constitution, which provides that 'no-one may deprived of property except in terms of a law of general application.' The Court further held that the duty to provide access to housing does not bind private landowners. Therefore, by requiring the applicant to provide the occupiers with accommodation, the state infringed the right of the applicant to equality recognised in s9(1) and s9(2) of the Constitution.

[101] The *amici* arguments in the SCA were simply that the state's duties in relation to the rights of access to adequate housing apply in any eviction situation, and even more so where it is known that the eviction will have the effect of leaving people homeless. Significantly, the SCA acknowledged that the occupiers were not demanding that houses be built for them. In fact, Harms JA noted that the occupier's needs were limited to a small plot each on which to erect a shack or the provision of an interim transit camp. See *Modderklip SCA* para 22.

> 'The real issue is not the existence of the [housing] right; it is whether the State has taken any steps in relation to those who, on all accounts, fall in the category of those in "desperate need". The answer appears to be fairly obvious; *it did not.* Does the State have any plan for the "immediate amelioration of the circumstances of those in crisis"? *The State, at all three levels, central, provincial and local, gave the answer and it is also no*. The medium and long-term plans at present also provide no apparent solution.'[102]

It is against this background that the state then applied to the Constitutional Court for leave to appeal against this decision.

Four years after *Grootboom,*[103] the Constitutional Court delivered judgment in the *Modderklip* matter. Since emphasis had been placed on s26 in both the High Court and the SCA – especially regarding steps taken in respect of those in dire need – one would have thought that the Constitutional Court would utilise or clarify the reasonableness test or even decide that the time had come for the minimum approach to be adopted regarding the right to housing. The Court did neither. Instead, the Constitutional Court chose to premise its judgment on a totally different basis – the right of access to courts entrenched in s34 of the Constitution, as read with the constitutional principle of the rule of law.[104] Despite this turn, the Court reiterated the state's constitutional duty to progressively realise the rights of access to adequate housing or land for the homeless. Furthermore, the Court recognised the importance of the state's objectives in maintaining structured land and housing programmes and discouraging land invasions. It clearly stated, however, that housing programmes that are so rigid that they cannot be adapted to meet evolving circumstances, cannot be regarded as being reasonable:

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[102] *Modderklip* SCA para 21. My italics.
[103] The *Modderklip* judgment in the Constitutional Court was delivered on 13 May 2005.
[104] According to s34 of the Constitution, the state is obliged to provide the necessary legislative and institutional mechanisms for citizens to resolve disputes that arise between them.

> ‘If social reality fails to conform to the best laid plans, reasonable and appropriate responses may be necessary. … Indeed, any planning which leaves no scope whatsoever for relatively marginal adjustments in the light of evolving reality, may often not be reasonable.’[105]

The Court found that by failing to take any steps to relieve Modderklip of the burden of accommodating the occupiers, the state had breached Modderklip's right to an effective remedy as enshrined in s34 of the Constitution.

It is interesting to compare the attitude of the government in the *Grootboom* and *Modderklip* cases. In the former, the state argued that it was the scarcity of available resources that hindered its efforts to meet its duties in relation to this right. In the latter, the state deliberately chose not even to engage with the applicant to find a feasible solution to a problem which could have resulted in the same situation in which the Wallacedene community in *Grootboom* had found itself. During the course of argument in the *Grootboom* case, Yacoob J told the state that its ‘treatment of the occupiers throughout this case could be likened to that of rodents.’[106] Counsel for the *amici* submitted that the real issue was this: ‘Where are the homeless people entitled to be when they have no home to go to?’ [107]

As in the case of *Grootboom*, the Court did not seek to define the minimum entitlements for the homeless in relation to the right of access to adequate housing. Nevertheless, it sent a clear message that the state cannot use blanket excuses of housing backlogs, resource constraints or the threat of land invasions to justify a failure to fulfil its socio-economic obligations to the most vulnerable in society. Despite basing the decision on s34 and the rule of law, Langa ACJ recalled the language and tone of *Grootboom* and laid emphasis on the difficulties that local government faced:

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[105] *Modderklip* para 49
[106] Reported in Christmas 9.
[107] *Ibid.*

'The State is under an obligation progressively to ensure access to housing or land to the homeless. I am mindful of the fact that those charged with the provision in housing face immense problems. Confronted by intense competition for scarce resources from people forced to live in the bleakest of circumstances, *the situation of local government officials can never be easy.* The progressive realisation of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable processes are vital. Land invasions should always be discouraged. At the same time, for the requisite measures to operate in a reasonable manner, they must not be unduly hamstrung so as to exclude all possible adaptation to evolving circumstances.'[108]

4.3.4 Test Developed

The socio-economic cases set out above (*viz. TAC* and *Khosa*) developed the original *Grootboom* reasonableness test in two ways. First, the *TAC* case added the requirement that a reasonable government programme must be transparent, and that its contents must effectively be made known to the public.[109] Second, in the *Khosa* case, the court recognised the close relationship between socio-economic rights and the founding values of dignity, equality, freedom and the right to life.[110] The impact of the state's action on these rights would have to be taken into account in appropriate circumstances, along with the availability of human and financial resources in

[108] *Modderklip* para 49. My italics.
[109] *TAC* para 123. On a procedural aspect, the Court in the *TAC* case went further than *Grootboom* in that it compelled the government to act (ie. to *do* something). By doing so, the Court retained jurisdiction over 'reasonableness' in the sense that should the state fail to implement the order, application could be made to the Court alleging non-compliance with the order. In *City of Cape Town v Rudolph and others* 2004 (5) SA 39 (C); 2003 (11) BCLR 1236 (C): [2003] All SA 517 (C), the High Court went one step further by requiring the state to submit a report to the Court stating what measures they had taken to remedy the breach of the right. See para 4.4.2 below.
[110] *Khosa* para 40.

determining whether the state has complied with the constitutional standard of reasonableness.[111]

The significance of the *Modderklip* judgment lies in the Court's discussion of the reasonableness test. In particular, *Modderklip* provides insight into the Court's pre-occupation with the requirement that a state programme must be flexible in order to meet the reasonableness standard.[112] This flexibility, the Court held, is needed 'for relatively marginal adjustments in the light of evolving reality.'[113]

Following *TAC, Khosa* and *Modderklip*, two additional considerations need to be added to Liebenberg's summary of the reasonableness test:

1. The programme must be transparent, and its contents must have been made known effectively to the public.
2. The programme must take into account the founding values of dignity, equality and freedom, and the right to life, where unfair discrimination of a group is possibly at issue.

The emphasis on flexibility would also require a slight amendment (set out in italics below) to paragraph 4 of Liebenberg's summary: the programme must be 'balanced and flexible and make appropriate provision for attention to housing crises and to short-, medium- and long-term needs.'[114] *In particular, the programme must leave scope for relatively marginal adjustments in the light of evolving reality.*[115] A reasonable programme cannot exclude 'a significant segment of society.'[116]

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[111] *Khosa* para 44.
[112] This was one of the factors mentioned by Yacoob J in *Grootboom* at para 43 and included in Liebenberg's list. Thus, this matter does not provide an additional factor as such, but merely highlights an existing one (*viz* flexibility of a programme).
[113] *Modderklip* para 49.
[114] *Grootboom* para 42.
[115] For example, assisting in providing alternative land for people facing eviction (*viz.* the facts in *Modderklip*).
[116] *Grootboom para* 43. Wesson 102 argues that it is this very principle that 'underpins, precedes and justifies the Court's finding that those whose needs are most basic should not be excluded from the state's socio-economic programmes.'

4.4 *Post-Grootboom*: Development of the reasonableness test in eviction proceedings

In *Jaftha v Schoeman; Van Rooyen v Scholtz*,[117] the Constitutional Court held that any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in s26(1). In these circumstances, the Court found that eviction proceedings must be understood within the context of the right to housing as a whole:

> 'Section 26 of the Constitution must be read as a whole. Section 26(3) is the provision which speaks directly to the practice of forced removals and summary eviction from land and which guarantees that a person will not be evicted from his or her home or have his or her home demolished without an order of court considering all of the circumstances relevant to the particular case. The whole section, however, is aimed at creating a new dispensation in which every person has adequate housing and in which the state may not interfere with such access unless it would be justifiable to do so.'[118]

Given that almost every eviction proceeding could lead to a crisis situation or one where those evicted will have, in *Grootboom* terms, 'no roof over their head',[119] eviction proceedings provide a rich source of jurisprudence on the right to housing and state provision for short-term needs in a social programme.[120]

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[117] 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC).
[118] *Jaftha* para 28 (footnote omitted).
[119] The importance of eviction proceedings in clarifying the right to housing must not be underestimated. Jajbhay J in *City of Johannesburg* at para 26, comments: 'Eviction is fundamentally a constitutional matter. The historical, contextual approach to eviction under our new constitutional order has now been accepted unequivocally by the Constitutional Court.' See also *Port Elizabeth Municipality v Various Occupiers* cited with approval in *Modderklip* at paras 36, 55 and 56.
[120] It is important to note that there was no right to have access to adequate housing (and its corollary *viz.* the right not to be evicted) in the interim Constitution of the Republic of South Africa Act 200 of 1993. As noted in chapter 1, the affidavits and heads of argument in an eviction proceeding prior to the final Constitution (*The Transitional Metropolitan Substructure of Cape Town v the occupants of erven 182, 183, 194 and 196* (unreported case no 1791/96 CPD)) display the innovative ways in which legal representatives sought to protect their clients from eviction. It will be recalled that counsel for the unlawful occupiers contested their

Therefore, it is useful to consider how eviction proceedings post-*Grootboom* have sought to use and develop the reasonableness test (and by so doing, amend or add to Liebenberg's summary where necessary). Three Western Cape eviction proceedings[121] and a Johannesburg inner-city eviction proceeding are considered below. These decisions focus on the crisis type situation envisaged by *Grootboom*.

However, before considering these proceedings, it is necessary to comment on an initiative that the state adopted as a direct result of the *Grootboom* decision. The adoption of this initiative took place in 2004 and most of the eviction proceedings discussed below comment directly on this initiative vis-à-vis the guidelines set out in *Grootboom.*

4.4.1 National Housing Programme: Housing Assistance in Emergency Circumstances (ECP)[122]

Up until 2004, none of the provisions in either the Housing Act or the National Housing Code provided for the kind of 'desperate need' situation that came

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eviction on primarily three grounds: (1) legitimate expectation; (2) the right to fair administrative action in terms of s24(b) of the interim Constitution; and (3) the right to life. In respect of the latter ground, counsel sought to link the right to life to the right to a livelihood using Indian jurisprudence. By removing the occupiers to a night shelter far away from the central business district (as suggested by the local authority), counsel argued that the occupiers would effectively be deprived of their right to a livelihood, and therefore, their right to life. The application for eviction was withdrawn on 21 August 1996 due to an agreement with the local authority that the occupiers be moved to another area where better facilities were made available to them (interview with Steve Kahanowitz, LRC 7 September 2006). This early reference to the right to a livelihood foreshadows the *City of Johannesburg* judgment in the court *a quo* exactly ten years later where the issue of the right to a livelihood is again raised and accepted by the court *a quo* – this time as a dimension of the right to have access to adequate housing. The *City of Johannesburg* case is discussed at para 4.4.5.

[121] *City of Cape Town v Rudolph and others* 2003 (11) BCLR 1236 (C); *City of Cape Town v Various Occupiers of the Road Reserve of Applicant Parallel to Sheffield Road, Phillipi* (unreported case, CPD Case No A5/2003); and *South African Rail Commuter Corporation v Unlawful Occupants of the Western Cape Commuter Area between Nolungile and Nonqubela Stations, Khayeltisha* (unreported case no 2452/03 CPD). There is no judicial decision in the last-mentioned case as the parties agreed to negotiations in May 2004. However, it is important to record the sentiments expressed in the affidavits deposed by officials on behalf of national, provincial and local government. It is submitted that these affidavits display a fundamental misunderstanding of the principles set out in *Grootboom* and are thus important for this research. See para 4.4.4 for a discussion of this matter.

[122] The acronym ECP (Emergency Circumstances Programme) is used throughout the rest of this dissertation as a reference to the National Department of Housing's programme for Housing Assistance in Emergency Circumstances.

before the Constitutional Court in *Grootboom.* To remedy this defect, the Minister of Housing introduced the concept of a national emergency housing programme in her presentation to the national legislature's housing portfolio committee[123] two years after the *Grootboom* decision.[124] However, it took another two years for the ECP to be adopted in April 2004. In her introduction to the programme, the Minister of Housing recognised that the ECP was conceptualised as a result of the *Grootboom* precedent, as well as flooding in the Limpopo province in the year 2000.[125]

Essentially, the stated main objective of the policy is to provide temporary assistance in the form of secure access to land and/or basic municipal engineering services and/or shelter in a wide range of situations of exceptionally urgent housing need. This is achieved through the allocation of grants to municipalities, instead of housing subsidies to individuals. Assistance is provided through grants to municipalities, administered, like all other subsidies, through the provincial housing departments. The role of the municipality is therefore to apply for project approval, via the provincial government's Department of Housing, to the Member of the Executive Council (MEC) responsible for housing of the provincial government.[126] It is implicit in the national programme that a municipality has its *own* local plan which makes provision for:

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[123] Housing Priorities for 2002: Briefing by Minister 7 May 2002 (www.pmg.org.za/viewminute.php?id=1597 accessed on 1 July 2005).

[124] In addition to an ECP, these initiatives included the following:

- a medium density housing initiative;
- a rental housing policy framework;
- a social housing development programme;
- a national home builders registration council's warranty scheme to the housing subsidy scheme financed houses (NHBRC); and
- a Human Settlement Redevelopment Programme.

All the initiatives above, bar the ECP, clearly cater for people with some level of income and therefore do not directly answer the main problem raised by the Constitutional Court in *Grootboom* – that of providing for the needs of those people who have no roof over their head, and those in intolerable conditions and in dire situations.

[125] ECP 4.

[126] The application for relief described by McLean 55-21 at footnote 4 is incorrect insofar as it refers to an Emergency Housing Steering Committee in the national Department of Housing. The idea of a committee at the national sphere, considering applications was removed in the final version of the programme.

- procedures to monitor land use, including illegal land invasion, within its area of jurisdiction;
- pro-active procurement measures (these can include annual contracts and the establishment of panels of suitable contractor and consultants); and
- liaison channels and procedures both within its organisation and with other public and private bodies to deal with emergency situations effectively when they arise.

The role of the Provincial Department is to 'guide, assist and collaborate with municipalities in the preparation and submission of applications and in the implementation of projects and also co-ordinate actions with any disaster initiatives as well as with the actions of other role players in an approved project.'[127]

According to the national Department of Housing, the programme applies to 'emergency situations of exceptional housing need.'[128] These situations exist when the MEC, on application by a municipality and/or the provincial Housing Department, deems that persons affected, owing to situations beyond their control:

- 'have become homeless as a result of a declared state of disaster, where assistance is required, including cases where initial remedial measures have been taken in terms of the Disaster Management Act, 2002 (Act No. 57 of 2002) by government, to alleviate the immediate crisis situation;
- have become homeless as a result of a situation which is not declared as a disaster, but destitution is caused by extraordinary occurrences such as floods, strong winds, severe rainstorms and/or hail, snow, devastating fires, earthquakes and/or sinkholes or large disastrous industrial incidents;
- live in dangerous conditions such as on land being prone to dangerous flooding, or land which is dolomitic, undermined at shallow depth, or prone to sinkholes and who require emergency assistance;

[127] ECP 5.
[128] ECP 8.

- live in the way of engineering services or proposed services such as those for water, sewerage, power, roads or railways, or in reserves established for any such purposes and who require emergency assistance;
- are evicted or threatened with imminent eviction from land or from unsafe buildings, or situations where pro-active steps ought to be taken to forestall such consequences;
- whose homes are demolished or threatened with imminent demolition, or situations where proactive steps ought to be taken to forestall such consequences; or
- are displaced or threatened with imminent displacement as a result of a state of civil conflict or unrest, or situations where pro-active steps ought to be taken to forestall such consequences;
- live in conditions that pose immediate threats to life, health and safety and require emergency assistance.'[129]

In addition to the situations described above, the MEC can also deem an emergency situation to exist where, on application by the municipality and/or the provincial housing departments, persons affected are in a situation of exceptional housing need, which constitutes an emergency that can reasonably be addressed only by resettlement or other appropriate assistance, in terms of this programme.[130]

In terms of the ECP, the grants allocated to municipalities cover the costs of compiling, *inter alia,* the project application, relocation of affected persons, and the provision of temporary shelter or supply of materials for the construction thereof.[131] Notably, the grants allocated to municipalities may not cover basic services such as, *inter alia*, refuse removal, street lighting and electrical services,[132] any operation, maintenance and management costs of

[129] ECP 7-8.
[130] It appears that the government has distinguished between situations where persons are affected 'owing to situations beyond their control' and situations where they find themselves in a situation of exceptional housing need. It is submitted later in this chapter that the definition of 'emergency' in terms of the programme is inadequate.
[131] ECP 9-10.
[132] Except that the provision of high-mast lighting could be considered in special circumstances.

developments, delivery of water and repair of eroded access roads.[133] The absence of provision for these services are, according to the ECP, to be met by 'pro-active planning' by the municipality in terms of their IDP processes. By utilising the IDP process, a municipality will be able to identify and prepare for possible emergency housing situations. The ECP envisages that the IDP will be utilised by municipalities to plan for identifying possible emergency housing situations in the following ways:

- Identification of communities that do not have access to basic municipal services. In this way, existing and potential emergency situations can be identified, risks assessed, and contingency plans made.
- In determining the municipality's development priorities and objectives, give consideration to existing emergency situations and identify potential emergency situations to be reflected in its priorities and projects.
- A spatial development framework that includes basic guidelines for a land use management system. Information about existing emergency housing situations where alternative land or development projects that may be required should be identified and reflected in the spatial framework. Threatening and potentially threatening situations, disaster-prone areas, and communities at risk, identified in the municipal disaster management plan that may qualify for assistance under this Programme, must also be identified.
- Land must also be identified that can be utilised for emergency situations.[134]

It will be seen how this ECP was subjected to the reasonableness test developed by the Constitutional Court in some of the eviction cases that follow. It should be noted for ease of reference that the ECP was only a draft when the matter of *City of Cape Town v Rudolph and others*[135] first came before the courts.

[133] ECP 10-11.
[134] ECP 27.
[135] 2004 (5) SA 39 (C); 2003 (11) BCLR 1236 (C) [2003] 3 All SA 517 (C) (*Rudolph*) and the unreported return of the structural interdict (*Rudolph II*).

4.4.2 *City of Cape Town v Rudolph and others*

The community (47 respondents in all), much like the Wallacedene community in *Grootboom*, decided to move to vacant land owned by the city in order to escape the desperate conditions in the informal settlement in which they were living. The City of Cape Town sought to evict the community and contended in its application to the Cape High Court that the respondents were land grabbers and not 'in crisis' in the *Grootboom* sense. Moreover, the City had a policy in place, with which it was complying, and were thus doing all it could do in respect of housing rights.

The respondents opposed the application and brought a counter-application in which they contended that the City's housing policies failed to give effect to *Grootboom*. The counter-application asked for a structural interdict and included questions related to:

- The housing list and the efficacy thereof;[136]
- Integrated development planning processes;
- The rapid release of land;
- The state's obligations in respect of people living in intolerable conditions; and
- The state's positive obligation in respect of people who are homeless and landless.'[137]

The issue of the counter-application two-and-a-half years after *Grootboom,* was whether the City had complied with its constitutional duties as declared by the Constitutional Court and if not, what the appropriate remedy should be.[138] In dealing with the justifications by the local government of its policy choices, Selikowitz J made a direct reference to *Grootboom*:

[136] The judgment records at 49B-C that the applicant confirmed that there are in excess of a quarter of a million applicants for housing on its waiting list. The waiting list grows by some 25 000 names a year with only enough funding to build 10 000 houses a year.
[137] Mohamed 3.
[138] *Rudolph* 79G-H.

> 'It is astonishing to find that the applicant's Head of Housing makes the assertion that none of the respondents are "persons in crisis" as contemplated in *Grootboom*. This statement is indicative of a state of denial on applicant's part and a failure to recognise and acknowledge that there is, in fact, any category of persons to which it has any obligation beyond the obligation to put them on a waiting-list for housing in the medium to long term, because they are people, "with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations." It is, in my view, precisely the same failure as was held, in *Grootboom*, to constitute a breach of the Constitution.'[139]

The Court found that the policy of the City was not justified in that it failed to give adequate prioritisation to those in desperate need and, in so doing, failed to comply with the requirements of the Constitution and with the order made by the Constitutional Court in *Grootboom*. The order granted by the Court included a declaration of a constitutional breach; together with a requirement that the City deliver a report to the court stating what steps it had taken to comply with the court order and what future steps it would take.[140]

In granting the order, Selikowitz J justified the nature of the remedy by stating that the Constitutional Court had already made a declaration [in *Grootboom*] and that since the declaration 'has not induced the applicant to comply with its obligations, something more is … necessary.'[141] Thus, the Court in effect asked the City to come back to show the Court what provision it had made for people in a crisis situation, such as the present respondents.

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[139] *Rudolph* 81H-82A. Applicants described the events as an 'orchestrated land grab' in terms of which the occupiers 'decided to take the law into their own hands and to resort to self-help by invading the park for residential purposes'.

[140] The report was to be submitted within four months of the court order. The order also made provision for the respondents to comment on the report or reports of the applicant, for the applicant to reply, for the matter to be set down for hearing on the report or reports, commentary on them and reply (*Rudolph* 88F-H and para 4-7 of the order of court).

[141] *Rudolph* 88E. Both *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) and the *TAC* cases were used in support of the order made which included both a declaratory order and a structural interdict.

The findings of the Cape High Court in the first hearing strongly resembled the order in *Grootboom* bar the implementation of a structural interdict which was included in *Rudolph*. The findings in *Rudolph* were that:

- The housing policy must make short-term provision for people in a crisis or desperate situation.
- The housing policy must give adequate priority and resources to the needs of people who have no access to a place where they can lawfully live.
- The allocation of housing must have adequate regard to relevant factors such as the degree and extent of the need of the applicants, as well as the length of time an applicant for housing has been on the waiting list.[142]

When the matter came back to court a year later (*Rudolph II*), four reports from the City and three responding reports from the respondents had been delivered to the Court.[143] In its first report, the City stated that the response of national government to *Grootboom* was to add a chapter to the National Housing Code dealing with housing assistance in emergency housing situations. The report submitted that the City was bound by the National Housing Code, and bound to follow that programme by making 'application for approval of funding for a particular housing project to assist people in a crisis situation.'[144]

Although the City indicated in this report that it would apply to the Provincial Authority for funding for the applicants in terms of the ECP, the City did not do so. In its second report to the Court, the City expressed serious doubts that an application of this nature would succeed. The rationale for this doubt was

[142] This factor seems closely related to those considered in an equality-type enquiry where the position of the complainant in society is an important consideration.
[143] The first report was filed on 22 January 2004. The second report was filed on 12 May 2004. The third report was filed in October 2004. The fourth and final report was filed on 12 November 2004. Steve Kahanowitz (a lawyer from the Legal Resources Centre who represented the respondents) commented in a telephonic interview (15 March 2006) that the City's final report was only drafted in response to the judge admonishing the City for the lack of substance and change in their first three reports. According to Kahanowitz, the matter was postponed for a day to allow the City to draft and present the report. This background is not apparent from the judgment.
[144] *Rudolph II* 12.

the fact that the applicants were supposedly currently housed; they had access to basic municipal services and were not threatened with eviction. Consequently, their situation did not fall within the then recently-drafted definition of emergency housing circumstances as provided for in the ECP.[145]

The second report acknowledged that there was still the same defect in the housing programme identified by the Constitutional Court in *Grootboom* some four years previously, and to which Selikowitz J had again pointed some ten months previously.[146] Regarding the defect, the City official conceded that despite the existence of a national housing programme, there was still no provision in the ECP or any other housing programme that made provision for a place where people with exceptional and immediate housing needs could be accommodated temporarily, until a more permanent solution could be found for them.[147] The City official who authored the report stated therein that he was 'working on a proposal' to remedy the defect.[148] However, the Court found that the report as at May 2004 represented no more than a statement by a City official – the City itself had not adopted a policy to remedy the constitutional breach, nor had it implemented any steps to remedy the breach.[149]

The third report stated that the Mayoral Committee had adopted a policy on 6 October 2004 dealing with the establishment of temporary settlement areas. The report commented that this would overcome the defect in the ECP, in that people could be accommodated while waiting for the application (in terms of that programme) to be processed. Other people who did not fall within the

[145] *Rudolph II* 11.
[146] *Rudolph II* 14.
[147] Boaden, an emeritus professor of housing development and management and an expert called on behalf of the respondents in *Rudolph II*, also criticised the ECP contending: 'The procedures to be followed in obtaining assistance [in the ECP] are so complex and highly regulated that the rate of delivery of housing opportunities under this programme [the ECP] is likely to be slower than the existing formal housing programme.' (Boaden affidavit para 47). The procedures provided for in the programme are remarkably time-consuming and expensive for measures aimed at providing a temporary solution, which invariably will give rise to considerable uncertainty concerning access to land in the future (Boaden affidavit para 49). In admitting the deficiencies in the programme, the City acknowledged the correctness of Boaden's assertions.
[148] *Rudolph II* 14.
[149] *Rudolph II* 26.

ambit of the programme, but who had exceptional and immediate housing needs would be similarly accommodated in these temporary settlements.[150]

The fourth report submitted by the City shifted ground dramatically. Firstly, the City stated that it considered that the applicants were no longer 'in a crisis or desperate situation', and urgent relief was consequently no longer needed to be provided for them. Secondly, the City stated that it no longer intended to proceed with an application in terms of the ECP. Instead, the report proposed that the applicants should be offered accommodation in the Mfuleni Emergency Housing Project which was intended principally for the occupiers in the South African Rail Commuter Corporation eviction case,[151] or the Delft 7 to 9 Project, or the Delft Symphony Way Project, whichever became available first. The reason given for this shift of position was: 'An application on their behalf under section 12 of the National Housing Code [the national housing programme] is a time-consuming process and, given the applicants' current circumstances, their application may be refused by the province.'[152]

The Court found the resettlement approach of the City in its fourth report inconsistent with the Constitution in that the decision to resettle the occupiers in Mfuleni or in one of the Delft projects had been made without consultation, without reference to the preferences of the people concerned and without reference to their actual needs, such as where they work, where their children go to school, or their family and social connections.[153] The Court emphasised consultation as a requirement in considering alternative accommodation. In this regard, Selikowitz cited the case of *Port Elizabeth Municipality v Various Occupiers* which emphasised that the local council must take account of the

[150] *Rudolph II* 16.
[151] An obvious reference to *South African Rail Commuter Corporation v Unlawful Occupants of the Western Cape Commuter Area between Nolungile and Nonkqubela Stations, Khayeltisha* (unreported case no 2452/03 CPD). See para 4.4.4 below.
[152] *Rudolph II* 18.
[153] *Rudolph II* 19. These factors replicate some of the factors raised in *Grootboom* and other socio-economic cases, especially the need for consultation (as set out in *TAC*), as well as those factors considered important to the UN Committee for Social, Economic and Cultural Rights.

'actual situation of the persons concerned'; must treat everyone with 'care and concern' and respond to the needs of 'those most desperate.'[154]

Selikowitz J also emphasised that one of the requirements of 'reasonable measures' set out in *Grootboom* was that the programme or policy had to be implemented reasonably, or at least evidence must be shown of an implementation plan.[155] In this matter, there was no evidence regarding the City's implementation of the policy approved by the Executive Mayor and Members of the Mayoral Committee.[156]

The Court also found that the City had failed to give adequate priority and resources to the needs of the applicants who have no access to a place where they may lawfully live. While the Court noted that the City undertook to 'do a survey of persons … to identify those falling within the ECP's definition of emergency housing need'[157] in its first report, the City abandoned this in their second report. The City's response is summed up in its fourth report where it stated:

> 'In its [the City's] replying report, the City invited people living in crisis to report their situation to it. This notwithstanding, only one person … has done so. … Should people … make such a complaint to the respondent, they will be prioritised for housing set forth in paragraph 13.1 of the respondent's replying report.'[158]

This, in effect, meant that the City's only means of communicating with the community was through the court report. This seems a ludicrous strategy

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[154] *Port Elizabeth Municipality* para 29.
[155] See para 42 of *Grootboom* where Yacoob J stated: '[Housing] policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.' See discussion of Mark Tushnet's views in footnote 62 above.
[156] Selikowitz J also questioned, but left open whether or not the resolution of the Executive Mayor and Members of the Mayoral Committee was binding on the City and was enforceable (*Rudolph II* 29).
[157] *Rudolph II* 30.
[158] *Rudolph II* 31.

especially when dealing with a group that is obviously poverty-stricken and lacks the means of accessing the report, or may lack appropriate levels of literacy to read it!

The Court found that the attitude of the City probably led to the crises and land invasions in the first place. The Court summarised the City's response as follows: The City will operate solely in reactive mode and it will initiate no steps to identify or anticipate crises or potential crises. By relying on 'paragraph 13.1' of the report, the City was found to have, in effect, said the following:

> 'When such crises emerge, it will in effect put the people concerned on an accelerated waiting list which at best will take 12 to 18 months to produce any result.'[159]

Despite finding that the City had failed to comply with its constitutional obligations, the Court refused to grant a further structural interdict. In declining to do so, Selikowitz J stated that the original structural interdict was necessary because the City had failed to acknowledge that it had a duty towards the people who are in a crisis or desperate situation in respect of accommodation and housing. He found that, while the City had not adequately complied with the order granted, it now appreciated and acknowledged its obligations and was making efforts to comply with the order granted.[160] The structural interdict therefore had attained its goal: that of achieving recognition by the Court of the rights of the applicants.[161]

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[159] *Rudolph II* 32.
[160] *Rudolph II* 41.
[161] *Rudolph II* 43. The reasoning for not extending the structural interdict is somewhat strained, with the court effectively washing its hands of the matter despite a continuing breach of the City's housing obligations. It is suggested that this attitude is probably a result of the difficulties the judge experienced in trying to administer the structural interdict and/or the judge's sympathy for the mammoth task faced by the City. In this regard, Selikowitz J stated (at 43) that the City had to achieve a balance 'so at to optimise the benefits to be achieved from a limited budget, the vast number of claimants and the constraints imposed by the decisions of the central government and the provincial authority.' In the recent decision of *Property Lodging Investments (Pty) Ltd and another v The unlawful occupiers of erf 705 Halfway Gardens and others* (unreported case no 6292/06 TPD, 23 March 2007), the Court also imposed a structural interdict in respect of an impending eviction. In a similar fashion to *Rudolph II,* the report of the municipality (the City of Johannesburg) failed to set out in any

4.4.3 *City of Cape Town v Various Occupiers of the Road Reserve of Applicant Parallel to Sheffield Road, Phillipi*[162]

In this matter, several hundred persons moved onto land owned by the local government. Many of the respondents had moved onto the land because their previous accommodations in backyard dwellings had become unavailable due to renovations undertaken by owners who received government subsidies to improve their own homes.[163] On 28 September 2001, a magistrate granted the City an application for eviction.[164] In the appeal the eviction was confirmed, but stayed, pending the availability of alternative land. Both the City and occupiers appealed the decision. In the appeal papers, the City used substantially similar arguments as those it put forward in the *Rudolph* case. It claimed that the respondents were land-grabbers and were amongst many people who could be said to be 'in crisis' for which the City had few resources.

In response, the respondents submitted that the housing programme of the City made no provision for people who are in a desperate situation while waiting for relief from the medium- and long-term measures being taken by the City. This is set out poignantly in the respondents' heads of argument in the appeal:

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detail the measures that the City had taken or would take. In this regard, Prinsloo J commented (at 10): 'In summary, I consider it fair to state that the reader of this report is left with the impression that the fourth respondent [the City of Johannesburg] shirks its responsibility, "prays for patience" and undertakes to do something which is not detailed, only "when available sources and funds" are available. In my opinion this is not an approach which a court can endorse because it cannot lead to any relief for any of the parties.' Unlike *Rudolph II,* the Court in the *Property Lodgings* matter found (at 13) that the City had 'ignored or perhaps overlooked inadvertedly' the ECP or efforts to approach the province for assistance. As a result, the eviction was granted but only on the basis that that alternative accommodation could be arranged and with the direction that the City make short-term provision for the respondents 'who are in a crisis or in a desperate situation', as intended by the statutory and constitutional obligations vested in the City (at 17). In a rather strange conclusion, Prinsloo J suggested one of the circumstances that he took into account when granting the eviction was 'the demands of the 2010 World Cup and what will happen after that' (at 16). Unfortunately, a discussion on the structural interdict in this matter lies outside of the scope of this research.

[162] Unreported case A5/2003 CPD.

[163] *Sheffield* para 4.

[164] *Sheffield* para 11.

> 'The Respondents say that they have nowhere else to go. The Council says that the Respondents should go somewhere else, but it does not suggest where that somewhere might be, where they can lawfully live. The Respondents accordingly are and upon eviction will be, in the words used by the Constitutional Court, people who are in desperate need because they are "people who have no access to land, no roof over their heads, and people who are in crisis because of natural disasters … or because their homes are under threat of demolition."'[165]

In considering the appeal, the Court held the view that '[t]he principles laid down in the *Grootboom* … govern the present case.'[166] The Court found that the appellant had not shown what measures it had taken to provide some form of relief for 'people in desperate need such as respondents'. In addition, the court found that, given the importance of the s26 right, consideration of alternative land was appropriate regardless of the distinct requirements of s4(6) and s4(7) of PIE.[167]

4.4.4 *South African Rail Commuter Corporation v Unlawful Occupants of the Western Cape Commuter Area between Nolungile and Nonkqubela Stations, Khayelitsha*[168]

In this matter, the South African Rail Commuter Corporation ('SARCC'), an organ of state,[169] sought to evict persons living next to the railway line on the

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[165] Heads of argument on behalf of the respondents, paras 12-13.
[166] *Sheffield* para 25.
[167] In an application for eviction under s4(6) of PIE, a Court must consider all the relevant circumstances but there is no requirement in that subsection for the Court to consider whether land has been made available or can reasonably be made available by an organ of state or another land owner for their relocation. However, s4(7) provides that where the occupiers have been on the land for more than six months, the court *must* consider the availability of alternative accommodation. This distinction has typically led to attempts by applicants to bring such proceedings before six months has passed under the Act.
[168] Unreported case no 2452/03 CPD. Given that the matter was settled before a decision was handed down, recourse is had to affidavits and court papers available from the LRC in Cape Town (the occupiers' legal representatives). See also footnote 121 above.
[169] SARCC is a corporation created in terms of s22 of the Legal Succession to the South African Transport Services Act 9 of 1989 (as amended). All the issued shares of SARCC are held by the state. It is a national government business enterprise listed in Part B of Schedule 3 of the Public Finance Management Act 1 of 1999.

outskirts of Khayelitsha, a township near Cape Town. The national, provincial and local governments were joined by the respondents as third parties, whom the respondents claimed had each breached their constitutional duty to provide access to adequate housing.[170]

Local, provincial, and national government all departed from their usual arguments regarding land grabbers (probably given its previous success rate)[171] and adopted a rather novel, if not rather startling approach. In effect, the response was as follows:

- The national Minister stated that it was the responsibility of the provincial minister;[172]
- The MEC for Housing Minister stated that it was the responsibility of the local government (*viz.* the City Council); and
- The local government stated that any constitutional breaches were due either to lack of funding or breaches by other spheres of government.

In particular, the City argued that *Grootboom* set out that the national government bears the overall responsibility for the implementation of s26, and therefore, the City was not required to take any such steps. Furthermore, the City argued that even if it was required to implement a policy to deal with people in crisis, it would be wholly unable to do so as it was already being owed millions of Rand in rental arrears, and facing non-payment for services and lack of land.[173]

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[170] It is interesting to note that prior to the institution of action against the unlawful occupiers, the SARCC instructed their attorneys to address written submissions to the relevant organs of state; namely local, provincial and national levels of government. These submissions outlined SARCC's problem and enquired about the availability of alternative accommodation or land for the relocation of the unlawful occupiers in the rail reserve. See founding affidavit of the SARCC para 30.

[171] See discussion of judgments of *Rudolph* and *Sheffield.*

[172] The National Housing Department filed no papers. Instead, a letter from the Minister of Housing dated 6 November 2002 responded to the matter by referring the issue to the provincial minister 'for further action and finalisation.' See para 86 of respondent's affidavit (Thabo Sakelele Nqandela) 4 June 2003.

[173] Affidavit of the City of Cape Town 9-13. It was further submitted in the affidavit that although SARCC is a government corporation, it alone is responsible for making land available – the respondents have no recourse elsewhere.

The provincial government, in turn, argued that it was bound by the national policy alone, and was unable to do anything beyond that.[174] The province further stated that if the occupants were evicted this would 'remove the occupants from potential danger, after which they will be in exactly the same position as the thousands of homeless people on our waiting list.'[175] In doing so, the provincial government implied that it was the responsibility of local government to respond to the occupants' needs, and that the provincial government had done what it needed to do. The litigation in this matter came to a halt in May 2004 due to negotiations.[176]

4.4.5 *The City of Johannesburg v Rand Properties (Pty) Ltd and others*[177]

In this matter, three applications were consolidated and set down together.[178] In terms of these applications, the City sought the eviction of over 300 people from six properties in the inner city. In contradistinction to the evictions discussed above, all the properties were in urban and densely populated areas.[179] The City appealed to the Court 'not to place a stop sign on its difficult road to upliftment of the inner city'[180] and relied on its statutory powers

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[174] Affidavit of the Province of the Western Cape 10.

[175] See para 82 of respondent's affidavit (Thabo Sakelele Nqandela) 4 June 2003 which quoted a letter from the Minister of Housing, Western Province 11 February 2003.

[176] The LRC attorney for this matter, Steve Kahanowitz, commented (in a telephonic interview on 19 April 2007) that the occupiers as at April 2007 were still living next to the railway line but were due to be relocated in May 2007, exactly three years after the matter was halted. This relocation was as a result of an application by the City in terms of the ECP. The reason for the delay related mainly to the allocation of land and issues around the submission of plans for electricity in the area. The land that was initially identified for residence by the occupiers was unsuitable in that the environmental impact assessment (EIA) had been negative. The second piece of land identified was suitable and was made available with money obtained from the province in terms of the ECP. However, the matter took on a developmental aspect: the City recognised that adjoining land could also be allocated for housing. Therefore, two processes in respect of funding were followed: process A (in terms of the ECP) and process B (financing obtained via the usual channels set out by the Housing Code). Services and one toilet for every five plots on both pieces of land could commence only after both processes were completed.

[177] Court *a quo:* 2006 (6) BCLR 728 (W). Supreme Court of Appeal decision: 2007 SCA 25 (RSA).

[178] These applications are referred to in the judgment as (1) the Joel Street Applications, (2) the 197 Main Street application and (3) the San Jose Application.

[179] See Wilson 9 for an interesting discussion on the socio-economic and political context leading up to the matter.

[180] *City of Johannesburg* para 6. After judgment was delivered in the court *a quo,* C Benjamin writing for *Business Day* ('Evictions judgment raises investment fears' 16 March 2006) quoted

and duties to prevent dangerous living in conditions in its area of jurisdiction as a basis for eviction.[181] While the matter largely turned on the constitutionality of these statutory powers,[182] both the court *a quo* and the SCA found that the ECP was relevant in this situation.

In the court *a quo,* the respondents contended that, *inter alia:*

- Section 12(4)(b), s12(5) and s12(6) of the National Building Regulations and Building Standards Act[183] were unconstitutional in that they violated s26(3) and s9 of the Constitution.[184]
- The provisions of PIE applied to at least some of the occupiers and, in the circumstances, s6 (the requirement concerning the provision of suitable alternative accommodation) had not been met.[185]
- The City's housing programme failed to comply with the constitutional and other statutory obligations of the City in its failure to address the situation of those in desperate need.[186] Thus the occupiers' rights to access to adequate housing in terms of s26 would be unjustifiably violated if the relief sought were granted to the Applicant.[187]

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a senior city official as stating that the ruling was a 'disaster for inner city development' and that the judgment 'could see some investors taking their money elsewhere.'

[181] The City relied on s12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 (NBRA), s20 of the Health Act 63 of 1977 and the City's fire by-laws. The provisions of s12(1) and s12(4) of the NBRA provide for the issuing of notices by the Applicant directing the demolition, alteration or evacuation of buildings in circumstances where the Applicant is of the opinion that the building is in such a state as to be dangerous or to show signs of becoming dangerous to life or property, or where it deems it necessary for the safety of any person. Section 20 of the Health Act directs that the applicant take all lawful, necessary and reasonably practical measures to maintain its district at all times in a hygienic and clean condition and to prevent conditions that will or could be harmful or dangerous to the health of any person. The City's fire by-laws allow the chief fire officer to issue notices to remedy fire-hazards identified on premises and empower the Applicant to take such steps as are necessary in the opinion of the chief fire officer to remove the risk or danger (see *City of Johannesburg* paras 7-9).

[182] *viz.* the National Building Regulations and Building Standards Act 103 of 1977 (NBRA), s20 of the Health Act 63 of 1977 and the City's fire by-laws.

[183] Act 103 of 1977.

[184] *City of Johannesburg* paras 11.6 and 12.4.

[185] *City of Johannesburg* para 11.3. It is noted that the City sought to evict the occupiers on the basis of the regulations and by-laws and not in terms of PIE.

[186] *City of Johannesburg* paras 11.7 and 12.4.

[187] *City of Johannesburg* para 11.5.

After conducting an inspection *in loco* of the properties concerned, Jajbhay J considered that the respondents were in an emergency situation. He described the living conditions of the occupiers as 'appalling and at times disgraceful'[188] and 'abysmal',[189] as well as containing health and fire risks. Whilst Jajbhay J recognised that these conditions were a health and fire risk, he considered their current situation to present the lesser of two evils: secure shelter from the elements with access to water, as opposed to the consequences of eviction: literal homelessness with no protection from the elements.[190]

In finding for the respondents, Jajbhay J did not consider it necessary to decide on the constitutionality of s12(4)(b) of the NBRA except to state that the section must be read as if it contained the words 'subject to section 26(3) of the Constitution'.[191] After considering the measures put in place to give effect to the housing right, specifically the measures taken at national level (*viz.* the Housing Act and the ECP), Jajbhay J found that the City did not have a local programme in place to deal with emergency housing circumstances. The later reference by Jajbhay J to the 'practical implementation' of the programme[192] is, in effect, a reference to the failure of the City to fulfil the requirement in the ECP that municipalities have to adopt local measures. In

[188] *City of Johannesburg* para 18.
[189] *City of Johannesburg* para 19.
[190] See *City of Johannesburg* para 57. In *City of Johannesburg II* para 46, Harms ADP found this contention to be faulty, stating that 'to deprive a person of unsafe housing denies him or her access to adequate housing is not correct. The corollary would be that to deny someone poisonous food is to deny that person food.' Harms ADP's approach is both vigorously rejected (by the applicants) and defended (by the respondents) in their heads of argument prepared for the appeal to the Constitutional Court in August 2007. See paras 126-139 of the Applicants heads of argument and paras 175-192 of the Respondents heads of argument.
[191] *City of Johannesburg* para 36. Section 26(3) of the Constitution prohibits arbitrary evictions. Wilson 13 characterises Jajbhay J's decision as one of 'judicious avoidance' in that Jajbhay J declined to rule on the constitutionality of the NBRA, the municipality's eviction practice, or on the occupiers' prayer for a structural interdict. Currie coined the term 'judicious avoidance' in an article of that same name in the *SAJHR* (Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 138). In this article, Currie looked at the practice of 'decisional minimalism' in the Constitutional Court, a practice of avoidance of decisions that do not have to be made, avoidance of first-order reasoning when decisions can be made on a deductive or analogical basis and a preference for avoiding large-scale theorising when substantive decision-making is unavoidable.
[192] *City of Johannesburg* para 53 is, in effect, a reference to the failure of the City to fulfil the requirement in the ECP that municipalities have to adopt local measures. In terms of the ECP (at 10-11) municipalities are required to plan pro-actively and use their integrated development plan to identify and plan for possible emergency housing situations.

terms of the ECP[193] municipalities are required to plan pro-actively and use their integrated development plan to identify and plan for possible emergency housing situations. To this end, the City had to secure the necessary resources and assistance from national and provincial government to deal with the crisis situation and engage in constructive dialogue with the occupiers.[194]

The Court declined a request by the respondents for a structural interdict and instead declared that the City's housing programme failed to comply with its constitutional and statutory obligations. In addition, it directed the City 'to devise and implement within its available resources a comprehensive and co-ordinated programme to progressively realise the right to adequate housing to people in the inner city of Johannesburg who are in crisis or otherwise in desperate need of accommodation.'[195]

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[193] ECP 10-11.

[194] *City of Johannesburg* para 61.

[195] *City of Johannesburg* para 3 of the order. There are two interesting aspects to come out of this eviction matter which demand attention. First, Jajbhay J's decision implied that the right to have access to adequate housing implies a right to a specific location within a reasonable distance of livelihood opportunities. This conclusion was firmly rejected by Harms ADP who held firmly that the City is *not* obliged to provide housing for the poor in the inner city specifically. See Wilson 13 and *City of Johannesburg II* para 75. This issue is pending resolution by the Constitutional Court on 26 August 2007. Second, Jajbhay J spent a great deal of the judgment translating the *Grootboom* requirement that the state treat everyone with 'care and concern' into the concept of *ubuntu* (see *City of Johannesburg* para 63). While this consideration is important in the context of our divided past, the practical implications of the use of *ubuntu* is difficult to gauge or measure except as a guiding principle, much like the principles set out in s7(1) of the Constitution. Jajbhay J does, however, use the concept of *ubuntu* to reject the City's suggestion that 'the Respondents be relocated to an informal settlement' as this suggestion 'flies in the face of the concept that "a person is a person through persons"'. Jajbhay continues: 'Recent experience has shown that this alternative is fundamentally skewed. Occupiers of shacks in these informal settlements have not only lost their possessions through floods and fires but also their lives.' If this is the case, the state faces a mammoth task in providing for an estimated 9.1 million people who live in these circumstances (see chapter 1 above). The suggestion in this statement is that the City would be relegating the occupiers to a worse situation in the informal settlements than that which they faced in the appalling conditions of the inner city of Johannesburg, especially with regard to flood and fire hazards. This statement affirms the tentative suggestion in the Fifth SAHRC Report at 14 that many of those living in informal settlements are in 'a crisis situation' and 'living in intolerable situations'. Although it would be too general to state that every person in an informal settlement is 'in crisis' (given the different levels of service, structure, and social opportunity in different settlements), it is submitted that both Jajbhay J and the SAHRC's conclusion lead to a requirement that any housing programme by the state needs to include a provision for urgent informal settlement upgrading projects where these people are living 'in intolerable situations'. This would be ascertained through judging whether the informal settlement is characterised by, *inter alia*, a lack of basic services (e.g. the bucket system) and health hazards. Such upgrading projects could, in turn, take priority over investment planning such as the inner city development project by the City of Johannesburg in the present matter.

Both sides appealed Jajbhay J's decision and the Supreme Court of Appeal (SCA) delivered judgment in this matter on 23 March 2007. The main complaint by both sides was the failure of the court to decide whether s12(4)(b) of the NBRA was constitutional and whether PIE applied to the particular circumstances. In a unanimous judgment, Harms ADP found that the City's action in terms of the NBRA was neither unconstitutional nor unlawful. While these issues fall outside the scope of this research, the fundamental proposition that a local authority has to have short-term measures in place for emergency circumstances was confirmed by the SCA.[196] In this regard, the Court held that 'eviction at the hand of the City creates an emergency for some that triggers … special duties.[197] Thus, while the SCA permitted the sheriff to remove all persons occupying the properties in question (should such persons not vacate the property), the Court did require the City 'to offer and provide to those respondents who are evicted and are desperately in need of housing assistance with relocation to a temporary settlement area as described in Chapter 12 of the National Housing Code [the ECP] … within its municipal area.'[198]

The Court noted that, in accordance with the procedure set out in the ECP, the City had filed a Chapter 12 application on 22 December 2005 shortly before the hearing in the court *a quo.*[199] Notwithstanding follow-up requests by the City, the provincial authorities had not responded in any manner to the application (ie. as at date of delivery of the SCA judgment: 23 March 2007).[200] The Court spelt out that simply filing an application and 'writing a letter or two' to the provincial authorities was not enough to fulfil the special duties triggered by the eviction. In this regard, Harms ADP reiterated the *Grootboom* requirement that a plan must not only be reasonable in conception but also in

[196] S Wilson, writing for *Business Day* on 12 April 2007, calls this confirmation 'the sting in the tail of the judgment.' Wilson goes on to state that the practical effect of the judgment was that the City was forced to provide alternative accommodation in these particular eviction circumstances – an obligation its appeal was designed to escape.
[197] *City of Johannesburg II* para 77.
[198] *City of Johannesburg II* para 78, section (c) 2.1 of the order.
[199] *City of Johannesburg II* para 29.
[200] *City of Johannesburg II* para 29.

implementation: 'I am not satisfied that the City has pursued with any vigour the application under Chapter 12. … *Plans are one thing, execution is another.*'[201]

4.4.6 Test Developed

The judgments (and arguments contained in affidavits) in the eviction proceedings cited above, clearly show how the reasonableness test in *Grootboom* has enabled communities to attack the state's housing programme. Litigation has shown up broad failures of policy for specific groups of persons, notwithstanding the introduction of a special programme by the state to deal with emergency circumstances.[202] In the light of this eviction jurisprudence, the following guidelines should be added to the original Liebenberg summary:[203]

1. The programme must include measures to deal with people in crisis whenever eviction proceedings, in particular, are brought before the court.[204]

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[201] *City of Johannesburg II* para 77. My italics.

[202] 'Success' in the sense that the state is required to draft policies that meet the *Grootboom* standard. For the applicants themselves, this 'success' is less tangible. After a victory in court, they will in all probability go back to their shacks and lack of facilities and wait for the outcome of the policy. In fact, a finding by a court that the state has failed to carry out its s26(2) obligations, does not necessarily mean that the occupiers will not be evicted. It is, however, noted that in most instances the parties to the proceedings are able to consider some sort of immediate amelioration in the form of building materials and basic services.

[203] It will be recalled that the objective of this chapter stated in para 4.1 was to reconsider the Liebenberg summary in the light of subsequent jurisprudence. This paragraph marks the development of the test vis-à-vis eviction proceedings.

[204] Given the most recent jurisprudence on this aspect (see *City of Johannesburg I and II*) it is submitted that the state (read: local authority) would need to have measures in place even if it is found by the Court that the occupiers in eviction proceedings fall within the four types of situations (set out by Blignaut J at para 20 of the *Sheffield* judgment) where the state would be justified in evicting the unlawful occupiers, notwithstanding the plight of the persons affected, namely:

- A land invasion for the purposes of coercing a state structure into providing housing;
- A situation where an inevitable choice must be made between two groups of people;
- A situation where the occupation of land causes a real threat to safety; and
- A situation where the landowner urgently requires the land, particularly for social developmental purposes.

See *City of Cape Town v Persons who are presently unlawfully occupying Erf 1800, Capricorn: Vrygrond Development and others* [2003] 3 All SA 371 (A) for a situation where the court found that some of the respondents had, in fact, attempted a land invasion (set out in the first type of situation above). While denouncing the unacceptable delay in providing the

2. The programme must place adequate emphasis on co-operative governance and the need for open, accountable and responsive governance by all three levels of the state.[205]
3. The programme must be capable of securing the necessary financial and human resources and assistance from national and provincial government to deal with crisis situations on an urgent basis.

Principles two and three above can be traced back to *Grootboom* where the Constitutional Court emphasised the need for co-operative governance in the following explicit terms:

> 'A co-ordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by Chapter 3 of the Constitution.'[206]

One would have thought that this point was well-made. However, this important aspect of the judgment seems to have been ignored in later eviction proceedings, especially in the *SARCC* matter. It is submitted that the 'finger-pointing' attitude of each sphere of government contravened *Grootboom* on two levels. First, it ignored the fact that the Constitutional Court explicitly recognised that all spheres are 'intimately involved in housing delivery'.[207] Second, the attitude of each sphere of government ignored part of the reasonableness test which asks whether the housing policy is coherent. This attitude may well be in breach of the Constitution, which requires '[a]ll spheres of government and all organs of State within each sphere [to] … provide effective, transparent, accountable and coherent government for the Republic as a whole.'[208]

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respondents with the houses promised to them, the Court could not condone the unlawful occupations. It therefore issued an order which prohibited the eviction of certain respondents, while authorising that of others.

[205] This guideline needs to be emphasised to counter arguments by various levels of government that another sphere is responsible.

[206] *Grootboom* para 40.

[207] *Grootboom* para 47.

[208] Section 41(1)(c) of the Constitution. It is worth noting that Wickeri 19-20 argues that the very statements of the Court in *Grootboom* could be to blame for this finger-pointing. She states that whereas the Court initially set out the broad contours of national, provincial and

This kind of governance (in respect of housing) should also be emphasised in light of both the local and provincial sphere's unacceptable action (or, rather, lack of action) as recorded in the *City of Johannesburg II* and the *Property Lodging Investments (Pty) Ltd and another v The unlawful occupiers of erf 705 Halfway Gardens and others* matters.[209] In *City of Johannesburg II,* the provincial authority failed to respond to an application in terms of the ECP for an effective 15 months (22 December 2005 to 23 March 2007). To exacerbate matters, the local authority did no more than 'write a letter or two' in pursuing the application.[210] In a similar vein, the local authority in the *Property Lodging* matter basically 'ignored or perhaps overlooked inadvertently' the ECP or efforts to approach the province for assistance.[211]

4.5 Conclusion

The socio-economic and the eviction cases discussed above are significant, not only because of the impact they have had on communities living in intolerable conditions and crisis situations, but, as importantly, because of the standards being developed by this jurisprudence.[212]

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local government responsibility (namely, that budgetary allocation falls to the national government, with most implementation tasks to the provinces and delegated to local government (at para 40*ff* of the *Grootboom* judgment)), the Court backtracks from this division somewhat, affirming that all spheres are 'intimately involved in housing delivery.' This backtracking, she argues, has led to the difficulty in subsequent cases regarding the failure of a sphere to take responsibility. While this view does attract some merit, it ignores the many and varied mechanisms ensuring co-operation between the spheres as set out in the Housing Act, the Municipal Systems Act and statutes dealing with intergovernmental fiscal relations (see chapter 3 above), not to mention chapter 3 of the Constitution.

[209] Unreported case no 6292/06 TPD, 23 March 2007.

[210] See C*ity of Johannesburg II* para 77.

[211] *Property Lodgings* para 13.

[212] While it is beyond the scope of this research, it is interesting to note how the courts have begun to use *Grootboom* as a basis for issuing structural interdicts. These kinds of interdicts have come about to remedy the complaint that the order in *Grootboom* 'lacked clarity', while still protecting the separation of powers doctrine. By issuing these structural interdicts, the courts are able to maintain jurisdiction over any policy which the state itself drafts in order to comply with the court ruling. See *Rudolph I and II* and *Property Lodgings* for examples of how structural interdicts have been used. See also K Roach and G Budlender 'Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?' (2005) *SALJ* 325 for a general discussion of structural interdicts.

The challenge is now to test whether local government has taken cognisance of the guidelines identified in this chapter (especially regarding short-term measures) when they conduct their planning and budgeting processes. Failure to ensure that these jurisprudential developments guide policy and budgetary processes could have the effect that South Africa's 'constitutional scheme itself [is] put at risk.'[213] Since the Court held in *Khosa,* that it is the government's duty to ensure that it places evidence before the court with regard to socio-economic rights which may have 'significant budgetary and administrative implications', so too is there a comparable duty that requires government organs to apply the standards laid down by the courts in developing and financing programmes relevant to the realisation of socio-economic rights. It is submitted that this is the essence of the rights-based approach set out in chapter 1 of this dissertation.

With reference to Liebenberg's summary and the cases studied, it is submitted that the assessment of a programme aimed at progressively realising the housing right should proceed as follows:

- Is there a programme designed to advance the housing right?
- If yes, is the programme 'reasonable' in terms of the following *Grootboom* and other socio-economic cases criteria:
    1. Is the programme a comprehensive and co-ordinated one, which clearly allocates responsibilities and tasks to different spheres of government and ensures that 'the appropriate financial and human resources are available'?[214]
    2. Does the programme recognise that each sphere of government is responsible for implementing part of the programme, with national government assuming the overarching responsibility for ensuring that the programme is adequate in meeting the State's constitutional obligations?[215]

[213] Creamer 222.
[214] *Grootboom* para 39.
[215] *Grootboom* para 39.

3. Is the programme capable of facilitating the realisation of the right?[216]
4. Is the programme reasonable 'both in [its] conception and [its] implementation'?[217]
5. Is the programme 'balanced and flexible' and does it make appropriate provision for attention to housing crises and to short-, medium- and long-term needs?[218] In particular, does the programme leave scope for relatively marginal adjustments in the light of evolving reality?[219] A reasonable programme cannot exclude 'a significant segment of society'.[220]
6. Does the programme include a segment that includes a component that responds to the urgent needs of those in desperate situations? Thus, a reasonable programme, even though it is statistically successful in improving access to housing, cannot 'leave out of account the degree and extent of the denial of the right they endeavour to realise.'[221]
7. Is the programme transparent with its contents made known effectively to the public?
8. Does the programme take into account the founding values of dignity, equality and freedom, and the right to life, where unfair discrimination of a group is possibly at issue?

Within the broader context of these guidelines, research within each local government case study will focus on three aspects within these guidelines which directly impact on the provision for those in desperate need and the role of local government:[222]

1. Has the local government institution proactively planned for emergency situations in their IDP or any other programme which allows for immediate relief for those in emergency situations?

[216] *Grootboom* para 40.
[217] *Grootboom* para 41.
[218] *Grootboom* para 42.
[219] *Modderklip* para 49.
[220] *Grootboom* para 43.
[221] *Grootboom* para 44.
[222] As is clear from para 4.4.6, these aspects are mostly those raised in eviction matters.

2. Does the programme place adequate emphasis on co-operative governance and the need for open, accountable and responsive governance by local government?
3. Is the programme capable of securing necessary financial and human resources and assistance from national and provincial government to deal with crisis situations on an urgent basis?

It is acknowledged that the emphasis on co-operative government here is a repetition of the *Grootboom* criteria. However, this repetition is justified in much the same way as Selikowitz J justified the nature of the remedy given in the case of *Rudolph.* Since the Constitutional Court has already made a declaration in *Grootboom* regarding the importance of co-operative governance and since the declaration 'has not induced the applicant to comply with its obligations, *something more is … necessary.'*[223]

[223] *Rudolph* 88E. My italics. That 'something more is necessary' reverberates through most of the eviction matters, especially the recent *Property Lodgings* and *City of Johannesburg II* cases. In both decisions, the judges expressed their dismay at the fact that there was no sign of proactive planning on the part of the City and that the City had not pursued an application in terms of the ECP with any vigour (see *Property Lodgings* 13 and *City of Johannesburg II* para 77 respectively).

Chapter 5:
Case studies: Historical and socio-economic context in three case studies

5.1 Introduction

Local government is an important vehicle in implementing the right to have access to adequate housing. This has been established through an analysis of housing legislation and case law in the two preceding chapters. However, the question remains: in the light of statute and case law, what effect has this had on the conduct of life outside the courtroom – more particularly – the conduct of state?[1] This chapter and the next one attempt to answer this question by considering housing planning and provision in three Eastern Cape local municipalities.

As mentioned in chapter 1, the rationale for considering three specific municipalities originates from a growing concern amongst researchers that the trend in socio-economic research is to pay more attention to theoretical questions relating to socio-economic rights rather than researching practical questions relating to their implementation. By applying the decisions of the courts in these case studies, one is able to gauge the effect of housing legislation and policy in 'actual, live conditions'.[2]

Before considering these 'actual, live conditions' in each case study area in chapter 6, this chapter attempts to put the current environment of each case study in its historical context. The purpose of this chapter, then, is to provide a brief historical overview of the different local government systems which operated within each case study area in the Eastern Cape prior to 1994, and the subsequent transformation of such structures post-1994. In order to contextualise the historic events in each case study, this chapter commences with an overview of the general transformation issues of local government in

[1] See chapter 1 para 3.1 for an explanation of the rationale behind the case study approach.
[2] Moseneke 318.

South Africa. This overview is then followed by a descriptive account of each case study's history, namely:

- Makana Local Municipality;
- Sakhisizwe Local Municipality; and
- Ngqushwa Local Municipality.

The chapter ends with a discussion of the socio-economic environment in each of the case study areas. When the transition to democracy took place in 1994, South Africa – and the Eastern Cape in particular – inherited a largely dysfunctional local government system based on inappropriate jurisdictions, structures and programmes.[3] It will be seen in this chapter that the reaction to this system was to design a local government structure which is arguably the most important level of government for the purpose of promoting development.[4] However, it is important to put such high expectations of local government[5] in the context of current social and economic realities. This is achieved by considering socio-economic indicators for each case study area at the end of this chapter.[6]

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[3] Atkinson (2002) 1. See Kriegler J in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) para 121 where he notes: 'The impact of the apartheid system is particularly evident in the area of local government.' He goes on to state: 'Nowhere is the contrast in existential reality more stark than in the residential areas of the cities, towns and villages of South Africa. In this case we are concerned with the vast conurbation that developed in the economic heartland of the country.'

[4] Atkinson (2002) 3.

[5] It will be recalled from chapter 3 that s152 and s153 of the Constitution set out the objects and developmental duties of local government. In order to fully appreciate the extent of local government's developmental mandate, it is useful to repeat these sections here in full. Section 152(1) sets out the objects of local government, namely,

- to provide democratic and accountable government for local communities;
- to ensure the provision of services to communities in a sustainable manner;
- to promote social and economic development; and
- to promote a safe and healthy environment; and to encourage the involvement of communities and community organisations in the matters of local government.

Section 153 provides that local government must:

- structure and manage its administration, and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
- participate in national and provincial developmental programmes.

[6] These social and economic realities are, in the words of Kriegler J, 'the consequences … of the vastly inferior living conditions imposed on the majority of residents, merely by reason of their skin colour.' See *Fedsure* para 21.

5.2 Local government up to 1994: some general characteristics

It is important to note that pre-1994, there was no single local government system for South Africa and the territory of the Eastern Cape in particular. However, the nature of all these local government systems was the same: racist, subservient, exploitative and illegitimate.[7] Local government bodies which formerly exercised powers and duties were of two sorts. Typically, those in historically 'white' areas were characterised by developed infrastructure, thriving business districts and valuable rateable property. [8] By contrast, those in so-called 'black', 'coloured' and 'Indian' areas were plagued by underdevelopment, poor services and vastly inferior rates bases.[9] Despite blacks being given some representation in 'white' South Africa, white local authorities and central government ultimately remained in charge of black townships. As a result, little development of commercial and industrial activities took place due to deliberate restrictions by legislation. In the Transkei and Ciskei homelands, while traditional leaders were given powers over land allocation and development matters in areas with communally owned land,[10] there was very little evidence of effective local government, if at all.

The problem with the different local government systems operating in the Eastern Cape (and the whole of South Africa) pre-1994 was that they were structured along ideological lines. The real purpose of these local government structures was not to serve the community but rather, to reinforce the apartheid policies of segregation and exclusion. An historical overview of local government in three different areas of the Eastern Cape makes it clear that various attempts by government to create local government for the black

[7] De Visser 57.
[8] In *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); (1998 (3) BCLR 257), the Court noted at para 35 the fact that 'there are for historical reasons enormous differences in the overall quality of services provided to what were formerly white suburbs and black townships.'
[9] See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) para 2 for a description of local government institutions in the former Transvaal.
[10] See the White Paper on Local Government, Section A.

population were simply an attempt to compensate for restricted rights and an attempt to maintain law and order. These structures were designed according to the apartheid principle that, eventually, all black people (except for migrant labourers) had to be moved to the homelands where the policy of 'own management for own area'[11] could, in theory, be applied.[12] However, both outside and inside the homelands, there was a lack of participation in the political process at local level. The provision of housing was, as mentioned in chapter 2, particularly affected by this principle.

5.3 Local government and apartheid: changes in the 1990s

It is often forgotten that the crisis in local government was a major force leading to the national reform process.[13] Organised consumer and services boycotts in the 1980s led to severe financial restraints on white municipalities. This, in turn, led to negotiations between white municipal officials, township representatives and civic organisations. It became clear that transformation of the entire system was needed.

The first major local government development in the 1990s was two investigations by the Council for the Coordination of Local Government Affairs[14] which resulted in the Thornhill Report I and Thornhill Report II[15] and the subsequent passing of the Interim Measures for Local Government Act.[16] As the title of the Act implies, the Act was an interim measure which enabled government to review the existing system of local authority in totality.[17] This

[11] This concept is taken from the White Paper on Local Government, Section A. This principle was to apply in both the townships and the homelands. See chapter 2 above.
[12] See chapter 2 for a description of the Group Areas Act 41 of 1950 and other legislation that reinforced racial exclusion.
[13] See White Paper on Local Government March 1998, Section A and Bekink 25.
[14] This council was a statutory body which existed to advise the then government on local government matters which required co-ordination.
[15] See De Beer and Lourens 81-83 for a discussion of these reports.
[16] Act 128 of 1991.
[17] The Act allowed able local authorities to enter into agreement on local government affairs with neighbouring authorities. The most common type of agreement entered in terms of the Act, was the service rendering arrangement. An example of this agreement would be where a local authority agreed to render certain services to a neighbouring black local authority. See De Beer and Lourens 84.

Act was criticised for number of reasons.[18] One of the main criticisms of the Act was that it did not cater for the Transkei and Ciskei until after their incorporation into South African territory.[19] This meant that the local government structures in the Eastern Cape would be particularly affected. By leaving the two homelands out of the process, it effectively meant that the establishment of formal local negotiating forums (as contemplated by the Act) took place only in the areas which formed part of the former Cape Provincial Administration.

During the opening of Parliament in 1993, the former Minister of Local Government, Dr Tertius Delport, delivered an extensive speech during the debate on the State President's opening address. His speech referred briefly to the creation of a forum for local government to bring about 'stable, non-racial viable local authorities with sound administration.'[20] The forum would have to address two issues: the extensive administrative rationalisation of the own affairs and general affairs departments in central government, as well as rationalising different local authorities in the same areas. In dealing with these problems, the Minister stated:

> 'The system of management committees and local affairs committees were built on the concept of own affairs government and does not fit into the new point of departure … An issue that must be pointed out as a second anomaly, is that different local authorities in the same areas (and neighbouring) are being regulated in terms of different legal provisions. I am of course referring to the position of black local authorities which are regulated by the Black Authorities Act, 1982, and other local authorities that are regulated by the relevant ordinances. … The various sets of legislation are an anomalic (*sic)* remain of a

[18] For example, the African National Congress (ANC) and South African National Civics Organisation (SANCO) rejected the Act in that it, *inter alia,* provided for the continuation of existing racially based local authority structures (through amalgamating existing racially based local government structures) and the lack of guiding principles on which new local authorities could be based.
[19] Cloete 5.
[20] Quoted in De Beer and Lourens 113.

> specific political and constitutional philosophy. … One possibility is of course to scrap the Black Local Authorities Act, 1982, and deem all local authorities to have been established in terms of the relevant ordinances. If this method is followed, certain transitional provisions will be necessary.'[21]

Approximately three months later, the Local Government Negotiating Forum (LGNF) was officially launched on 22 March 1993. The LGNF's mission statement, announced at its official launch, was a refinement of the Minister's stated objective in his parliamentary speech, *viz.* 'to contribute towards democratisation of local government and the creation of a democratic, non-racial, non-sexist and financially viable local government system.'[22] The LGNF was composed of representatives of statutory local government institutions and organisations entrusted with local government, including the central and provincial tiers of government and 'non-statutory' bodies and organisations. It comprised 50 members, 25 from each delegation.[23] In this regard, the most important element to the agreement was the notion of 'one city one tax base'. This element highlighted the previous grossly inequitable distribution of resources between different population groups in local government structures.[24]

The agreements reached by the LGNF can be translated into three measures: an agreement on local government finances;[25] a Local Government Transition Act[26] (LGTA); and a chapter on local government in the interim Constitution.[27]

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[21] Quoted in De Beer and Lourens 114.
[22] Quoted in De Beer and Lourens 116.
[23] In other words, 25 from the body comprising statutory institutions and 25 from the body comprising non-statutory institutions.
[24] De Visser 60.
[25] See Pimstone 5A-3. In addition, agreements were reached on writing off the arrear accounts of many black local authorities.
[26] Act 209 of 1993. In *Executive Council, Western Cape Legislature, and others v President of the Republic of South Africa and others* 1995 (4) SA 877 (CC); (1995 (10) BCLR 1289) para 162(e) and (f), the court set out the essence of the LGTA: 'The Transition Act was intended and drafted to govern the reconstruction of local government from A to Z. (In many areas of the country "reconstruction" was a euphemism for creation.) Its principles and terms were separately negotiated. It was then passed by the 'old' Parliament as part of the statutory scaffolding agreed upon by the negotiating parties as necessary before, during and after the

The road to transition was mapped out in three phases: a pre-interim phase, an interim and a final phase. This three-phase process was an acknowledgement by negotiators that 'simply democratising local government structures does not mean that local government will be equipped to perform the developmental role ascribed to it in the final Constitution.'[28]

5.3.1 Pre-interim phase

The pre-interim phase commenced with the passing of the LGTA on 2 February 1994 and was operative until the first local government elections were held in November 1995.[29] The LGTA provided for the disbanding of race-based municipalities and the establishment of transitional councils. The LGTA provided for a negotiating forum in each municipal area, comprising statutory representatives (existing local government bodies such as white, Indian and coloured local governments) and non-statutory representatives (civic organisations, trade unions and previously unrepresented political parties). Members of these forums were nominated onto the transitional council in the area on a 50/50 statutory/non-statutory basis. These locally negotiated transitional councils governed the local authorities until the elections in 1995/6. The LGTA also established a specific demarcation board for each of the provinces of the country. These demarcation boards were given powers to investigate and make recommendations regarding the demarcation of any area of local government. The LGTA was amended at various stages during the pre-interim phase to address certain shortcomings. One important amendment was the LGTA Second Amendment Act[30] which sought to create a basic framework for rural local government, which was at

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transition of national and provincial government. The Transition Act represented a 'turn-key operation', commencing with tentative negotiating forums for local councils, continuing with temporary local government structures, and carrying on until new structures have been democratically elected and put in place.' See also *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) para 129.

[27] Chapter 10 of the interim Constitution of the Republic of South Africa Act 200 of 1993.

[28] Rycroft 154.

[29] It should be noted that two provinces held local government elections in the following year. Local government elections took place in the Western Cape in May 1996 and in KwaZulu Natal in June 1996. As such, further reference to these elections will be to the local government elections of '1995/1996'.

[30] Act 89 of 1995.

the time, not properly addressed.[31] This amendment also sought to make the Act applicable to the entire territory of South Africa including the Transkei and Ciskei, thus filling the gap left by the Local Government Interim Measures Act.

It should be noted that the interim Constitution came into effect only two months after the commencement of the LGTA in April 1994. Section 245 of the interim Constitution set out that the transitional phases of the restructuring of local government had to be done in terms of the LGTA.[32] Importantly, the interim Constitution set out the commitment to establish democratic institutions at local government level and to include traditional authorities in such processes.[33]

5.3.2 Interim phase

The 1995/6 elections ushered in the interim phase which ended with the implementation of the final Constitution model at local level. This phase lasted between three to five years and was dealt with by the interim Constitution and the LGTA. Following the election in 1995, transitional local authorities were established in the urban and rural areas of South Africa.[34] The councils were elected on the basis of a system that combined ward representation (60% of the seats) with proportional representation (40% of the seats).[35] In the Eastern Cape, 183 local councils were established, consisting of six district councils, 94 urban local councils, 76 rural councils and seven

[31] In terms of this amendment, Part VA (entitled 'Rural Local Government') was inserted.
[32] See *Executive Council, Western Cape Legislature and others v President of the Republic of South Africa and others* 1995 (4) SA 877 (CC) and *ANC v Minister of Local Government and Housing* 1998 (3) SA 1 (CC). Here the Constitutional Court confirmed that the restructuring of local government could only be effected in terms of the LGTA until elections had been held under its provisions.
[33] See chapter 10 of the interim Constitution. The inclusion of traditional authorities in local government structures is mentioned in this research insofar as the chiefs and headmen system was 'legislated' in 1951. The issue of traditional authorities, post-1994 is beyond the scope of this research. For a fascinating analysis of traditional authorities, see Ntsebeza *Democracy Compromised: Chiefs and the Politics of Land in South Africa* (2006).
[34] Section 8(2) of the LGTA empowered the Administrator to delimit the boundaries for the interim local authorities and to determine their powers and functions.
[35] Although the legitimacy of the municipal councils was infinitely greater than under all the previous dispensations, they did not constitute *democratically*-elected councils on the basis that the ward representation was still based on the old racially-based wards. See De Visser 61.

rural local councils. This constituted by far the most fragmented local government system among the provinces in South Africa.

During the interim phase, critical pieces of legislation were passed which impacted on the future role of local government. The final Constitution was adopted in 1996. In terms of chapter 7 of the Constitution, the Municipal Structures Act[36] and the Municipal Systems Act[37] were passed during this time. These Acts were preceded by the White Paper on Local Government in 1998 which set the course for a developmental, autonomous and democratic local government. It was also during this time that the Local Government: Municipal Demarcation Act[38] was passed. This Act provided for an independent Municipal Demarcation Board to determine the new municipal boundaries, thus fulfilling the requirement in s151(1) of the Constitution that municipalities must be established 'for the whole of the territory of the Republic'. The interim phase ended on 5 December 2000 when local government elections took place, thus commencing the final phase as contemplated by the LGTA.

5.3.3 Final phase

The second municipal election in December 2000 consolidated the local government system following the municipal demarcation process.[39] The new municipalities amalgamated an average of four transitional local government structures stemming from the municipal election of 1995.[40] This phase established 38 B-municipalities (including Makana, Sakhisizwe and Ngqushwa Local Municipalities), one metropolitan area (Nelson Mandela Metropolitan) and six C-municipalities within the Eastern Cape.[41] District management areas (DMAs) were established in areas of the province where

[36] Act 117 of 1998.
[37] Act 32 of 2000.
[38] Act 27 of 1998.
[39] Cloete 6.
[40] See www.dmarc.org.za for an overview of the district management areas (accessed on 12 April 2006).
[41] See s155 of the Constitution which sets out the final version of various categories of municipalities.

local government objectives could not be achieved; for example, in demarcated parks or in areas displaying low population density.[42]

The aim of this rubric is to portray the transformation of local government so as to provide a general background for the more specific history of transformation in the case study areas chosen for this research. The following section gives a brief historical background of the local government structures operating in each area and sets out the current status of its housing policies and the particular socio-economic conditions prevalent in each municipality.[43]

5.4 Case study areas: Historical Context

5.4.1 Makana Local Municipality

Makana Local Municipality falls under Cacadu District Municipality in the Eastern Cape Province. Makana Local Municipality incorporates the city of Grahamstown, the smaller towns of Alicedale and Riebeeck East, and surrounding rural areas. Prior to the demarcation process in the late 1990s, the rural areas included under the current Makana Local Municipality fell under the erstwhile Western District Council. Prior to 1994, Grahamstown, Alicedale and Riebeeck East had two separate local government entities for their white and black populations, each set up under the Cape Government Ordinance[44] and the Black Local Authorities Act[45] respectively. Given that Grahamstown is the current municipal seat of Makana Municipality, the focus

[42] In terms of the success of political parties in the area, the ANC was the foremost successful political organisation in the Eastern Cape. The coalition of the Democratic Alliance (DA) and the New National Party (NNP) enjoyed its strongest electoral support in the areas of the previous Cape Province, including Makana Local Municipality. See Southall and Wood 235-238.

[43] As set out in chapter 1, information on the current status of housing policies and their implementation in each municipality was gathered by means of semi-structured interviews with local government officials and an analysis of literary sources, most notably the IDP of the municipality, and linked documents.

[44] Ordinance 20 of 1874.

[45] Act 102 of 1982.

of this historical background is on the previous local government structures operating in Grahamstown itself.

It is important to note that none of the areas now falling under Makana Local Municipality was ever designated as a native reserve[46] or formed part of an independent homeland. So, different local government structures existed in Makana from those found in both the areas that are now known as Ngqushwa Local Municipality and Sakhisizwe Local Municipality.

The entire Makana area originally fell under the Cape Province, one of the four provincial authorities of South Africa, demarcated in terms of the South Africa Act.[47] In terms of this Act, a three-tier unitary system of government was formed.[48] At this early stage, the third tier (local government) became, at least in part, a responsibility of each province.[49] Whilst each province could (and did) enact its own Local Government Ordinance,[50] there was little difference in the systems developed in the four provinces. Even at this early stage, the arrangements for local government excluded the black population in totality. This arrangement was premised on central government's insistence that it was the only policy maker with regard to 'blacks' and that their presence in cities was to be regarded as temporary.[51] As a result, the system of local government awarded no rights to blacks to participate or benefit from its structures.

Grahamstown local government in the early 1900s consisted of a white town council which took responsibility for many of its locations. These locations were populated by (1) resettled Mfengus who had moved from the Peddie

[46] As proclaimed in terms of the Land Acts 1913 and 1936.
[47] Act 1909. The South Africa Act 1909 was an Act of the British Parliament. This Act created the Union of South Africa from the British Colonies of the Cape of Good Hope, Natal, the Orange River Colony and the Transvaal.
[48] The first tier, Parliament, was based on the British Westminster system in terms of structure, procedure and practice. The second tier consisted of four provinces whereby power was shared between a centrally-appointed Administrator and the elected local council. Local government, as the third tier, was created by provincial authorities, which defined their scope.
[49] De Visser 57.
[50] As set out earlier, local government in the Cape Province operated in terms of the Local Government Ordinance 20 1974.
[51] De Beer and Lourens 28. See chapter 2 regarding the operation of the Stallardist doctrine.

district; (2) Xhosa refugees of the 1879 Frontier War; and (3) people who were attracted to Grahamstown by railway construction.[52] Following the national trend,[53] the Town Council is reported to have made a profit from the rents and rates of the location sites, while spending only a small amount of money on meeting the desperate needs of its residents in the locations.[54]

Despite the powers given to the Town Council by the Housing Act,[55] the Council paid very little attention to the living conditions of blacks in the locations. Only 76 houses were built in the locations of Grahamstown *in toto*: 26 houses in 1928 and 50 sub-economic houses in 1938.[56] However, after the amendments to the Housing Act, the Council placed more emphasis on housing. One thousand houses were built in Joza[57] from 1957 to 1962 and a site-and-service scheme was established by the Council in the 1960s.[58] With central government intensifying its homeland policy from the 1950s onwards, many forced removals of the black population in urban areas took place around the country. These forced removals were made possible through the Group Areas Act[59] and the general homelands policy. Referring to the implementation of the Group Areas Act, a local commentator noted that the Group Areas Act was an extraordinary feat of town planning which,

> 'sought to destroy at the stroke of a pen the historical and cultural centre of black Grahamstown, the scene for over a hundred years of intense community life, of education and of the adaptation and development of the African residents to an urban way of life.'[60]

However, the central government did not manage to destroy community life completely. Grahamstown is said be unique among the South African cities at

[52] Møller 2.
[53] See chapter 2.
[54] Sellick in Møller 2.
[55] Act 35 of 1920.
[56] Møller 4. This information roughly corresponds with Taylor 62 who sets out that houses were built adjacent to the Fingo village and adjacent to the Tantye area in 1930 and 1938 respectively.
[57] A location of Grahamstown.
[58] Taylor 62.
[59] Act 21 of 1950.
[60] Charton, quoted in Taylor 64.

the time in that its black population was never resettled.[61] This is evident in the central government's failure to relocate the black population in both 1957 and again in 1970. Both moves were vehemently opposed by the Town Council and Grahamstown's black and white population and as a result, central government abandoned the plan in 1980.[62]

Despite this small victory, renewed efforts by the Council to address the housing problems in its locations in 1967 proved unsuccessful. Having applied for a loan in terms of the Housing Act,[63] central government turned down the Council's application to build more houses in its locations. The application was turned down on the grounds that future housing for blacks would have to be in the homelands[64] and that central government wished to enforce its policy of discouraging permanent residence of blacks in urban areas.[65]

In the early 1970s, the central government sought to centralise control of the blacks in urban areas of South Africa and in 1974, the Eastern Cape Administration Board (ECAB) took over the municipal functions previously

[61] See chapter 2 regarding the forced removals that took place over this period generally.
[62] In 1957, Fingo village (a suburb in Grahamstown) was designated a coloured residential area, with small Chinese and Indian sections making up parts of it. Despite objections to the proposal by the Town Council, the central government proclaimed Fingo village a designated coloured area in 1970. The central government then planned to move 5 500 Fingo village residents to Committee's Drift (located in the Ciskei, 40 km from Grahamstown). In 1975 the government shelved the proposed move and in 1980, the central government abandoned its plan completely. See Møller 3. According to one source, the planned removal was abandoned because '[c]oncerned white Grahamstownians set up an advice office to help residents fight the expropriation of their land [in 1970]. … After a further ten years of resistance, Fingo village was deproclaimed in 1980 and its residents assured of title to their own land.' See Black Sash 29. Grahamstown therefore had characteristics not found in many other South African cities ie. private (freehold) ownership of property by black South Africans. See Taylor 55, 59 and 63 for a discussion of Fingo village.
[63] Act 4 of 1966.
[64] Møller 3. This view is confirmed by the Riekert Commission, in reflecting on this situation in 1979: 'The official [housing] policy from 1968 was, in regard to black workers in white areas, to provide family housing in the black states as far as possible rather than in the black residential areas surrounding the white cities and towns where they worked. This change in policy is very clearly reflected in the allocation of funds for black housing in white areas in the annual budgets of the Minister of Finance from 1968. Whereas the allocation to the Department of Community Development of funds for black housing – from which the boards obtain their allocation – declined since 1968, the allocations to the Development Trust and to the governments of black states rose sharply so that the total funds for black housing for the country as a whole also rose fairly sharply.' See Riekert Commission 1979 para 4.387.
[65] Black Sash 31 and 40.

exercised by the Grahamstown Town Council in respect of its locations.[66] Amongst its functions, ECAB acted as a local authority for black persons with regard to the Housing Act.[67] This entailed the acquisition and development of township land, as well as acting as township manager and lessor of all housing stock in its area.[68] The ECAB intensified its strict control of building activities in the locations of Grahamstown and by 1979, its demolition of 'unapproved dwellings'[69] created many hardships for the location residents.[70] By 1983, there was a blatant housing crisis in the area.[71]

On a local level, a new black authority in Grahamstown, Rhini Town Council, was constituted in 1983.[72] It also suffered the same lack of support and illegitimacy as the ECAB. Only 4.6 per cent of the registered voters took part in the elections for Rhini Town Council.[73] In the same year as the Rhini Town Council was constituted, the black residents of Grahamstown formed a civic body known as the Grahamstown Civic Association (GRACA) as an alternative forum for the black population in Grahamstown.[74] As in other parts of the country, the black residents of Grahamstown engaged in a rent and service boycott in the 1980s which crippled the Rhini Town Council. Interestingly, a sample survey conducted in black Grahamstown during the boycotts listed housing as the most serious community grievance, ahead of demands such as minimum wages and the lifting of the state of emergency.[75] By the late 1980s, it was clear that most townships and rural areas throughout

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[66] Bekker and Humphries 19 and Møller 3. This board was one of 22 boards established around South Africa in terms of the Black Affairs Administration Board Act 45 of 1971. These 22 boards were later reduced to 14 boards.
[67] Act 4 of 1966.
[68] See Bekker and Humphries for a comprehensive analysis of the changing role of the Administration Boards in South Africa from 1971 to 1983.
[69] Despite these demolitions, it was reported in 1980 that more than half the black residents in Grahamstown (estimated at over 80 000 in 1980) lived in self-built dwelling units, built mainly with wattle and daub, and corrugated iron. See Bekker and Humphries 86.
[70] Møller 4.
[71] Taylor 55.
[72] In terms of the Black Local Authorities Act.
[73] Manona 108.
[74] GRACA was banned in 1985 but was unbanned in February 1990 along with other community organisations in the country. GRACA joined the South African National Civics Organisation (SANCO) in 1992 and existed locally as SANCO Grahamstown. See Manona 116.
[75] Roux and Hellicker in Møller 4.

South Africa were effectively ungoverned and that a new dispensation and structure was urgently needed. The situation was so dysfunctional that by 1991/1992, 125 of the 264 black local authorities were inquorate. Whilst the Rhini Town Council still reached quorum at this stage, it was clear that it was in a financial crisis.[76] However, the Rhini Town Council ceased to exist only one year later – for different reasons – which are explained below.

The idea of a single administration in Grahamstown was first discussed in September 1988, long before the official local government negotiating forums were set up.[77] These discussions had three objectives: to create (1) a united city with a non-racial democratic local government; (2) an integrated society with good communication; and (3) trust between local communities.[78] These discussions led to the establishment of the Grahamstown Joint Negotiating Forum in 1990 which dealt with the problems associated with land invasions and squatter settlements and later handled development issues such as the provision of water and toilets to the local informal settlements.[79] According to one source, these early attempts at negotiations were important 'in that they gave Grahamstown leaders some experience in talking to each other.'[80]

In 1991, Grahamstown Town Council, Rhini Town Council, GRACA, Grahamstown Ratepayers Association, the Grahamstown Management Committee and the Indian Association all met to pursue the idea of a single city. Out of all the negotiating parties, only Rhini Town Council did not support the one city initiative.[81] The Rhini councillors eventually abandoned

[76] Manona records that with a debt of R767 338 in unpaid electricity, water and rates in 1993, the Rhini Town Council was forced into an arrangement with SANCO Grahamstown whereby residents would pay a flat rate of R25 for rent and services. Manona 116.
[77] These initial discussions were organised by a group called 'The Grahamstown Initiative'. This forum was one of hundreds of informal local-level negotiations which were set up throughout the country. Swilling and Boya 173-176 maintain that these local-level type negotiations were the basis for the statutory local negotiating forums, as national negotiators realised that a national framework was needed to guide the local government transition via the local forums.
[78] See Manona 116 and Møller 4.
[79] Manona 116 and Møller 4.
[80] Manona 116.
[81] This attitude is understandable if one considers that they were effectively negotiating their own destruction!

the negotiations in April 1993. The Rhini Town Council ceased to exist shortly thereafter.[82] This happened when SANCO members occupied the offices of the Rhini Town Council overnight and two councillors' houses were stoned.[83]

The first meeting of the local government negotiations (in terms of the Local Government Transition Act) took place in Grahamstown on 1 March 1994 and was attended by many organisations. These negotiations included both statutory and non-statutory participants (as contemplated by the Act). There was no dispute as to boundaries for the newly constituted Transitional Local Council for Grahamstown and a transitional local government agreement was signed in September 1994.[84] Local government elections were then held in 1995 in which the African National Congress (ANC) was given a well-supported mandate. Despite continued problems with unpaid accounts during the next five years,[85] documentary research and interviews conducted with councillors during 1997 showed that the Grahamstown Transitional Local Council had performed relatively well in relation to the enormous challenges facing it:

> 'The minutes of the Grahamstown Transitional Local Council which were read carefully during the research showed much transparency in the decision-making practices of this council. Issues were discussed at length and, on the whole, the councillors were interested in their work. Another positive feature in this case was the sense of community and unity which had developed in Grahamstown. To a large extent, this resulted from the fact that Grahamstown has a strong historical consciousness of being one town. During the research it was clear that this had produced a good measure of consensus between the statutory and non-statutory members. This sense of community represented good vision and confidence in the future of the town. Some of the councillors who were interviewed said that there was a good spirit among the

[82] The day-to-day running of the affairs of the black population in Grahamstown came under the control of an administrator who worked for the Cape Provincial Administration.
[83] Manona 117, Møller 4.
[84] Manona 118.
[85] Møller 4.

> councillors. Some of them saw this as the councillors' conscious effort to unite the various segments of this city which has all along been racially divided. The relatively good performance of the Grahamstown Council is not surprising if one takes into account the many years of serious discussions and negotiations which had taken place there.'[86]

Due to the demarcation process undertaken in 2000, the original local government jurisdiction of Grahamstown was increased from 100 square kilometres to 2 500 square kilometres to form Makana Local Municipality. In this process, the transitional local councils of Alicedale and Riebeeck East, as well as the adjoining rural areas, were incorporated. To date, elections which have been held in the newly-constituted Makana Municipality confirm the ANC mandate given to the Transitional Local Council in 1995.

5.4.2 Ngqushwa Local Municipality

Ngqushwa Local Municipality falls under the Amatola District Municipality in the Eastern Cape Province of South Africa. It consists of two urban centres (Peddie and Hamburg)[87] and 112 villages. Ngqushwa Local Municipality (as with all other local municipalities) was created during the demarcation process in the late 1990s. The geographical area of Ngqushwa Local Municipality is mainly made up of the former magisterial district of Peddie, but also includes some parts of the former magisterial district of Zwelitsha.[88]

The socio-economic character of Ngqushwa Local Municipality is largely shaped by the colonial and apartheid policies which turned parts of both Peddie and Zwelitsha districts into an impoverished African reserve and, later, the Ciskei homeland.[89] As such, it is necessary to discuss these colonial and

[86] Manona 119.
[87] It is useful to note that the district (most notable, the urban areas of Peddie and Hamburg) never originally formed part of the native reserves but were incorporated into the homeland of the Ciskei only during the South African government's phase of consolidation in the 1970s undertaken in terms of the Development Trust and Land Act 18 of 1936, as amended. Prior to incorporation, these areas would have fallen under the Cape Provincial Administration.
[88] Manona 110, Ainslie 66, Lind 140.
[89] This view is confirmed in the light of the socio-economic indicators set out below.

apartheid policies, especially as they related to local government and housing in the area now known as Ngqushwa Local Municipality.

Both the Peddie and Zwelitsha districts were declared native reserve areas in terms of the Native Land Act.[90] This meant that, apart from the urban areas of Peddie and Hamburg and the immediate surrounding farming areas, the local government structures under the Cape Ordinance (as discussed under Makana Local Municipality) were never implemented in this area. After the unification of South Africa in 1910, the first important step (in terms of local government structuring) was the enactment of the Native Affairs Act.[91] This Act provided for the establishment of local councils for the native reserves and empowered a local council to provide a number of functions within its area of jurisdiction, from taxation to weeding.[92] Following this Act, the Peddie Local Council was established;[93] being one of nine councils established in the Ciskei reserve.[94] The Peddie Local Council was merely an advisory body and it operated under the guidance of a Native Commissioner in Peddie. In general, the ability of these councils to carry out their functions was severely curtailed by their lack of revenue.[95] They had no powers to develop housing schemes or raise loans for their respective populations. In 1950, research in the neighbouring district of Keiskammahoek concluded that the population was apathetic towards their local council[96] and did not support it.[97] There is no reason to believe that the situation was any different in the Peddie district.

Notwithstanding the introduction of local councils, it should be noted that the system of headmen still operated in the rural areas, including the Peddie

[90] Act 27 of 1913 (as consolidated by the Native Land and Trust Act 18 of 1936).
[91] Act 23 of 1920.
[92] Groenewald 85. Ainslie 96. In terms of the reserve as a whole, the Act also provided for the establishment of a General Council. This General Council was established in Ciskei in 1934. It is interesting to note that the men in Tyefu (a location within the Peddie District) refused to elect representatives to this Council, claiming that there was no such thing as a General Council in Tyefu. See Ainslie 98.
[93] In terms of Proclamation 127 of 1927.
[94] Groenewald 87.
[95] This revenue had to be raised by local taxes and fees paid by the residents in the districts or locations. See Ainslie 97.
[96] Ainslie 97 records that research conducted in 1950 found that both the meetings to nominate councillors and ordinary meetings of council were poorly attended.
[97] Apart from the dipping of stock, the people in Keiskammahoek complained to researchers that the council 'had done nothing for them.' See Ainslie 97.

District. This meant that the 'chain of command' was: location headman – Native Commissioner – Chief Native Commissioner – Minister (Secretary) of Native Affairs.[98]

In 1951, the Bantu Authorities Act[99] changed the set-up of local government in the native reserves. The then Secretary of Native Affairs, Dr Eiselen, stated in his opening address to the Ciskeian General Council:

> 'The Councils in the rural areas have not been able to convert the Native population to a more progressive mode of life. We find more deterioration rather than progress. We must, therefore, ask the question whether the council system, based largely on Western concepts of social organisation, is a suitable instrument for guiding and controlling the development of Bantu people. The councils, as you know, devoted a great deal of their time to criticising and advising on Government measures. It is considered essential to foster a more positive attitude and therefore a Bantu authority will be expected to initiate and exercise in its own sphere local government in all its ramifications. … The Minister has therefore found it necessary to devise an alternative system for stimulating Bantu progress.'

In terms of this Act, all local councils, including the Peddie Local Council, were abolished and tribal authorities set up in their place.[100] This Act effectively 'retribalised' the native reserves by using chiefs and headmen as local government administrators. Tribal Authorities consisted of a tribal chief and his councillors who dealt with local tribal matters. Tribal Authority councillors were nominated by the tribal authority itself (*viz.* the chief) and were thus not necessarily representative of any major constituency in the rural villages.[101] The problem with this set-up was that chieftancy in the Peddie

[98] Ainslie 98 comments that this resulted in ambiguous and dissonant management of the rural areas.
[99] Act 68 of 1951.
[100] Ainslie 101, quoting Bundy, comments that the Act effectively delegated much of the local administrative authority to a system of direct rule through 'ethnic and reconstituted pseudo-traditional chiefs and headmen.'
[101] Ainslie 102.

District was highly contested because of the earlier relocation of the Mfengu into the area by Governor D'Urban in the early 1800s.[102] This resulted in amaXhosa people being subject to a Mfengu chief or Mfengu people being subject to a Xhosa chief – despite no customary affiliation to the chief or the people. As a result, the tribal authority system in Peddie did not have popular support.[103] In general, tribal authorities were inefficient for the same reasons as the local councils, namely financial resources. This inevitably led to the centralisation of local government functions, as many of the chiefs themselves were also members of the tribal authority and later, of the Legislative Assembly and Cabinet of the Ciskei.[104]

In terms of the Ciskei Proclamation,[105] the Ciskei was declared a self-governing state in 1972. The declaration was a natural consequence of the government's thinking of the time on labour control, housing and segregation. During the 1970s and 1980s, the South African government set out to consolidate scattered portions of the designated reserve areas so as to form one geographical area which would later become the independent Ciskei homeland in 1981.[106] In the Peddie area, this involved incorporating the former so-called proclaimed urban areas of Peddie and Hamburg and surrounding farm land into the homeland of the Ciskei area.[107]

When the Ciskei gained its independence in 1981, Chief Lennox Sebe was appointed 'president-for-life.' After an unpopular nine years, Brigadier Oupa

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[102] See Manona 106, 114 and 102. See Ainslie 113.
[103] Manona 113.
[104] Groenewald 89. See also Ainslie 102.
[105] Proclamation 187 of 1972.
[106] The legal vehicle through which this acquisition and transfer took place was the Development Trust and Land Act 18 of 1936, as amended. Section 4(1) of the Act established the South Africa Development Trust (SADT) which was to be administered 'for the settlement, support, benefit and material and moral welfare of the blacks of the Republic.' The Act empowered the SADT to acquire certain specified categories of land only, including land within a released area for black settlement. An area became defined as released by resolution of (the then) both Houses of Parliament, whereafter it was declared a released area by proclamation of the State President in the Government Gazette.
[107] In terms of Proclamation 257 of 1972 published in Government Gazette No 3637 dated 13 October 1972, the particular district of Peddie was proclaimed to be a released area. For an interesting account of how farms were expropriated from white farmers in the Peddie district during this time, see *Randall and another v Minister of Land Affairs; Knott and another v Minister of Land Affairs* 2006 (3) SA 216 (LCC).

Gqozo took over from him in a bloodless coup in 1990. One of Gqozo's first moves was to suspend all headmen. This resulted in tribal authorities ceasing to function, mainly because of their reliance on headmen to collect taxes. In the absence of an effective local government structure, residents in the various districts formed residents' associations. These associations, despite no formal status, took up many of the functions of the Council, including the allocation of land. In the Peddie district, Peddie SANCO was formed to carry out these functions.[108]

With no official local government operating in the area, Gqozo's military government did an about-turn by abolishing all residents' associations and re-instituting headmen as a method of exercising control over the Ciskei. This was an unpopular move which resulted in violent opposition. As a result, a state of emergency was declared in the Ciskei in October 1991.

Against the backdrop of the Local Government Negotiating Forum and negotiations to incorporate the homelands back into South Africa, an amendment to the Local Government Transition Act provided for local government forums to be established in all parts around the country including the former Ciskei. The first meeting of the local government forum in Peddie in 1994 was acrimonious, with Peddie SANCO refusing to recognise councillors from the Tribal Authority. This situation was soon resolved and the provincial government accepted the decision of the Peddie forum regarding the jurisdiction of the newly-formed transitional councils in December 1994.[109]

Following South Africa's first municipal election in 1995, one transitional representative council (TRC) and two transitional local councils (TLCs) were established in Peddie and Hamburg.[110] From 1995 to 1997, three pilot housing projects were implemented in the Peddie and Hamburg area.[111] While these projects together realised only 58 completed houses, the projects

[108] Manona 113.
[109] Manona 118.
[110] Lind 146.
[111] Lind 151 reports that these pilot housing projects stemmed from a provincial policy initiated by the first MEC for housing in the Eastern Cape Province.

were regarded as successful in terms of council management, as well as the quality of the housing project.[112] Following the municipal demarcation process in 2000, the local transitional councils were amalgamated into a unified Ngqushwa local government, consisting of Peddie and Hamburg TLCs, as well as the Peddie TRC, part of the King William's Town Rural TRC and parts of the Victoria East TRC.

5.4.3 Sakhisizwe Local Municipality

The area that is now known as Sakhisizwe Local Municipality consists mostly of the magisterial district of Xhalanga situated in the former Emigrant Thembuland which, in turn, formed part of the erstwhile Transkei homeland. Like Ngqushwa Local Municipality discussed above, it also includes a former Cape Provincial Administrative urban area, namely, the town of Elliot.[113]

The town of Cala (the seat of the former district of Xhalanga) and its surrounding area is renowned for its popular resistance to Chief Kaiser Matanzima (later the head of state of the independent homeland of the Transkei). More relevant for this research, Xhalanga is renowned for its resistance to the restructuring of local government which inhabitants saw, rightly so, as a fiction of apartheid planning.[114] Up until 1956, the interaction of bureaucratic, traditional and elective advisory bodies formed the pattern of Transkeian local government.[115]

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[112] Lind 153.

[113] Significantly, Circular 1 of 2006 of the Demarcation Board set out a possible redetermination of the boundaries of Sakhisizwe Local Municipality which would exclude the area of Elliot from Sakhisizwe. In the Circular, the Demarcation Board commented that 'Sakhisizwe will be without a significant node and tax base. Only Cala will remain.' Having considered this proposal, the Municipal Demarcation Board noted in December 2006 that it was concerned with 'the alleged poor service delivery and the deterioration of Elliot.' Whilst it did not totally exclude the possibility of redetermining the municipal boundaries, it commented that 'these matters should not be addressed by re-determining municipal boundaries, but through interventions by the MEC.'
See http://www.demarcation.org.za//Documents/Circulars/2006Nov07/CIRCULAR%204%20-%202006%20BOARD%20RESOLUTIONS%20ON%20REDETERMINATION%20OF%20BOUNDARIES.mht (accessed 4 June 2007).

[114] Bank 93.

[115] Carter *et al* 88.

In 1917 the Xhalanga district was subdivided into 18 locations,[116] with the Cala reserve being proclaimed a location in this district in 1927.[117] In line with the Native Affairs Act[118] (which, it will be recalled, set up a district council model in all the reserves), the South African government issued Proclamation 301 establishing a district council in the Xhalanga District. As in other parts of the Transkei and Ciskei, two rural local government structures now existed: the District Council at a district level and headmen, at an administrative, location level.[119] While the people initially supported the Xhalanga District council, the council quickly lost support as most Xhalanga residents realised that it was little more than a colonial administrative structure drawing on headmen to promote colonial policies.

Throughout the period of the Xhalanga District Council, the involvement of the two dethroned chiefs in the area was marginal.[120] This role is attributed to the fact that, even before the district council was set up, the authority of the chiefs in the Xhalanga area was contested.[121] Despite this, central government

[116] In terms of Government Notice 301 1917.
[117] This proclamation was in conformity with the provisions of an earlier proclamation, namely, Proclamation 241 1911.
[118] Act 23 of 1920.
[119] In terms of the whole reserve, all district councils in the Transkei were federated in the United Transkeian General Council (UTTGC) in 1931. The UTTGC or *Bunga* met annually and consisted of the Chief Magistrate of the Transkei, who acted as chairman, 26 magistrates, and three members appointed for each district council from amongst their number. The three paramount chiefs of Eastern Pondoland, Western Pondoland and (after 1936) Thembuland, sat on the Council *ex officio* making 108 members in all. The *Bunga* had limited control over certain locally raised funds, which were allocated mainly for road-building and other public works, agricultural improvements, and scholarships. In terms of housing functions, the Council was occasionally responsible for the resiting of homesteads. It also discussed any proposed legislation by the white South African Parliament which affected blacks. However, any resolutions taken were not binding – they were merely submitted to the Official Conference of Magistrates who supported, did not support, or forwarded such resolutions without comment to the Governor-General for information. It is clear from the aforegoing that while there was some measure of representation at local level at this stage, ultimate authority at every level in the Transkei was vested in the government in Pretoria. See Hammond-Tooke 187 and 192. Nelson Mandela, in a 1956 article written for *Liberation* (described as a 'journal of democratic discussion') characterised the *Bunga* system as 'discriminatory and largely powerless.' http://www.anc.org.za/ancdocs/history/mandela/1950s/nm55-56.html£N_6 accessed 21 August 2006).
[120] Chief Gecelo and Chief Stokwe. See Ntsebeza 128.
[121] See Ntsebeza for an interesting account of chiefs in the area before and after unification. Ntsebeza 4 argues, throughout the book, that chieftancy has always been contested and that it has 'throughout its history since colonialism been dependent on the support of the state that was moreover highly fickle and constantly changing.' In particular, Ntsebeza argues that land issues in Xhalanga – such as the struggles of landholders against apartheid's engineered

sought to give these chiefs powers at the local Tribal Authority level to execute government policies in terms of the Bantu Authorities Act. The people of Xhalanga, perhaps more than any other area within the Transkei, resisted the imposition of these traditional authorities. However, because rural residents could not gain access to government resources (especially land) without the chief's endorsement, they had no option but to use the tribal authorities' structure even if they did not support it.[122] In effect, the new local government structure effectively shifted power from the headmen to the chiefs.[123]

Despite resistance by many of the people in Xhalanga, the Bantu Authorities Act took effect in the Transkei in 1956.[124] Four tribal authorities were set up in Xhalanga, namely: KwaGcina, emaQwathini, eHlathini and eQolombeni; under the chiefs Gecelo, Stokwe, Msengana and Nvinjelwa respectively.[125] A letter from the Xhalanga Residents Association to the Secretary of Bantu Affairs in 1957 indicates the feeling of the people at the time:

> '(W)e beg with respect to inform you that the Chief Magistrate of the Transkeian Territories visited Xalanga District to introduce the Bantu Authorities Act … at the Plantation Ward. The Xalanga people told the Chief Magistrate that the Bantu Authorities Act was not acceptable to them as it was a measure … calculated to diminish and/or deprive them of their rights. Subsequently Chief Kaizer Matanzima of Confimvaba District visited the same ward and unsuccessfully persuaded the people to accept the Bantu Authorities Act. … From Confimvaba, Chief K Matanzima came with a large retinue between

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'retribalisation' – gave chieftainship in the area a specific trajectory. At 297, Ntsebeza argues that the chieftainship in the area of Xhalanga was contested right from the establishment of the Xhalanga district in 1865.

[122] Ntsebeza 253.

[123] In addition, the *Bunga* was replaced by the Territorial Authority which was composed entirely of chiefs. This meant that from 1956 until the Promotion of Bantu self-Government Act 1958 and the Transkei Constitution Act 1963, there was no elective element in the Transkeian structure above the district level – and only the slightest of representation below that level. See Carter *et al* 90.

[124] In terms of Proclamation 180 of 1956.

[125] These 4 tribal authorities were established in terms of Government Gazette 1149, 2 August 1957.

> forty and fifty people. When it came to voting for or against Chief Matanzima's proposal, some of the people forming the retinue voted for this proposal, whereas they are not Xalanga people. The people appeal to you, Sir, to try and prevail over the Chief Matanzima to stop coming or calling at Cala (Xalanga District). His visits are likely to cause friction and much unpleasantness.'[126]

Two issues are raised in this letter. Firstly, the Xhalanga residents clearly were not in favour of the Bantu Authorities Act. Secondly, Kaiser Matanzima was intimately involved in the politics of the Xhalanga district and was not fully supported. It was due to his political manoeuvrings that the central and north-western Transkei was divided into two tribal regions, Thembuland and Emigrant Thembuland, the Xhalanga district falling into the latter. In terms of this division, Kaiser Matanzima was elevated to the position of paramount chief of Emigrant Thembuland from the position of a less senior chief,[127] thereby setting himself up for greater political ambitions.[128] This division was seen by the Xhalanga residents as a fiction of apartheid planning and blatantly accused Kaiser Matanzima of being an 'impostor' in the region.[129] This resistance to fictional divisions and tribal authorities became more organised and militant, and the period of the late 1950s-1960s was characterised by the term 'tshisa, tshisa' ('burn, burn')[130] and the draconian Proclamation 400.[131]

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[126] Letter from the Xhalanga Residents' Association to the Secretary of Bantu Affairs, dated 23 December 1957 quoted in Ntsebeza 131 and 150. The letter was signed by Eleazor Masoka 'on behalf of the people.'

[127] Bank 93.

[128] As paramount chief, he would have been able to participate in the *Bunga.*

[129] Bank 93. According to Ntsebeza 187, Matanzima was aware of the hostility he faced in the Xhalanga District in his reference to its people as *amadyakobi*. Ntsebeza opines that this term presumably refers to a form of the word 'Jacobins', denoting the French Revolutionary political group. As an educated chief with a Bachelor of Arts degree, Matanzima probably saw similarities in the hostility he received in Xhalanga to the hostility or extremism displayed by the Jacobins during the revolution. At 292, Ntsebeza contends that because of this hostility, Matanzima singled out the Xhalanga district for punishment for rejecting him as their chief when Bantu Authorities were introduced in the 1950s.

[130] According to Ntsebeza, the phrase indicated the burning of huts of both pro- and anti-government figures in the district. This action was apparently a popular method of resistance against tribal authorities in many rural areas in the former homelands. See Ntsebeza 175.

[131] Proclamation 400 provided, amongst other things, for the banning of meetings and the banishing of individuals. It also gave wide-ranging powers to the chiefs, including the power

According to the South African government publication *Bantu,* the Promotion of Bantu Self-Government Act[132] that followed in 1959 'gave the Bantu people of South Africa a categoric assurance that the South African government had irrevocably set a course on a road that would lead the homelands to meaningful self-government.'[133] Smit, Olivier and Booysens[134] give a more plausible rationale for the Act. They comment that the Promotion of Bantu Self-Government Act reflected an increased awareness by government that an urban structure was absolutely essential if the homelands were to be guided towards independence. In terms of this Act, a number of white Commissioners-General were appointed to act as agents of the central government in the homelands, and to set up eight Bantu territories, one of them being the Transkei. In terms of the Transkei Constitution Act,[135] the newly-formed Transkei Legislative Assembly was given authority over African local government; that is, over the structures of Bantu Authorities below the level of the Transkeian Territorial Authority (which was disestablished when the first Transkeian Cabinet was constituted in1963).[136] In 1972, John Dugard commented on the reality behind this legislation:

> 'Basically, the law fulfils four functions. First, it constructs a legal order based on racial discrimination and differentiation. Secondly … by legitimising discriminatory practices, it neutralises the immorality of such practices in the eyes of the majority of the white population who accept without question any rule which has been blessed by Parliament. Thirdly, those laws which institutionalise separate

to banish their opponents, but also to demolish the immovable property of their victims. See Ntsebeza 191.

[132] Act 46 of 1959.

[133] Quoted in Rogers 41.

[134] Smit, Olivier and Booysens 96.

[135] Act 15 of 1976.

[136] A spate of legislation followed dealing with mainly administrative matters connected with the homelands. These Acts all affected the status of the blacks in 'white' South Africa, seeking to control and exclude. Dugard comments that common features of this legislation were the lack of political process at local level, as well as the intention of the South African government to remove any rights that Transkei 'citizens' had had in South Africa. See Dugard 98-99. This legislation included: The Bantu Homelands Citizenship Act 26 of 1970, the Bantu Homelands Constitution Act 21 of 1971, the Constitution Act 1 of 1971, the Bantu Laws Amendment Act 7 of 1973, the Bantu Laws Amendment Act 70 of 1974, and the Second Bantu Laws Amendment Act 71 of 1974.

> development provide a convenient façade for the outside world. The Promotion of Bantu Self-Government Act, the Transkei Constitution and the Bantu Homelands Constitution Act are useful for foreign consumption as they adopt the rhetoric of self-determination and self-government without disclosing the realities of South African life. Legal tinsel is used to conceal the fact that most of the African population lives outside the homelands and cannot in fact participate in the homeland's political process; that the African people themselves have not been consulted about their future; and that self-determination inside or outside the homelands is meaningless while the harsh security laws remain in force. Fourthly, the drastic security laws … create a repressive atmosphere in which meaningful political debate and activity is stifled.'[137]

In 1976, the Transkei was granted independence by the apartheid government[138] with Kaizer Matanzima as head of state – the same year as the Soweto uprising. In that same year and shortly before the uprising, several Cala youths were arrested and severely punished for their association with the events that led up to the uprising.[139] This set the scene for youth politics in the Xhalanga district which flourished during the 1980s and was intimately linked to the housing crisis in the area. The youth politics in the area created the impetus for the creation of various organisations, one of which was the Xhalanga Youth Congress Organisation (XAYCO) in 1989 and the Cala Residents Association (CRA) in 1990 (modelled along the lines of the civic associations in South Africa).[140]

[137] Dugard 98-99. Dugard's reference to 'security laws' in the extract points to the fact that, on 'independence', the Transkei effectively adopted South African legislation on all security matters. The subsequent Transkei Public Security Act 30 of 1977 (which repealed all security laws applicable in South Africa) made it an offence equivalent to treason to refuse to recognise the Transkei's independence or advocate that it should be 'part of another country' (ie. South Africa). The maximum sentence prescribed was death.
[138] In terms of the Status of the Transkei Act 100 of 1976.
[139] Bank 93.
[140] Bank 95.

Both the CRA and XAYCO concerned themselves with the housing crisis that beset Cala and the surrounding area.[141] At the beginning of 1990, the CRA sent various petitions to the Transkei government (now under the leadership of General Bantu Holomisa) requesting that attention be given to the housing crisis in Cala. Despite promises by officials visiting the area, nothing had been done in the area by June 1990 and XAYCO stepped into the picture. XAYCO convinced CRA to initiate squatting as a political response to the lack of action by the Transkei government.[142] In the ensuing months, the CRA began allocating residential sites to residents. However, by mid-1991 the whole issue of urban housing in Cala was in complete disarray with difficult political groups claiming 'irregularities' in site allocation.[143] The response of the Transkei government was to revive the unrepresentative town council which was disbanded in 1989. Despite controversy and protest, a new town council was elected in September 1991.[144]

As a result of the changes at national level, local government in the area consisted of the Cala Transitional Local Council, Xhalanga Transitional Representative Council, Elliot Transitional Representative Council and Elliot Transitional Local Council. After 2000, these councils united to become Sakhisizwe Local Municipality.

5.5 Case study areas: socio-economic indicators[145]

[141] Developments in Cala around the housing crisis motivated youth activists in surrounding rural areas, most notably, in the area of Emnxe. See Ntsebeza 241.
[142] Bank 97.
[143] It was claimed that the CRA gave sites to members of the ANC, or people who paid the joining fee of the ANC. Bank 97. See also Ntsebeza 248.
[144] Bank 98.
[145] The socio-economic indicators in this chapter are sourced from the 2000 District Profile Reports compiled by the Eastern Cape Socio-Economic Council (ECSECC) instead of from the 2007 District Profile Reports. The reasons for this are clear from the two caveats listed below. ECSECC is a Schedule 3 Public Entity (in terms of the PFMA) established in 1996 as a formal Consultative Council comprising the social partners of government, organised business, organised labour, the higher education sector and NGOs in the Province of the Eastern Cape. According to its Annual Report for 2005/2006, ECSECC was established 'to assist Provincial Government accelerate the pace of socio-economic transformation, and address the principal challenges of unemployment, inequality and poverty in the Province.' See ECSECC Annual Report (2005/2006) 10. The statistics published by ECSECC in their 2000 District Profile Reports are used to paint a general picture of the environment in each municipality but are subject to two caveats:

Before considering the current status of housing provision in each case study area, current socio-economic indicators for each case study area are set out. These data are not analysed in any depth – the data are merely set out to give the reader some context of the kind of conditions within which each of the local municipalities must endeavour to meet their housing obligations. However, as will become apparent, the current socio-economic environment in each case study area is largely a product of its own peculiar history as discussed in the previous paragraphs.

5.5.1 Population profile

Local Municipality	Black	Coloured	Asian	White	Other	Total	Male	Female
Makana Local Municipality	55 362 (91%)	9 281 (4%)	806 (0.2%)	10 462 (4%)	271 (0.4%)	76 182	36 199 (48%)	39 957 (52%)
Sakhisizwe Local Municipality	48 555 (97%)	329 (0.6%)	84 (0.1%)	922 (2%)	183 (0.3%)	50 073	23 136 (46%)	26 895 (54%)
Ngqushwa Local Municipality	93 443 (99.4%)	137 -	5 -	187 -	225 -	93 997	43 777 (47%)	50 210 (53%)

Table 5.1 Population profile

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1. The statistics provided in these reports appear to be inaccurate at times: there are some instances where the numbers and / or percentages simply do not add up. The 2000 District Profile Reports record the source of these statistics (for example, the Municipal Demarcation Board) but one cannot check their accuracy by cross-reference because (1) the format of the tables is different from its recorded source, and (2) certain statistics from consultants cannot be accessed by the general public. For example, statistics sourced from a privately-held company, Global Insight (formally Wharton Econometric Forecasting Associates), are not available to the public. See www.globalinsight.co.za (accessed 21 August 2006).
2. The statistics are approximately seven years old. Although ECSECC has produced 2007 District Profile Reports, these reports have not been used because they do not allow for comparison between municipalities in different districts. This is because not all statistics in each report are recorded in the same format. In addition, certain indicators simply do not feature at all in a district report. For example, no poverty index is recorded for Ngqushwa Local Municipality and no comparable education statistics are provided for both Makana Local Municipality and Ngqushwa Local Municipality. Many of the latest statistics (recorded in the reports as 'RSS 2007') are sourced from the Rapid Assessment of Service Delivery and Socio-Economic Survey, a survey commissioned by the Premier of the Eastern Cape government in 2005. To date, only an abridged version of the survey has been released to the public. This survey is discussed more fully in chapter 7.

From the data above, larger black populations are to be found in the former Transkei and Ciskei areas (*viz.* Sakhisizwe Local Municipality and Ngqushwa Local Municipality respectively) than in the previous Cape Provincial Administration (*viz.* Makana Local Municipality). This can be attributed to settlement policies and the migrant-labour system which segregated these areas according to race and ethnic lines. In terms of gender profile, the percentage of women in all three case studies is similar to the Eastern Cape Province as a whole – 47% male and 53% female. Research by IDASA[146] indicates that women generally have lower incomes than men, with more female-headed households living in poverty. The opportunities afforded to women would then impact on the quality of life of all members of the family.[147]

5.5.2 Development indicators

In 1999 WEFA South Africa[148] measured the life expectancy, literacy and income (together known as the Human Development Index – HDI)[149] in all the magisterial districts in the Eastern Cape. The data for the three municipalities under discussion can be seen in the table below. The massive differences in the poverty gap in the magisterial districts are indicative again of the underdevelopment of areas in the previous homelands. If one considers the local government history above, the following is apparent: the poverty gap is less in the magisterial districts where those districts were not, or only later, amalgamated with a homeland territory. The magisterial district which was originally part of a native reserve and a homeland (ie. Cala), has by far the worst poverty gap data. The most encouraging data are for the magisterial district of Albany which was never part of either a native reserve or a homeland and has not been incorporated with any former homeland territory. Elliot's data are alarming, considering that it never formed part of a native

[146] Institute for Democracy in South Africa.
[147] See ECSECC Profile: Amatole District Council (no page number).
[148] WEFA South Africa is now named 'Globalinsight'. The WEFA data were obtained through the research of ECSECC. See footnote 145 above.
[149] The HDI is a composite, relative index which attempts to quantify the extent of human development within a community. See Alebiosu 38. It is based on measures of life expectancy, literacy (education) and income. Developed by the Pakistani economist, Mahbub ul Haq, it has been used by the United Nations in its Human Development Programme (the UNDP) since 1993. See www.undp.org (accessed 25 August 2006).

reserve or homeland. However, this may be attributable to the fact that it has now been amalgamated with a district that was both a native reserve and later a homeland.[150] Finally, the magisterial district of Peddie follows the Albany district with the best data. This can be explained by the fact that the district was originally part of the Cape Provincial Administration but was then incorporated into the homelands of the Ciskei during the 1970s.

Local Municipality	Magisterial District	Human Development Index	Persons living in poverty (number)	Persons living in poverty (%)	Poverty Gap[151] (R million)
Makana Local Municipality	Albany	0.57	39 248	47.6	44
Sakhisizwe Local Municipality	Elliot Cala	0.47 0.45	12 354 42 747	71.0 73.5	471 1 171
Ngqushwa Local Municipality	Peddie	0.44	51 943	79.9	77

Table 5.2 Development Indicators

5.5.3 Education: functional literacy and education status

The functional literacy rate of the three municipalities is calculated on the percentage of the population that is literate (20 years and above). Once again, literacy varies significantly between the three municipalities with a literacy rate of 68.1% recorded for the Magisterial District of Albany (Makana), compared to the 58% literacy rate in Elliot and the 48% literacy rate in Cala. These low literacy rates are reflected in the levels of education of each municipality's populations.

[150] Xhalanga district (ie. Cala).
[151] The poverty gap is explained by ECSECC at 9 as 'an indicator that incorporates both the depth and incidence of poverty: it shows both the proportion of households living in poverty, as well as how far they are below the poverty line. It is calculated by summing up the differences between the income of each poor household and the poverty line.'

Local Municipality	No formal schooling	Grade 0-6	Grade 7-9	Grade 10-11	Matric only	Matric +	Total
Makana Local Municipality	4062 (6.1%)	13 806 (20.8%)	15 891 (23.9%)	9 127 (13.7%)	10 751 (16.2%)	6 410 (9.6%)[152]	66 445
Sakhisizwe Local Municipality	5417 (13%)	12 297 (30%)	12 976 (31%)	6 662 (2%)	2 904 (7%)	974 (2%)	41 230
Ngqushwa Local Municipality	4778 (11%)	14 160 (34%)	1 231 (30%)	560 (14%)	3 001 (7%)	1 291 (3%)	42 021

Table 5.3 Education status

5.5.4 Labour market indicators: unemployment

The unemployment rate in all three municipalities has been captured by WEFA South Africa and, again, follows the lines of underdevelopment in the former homeland areas. The unemployment rate would obviously put greater demands on the municipalities of Sakhisizwe and Ngqushwa to provide housing for those who cannot provide for such housing themselves.

Local Municipality	Magisterial District	Unemployed persons (%)	Unemployed persons (number)
Makana Local Municipality	Elliot Cala	42 70	2 111 5 971
Sakhisizwe Local Municipality	Albany	37.2	10 459
Ngqushwa Local Municipality	Peddie	75.6	11 385

Table 5.4 Unemployment

[152] This level may be explained by the existence of Rhodes University in Grahamstown (part of Makana Municipality) where many academics would be resident.

5.5.5 Service infrastructure

In chapter 3, emphasis was placed on General Comment 4 (adopted in 1991) of the Committee on Economic, Social and Cultural Rights which set out that the term 'housing' should include seven aspects of adequacy, such as safe drinking water and washing facilities, sanitation and energy for cooking, heating and lighting. In chapter 4 emphasis was placed on the fact that 'housing' is inextricably linked to the provision of services by municipalities. Given these two emphases, the service infrastructure of the three case studies regarding access to water, sanitation and electricity is an important facet in understanding the socio-economic challenges facing the three local municipalities in the provision of housing. As such, the data set out below show that none of the municipalities can be said to provide all aspects of adequate housing. Nevertheless, it is apparent that those municipalities which were part of the former homeland territories have a far greater need than that of Makana Municipality.

Local Municipality	Water in Dwelling	On site	Public Tap	Tanker	Bore-hole	Natural	Other	Un-specified
Makana Local Municipality	6735 (41.2%)	4874 (29.9%)	3542 (21.7%)	153 (0.94%)	560 (3.44%)	376 (2.31%)	7 (0.04%)	45 (0.28%)
Sakhisizwe Local Municipality	1564 (16%)	1674 (17%)	2782 (28%)	127 (1%)	872 (9%)	2895 (29%)	95 (1%)	95 (1%)
Ngqushwa Local Municipality	321 (1.5%)	383 (2%)	10327 (50%)	425 (2%)	1164 (6%)	7973 (38%)	75 (0.3%)	90 (0.4%)

Table 5.5 Access to water

Local Municipality	Flush	Pit Latrine	Bucket Latrine	None	Unspecified
Makana Local Municipality	5826 (36%)	2953 (18%)	5821 (36%)	1643 (10%)	49 (0.3%)
Sakhisizwe Local Municipality	1786 (18%)	5707 (57%)	903 (9%)	1535 (15%)	70 (0.7%)
Ngqushwa Local Municipality	288 (1.4%)	17 978 (87%)	206 (1%)	2199 (10%)	86 (0.4%)

Table 5.6 Access to Sanitation

Local Municipality	Local Authority	Other	Gas	Paraffin	Candles	Other Source	Unspecified
Makana Local Municipality	11602 (71%)	59 (0.3%)	71 (0.4%)	4155 (25.5%)	356 (2%)	0	49 (0.3%)
Sakhisizwe Local Municipality	2450 (24%)	44 (0.4%)	65 (0.6%)	5118 (51%)	2254 (23%)	0	79 (0.8%)
Ngqushwa Local Municipality	4672 (22%)	85 (0.4%)	223 (1%)	15192 (73%)	477 (2%)	0	108 (0.5%)

Table 5.7 Access to Electricity

5.6 Conclusion

The aim of this chapter has been to set out the historical context of local government in South Africa with reference to the peculiar histories of the case studies in question. The aim was also to set out a brief overview of socio-economic indicators in each of the three case studies.

What can be concluded from these contextual discussions? First, while local government is touted, post-1994, as being the sphere closest to the people, it is clear from the history of local government that this was not always the case. In fact, a feature of the apartheid era was the systematic emasculation of local government (especially for specific race groups) and the implementation of the policy of ‘own management for own area’ in the form of homelands. Even in the homelands, the contested authority of the tribal authorities – especially

in Cala – meant that the people did not feel at all close to their form of local government. From this history, it must be acknowledged that local government institutions face an enormous task in fulfilling their constitutional objectives (including their housing responsibilities) while, at the same time, attempting to address the legacy of local government as an oppressive and ineffective arm of government.

Second, it is evident that the particular historical context has contributed to the current social and economic environment in each case study area. The socio-economic indicators for each case study area displays the difficult conditions in which the housing right must be realised. It also reflects how the three case studies vary in need and capacity. This theme is taken up into chapter 6 which considers the actual housing provision in each of the case studies and analyses such housing provision in the light of criteria set out in chapter 4.

Chapter 6:
Housing provision in three case studies within the Eastern Cape Province

6.1 Introduction

This chapter commences with a summative account of the planning and implementation of the housing right in the three case studies. This entails a description of housing provision in each case study area based on interviews conducted during the period July – September 2006 and local government documentation. Having described the housing provision in each area, the chapter then evaluates the reasonableness of such provision in the light of the three criteria identified in chapter 4. The discussion of the first two criteria focus on the role of local government in (1) pro-active planning and implementation of the ECP and (2) co-operative governance. Both pro-active planning and co-operative governance have been considered as components of the housing right. Discussion on the third criterion (namely, adequate budgetary and resource allocation) turns its focus on the role of provincial government given its responsibility in approving applications under the ECP and its vital role as distributor of housing grants generally.

6.2 Current housing provision in three case study areas

6.2.1 Makana Local Municipality

It will be recalled that s9(1) of the Housing Act[1] requires that a local municipality must include its housing responsibilities in its IDP. Thus, it is used as a starting point in discussing the planning for housing in all three of the case study areas.

[1] Act 107 of 1997.

Makana's IDP for the financial year 2006/2007 lists housing as its second highest priority[2] with ten housing projects listed. The IDP sets out each housing project, documenting the budget, source of funding and notes relating to completion. No reference is made to the National Housing Programme: Housing Assistance in Emergency Circumstances (ECP) or any other planning document for housing in the municipality. However, prior to national government's formulation and adoption of the ECP (April 2004), Makana already adopted measures to deal with similar-type emergency situations in 2001/2002, albeit only in terms of provision of land and access to water. This was a direct result of the proceedings discussed in chapter one, namely, *Davies and others v Makana Municipality.*[3] Simply stated, the municipality surveyed and reserved 440 erven outside the town of Grahamstown. The idea behind this move was that it wished to provide a place where people could live temporarily until they were provided with a house in terms of the normal route of applying for a housing subsidy.[4] In terms of this project, no building material was provided on these erven but water was provided by standpipe.

When asked to describe the type of people who were assisted and allowed to reside on these erven, the Makana official stated that although the municipality had its own disaster management section to deal with floods, fires and the like,[5] it needed to make provision for two sections of the populations, namely (1) 'another category of people, people who are dumped here in Grahamstown by the farmers'[6] and (2) those who have been renting

[2] IDP 2006/2007 para 6.2. Section 26(c) of the Municipal Systems Act 32 of 2000 requires that a municipality 'reflect the council's development priorities and objectives for its elected term; including its local economic development aims and its internal transformation needs.'
[3] Unreported case no 391/02 ECD.
[4] The allocation of these erven is apparently strictly controlled and supervised by *Mayibuye* – a company contracted by the municipality to assist in building and relocating. See Makana interview 12.
[5] Makana interview 9-10. See also Makana interview 13: '… if a person his house burns down and flood (*sic*) comes in, then that is a different issue. That is disaster management.'
[6] Makana interview 10. The official followed this comment up by stating: 'You can have all these nice things about your rights etcetera but that process is going to be a lengthy process, trying to find out whether the rights of these people have not been violated by the farmer. But basically, the fact remains is that the person is here and he has been dumped here and he is here in front of us.' The SAHRC's comments in its Fifth SAHRC Report at 56 recognises the reality of the situation described above: 'After nine years of democracy and despite the

and, unable to pay the rent through the loss of a job, are 'kicked out'[7] by their landlords. In this regard, the official states quite simply that:

> 'This is the township, the township is not like town. The man [i.e. the landlord] is not going to go for an eviction order, he is going to do so himself. … So that is why you have to speak to this man and tell him, you can't evict him now, give this man two days so that we can … try and assist this man. It is only then that we say that this falls under emergency … that this man must get a site.'[8]

Many of the housing project entries in the IDP have not been completed by the municipality in the timeframes allocated.[9] In addition, despite Makana Local Municipality applying to the province for several housing projects in line with its housing obligations, all such projects lie dormant until 2007/2008. This is borne out in various documents. Out of nineteen housing projects recorded in an IDP Implementation Report submitted to Makana Municipal Portfolio Committee on Land, Housing and Infrastructural Development on 18 July 2006, seven housing related projects had the status: 'Housing Application is on-hold until 2007/2008.'[10] Similarly, the 2006/2007 IDP sets out that six of the ten housing projects listed are on hold until 2007/2008 due to the moratorium declared by the department.[11] Before this moratorium came into effect, Makana received a Vuna Award[12] and an award for provision of housing in 2003.[13]

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existence of human rights values in South Africa, the use of violence, harassment and other tactics to facilitate eviction remains common.'

[7] Makana interview 13.

[8] Makana interview 13.

[9] A comparison between the entries in the 2004/2005 IDP and the 2006/2007 IDP bears this out. Most of the housing projects listed in the 2004/2005 IDP are again listed in the 2006/2007 IDP ie. they have not been completed.

[10] Makana IDP Implementation Report, 18 July 2006 (no page numbers).

[11] Makana IDP 2006/2007 (no page numbers).

[12] The Vuna awards are the initiative of the Department of Provincial and Local Government, together with the South African Local Government Association (SALGA), the Development Bank of Southern Africa (DBSA) and the National Productivity Institute (NPI). The Vuna awards rewards the municipalities that go beyond standards to give their communities excellent service and governance (see http://www.dplg.gov.za/vuna/vunamain.htm accessed 21 September 2006). Despite the awards' stated intention, it is questionable whether the award to a certain municipality can be used as a true measure of service delivery. Atkinson (2006) 15 comments on the award as 'the paradox of formal success combined with popular grievances' using, amongst others, the Nelson Mandela Metropolitan Council as an example.

6.2.2 Ngqushwa Local Municipality

Ngqushwa Local Municipality's IDP for 2006-2011 lists housing as its third highest priority. The IDP sets out the intention to 'lobby with the Department of Housing and Local Government to embark on the People Housing Process, CIMP,[14] Rapid Release Programme etc',[15] and sets out one ambitious project for the construction of 3000 housing units in 5 villages[16] to the amount of R49 million.[17]

There is currently one estate officer who is responsible for housing, land and town planning. Despite the envisaged provision for another two staff members in this area, none has been advertised or appointed.[18] In her two years of working at the municipality, the estate officer for Ngqushwa has never dealt with a new housing project – she has only ever tried to unblock two existing housing projects.[19] The municipality first applied to manage these projects (which are still not complete) in 1997.[20] The estate officer identifies the IDP as the housing strategy and advised that there is no housing strategy or plan outside of the IDP.[21] There is no reference in the IDP of provision for emergency housing or the ECP. Unlike the Makana IDP, there is no reference to timeframes or implementation plans for the R42 million project

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Despite large protests in its municipal area relating to lack of service delivery and mismanagement of housing projects, the Council won a Vuna award. Atkinson opines that the reasons for this paradox could be: (1) that municipalities provided information about themselves for the award leading to a bias in the evidence; (2) the methodology of evaluation of municipalities is still poorly developed, and that it tends to focus of formal office requirements; and (3) municipalities are making serious efforts to improve at head office level, but these efforts have not yet been felt at community level.

[13] Makana interview 17.

[14] Consolidated Municipal Infrastructure Programme.

[15] Nqgushwa IDP 2006-2007 93.

[16] Gcinisa, Mpekweni, Masele, Hamburg and Glenmore.

[17] Ngqushwa IDP 2006-2007 118 (project number 80).

[18] Ngqushwa interview 15. This post was created in 2004 to manage housing, land and town planning. All housing-related matters prior to 2004 were handled through the Municipal Manager's office. Currently (as at July 2006), one estate officer and one building inspector manage housing for the entire municipality (Ngqushwa interview 5).

[19] Ngqushwa interview 9. In this regard, she states at 3: 'We haven't had any new projects that have started while I am here.'

[20] See para 5.6 for a more detailed discussion of Ngqushwa housing projects.

[21] Although it should be noted that the estate officer advised (as at July 2006) that they were waiting for Amathole District Municipality to assist them in drawing up a housing strategy. See Ngqushwa interview 3.

listed in Ngqushwa's IDP, except that it is set out under the heading '2006/7.'[22]

Neither of the blocked projects mentioned in interviews with the estate officer and the project manager for the area are mentioned in Ngqushwa's IDP, despite a total of 816 houses that still need to be built in respect of these projects.

6.2.3 Sakhisizwe Local Municipality

In Sakhisizwe Local Municipality, one official manages the Local Economic Development process, the Integrated Development Process, Housing, Land and Sports and Recreation. This official is assisted by four housing clerks. None of the clerks has engineering, project administration or financial experience.[23]

The IDP of Sakhisizwe Municipality for 2006-2011[24] identifies housing as third on the list of development priorities[25] and sets out that 'a large housing backlog … requires urgent attention.'[26] Housing projects to address this large housing backlog, as specified in the Sakhisizwe IDP, are set out in the table below for ease of reference.

[22] This entry is distinguished from the entries in Makana Local Municipality's IDP which sets out the person responsible, source of funding, and status of a housing project.
[23] Sakhisizwe interview (2) 3.
[24] Each page of the Sakhisizwe IDP for 2006-2011 has a marginal note titled 'Draft 2006/2011 IDP Document.' Upon my visit to the Local Municipality in June 2006, this was the only IDP document available. Efforts to ascertain the document's status in September 2006 were unsuccessful. In addition, the Sakhisizwe IDP could not be accessed via the internet. For the purposes of this dissertation, the draft available is taken as the official IDP.
[25] Sakhisizwe Local Municipality IDP 2006/2011 11.
[26] Sakhisizwe Local Municipality IDP 2006/2011,12.

Project number	Housing Project	Budget	Funder	Timeframe	Corresp-ondence re: progress (18/10/06)[27]
1	Ekuthuleni housing project and internal infrastructure	14 750 000 (expected budget in 2006/2007)	No information given	2006/2007	Application phase
2	Old township housing (construction and upgrading)	24 800 000 (expected budget in 2008/2009)	DHLGTA[28] (consultant not yet appointed)	No information given	Application phase
3	New township housing (construction and upgrading)	17 500 000 (expected budget 2010/2011)	DHLGTA (consultant not yet appointed)	2010/2011	Application phase
4	Maxhongo's hoek housing and infrastructure	1 500 000 (expected budget in 2006/2007)	No information given	2006/2007	Planning stage
5	Rural housing	31 680 000 (expected budget in 2008/2009)	DHLGTA (consultant appointed)	2007/2008	No information given
6	Sakhisizwe housing project ext. 13,14,15	55 000 000 (budget for 2005/2006)	No information given	2005/2006	Blocked project
7	Elliot – Phola Park	14 500 000 (budget for 2005/2006)	No information given	2005/2006	Blocked project

Table 6.1 Housing Projects in Sakhisizwe Local Municipality

Two of the envisaged projects[29] identified to be completed in the financial year 2005-2006 in the IDP are, in fact, projects which have been blocked since 2003.[30] One of these projects envisaged the building of 3 415 houses. Despite misgivings by the provincial project manager, the housing application was approved by the Provincial Department which was then under pressure to

[27] Correspondence from the official responsible for housing, 18 October 2006 (on file with the author). Whilst falling outside of the time-frame of the research of this dissertation, it is interesting to note the latest developments in the municipality. According to a telephone interview with a housing official at Sakhisizwe Local Municipality on 2 October 2007 the Provincial Department turned down the municipality's applications for the housing projects 1, 2, 4 and 5 as tabulated above. In respect of the new township planning construction and upgrading (3), the municipality has yet to apply for the 2010-2011 project. The housing official reported that the Premier of the Eastern Cape visited the municipality in September 2007 and promised R2 million for the old township housing construction and upgrading. In respect of the Sakhisizwe and Phola Park housing project (6 and 7), top-up funding (R96 760 000) has been provided by the Provincial Department to complete the project. Work on this project is due to commence on 10 October 2007.

[28] Department of Housing, Local Government and Traditional Affairs in the Eastern Cape.

[29] Sakhisizwe Housing Extension 13,14 and 15 and Elliot – Phola Park.

[30] Sakhisizwe Project Consultant 19.

spend money to avoid yet another year of under-spending.[31] However, the IDP does not indicate that these projects have been carried over from 2003 and whether the budget for each project refers to top-up funding or the original amount given (presumably) by the Department.

There is no reference to emergency housing or the ECP in the IDP or in any other planning document of the municipality. According to the official responsible for housing within the municipality, the only housing plan (apart from their IDP) is its housing list which does not include any reference to emergency housing.[32] According to the project manager for Sakhisizwe Local Municipality, no measures have been taken to implement the ECP at local level. This is because 'that concept [emergency housing] *has not yet been implemented fully* by the Department. It is at a very tender age.'[33] The measures taken by the province itself had, as of July 2006, consisted of one 'policy session' with provincial housing project managers – consultants employed by the province itself.[34]

6.3 Application of eviction criteria to case studies

6.3.1 Proactive planning by local government

In response to the *Grootboom* judgment, it will be recalled that the National Department of Housing drafted and adopted the National Housing

[31] Sakhisizwe Project Consultant 10.

[32] Sakhisizwe interview 3. The housing list is a list of beneficiary names that have been approved by the Department and who are waiting to be housed. When asked whether plans had been made for emergency housing, the official responded that 'it ECP] does not affect us.' (handwritten notes with the author).

[33] This comment was made in 2006, more than two years after the National Department of Housing adopted the ECP. When asked to distinguish between situations where the Disaster Management Act 57 of 2002 provisions would be applicable (as opposed to situations where the ECP would be applicable), the response of the same manager was: 'Because the policy *has not been implemented* I wouldn't be able to tell you how and what stage would those two things be separated.' My italics.

[34] Sakhisizwe Project Consultant 19. This statement relies on an interview with one of the project managers from the Department. No local government officials interviewed made any reference to assistance by the province for emergency planning other than that provided for in terms of the Disaster Management Act. Furthermore, no reference could be found on the Department's website to the ECP (accessed 23 September 2006 http://www.ecprov.gov.za/municipality/content.asp?PageID=72&buster=2006%2F09%2F25+06%3A39%3A41+PM). It must therefore be assumed that this statement is correct.

Programme: Housing Assistance in Emergency Circumstances (ECP) in 2004. This programme in turn specifies that the municipality must proactively plan for these types of situations in their IDP.

Even before the ECP was finalised, the SAHRC commented on the draft, noting in its Fifth Report that the allocation of grants to the municipalities in the ECP was a way forward towards improving the co-operation and co-ordination between the different spheres of government.[35] However, the SAHRC questioned in that same report, whether many municipalities had the capacity to institute measures initiated by national government, especially regarding the implementation of the ECP.[36] The SAHRC based this concern on the fact that the ECP does not cover refuse removals, operations, maintenance and management of the development. In addition, the SAHRC commented: 'The temporary nature of the programme presupposed a programme that will adequately help the situation *at that moment.*'[37]

The context is thus: National government formulates a programme to respond to *Grootboom*. Assistance comes in the form of grants from provinces to municipalities. If a province actually responds timeously to such application, the grant is given. However, the grant is limited to certain forms of assistance for the emergency situation. The municipality is then faced with providing services not covered by the grant to people who cannot pay for them.[38]

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[35] Note that the SAHRC were commenting on a draft version of the ECP as it was only finalised in July 2004, after the SAHRC Report was published. However, the only real difference between the draft and the final version was the fact that applications for emergency housing funds would be heard at provincial level (as opposed to the draft version which set out that a committee within the National Department of Housing would hear all applications).

[36] Fifth SAHRC Report 12.

[37] Fifth SAHRC Report 15. My italics.

[38] The problem identified here does not only relate to the ECP. McLean 55-25 notes that the national government has been criticised for failing to appreciate fully the financial implications for local government of engaging in housing delivery – in general terms. This is made very clear in a 2003 Public Service Commission report (quoted in Urban Sector Network Report 27-29) which notes: 'In spite of the evidently high levels of severe poverty in many HSS projects local authorities continue to expect payment for rates and services. Only the larger metros have developed indigent policies that allow the poorest household a basic lifeline of water and/or energy supply, and also zero rating for rates payments. Poorly resourced small town municipalities face up to 80% to 90% default on rates or services but appear not to have the means, *or the national or provincial support*, to be able to put in place appropriate indigent policies. This affects the social and economic viability not just of the housing projects but also of these small municipalities.' My italics.

Whilst the ECP envisages that this scenario is to be remedied by 'pro-active planning' by municipalities in their IDP planning, this raises serious questions as to the sustainability of the programme, particularly with regard to:

(i) payment for rates and services for those who fall into the category of an emergency situation (and payment of those services listed by the SAHRC above); and

(ii) a municipality's obligations to promote economic development.[39]

Thus the programme can be criticised as short-sighted in that it fails to realise all components of the right to have access to housing which extends *beyond* the immediate ECP grant and emergency situation. In other words, how will the municipality be able to continue to support those in desperate need when they only receive a 'once-off' payment in terms of the ECP?

Notwithstanding the SAHRC's hesitance in accepting the reasonableness of the ECP and issues raised in case law,[40] it is clear that a local municipality must have a programme that addresses those in desperate need – whether it is a separate, locally-drafted programme (as envisaged by *Rudolph I and II*) or a programme drafted in terms of the ECP (as envisaged by *City of Johannesburg I and II*).[41]

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[39] See *City of Johannesburg* para 6 where the applicant (the local government for Johannesburg) appealed to the Court 'not to place a "stop sign" on its difficult road to upliftment of the inner city.' See also *Property Lodgings* 16 where the court emphasised that the local government had a duty to take into account the interests of the developers and the demands of the 2010 World Cup.

[40] Subsequent to the drafting of the ECP, two judgments (namely *City of Cape Town v Neville Rudolph and others II* and *The City of Johannesburg v Rand Properties (Pty) Ltd and others*) have reflected a difference in approach as to whether the ECP requires that local government make up for the deficiencies in the ECP by adopting its own plan or simply follow the procedures set out in the ECP. It was common cause in *Rudolph II* that the ECP is structured in such a way that it does not pay 'due regard to the urgency of the situation it is intended to address'. In *City of Johannesburg* however, Jajbhay J held that the applicant municipality had failed in the pragmatic implementation of the ECP. Nowhere in the latter judgment did the court question the effect of the bureaucratic procedures within the ECP as considered in *Rudolph*. Unfortunately, the SCA in *City of Johannesburg II* did not deal with this issue on appeal, mainly because the provincial housing department was not joined and the appeal mainly dealt with the NBRA. However, as is apparent from chapter 4, the Court articulated quite clearly that it disapproved of the province's lack of action in the matter.

[41] It will be recalled that in *City of Johannesburg,* the court rebuked the local government concerned for failing to implement this ECP: 'The applicant has failed in the pragmatic implementation of this programme' (para 53).

If one follows the judgments in the *City of Johannesburg* matter, this means that, in effect, local government must take steps to implement the ECP.[42] In terms of implementation by local government, the ECP sets out that local government must *plan ahead* for emergency housing situations by making provision for: procedures to monitor land use, including illegal land invasion, within its area of jurisdiction;[43] pro-active procurement measures;[44] and liaison channels and procedures both within its organisation and with other public and private bodies to deal with emergency situations effectively when they arise.[45] In addition, local government must identify possible emergency housing situations by utilising components of its integrated development plan (IDP).[46]

Thus, in addition to the planning in the IDP, it is vital that a municipality should be able to access funding from the province at short notice.[47] The ECP operates on the basis that, in emergency situations, a municipality applies for

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[42] *City of Johannesburg* para 67: 'The order … requires that the Applicant be interdicted from evacuating the Respondents, until such time that the applicant has developed a pragmatic, constructive and coherent programme that will deal with the predicament that the Respondents presently have to endure, The programme must also provide for alternate adequate accommodation for the Respondents.'

[43] ECP 27.

[44] Examples of pro-active procurement measures include annual contracts and the establishment of panels of suitable contractors and consultants. A municipality and/or the provincial housing department have considerable discretion in the particular contract strategy it chooses to use, especially given the nature of the emergency. However, the programme requires that in all instances acquisition procedures must be fair, equitable, transparent and cost effective. See ECP 22 and 27.

[45] ECP 27.

[46] In particular, the ECP requires that a municipality's IDP should include:

- Identification of communities that do not have access to basic municipal services. In this way, existing and potential emergency situations can be identified, risks assessed, and contingency plans made.
- Setting out existing emergency situations or potential emergency situations as development priorities and objectives.
- Information about existing emergency housing situations where alternative land or development projects may be required should be identified and reflected in the spatial development framework. Threatening and potentially threatening situations, disaster-prone areas, and communities at risk identified in the municipal disaster management plan, that may qualify for assistance under the ECP, must also be identified.
- Land must also be identified that can be utilised for emergency situations.

See ECP 27. Jajbhay J in *City of Johannesburg* at para 53 interpreted these duties as 'targeting those who can afford to pay for housing and those who cannot.' In particular, he found that the implementation of the ECP by local government had to be undertaken with a measure of urgency; yet in a co-ordinated and coherent fashion.

[47] *City of Johannesburg* para 53.

funding via the Department to the Member of the Executive Council ('the MEC') responsible for housing. The funding consists of a grant to the municipality, rather than subsidies to individuals.[48] However, it is clear from the *Rudolph II, City of Johannesburg II* and *Property Lodgings* decisions that it could be months before the province even responds to such an application, thus justifying the concern that the SAHRC expressed regarding the temporary nature of the ECP.[49]

Given the duties set out in the ECP and case law, the first aspect of the 'eviction criteria' requires local authorities to (1) proactively plan for emergency situations in their IDP and/or separate programme(s) and (2) ensure that such planning allows for the immediate relief of the emergency situation by securing the necessary funding from provincial government in a co-ordinated and coherent fashion. The question posed in the next section is: What have the three Eastern Cape local municipalities under review done to comply with this requirement?

As set out above, none of the three municipalities studied includes any reference to the ECP in either their IDP or any other planning document.[50] In fact, only one local government official interviewed (from Makana Local Municipality) even knew that the ECP existed. In Ngqushwa Local Municipality, the estate officer advised that there was no planning for an emergency-type situation, in terms of the ECP or any other plan in her municipality.[51] In Sakhisizwe Local Municipality, an official stated that the

[48] ECP 9-10.
[49] Fifth SAHRC Report 13.
[50] For example, the Spatial Development Framework, the Local Economic Development Plan etc. It may be argued that the IDP is a five-year planning document and, since the ECP was only adopted in 2004, it will obviously not include emergency measures if such IDP was adopted prior to 2004. However, the IDP is subject to an annual review and may in fact be amended 'to the extent that changing circumstances so demand' (see s34 of the Municipal Systems Act 23 of 2000). It is submitted that the inclusion of proactive measures in terms of the ECP should be made at this annual review or in terms of 'changed circumstances'.
[51] Ngqushwa interview 2. This was confirmed by the project manager overseeing Ngqushwa Local Municipality who stated: 'I would know something about it (the ECP) or I would be asked to facilitate it … *that hasn't happened.*' My italics. Ngqushwa Project Consultant 5. The Eastern Cape Provincial Report on the assessment of municipal powers and functions (prepared by the Municipal Demarcation Board, May 2003) noted at 15 that there was no dedicated budget for integrated planning for the District Municipality under which Ngqushwa Local Municipality operates (*viz* Amatole District) or any of the local municipalities which fell

municipality's housing plan (apart from its IDP) was the municipality's housing list[52] and that, in any event, the ECP 'does not affect us'.[53] The Makana Local Municipality advised that the municipality did make provision for those in desperate need, although this was not in terms of the ECP but in terms of its own arrangements.[54] These arrangements, described above, provide a piece of ground with access to water.

From interviews conducted with local government officials and project managers, the kind of planning that has taken place in Makana is not evident in the other two municipalities studied. It is clear that all the municipalities studied have not taken any steps in terms of the ECP, with only one municipality planning pro-actively in some way.[55]

The description of those persons who benefit from Makana Local Municipality's arrangements certainly fit the *Grootboom* profile – to the extent that such description acknowledges that an emergency does not only consist of natural disasters such as floods and fires.[56] Thus, while Makana Local Municipality has not 'pro-actively planned' in its IDP in the manner required by the ECP, it has attempted to accommodate those in dire need by allocating a plot with access to water where a person can build his or her shack.

When asked to describe the rationale for reserving these erven, the Makana official's reply reminds one of comments made in the judgments of *Grootboom, City of Johannesburg* and *Port Elizabeth Municipality v Various*

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under it (including Ngqushwa). In particular, the report noted that 'Ngqusha (*sic)* Municipality, while it renders the function [of integrated planning], has some capacity limitations.' These capacity limitations vis-à-vis housing and integrated planning are discussed later on in the chapter.

[52] Sakhisizwe interview 3. The housing list is a list of beneficiary names that have been approved by the Department and who are waiting to be housed.

[53] Sakhisizwe interview (handwritten notes with the author).

[54] The official interviewed from Makana Local Municipality stated that whilst 'there is no document for that [provision for those in dire need],' the municipality had 'reserved erven for this particular type of thing.' Makana interview 14.

[55] It should be noted that the ECP sets out at 7 that it will take preference over any existing provincial and municipal programmes relating to emergency housing assistance. Such programmes must be brought into conformity with the ECP.

[56] It will be recalled that the SAHRC commented in its Fifth SAHRC Report at 15 that the definition of 'emergency' in the ECP might be too narrow to cover the situations envisaged by the court in *Grootboom*.

occupiers[57] regarding the need of the state to show 'care and concern',[58] '*ubuntu*'[59] and 'good neighbourliness'[60] when dealing with the poor:

> 'The problems were that we were telling a person that you cannot squat here in Makana. Yet, the circumstances of this person are forcing him to squat. … *Because at the end of the day we are human beings*, now we have to face that … *our people cannot just be dumped on the street*.'[61]

The provision of land by Makana Local Municipality in this way appears to solve the problem raised by Pienaar and Muller as far back as 1999, as well as Sachs J in *Port Elizabeth v Various Occupiers,* namely: there is no substitute infrastructural provision for transitional support of evicted persons.[62] Makana Local Municipality has thus responded to the problem raised by Pienaar and Muller (and repeated by Sachs J) that 'there is still a need for areas with basic or rudimentary services, areas where squatters can legally settle while they wait to get to the front of the housing queue.'[63]

6.3.2 Co-operation between the provincial and local sphere of government

The ECP drafted at national level can only succeed if local government and provincial government 'co-operate with one another in mutual trust and good faith by co-ordinating their action and legislation.'[64] The Constitutional Court stated in *Grootboom*:

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[57] 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC).
[58] *Grootboom* para 44.
[59] *City of Johannesburg* para 62.
[60] *Port Elizabeth Municipality* para 37.
[61] Makana interview 14. My italics.
[62] Van Wyk 49. See *Port Elizabeth Municipality* para 28 (footnote 28).
[63] J Pienaar and A Muller 'The impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on homelessness and unlawful occupation within the present statutory framework' (1999) 10 *Stell LR* 370 393.
[64] Section 41(1)(h)(iv) of the Constitution.

> 'All levels of government must ensure that the housing programme is reasonable and appropriately implemented. … Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.'[65]

It will be recalled that the *Grootboom* judgment also emphasised that '[t]he State must devise a comprehensive and workable plan to meet its obligations [in terms of s26]'[66] and '[a] reasonable programme must … ensure that the *appropriate financial and human resources are available.*'[67]

The Housing Act[68] draws no distinction between a local council, a metropolitan council, a metropolitan local council, a rural council and a district council. The Act therefore imposes the same obligations and duties on all of these different types of municipalities. The underlying assumption of the Housing Act is therefore that municipalities are similarly placed in terms of resources and infrastructure so as to enable them to perform their duties and functions in an equally diligent and capable manner. This lack of distinction in spite of the vast disparities in their resources, capacity and general skills and knowledge regarding housing development is only manageable if the provincial sphere is able to assist the smaller municipalities both financially and in providing human resources in accordance with the principles of co-operative government.[69]

The role of local government as regards housing development is also not linked with any specific financing provisions in the Housing Act. Funding for housing development is drawn down from the provincial sphere. This is a critical issue in the context of the limit of 'available resources' in terms of s26(2) of the Constitution and, again, the success of co-operative government

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[65] *Grootboom* para 82. The co-operation that should take place between the province and local government in terms of s26 is spelt out s7(2)(c) and s7(2)(e) of the Housing Act.
[66] Grootboom para 38.
[67] Grootboom para 39. My italics.
[68] Act 107 of 1997.
[69] K Pillay 'Local Government and the Right to Adequate Housing' (1998) 1 *ESR Review* http://www.communitylawcentre.org.za/Projects/Socio-Economic-Rights/esr-review/esr-previous-editions/esr-review-vol-1-no-1-march-1998.pdf/ accessed 5 March 2007.

becomes vital. Any planning by local government would need to be an iterative process between provincial and national government giving consideration both to national and provincial policy principles.[70] One recalls the warning in the 1994 Housing White Paper:

> 'The absence of legitimate, functional and viable local authority structures will jeopardise both the pace and quality of implementation of housing programmes.' [71]

Local government's ability to realise the housing right is therefore severely undermined if communication with the province regarding housing policy consistency and alignment breaks down. The SAHRC has stated:

> 'It is the responsibility of both the national and provincial governments to strengthen the role and responsibilities of local government through the exchange of expertise and experience, in line with the principles of co-operative governance to locally implement the adopted housing programme.'[72]

In the interviews conducted, local government officials complained in general about the lack of communication between local government and provincial government, resulting in delay and uncertainty in planning ahead. A Makana official comments that planning at provincial level is haphazard[73] and the process 'is not how it should be.'[74] Lack of planning at provincial level necessarily impacts negatively on the Municipality's ability to plan (and monitor) housing projects ahead in terms of the Municipality's IDP.[75] Despite

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[70] This success did not seem apparent in a 2003 survey conducted by the Urban Sector Network. A local government official is reported to have commented: 'The question is: is the provision of housing the core function of local authorities? If yes, the national policy is not very clear. If housing is the high priority at national level, then all local authorities should align their responsibilities and resources to meet this obligation.' See Urban Sector Network 22.
[71] White Paper para 5.2.3.
[72] Fourth SAHRC Report 60.
[73] Makana interview 15.
[74] Makana interview 5.
[75] Makana interview 20: 'It must not be a lucky lotto stake. I must know so that I can plan accordingly.' Also see Makana interview 19: 'The problem … is that if you are dependent on the province to give you funding, you can't determine that [the future].' Atkinson (2006) 4

the obligation of the provincial government to assist and integrate a municipality's IDP,[76] the Makana official notes that 'as far as housing [is concerned] I have never received anything from the province. You never get such a thing.'[77]

The lack of pro-active planning by Ngqushwa and Sakhisizwe Local Municipalities set out above cannot be seen in isolation.[78] As noted in Chapter 3, the Provincial Department of Housing is under a duty to assist local government in its housing functions. Such assistance would cover assistance to local government in carrying out its functions in emergency housing situations either in terms of the ECP or in terms of a separate programme.

The ECP stipulates that Provincial Departments must:

> 'guide, assist and collaborate with municipalities in the preparation and submission of applications and in the implementation of projects [for emergency situations] and also co-ordinate actions with any disaster initiatives as well as with the actions of other role players in an approved project.'[79]

The Provincial Department's duty to assist municipalities goes beyond assistance in the actual project application itself (which may be implied in the programme excerpt above). This submission is borne out by the Provincial Department's general constitutional mandate to assist and support local

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notes that inadequate communication between the provincial and local spheres of government 'is a regular occurrence, with municipalities receiving highly contradictory information about budgetary allocations and spending deadlines.'

[76] Part 4 of the Housing Act requires that local government include housing responsibilities in their IDP process. As set out in chapter 3, the IDP of each municipality is aimed at the integrated development and management of the area of jurisdiction of the municipality concerned in terms of its powers and duties.

[77] Makana interview 20.

[78] See the Sixth SAHRC Report 28 which confirms this approach: 'The activities of different departments at all levels of government are interlinked and intertwined. The failure of one department contributes to the ultimate failure of other departments. Likewise, an inappropriate decision by one department affects the ability of other departments to implement appropriate decisions.'

[79] ECP 5.

government[80] and its very specific mandate in both the Housing Act[81] and the Municipal Systems Act[82] to assist municipalities in their planning for housing.

What then has the Provincial Department done to assist these municipalities in planning for emergency situations? The measures adopted by the Provincial Department for the ECP are unclear. One project manager reported that the measures have, to date, consisted of one 'policy session'[83] with provincial housing project managers (*viz.* consultants employed by the province itself).[84] The project manager comments: 'That concept [ECP] *has not yet been implemented fully* by the Department. It is at a very tender age.'[85] This comment was made in 2006, more than two years after the National Department of Housing adopted the ECP. When asked to distinguish between situations where the Disaster Management Act[86] provisions would be applicable (as opposed to situations where the ECP would be applicable), the response of the same manager was: 'Because the policy *has not been implemented* I wouldn't be able to tell you how and what

[80] Section 155(b) of the Constitution states that 'each provincial government must provide for the … support of local government in the province; and must promote the development of local government capacity.' In giving content to the concept of support, it is instructive to refer to how the Constitutional Court interpreted the meaning of support in s155(6) of the Constitution. In *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), the Court held at para 371 that the term 'support' derived much of its significance from s154(1) where national and provincial government are compelled to 'support and strengthen the capacity of the municipalities'. The Court held that this power of 'support' can be employed by provincial governments to strengthen existing local government structures, powers and functions and to prevent a decline or degeneration in such powers, structures and functions. See also Mettler 222.

[81] Section 7(2)(c) of the Housing Act 107 of 1997 requires that the province (through its MEC) must take all reasonable and necessary steps to support and strengthen the capacity of municipalities to effectively exercise their powers and perform their duties in respect of housing development. See also s7(2)(e) of the Housing Act.

[82] Section 31 of the Municipal Systems Act 23 of 2000 requires that the MEC for local government in the province must, *inter alia,* assist a municipality with the planning, drafting, adoption and review of its integrated development plan.

[83] Sakhisizwe Project Consultant 19.

[84] This statement relies on an interview with one of the project managers from the Provincial Department. No local government officials interviewed made any reference to assistance by the province for emergency planning other than that provided for in terms of the Disaster Management Act. Furthermore, no reference could be found on the Provincial Department's website to the ECP (accessed 23 September 2006 http://www.ecprov.gov.za/municipality/content.asp?PageID=72&buster=2006%2F09%2F25+06%3A39%3A41+PM). It must therefore be assumed that this statement is correct.

[85] Sakhisizwe Project Consultant 20.

[86] Act 57 of 2002.

stage would those two things be separated.'[87] Given that these project managers are often the sole advisors and contacts the municipality has with the province, it is clear that if the project managers cannot articulate the details of the programme, it is hardly likely that meaningful assistance is being provided to municipalities in respect of planning for emergency situations under the ECP or otherwise.[88]

Both project managers and all local government officials interviewed commented that they had not prepared or been assisted in any preparation of a separate programme to deal with emergency situations. The acting senior manager of policy and research for the Provincial Department disputed this conclusion when interviewed, setting out the fact that the province had trained municipal officials and had, in fact, set aside R32 million for emergency programmes for 2006/7.[89]

If we accept the version of the local government officials interviewed, it is highly likely that, notwithstanding the setting aside of money, the province itself has not planned the operation of the ECP and that many local municipalities in the Eastern Cape are not in a position, in the words of Jajbhay J, to '[s]ecure the necessary resources and assistance from … provincial government to deal with the current crisis situation.'[90] It also follows that, should a local municipality apply to the province for funding, such application would not be 'attended to with a measure of urgency; however in a co-ordinated and coherent fashion' as required by *City of Johannesburg I* and *II.*[91] This conclusion is articulated by a project manager:

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[87] Sakhisizwe Project Consultant 20. My italics.
[88] Given that these project managers are each responsible for twenty to twenty-five projects in several different municipalities (Pillay Commission, Perks 130), it is fair to conclude that ignorance of the ECP extends beyond the three municipalities studied.
[89] Provincial interview 5. However, setting aside an amount of money does not equate with adequate planning – especially when the Provincial Department has a history of under-spending. In any event, the setting aside of money is a statutory obligation. For example, see Government Gazette 24834, GN 616, 30 April 2003 published in accordance with s24 of the Division of Revenue Act 7 of 2003. In terms of Annexure A of this Gazette, Provincial Governments have to set aside 0.5-0.75 per cent per year to finance emergency housing needs. According to the Annexure, the setting aside of funding 'will provide for the people who have been affected by disasters; and need to be assisted as a matter of urgency.'
[90] *City of Johannesburg* para 61.
[91] *City of Johannesburg* para 53 and *City of Johannesburg II* para 77.

> 'I have not been involved in that [planning for emergency situations] which then clearly says that in municipalities in which I have been involved in, that [planning under the ECP] hasn't happened.'[92]

The lack of communication between officials in the three case studies reviewed and the province appears to be a general problem within the Eastern Cape by (1) the provincial government's own admission and (2) reports by the media.

In May 2003 the MEC for Housing in the Province noted that there was a 'volatile' and 'unstable' environment within local government which led him to conclude that '[n]ot all of us understand the significance of Chapter 3 … one of the things we need to practise is co-operative government.' The MEC said further that 'difficulties in executing principles of co-operative government were due to the spheres of government not talking to one another.'[93]

In the same month, the Director of the Provincial Department of Housing , Local Government and Traditional Affairs admitted that one of the reasons for its under-spending on housing was that municipalities lacked housing units (i.e. adequate human resources) and the political will 'to do the right thing' at local level. In response to this statement, the mayor of Buffalo City at the time, Sindisile McLean, stated that 'the Department says municipalities have no capacity. We say the Department fails the municipalities.'[94] Over the same period, the strategic plan of the Provincial Department for 2004-2007 noted that the provincial housing programme suffered from 'poor communication internally and externally.'[95]

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[92] Ngqushwa Project Consultant 5. The project manager interviewed is responsible for Ngqushwa, Nxuba, Great Kei, Amahlathi and Mnquma Local Municipalities. It is therefore safe to conclude that in all these municipalities, no planning has been undertaken in respect of the ECP or any other programme. A general overview of the relationship, co-operation and assistance between the province and municipality (i.e. not only for emergency situations) paints the same picture.

[93] 'Nkwinti calls for better co-operation' *Daily Dispatch* 9 May 2003.

[94] 'Dept vows to spend R1.1 billion on new houses' *Grocott's Mail* 23 May 2003.

[95] Provincial Department of Housing, Local Government and Traditional Affairs Strategic Plan (2004-2007) 15. Research conducted in 2002 by De Visser in the province of Kwa-Zulu Natal

The lack of co-operative government within the Eastern Cape however, has been taken up politically in the last two years. In her State of the Province address in February 2005, the Premier of the Eastern Cape stated that relations between municipalities and Provincial Government needed to be strengthened in order to accelerate service delivery.[96] This theme was reiterated in a policy speech a month later by the MEC for Housing, Local Government and Traditional Affairs stating that there needed to be 'role clarification between provincial government and municipalities.'[97] As a result of widespread protests in the Port Elizabeth area in May 2005 relating to lack of service delivery and alleged mismanagement of housing projects, the national Minister of Housing met with the Mayor of Port Elizabeth, the Housing MEC and the Premier. At that meeting, the national Minister maintained that inadequate communication between the three spheres of government and the affected communities had been the cause of problems relating to service delivery and housing.[98] A year later, the Premier continued to focus on lack of co-operative government, resulting in poor capacity at municipal level:

> 'Local government is what gives life to the concept of wall-to-wall government. Extensive work has been undertaken to review the functionality of this sphere of government, out of which two problems underlying the performance of municipalities have been distilled. The first

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also revealed a break down in co-operative government between provincial and local government. Having interviewed both municipal and provincial officials, he found: 'An issue that constantly came up [in interviews] was the lack of knowledge on the part of the municipalities about provincial plans, budgets and priorities that were supposed to influence IDPs. … From the interviews it appeared that some provincial departments are blissfully unaware of municipal IDPs and the communication and sharing of information during municipal IDP processes is sorely lacking. Numerous respondents complained about the lack of understanding and interest of departments in IDPs; they show little interest in municipal IDPs, thereby stifling its integrative potential.' Research carried out by the National Assembly's Portfolio Committee on Local Government and a Ministerial Advisory Committee on Local Government confirmed this finding. See Portfolio Committee on Provincial and Local Government (2003) 19 and Ministerial Advisory Committee (2001) 61-62 quoted in De Visser 225.

[96] State of the Province Address, Premier Nosimo Balindlela 18 February 2005 (http://www.ecprov.gov.za/images/pdfFiles/05state_province_address.pdf accessed on 3 August 2006).

[97] Policy Speech of Neo-Moerane, MEC for Housing, Local Government and Traditional Affairs 2005/2006 17 March (2005) 11 and 21.

[98] *Local Government Briefing,* June (2005) 32.

is *poor capacity* within municipalities to discharge their functions, compounded by *inadequate and inappropriately structured capability within the state in* general to support municipalities. Secondly, the existence of poor and inadequate accountability mechanisms straddles both the administrative and political domains of our municipalities. It is for this reason that the next term of local government must be characterised by a decisive shift towards building municipal capacity and sustainability that should lead to an improvement in the performance of the whole of government.'[99]

6.3.3 Adequate financial and human resource allocation

The right to have access to adequate housing is subject to the limitation that the state must take reasonable measures to achieve the progressive realisation of the right within its available resources.[100] Although the courts have been hesitant in the past to consider the spending patterns or to impose specific planning directives regarding socio-economic rights,[101] they have accepted that the provision of constitutional remedies inevitably impacts on budgets and planning.[102] Where the courts have accepted as much, they have also been quick to point out that these possible budgetary consequences on the state are a direct consequence of its duty to enforce

[99] My italics. See State of the Province Address, Premier Nosimo Balindlela 10 February 2006 (http://www.ecprov.gov.za/Uploads/pdfFiles/premier%20sopa%202006%20v7.doc accessed on 3 August 2006).

[100] Section 26 of the Constitution of the Republic of South Africa, 1996.

[101] In *Soobramoney* para 29 the Constitutional Court stated: 'A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.' In *Minister of Health and others v Treatment Action Campaign and others* 2002 (5) 721 (CC), 2002 (10) BCLR 1033 (CC) para 37 the Constitutional Court again refrained from examining policies that influence the overall resource availability by stating: 'It should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second *amici* should be, nor for deciding how public revenues should be most effectively spent.'

[102] See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* para 77 and 78. In other words, while the courts are unlikely to be receptive to a direct challenge to the state's micro-economic budgetary decision-making processes, the courts are not likely to defer to the government's set budget priorities where such priorities run counter to the Constitution. Roux (quoted in Wilson (2004) 440) makes this point very well: 'The Constitution does not say that South Africa's macro-economic strategy is the supreme law of the Republic, and everything that government does must necessarily fall into line with this strategy.'

progressive realisation of soci-economic rights.[103] This is clear from both the *Khosa and others v Minister of Social Development and others; Mahlaule and another v Minister of Social Development and others*[104] and also the eviction cases[105] where the courts have shown that they will not accept unsubstantiated allegations regarding resource shortages.

It follows then that the reasonableness review could lead to an enquiry into the fiscal policy which supports a particular socio-economic right such as housing. Thus, while the court is not able to 'judge' the choice of a particular operating system, it could assess the reasonableness of such housing budget *spending* in achieving what is required by the Constitution. This is what the Constitutional Court in fact did in both *Grootboom* and *Khosa* in varying degrees.[106]

Without considering the actual budgetary allocation at national, provincial and local level, the courts have indirectly expected the proper management of financial resources. The SAHRC has continually reported that the Eastern Cape Provincial Department has attributed its under-spending of the housing budget on a lack of capacity at local level. However, if the management of these resources – both in terms of financial and human resources – is

[103] For example, in *Grootboom*, the court would not specify the amount to be spent on those 'in dire need' but rather required proof that there was sufficient allocation and use of budget for the specified group.

[104] 2004 (6) BCLR 569 (CC). In *Khosa* (discussed in chapter 4), the likely budgetary impact of the order to include permanent residents as beneficiaries of certain social grants amounted to an estimated R243 million to R672 million per year. While the Court found that the necessary increase of the budget as a result of the order was 'a small portion of the total cost' of social grants (at the time valued at R26,2 billion per year) (para 62), the order did show the Court's willingness to make orders affecting budgets.

[105] See especially *South African Rail Commuter Corporation v Unlawful Occupants of the Western Cape Commuter Area between Nolungile and Nonkqubela Stations, Khayelitsha Khayelitsha* (unreported case no 2452/03 CPD) and the unreported return of the structural interdict in *City of Cape Town v Neville Rudolph and Others* (*Rudolph II*).

[106] In *Grootboom* the Court indicated that the state had to show proof to the court that there was a sufficient and reasonable part of the national housing budget set aside for those in desperate need, although the precise allocation of budget was for national government to decide. The state could not show this and therefore, it was in breach of its s26 obligation. In *Khosa*, the Constitutional Court actually considered the state's figures in deciding whether the exclusion of foreign permanent residents to the state's scheme for social welfare assistance was reasonable. The Court found that given the small cost of including such members of society, the scheme was not reasonable and thus it insisted that the state increase its budget to accommodate permanent residents. The purpose of the court's analysis was therefore not to engage in policy-making or actual budgeting, but to enquire whether any restrictions of the right (based on resource constraints or any other reason) were reasonably required in achieving the constitutional goal.

unreasonable and affects the implementation of the housing programme, it is submitted that such mismanagement would constitute a breach of s26.

Local government must apply to provincial government for funding for housing projects and for funding in terms of the ECP. Given provincial government's responsibilities in both the Housing Act and in the ECP for funding programmes, the expenditure of the budget of the provincial housing department must also be considered.[107] This section is therefore divided into two sections: a discussion of the issue of human resource allocation at local level followed by a discussion of both budgetary and human resource allocation at provincial level.

6.3.3.1 Human resource allocation at local government level

In almost all the SAHRC reports to date,[108] the Eastern Cape Provincial Department has attributed its under-spending to a lack of capacity at municipal level. This lack of capacity is certainly apparent in two of the three municipalities studied, namely Ngqushwa and Sakhisizwe.

In Sakhisizwe Local Municipality, one official manages the Local Economic Development Process, the Integrated Development Process, Housing, Land and Sports and Recreation. This official is assisted by four housing clerks who do not have any engineering, project administration or financial

[107] The focus of this application must necessarily be devoted to the role of the province in transferring and monitoring funds for housing projects to municipalities. The majority of funding that comes from the national Department of Housing is in the form of conditional grants. These comprise predominantly grants for housing subsidies. Funds appropriated as conditional grants may not be used for any other purpose. In order to support sectoral legislation and policy on spending, the Division of Revenue Act (DORA) regulates the spending of conditional grants, together with additional reporting responsibilities imposed by Treasury. Transfers from a Provincial Department are, in turn, regulated by the Treasury Regulations. See chapter 3, para 3.6.

[108] For example, in the Fourth SAHRC Report the SAHRC reported: 'The Eastern Cape attributed its under-spending to insufficient capacity at municipal level' and later on in the report: 'Eastern Cape and Limpopo cited lack of capacity at local level.' (no page numbers cited). In the Fifth SAHRC Report the SAHRC reported at 36-37: 'The under-expenditure [by the Eastern Cape Department of Housing] is attributed to capacity constraints at municipal level.' In the Sixth SAHRC Report (a report that is considerably less comprehensive than previous SAHRC reports), there is no mention made of the particular responses of provinces. However, the Report does make a general recommendation at 28: 'The national and Provincial Department of Housing and local government officials should be capacitated … to be more effective in ensuring access to adequate housing.'

experience.[109] In Ngqushwa Local Municipality, the position of 'estate officer' was created in 2004 to manage Housing, Land and Town Planning. All housing related matters prior to 2004 were handled through the municipal manager's office. As at July 2006, one estate officer and one building inspector manage housing for the entire municipality.[110] In her two years of working at the municipality,[111] the estate officer for Ngqushwa has never dealt with a new housing project – she has only ever tried to unblock existing projects.[112]

Ngqushwa and Sakhisizwe Local Municipalities are by no means exceptions to the rule as is clear from the comment of a consultant hired by the Provincial Department:

> 'I have five municipalities which I am looking after. Only two municipalities out of these five have housing managers, so-called housing managers who do not even have a secretary or an assistant. But they manage housing, they manage everything. And each municipality does not have one project; they have more than one project within its municipality. … They cannot expect a housing official, or a housing municipal manager who does not have anything in terms of support underneath him, any support whatsoever, to run four projects.'[113]

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[109] Sakhisizwe interview (2) 3.

[110] 'I am the only one doing housing.' Ngqushwa interview 5.

[111] The lack of municipal experience appears to be a general phenomenon. Atkinson (2006) 8 notes that a 2004 survey conducted by the Municipal Demarcation Board showed that many municipal managers have fewer than five years municipal experience. This accounts for 48% of the managers in the North-West Province; 57% of managers in Limpopo; 48% of Free State managers; 34% of Eastern Cape managers, and 33% of Guateng managers.

[112] Ngqushwa interview 9. In this regard, the Ngqushwa official states at 3: 'We haven't had any new projects that have started while I am here.' Quite simply, this official suggested (at 23) that the Department should 'just take the function [of housing] over.' In Sakhisizwe, the official responsible for housing offered two solutions (Sakhisizwe interview (1) at 16): 'Build capacity within the municipality because it [delivery of housing] is going to go faster' and 'Do away with consultants to make money.' At 14, the official comments: 'The thing is, as long as it [the housing function] is in Bhisho, then there is a problem. If they can capacitate the municipalities … then this thing will run smoothly. If we rely on Bhisho then we have a problem.'

[113] Ngqushwa Project Consultant 31. The project consultant 22 comments on the lack of support or capacity in the following terms: 'Great Kei – they don't even have anybody to do housing; they grab anybody to do something which is housing or land. But they do have

Given the issues at local government level, the focus now turns to the provincial government's role in human resource and financial allocation for the purposes of meeting the obligations created by the housing right.

6.3.3.2 Human and financial resource allocation at provincial government level

In terms of s7(2)(e) of the Housing Act, a provincial government is obliged to:

> 'take all reasonable and effective steps to support and strengthen the capacity of the municipalities to effectively exercise their powers and perform their duties in respect of housing development.'

The question posed in this section is, how has the provincial government sought to address capacity issues at municipal level? This question is especially important given that the province has used 'lack of capacity at municipal level' since 2000 to explain to the SAHRC why it has failed to spend its budget and thus delay the progressive realisation of the housing right.

As noted in chapter 3, the Provincial Department of Housing is under a duty to assist local government in its housing functions. This duty would cover assistance to local government in carrying out its functions in emergency housing situations either in terms of the ECP or in terms of a separate programme.

6.3.3.2.1 Management of financial resources

Given provincial government's responsibilities in both the Housing Act and in the ECP for funding programmes, it is necessary to consider the expenditure

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building inspectors. As far as finances are concerned, their project is heading towards blockage because they don't know how to reclaim VAT. I don't know how, but they just cannot know how to reclaim VAT. So they will not be able to put in proper reconciliation statements.'

of the budget of the provincial housing department and consider whether such expenditure is reasonable.

Funding is technically provided by a Provincial Housing Development Board (PHDB), a public entity set up in terms of the Housing Act.[114] In practice, however, the PHDB in the Eastern Cape has no employees or offices and all administrative functions are performed by the Provincial Department.[115]

Statistics provided by the Provincial Department itself display a bleak picture of management of resources. Between 2000/2001 and 2003/2004, the Provincial Housing Department underspent by a total of R928 million (29%) allocated to its housing programme, despite the Provincial Department's complaint to the SAHRC that its budget 'was not enough'.[116] The actual amount that the Department failed to spend during this time (2000-2004) was approximately R1.24 billion, as the Provincial Department made advance payments of R314 million to municipalities in the 2003/2004 financial year, between January and March 2004 (the last quarter of the financial year) for house construction. These advance payments went entirely unspent and were found by the Auditor-General to be made without due regard to efficiency.[117]

The amount of R1.24 billion identified as unspent is corroborated by a project manager contracted by the Provincial Department during 2004:

> 'There was a tender at the time [around July 2004] in the paper where the department embarked on a turnaround strategy of R1.1 billion that

[114] The Housing Arrangements Act 155 of 1993 made provision for what was termed Housing Boards at the time. Provincial Housing Boards were then established from that in terms of the Housing Act.
[115] Pillay Commission, Papadakis 46.
[116] For the particular year in which the Eastern Cape Provincial Department alleged that its budget was not enough (2002/2003), the Provincial Housing Department nevertheless reported to the SAHRC that it had under-spent its budget vote of R1 221 072 000 by R376 471 000. See Fifth SAHRC Report 36.
[117] Overy 39. See also the Report of the Auditor-General which noted that these advance payments represented a breach of treasury regulations which requires the Department to make payments no earlier than is necessary with due regard to efficiency. See Reports of the Auditor-General to the Eastern Cape Provincial Legislature on the Financial Statements of Vote 8 – DHLGTA Annual Report 2003/2004, 61.

they had to spend. … [i]t was money which was unspent in previous years in the allocation for that particular year.'[118]

In addition, the Department underspent a cumulative total of R172 million (18%) which it allocated to its programme on 'Developmental Local Government' for the year 2003/2004.[119] This programme aimed, *inter alia*, to monitor, promote and facilitate the administration of human resources at municipal level, monitor and audit transferred funds and municipal finance systems, render support to municipal developmental planning, surveying and valuations, monitor and evaluate municipal performance and standards, and monitor legislative compliance.

At the end of the 2004/2005 financial year, the situation did not appear to have improved in any way. This is evidenced by the fact that the Provincial Housing Department received its third audit disclaimer[120] in a row. The Auditor-General indicated that he could not be sure how much of the R570 million spent on housing should be considered fruitless and wasteful expenditure because of the lack of monitoring on the part of the Department. In addition, the Department froze all new housing developments in September 2005 until the 2007/2008 financial year.

Where the Provincial Department has managed to spend part of its budget, it is obliged by the Housing Act to ensure that housing development is 'economically, fiscally, socially and financially affordable and sustainable,'[121] and is 'administered in a transparent accountable and equitable manner, and

[118] Ngqushwa Project Consultant 1.
[119] Overy 40.
[120] An audit disclaimer results where the Auditor-General, having audited the accounts of the public entity, cannot confirm whether the auditee's resources were procured economically and utilised efficiently and effectively (s 20(3) of the Public Audit Act 25 of 2004). In addition, an audit disclaimer will usually follow where the Auditor-General answers any of the three subsections of s20(2) of Public Audit Act in the negative. Section 20(2) requires the Auditor-General's report to reflect an opinion or conclusion on: (a) whether the annual financial statements of the auditee fairly present, in all material respects, the financial position at a specific date and results of its operations and cash flow for the period which ended on that date in accordance with the applicable financial framework and legislation; (b) the auditee's compliance with any applicable legislation relating to financial matters, financial management and other related matters; and (c) the reported information relating to the performance of the auditee against predetermined objectives.
[121] Section 1(c)(ii) of the Housing Act.

upholds the practice of good government.'[122] These sections basically require that the Department spends its money reasonably and therefore assists an enquiry based on the *Grootboom* reasonableness standard. The question is thus: why has the Department failed to spend its 'available resources' (using the terminology of s26(2) of the Constitution) reasonably and in so doing, risked progressive realisation of the housing right?

A major problem, identified by the Auditor-General, appears to be the lack of adequate monitoring and reporting by the Provincial Department in relation to financial resources. In addition, despite detailed legislation, regulations and guidelines; a forensic investigation of the Provincial Department's in-year monitoring reports (IYMs)[123] from April 2002 to March 2004 indicated that the Provincial Department:

- failed to set out expenditure per programme in its IYM reports;[124] and
- allocated expenditure to suspense accounts instead of specific programmes within the Department unnecessarily and without adequately managing and clearing the suspense accounts timeously.[125]

By failing to set out expenditure per programme and allocating expenditure to suspense accounts, the IYM report is not an accurate reflection of the current financial status of the Department. This has a knock-on effect: With unreliable information contained in the IYM, it is highly unlikely that the budget can be properly managed throughout the year. Without proper in-year management of the budget, under- or over-expenditure within the Provincial Housing Department is inevitable. At the end of the line, underspending can

[122] Section 1(c)(iv) of the Housing Act.
[123] See chapter 3 above for a description of this type of report.
[124] Pillay Commission, Papadakis 41.
[125] Pillay Commission, Papadakis 17. This is obviously a reference to regulation 17 of the Treasury Regulations (as amended) which gives effect to s40(1)(a) of the PFMA. Regulation 17 provides that revenue and expenditure transactions can be allocated to a clearing or suspense account in exceptional cases. This can occur where the classification of such revenue has not been resolved. However, the regulations require that, in respect of these suspense accounts, the accounting officer must ensure that the amounts included in clearing or suspense accounts are cleared and correctly allocated to the relevant cost centres on a monthly basis and that monthly reconciliations are performed to confirm the balance of each account.

be nothing less than a failure to make use of, or manage available resources to progressively realise s26.

Since the Department primarily spends its money on the funding of housing projects, one could reasonably expect that the Provincial Department monitor and account for the transfer of housing subsidies to local government to ensure the efficient and effective use of its resources.[126] This, as mentioned above, is regulated by the DORA framework which sets out strict reporting requirements for all transfer payments.[127] In terms of DORA, the Provincial Department assumes certain responsibilities for monitoring resources set aside for housing subsidies. The local authorities also assume certain responsibilities for monitoring and accounting for housing subsidy resources. However, the same forensic investigation (mentioned above) indicates that the Provincial Department had, at times, incorrectly classified housing resources as 'specialist goods and services' instead of 'transfer payments' in their IYM report.[128] By classifying the transfers as specialist goods and services, the Department did not have to comply with same strict regulatory requirements as required for transfer payments. Thus payments to municipalities were not monitored carefully enough, resulting in ineffective use of resources.

This view is confirmed by the Auditor-General[129] who noted that the problems at municipal level could be attributed to some extent to the actions (or inactions[130]) of the Department. In particular, the Auditor-General noted that the monitoring and control of transfer payments to municipalities were 'ineffective.'[131] This comment was followed up in the recent Commission of

[126] This could be seen as part of the reasonableness test as it looks at the actual success of implementation.
[127] See also s30(1)(i) of the PFMA read with regulation 8.4.1 of the Treasury Regulations (as amended) and Treasury Instructions K5.1 and 5.4.
[128] Pillay Commission, Papadakis 112.
[129] Report of the Auditor-General to the Eastern Cape Provincial Legislature on the Financial Statements of Vote 7 – DHLGTA Annual Report 2003/2004 60-61.
[130] For example, the R172 million allocated to promoting and monitoring municipal performance which went unspent. See above.
[131] This assertion by the Auditor-General casts doubt on the comment by a project manager: 'One thing I know about the [Provincial] Department of Housing is that they are very good in monitoring whatever transactions or funds between themselves and the municipalities' Sakhisizwe Project Consultant 9.

Inquiry into the Finances of the Eastern Cape.[132] Here, evidence was led that the Department failed to adequately monitor transfers effectively in at least three projects and a further suspected 27 more housing projects in 2003/2004.[133] A senior manager commented that the Department's biggest challenge was its over-reliance on municipalities without effectively monitoring them.[134] He notes: 'We were providing funds to a municipality without seeing if they've got the ability.'[135]

In addition, the Auditor-General noted that the Provincial Department had not sought business plans from municipalities before funds were transferred for housing projects. In relation to the use of approximately R642 million budgeted for top structures, the Auditor-General found that site visits to projects by departmental officials were 'infrequent' and site inspection reports were inconsistent, lacked specific comment on the quality of houses and were not submitted to the Provincial Department on time.[136]

While many of the problems with blocked housing projects could be attributed to lack of proper monitoring of conditional grants (we have seen that both Sakhisizwe and Ngqushwa Local Municipality have had to apply for top-up funding for blocked projects in their jurisdiction[137]), it would not be fair to blame the Provincial Department in all projects for the inefficient and ineffective use of resources. This is borne out by the problems raised by local officials such as labour disputes and litigation with contractors[138] which inevitably delay and increase costs. However, by not managing resources effectively, the Provincial Department cannot effectively assist and support

[132] Established in terms of Provincial Gazette, Proclamation No 1440, GN 4, 7 October 2005.
[133] Pillay Commission, Papadakis 55 and 87. This evidence related specifically to three forensic investigations into housing projects situated in the Nelson Mandela Metropolitan Council, namely, Jacksonville R22 million, Bloemendal Block 23 South R31 million and Motherwell Tjoks R28 million. From a review of media reports over the last few years, Atkinson (2006) 3 records that angry residents took to the streets in May 2004 and again in March 2005 (just before the local government elections) to protest against corrupt councillors and housing officials, alleged to have mismanaged various projects in the Nelson Mandela Metropolitan Municipality.
[134] Province Interview 24.
[135] Province Interview 26.
[136] Report of the Auditor-General to the Eastern Cape Provincial Legislature on the Financial Statements of Vote 7 – DHLGTA Annual Report 2003/2004 60-61.
[137] See Ngqushwa Project Consultant 26-27 and Ngqushwa interview 21.
[138] Ngqushwa Project Consultant 7 and Sakhisizwe interview (1) 7.

local government and therefore cannot realise the housing right, leaving the most needy without proper shelter.

6.3.3.2.2 Management of human resources

The way in which the Department has sought to deal with the lack of capacity at municipal level is ambiguous and is best dealt with in two parts, namely (1) training of municipal officials; and (2) centralising the housing function.

In accordance with its mandate in both the Constitution and the Housing Act to assist and support local government, the Department has provided training courses on housing for municipal officials.[139] However, it appears that some of this training was not properly organised and participants were informed at the last minute.[140]

The Department's 2003/2004 annual report records that it trained 77 municipal officials in total under its developmental local government sub-programme.[141] In addition, the annual report noted that 17 mentors were appointed in 14 municipalities under its development finance sub-programme. The purpose of this mentorship programme was to produce 'competent' municipal managers. Only one mentee was reported as having completed the mentoring task. In the same sub-programme, the Department recorded that it intended training municipal staff in nine different municipalities, but only managed to do so in two.[142] Despite the limited numbers of officials trained, the Department spent all but five percent of their training budget.[143]

Since 2004, the Department has attempted to centralise the housing function by appointing consultants as regional project managers to oversee housing

[139] The Department's Annual Report 2003/2004 at 20 records that it managed to train 90 housing practitioners.
[140] Ngqushwa interview 18.
[141] Department's Annual Report 2003/2004 30.
[142] Department's Annual Report 2003/2004 36-37.
[143] Department's Annual Report 2003/2004 90.

projects in a particular municipal area.[144] Approximately nine project managers were appointed in 2004 for a two year period.[145] Presently, 21 project managers are contracted to the Department to oversee eight so-called 'management areas'.[146] These project managers' duties are to assist in the management of housing projects falling within their particular management area and service the municipalities falling within that area. According to a provincial official, the ideal ratio of project manager to housing project is 1:5.[147] Given that there are currently approximately 460 housing projects within the province, each project manager is required to manage between 22 and 25 housing projects on average.[148]

It can be argued that the Provincial Department is assisting municipalities in their housing function by the appointment of these project managers and indeed, most local government officials have found such assistance to be invaluable.[149] Nevertheless, by doing so, the province is not actually addressing the capacity issues of the municipality in the long term. Instead of seeking to create viable housing units within municipalities, the Provincial Department appears to be centralising the housing function. While it is clear from the interviews that the project managers have assisted local government officials enormously in managing housing projects, the risk is that these managers effectively take over the local government function allowing officials at the local level to shrug off all responsibility for housing. In one instance, a local government official suggested that the Department should 'just take the function over.'[150] The practical result of relying on these provincial project

[144] An official from Sakhisizwe (1) comments at 9: 'They [the project managers] are supporting us local municipalities in terms of engineering and all those things.' An official from Ngqushwa comments at 11: 'He [the project manager] has been assisting me a lot.'
[145] Sakhisizwe Project Consultant 2.
[146] Pillay Commission, Gerber 174.
[147] Pillay Commission, Perks 130.
[148] Pillay Commission, Perks 130. However it is noted that the Sakhisizwe project consultant commented that he was responsible for 52 housing projects within his management area (at 2). The Ngqushwa project consultant stated that he was responsible for the housing projects in 5 municipalities without specifying the actual number of projects (at 30).
[149] See, for example, Ngqushwa interview 11: 'We have been assisted by the department with a project manager from the dept to do all the applications for funding, to go and sign the bill of quantities.'
[150] Ngqushwa interview 23.

managers is evidenced in the scenario reported by a project manager as follows:

> '[The estate officer] was busy doing something else and then I had a TET[151] which was going on in the following week or so. She couldn't be able to do what was required. *So I did everything and then I emailed it to her so she can just put it on the municipality's letterhead*. You know. And then it is fine. In that instance, I was not advising her; *I was doing what was supposed to be done by the municipality.*'[152]

This method of centralising the obligations of local government regarding housing goes against the objectives of strong, developmental local government (as articulated in the White Paper on Local Government and subsequent legislation). These objectives make it clear that 'the shackles of centralising, dourness and control-mindedness must be broken.'[153]

Why then take this centralising route? A provincial official, who admitted that the Department has not capacitated local government, justified this approach by blaming it on a scarcity of technical capacity throughout South Africa.[154] From other interviews undertaken, it appears that the Provincial Department was (and is) under pressure from the provincial portfolio committee on housing to spend the budget and deliver housing.[155] In addition, centralising is simply seen as the easier and cheaper option for the housing department:

> 'At the end of the day because it is going to cost quite a lot to be able to address the capacity issues at municipalities than the department having capacitating themselves (*sic*) within the provincial level overseeing these housing projects, … They [the Provincial Department]

[151] Technical Evaluation Team. This team, located at provincial level, assesses the applications for housing projects by municipalities. See Ngqushwa Project Consultant 7.
[152] Ngqushwa Project Consultant 19. My italics.
[153] Heymans 148.
[154] Province interview 7.
[155] Province interview 26: 'That is why the department has taken the decision [to appoint project managers]. … We cannot continue any longer to be answering questions [from the portfolio committee] about why people are not doing their jobs so let's [get] project managers attached to these municipalities.'

> will be able to put proper planning because we got engineers, we got town planners, we got electrical engineers, we got plumbers, we got a whole lot of range of people. Within that level we can create a technical section where the problem is being dealt with at a technical level more appropriately than at the level of the municipalities where sometimes they have to go and source a third party in assuming responsibility.'[156]

While the province blames lack of capacity at municipal level, it does not acknowledge to the SAHRC how its own lack of capacity has affected under-spending and hence effective implementation of the s26 right.

In 2003/2004, the Department's annual report noted that there were 1086 posts within the Provincial Department, of which 587 were vacant (46%). The report also noted that the Provincial Department employed 460 staff (42% of its total staff complement) who were additional to the establishment figure (so-called 'supernumeraries').[157] In terms of critical posts,[158] the Annual Report noted that only 34 of 103 critical posts were filled (33%). As a result of the lack of suitably-qualified staff (and no staff at all), the Department's Management Report commented that the shortage of personnel, especially at management level, 'has impacted service delivery negatively since there are no managers to manage, drive or monitor critical projects.'[159]

It is fair to assume that with an overall vacancy rate of 46% and a critical staff complement of 33% the Provincial Department is seriously constrained and

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[156] Province interview 21-22.

[157] DHLGTA Annual Report, 2003/2004 201. The term 'supernumeraries' refers to those not placed in defined posts within departments. These 460 persons were employed in 2003/2004 despite the Auditor-General warning as early as 2000/2001 that the payment of wages of staff additional to the establishment was fruitless expenditure because 'the Department did not receive any economic benefit.' See the Report of the Auditor-General to the Eastern Cape Provincial Legislature on the Financial Statements of Vote 7 – the Department for the year ended March 2001, DHLGTA Report, 2000/2001, s2.1.1.1(b)(i)(b) 106. In an effort to address the problem of additional staff, a Public Service Co-ordinating Bargaining Council Resolution 7 of 2002 came into effect on 6 March 2002. Section 5 required government departments to redeploy, retrain or find alternative employment for excess employees. In terms of s3 of the resolution, the resolution was to be implemented within a maximum of 15 months.

[158] These posts are described by the department as professionals and technicians.

[159] DHLGTA Annual Report 2003/2004 56 and 58.

therefore, must be very careful in conceiving and implementing a programme which is capable of meeting the obligations set out in s26 of the Constitution. The programme must at least have reasonable measures to deal with capacity constraints or at least take them into account when drafting its plans. Linked with the under expenditure of the Department cited above, it is clear that the Department has failed to deal with human resource issues reasonably, using the *Grootboom* standard. This has a knock-on effect. If the Department is incapable of handling its own human resource issues, it is reasonable to conclude that it cannot assist in capacitating or managing another institution's human resource issues (*viz.* local government), and for that matter, it cannot effectively manage implementing s26. Three human resource issues illustrate this point:

- *The failure of the Provincial Department to actually implement its stated intentions*

  The failure of the Provincial Department to actually implement its stated intention can be gleaned by a comparison of two financial years.[160] In the Provincial Department's Annual Report 2002/2003, the Department recorded its intention[161] to make all 1656 of its staff members sign performance agreements, attend quarterly performance reviews and have valid workplace plans. However, during 2002/2003 no staff members attended performance reviews, no workplace plans were validated and only 9 performance agreements were actually signed. The following year, the Department reported in its Annual Report 2003/2004[162] that only six performance agreements had been signed, 205 performance reviews completed and no staff had had their work plans validated.

- *20 million spent on supernumeraries in 2001*

  Whilst the Department generally under-spent its budget in respect of housing subsidies, the budget for personnel within the Department was over spent by R20 million in 2001, despite huge vacancy rates. The cause

[160] This comparison was initially made by Overy of the PSAM in a 2005 report *Housing in the Eastern Cape 2001-2004: A Crisis of Accountability and Service Delivery*.
[161] DHLGTA Annual Report 2002-2003 64.
[162] DHLGTA Annual Report 2003-2004 51.

of such over expenditure was attributed to the payment of supernumeraries employed by the Department.[163] Five years later, the Department is still over-spending and is still blaming such over-spending on supernumeraries.

- *Failure to implement disciplinary hearings*

  In October/November 2005, the Auditor-General reported that approximately 1100 people applied for and had obtained housing subsidies despite not fulfilling the criteria for a housing subsidy; most notably, the criterion that the beneficiary cannot earn more than R3 500 per annum.[164] Of these 1100 people, 583 are employees of the Province and approximately 283 are employees working in the Department itself. Eleven months later, none of the employees implicated has been subject to any disciplinary action and they continue to work at the Department.[165]

Given the debilitating levels of staff shortages and adequately trained staff at provincial level, it is not surprising that the Department has made extensive use of consultants.[166] While the actual amount expended by the Department for consultants is not clear, this amount is considerable. In the Department's 2003/2004 Annual Report, it was reported that the Department spent R51 million on consultants in the housing sphere.[167] The amount cited is at odds with the Eastern Cape Provincial Government Budget Statement which reported that R90 million was spent on consultants in the housing sphere over

[163] The existence of these supernumeraries is usually blamed on the revision of apartheid organisational structures which result in employees being 'additional' to the new amalgamated institution under a new organogram. One can certainly understand how this problem could arise, especially given that the Department represents an amalgamation of housing employees from the previous Ciskei, Transkei, Cape Provincial Administration and the Eastern Cape Housing Board. However, this amalgamation took place from 1994 to 1997, years previously. In addition, the Chief Financial Officer for the Department (Putu) could not explain adequately how these supernumeraries suddenly arrived on the scene in 2001 when it did not appear that they were employed by the Department in 1999. See the Pillay Commission's evidence leader's question (Pammenter) at 213 and Putu's response at 214.

[164] Gerber indicates (at 183 of the Pillay Commission) that some employees who were awarded housing subsidies were earning +- R42 000 per month.

[165] Pillay Commission, Putu 235.

[166] See also the discussion above regarding the use of 9 consultants employed as project managers.

[167] DHLGTA Annual Report 2003/2004, Notes to the Annual Financial Statements, 9, 82.

the same period.[168] While the use of consultants can be a useful endeavour to facilitate better service delivery, a media report[169] describes the problem that emerges from relying on consultants. It does so by comparing the spending on consultants to the spending on the training of the province's employees:

> 'Sometimes an organisation needs to call on some outside expertise and this comes at a price. But what happens when calling on outside expertise gets a little out of hand, as it has in the Eastern Cape? There, the provincial government blew no less than R3.43-billion on such services between 2002 and 2004. A study by the Public Service Accountability Monitor showed that this was 15 times more than the R219-million it spent on training its own employees in the same period. Perhaps Premier Nosimo Balindlela should outsource the whole government to the highest bidder.'[170]

This general problem is replicated within the Department itself. In the same period that the Department spent R51 million or R90 million (depending on the source) on consultants, the Department spend a paltry R698 000 on the training of its own employees.[171]

6.4 Conclusion

The aim of this chapter was to provide a summative and evaluative account of the current housing provision in three case studies as supported by provincial government.

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[168] Eastern Cape Provincial Government Budget Statement PR NR: 26/2005 406.

[169] 'And so the government was quietly privatised' *Sunday Times*, 30 October 2005 (http://www.sundaytimes.co.za/Articles/TarkArticle.aspx?ID=1741221 accessed 11 October 2006).

[170] This report surfaced in 2005 despite the Municipal Demarcation Board's 2003 stated concern regarding the use of consultants and its recommendation that an evaluation be undertaken in the Eastern Cape on the extent and role played by such consultants, especially in relation to the integrated municipal planning process. See Municipal Demarcation Board Report 16-17.

[171] Eastern Cape Provincial Government Budget Statement, PR NR: 26/2005, 428.

The conclusion in chapter 5 was that the parlous state of affairs in local government (in terms of inappropriate jurisdictions and structures) up to the early 1990s has contributed to the particular capacity and socio-economic problems faced by individual municipalities.

What effect has this had on housing provision in the case studies under discussion? First, it is evident that the particular historical (hence social and economic) context of each municipality has affected housing provision in terms of capacity. While Makana Local Municipality has many housing projects that are stalled, it is in a far better position than either Sakhisizwe or Ngqushwa Local Municipality to carry out housing provision. However, none of the municipalities has the ECP pro-active planning in place. Despite Makana Local Municipality's advantage in terms of capacity, neither Makana Local Municipality nor any of the other municipalities under discussion have pro-actively planned in terms of the ECP. The relative inexperience of the officials running housing in Sakhisizwe and Ngqushwa Local Municipality, the absence of support staff, and the appalling social and economic indicators, make the task of providing housing by the local government that much more challenging. Second, it is not clear from a survey of planning documents from each case study area whether comprehensive provision has been made for those living in desperate need – as required by the *Grootboom* judgment – even in the form of acknowledging that the ECP exists or the need for temporary measures.

These two issues have a direct impact on the point made by the Court in *Grootboom,* namely, that reasonableness should be assessed not only with regard to legislation and policy, but also with regard to the implementation of the policy.[172] This requirement sets out that any programme adopted by the state to realise socio-economic rights must go beyond 'hollow statements of good intentions.'[173] Both the Housing Act and the ECP recognise that the

[172] *Grootboom* para 42.
[173] Creamer 226.

central planning mechanism in local municipalities is the IDP.[174] However, in 2002 Atkinson warned that IDPs must not become 'dust covered tomes that grace municipalities' bookshelves'.[175] In 2006, the SAHRC reported that, in relation to housing, '[m]ost IDPs have been reduced to a councillor's wish list instead of being a strategic document that ensures the realisation of a developmental local government.'[176] Examples of this 'wish list' mentality are littered throughout the IDPs of Ngqushwa and Sakhisizwe Local Municipalities.

The IDP of Ngqushwa can be used as a specific example. The IDP sets out its intention to 'lobby with the Department of Housing and Local Government to embark on the People Housing Process, CIMP,[177] Rapid Release Programme etc'[178] and sets out an ambitious project for the construction of 3000 housing units in five villages[179] to the amount of R49 million.[180] These two intentions are set out in the IDP despite the facts that:

- The municipality has been incapable of completing the only two projects (the Peddie 500 and Peddie 710 project) that it has applied for since 1997. Neither project is mentioned in their IDP despite a total of 766 houses that still need to be built in respect of these projects. The severe delays in the completion of these projects[181] have arisen through political issues and a 'lack of value for money' from contractors.[182] In respect of the latter

[174] Van Wyk confirms this view when she states at 55: 'From a local government perspective – where the responsibility normally rests – *the heart of the solution is the Integrated Development Plan*. Both housing and disaster management are inextricably part of integrated development planning.' My italics. But see further in this chapter that planning in the IDP is not enough – proper co-operation with the provincial government and resource allocation is needed.
[175] Atkinson (2002) 4.
[176] Sixth SAHRC Report 29.
[177] Consolidated Municipal Infrastructure Programme.
[178] Ngqushwa IDP 2006-2007 93.
[179] Gcinisa, Mpekweni, Masele, Hamburg and Glenmore.
[180] Ngqushwa IDP 2006-2007 118 (project number 80).
[181] As at July 2006, no houses have yet been completed in the Peddie 710 project. In the Peddie 500 project, 106 houses are outstanding.
[182] Ngqushwa interview 4 and 6.

reason, a forensic audit was undertaken in 2003 in respect of the Peddie 710 project.[183] Apparently, the matter is currently before the courts.[184]

- The human resource capacity of Ngqushwa Local Municipality is totally inadequate for the task; there is currently one estate officer who is responsible for housing, land and town planning.
- There is no reference to timeframes, implementation plans or responsible staff members for the R42 million project listed in Ngqushwa's IDP, except that it is set out under the heading '2006/7.'
- There is no integration between the IDP and the Province's plans in respect of housing.[185] The housing project envisaged for 2006/2007 is set out in the IDP despite the stated intention of the Provincial Department in 2005 that no funds will be made available for new projects until 2007/2008.[186]

The 'wish list' scenario is repeated in the IDP of Sakhisizwe Municipality which, as stated previously, identifies housing as third on the list of development priorities[187] and states that 'a large housing backlog … requires urgent attention.'[188] However, the attention which is to be given to the large housing backlog is unclear from the IDP and from interviews conducted with two local government officials. Of seven housing projects listed in the IDP, only three projects have an identified source of funding. Two of the envisaged projects[189] identified to be completed in the financial year '2005-2006' in the

[183] In respect of the Peddie 500 housing project, the project manager advised that additional funding was approved on 20 February 2006 in order to complete the project (correspondence with project manager 4 October 2006). Despite this approval, the municipality has not yet appointed a service provider or a contractor as at 29 September 2006 (date of interview with project manager) – some 7 months after funding was approved. The project manager comments at 8: 'I've written a letter to them, explaining that additional funding has been approved on your project. Why aren't you proceeding with the project? They have not responded. So as far as Peddie 500 is concerned, the issue is with the municipality not with the department.'
[184] Ngqushwa Project Manager interview 8-9.
[185] Section 31(c) of the Housing Act provides for the submission of IDPs to the MEC. It is envisaged that the MEC assesses a particular IDP to check, *inter alia*, whether the IDP is aligned with the strategies of other municipalities, the provincial government or national government. Should the IDP conflict with any of these strategies, the Act provides that the MEC can request that the municipality change its IDP in accordance with his/her proposals.
[186] In terms of Provincial Circular 1 of 2005.
[187] Sakhisizwe Local Municipality IDP 2006/2011 11.
[188] Sakhisizwe Local Municipality IDP 2006/2011 12.
[189] Sakhisizwe Housing Extension 13,14 and 15 and Elliot – Phola Park.

IDP are, in fact, projects which have been blocked since 2003.[190] One of these projects envisaged the building of 3415 houses. Despite misgivings by the project consultant for the area regarding the size of the project in relation to the capacity of the local government, the housing application was approved by the Department which was then under pressure to spend money to avoid yet another year of under-spending.[191] The reasons given for the delay and problems with the project are many and varied[192] and fall outside the scope of this research. However, the references to these projects in the IDP do not reflect the current status of the projects. A physical site audit of these projects was completed in 2005 and whilst the audit document is unclear in terms of the categories it uses,[193] it sets out that, at best, approximately 650 houses contemplated in both projects have been completed. As of July 2006, no further work had been completed on these projects. A local municipal official advised that the contractor responsible for the projects had threatened 'to take us to court … because they say that we owe them. And we say that they owe us.'[194] In the light of these facts, the IDP entries relating to these projects are nothing more than hollow statements of good intentions. As with Ngqushwa Local Municipality, there is no reference to the moratorium placed on all municipalities by the Department in 2005. This means that the housing

[190] Sakhisizwe Project Consultant 19.
[191] Sakhisizwe Project Consultant 10.
[192] These reasons include a dispute regarding the rates of payment of the contractor to local labourers and lack of local infrastructure (see Sakhisizwe Project Consultant 18). The Sakhisizwe Project Consultant interviewed also mentioned the possibility of graft in the particular contract but could not produce any evidence to support this claim. However, he mentioned that during the tendering process, the successful tenderer for the project sponsored a trip to Cape Town (flight and hotel) for eight councillors and the municipal manager. The purpose of the trip was to show the municipality current housing projects that they were working on in the Western Cape. The provincial official notes (10-11): 'Imagine these councillors … not used to travelling, they haven't even travelled before, some of them haven't ever left the area before or even got (*sic)* in a plane. Do you get me? So you can imagine the situation so they are taken from here to Cape Town by a flight then from there, holiday in a hotel. … I don't know what exactly took place in that Cape Town trip of theirs.'
[193] The undated audit document (titled 'Physical Site Audit on Cala, Elliot Housing Project) sets out the following categories for the housing projects: '(1) total number of site (*sic*) counted; (2) number of floor slabs; (3) number of empty sites; (4) number of units roof taken as completed; (5) number of units at wall plate level without roof; (6) number of units at window level.' The number of approximately 650 units completed is based on the assumption that (4) above represents completed units. The last category entered on the document is set out as: 'Number of units with roof but completed – 62.' It is not clear what this last category means, given the grammar. It is assumed that these 62 units are completed.
[194] Sakhisizwe interview (1) 8.

projects scheduled for 2006/2007 will, at best, be delayed and at worst, be white elephants. [195]

In comparison, the IDP of Makana Local Municipality sets out its housing projects in more detail than the Ngqushwa IDP and Sakhisizwe IDP. Despite this detail, the IDP also remains a wish list for a different reason, namely, because of the moratorium declared by the Provincial Department on all housing projects until 2007/2008. Despite Makana applying to the province for several housing projects in line with their housing obligations, all such projects will lie dormant until 2007/2008. Of nineteen housing projects recorded in an IDP Implementation Report submitted to Makana Municipal Portfolio Committee on Land, Housing and Infrastructural Development on 18 July 2006, seven housing projects had the status: 'Housing Application is on hold until 2007/2008.'[196]

The frustration of the Makana housing manager in relation to these projects 'on hold' is clear:

> 'The province comes and slaps us with this circular and then when we want to understand the relevance of this circular to us as Makana Municipality, the province is saying the municipalities across the board are not delivering.'[197]

This may, in fact, be the case in the Sakhisizwe and Ngqushwa Local Municipalities where not one house has been built since 2003, but it is certainly not true of Makana where several projects have been successfully completed to date. In this regard, the Makana housing manager commented: 'They are truly holding the purse for us here, you see, we can't do anything. So, it [the moratorium] plays a big role.'[198]

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[195] Officials would have known about the Provincial Circular before drafting either the reviewed IDP documents for 2006/2007 (see Ngqushwa) or the 5-year IDP document (see Sakhisizwe).
[196] Makana IDP Implementation Report, 18 July 2006 (no page numbers).
[197] Makana interview 6.
[198] Makana interview 21.

The circular issued by the Provincial Department declaring this moratorium in 2005 gives no reason for taking such a drastic measure. When asked for the rationale behind the circular, a provincial project consultant reflected: 'What would be the point of having 472 projects within the Province not move – then approving new ones?'[199] Clearly, the Provincial Department intended to unblock existing projects before considering new applications[200] despite the fact that some municipalities who are, in fact, capable of completing projects will suffer delay in the process.[201]

It is clear that housing provision in each case study area is not only hampered by a lack of proactive planning by local government, but also by a lack of co-operation and assistance between the local and provincial sphere of government. This situation is exacerbated by the absence of capacity in number and skills at both levels of government. In addition, it is clear that housing provision within each case study is largely dependant on the adequacy (or not) of resource allocation – financial and human – from the provincial sphere. These three factors in turn impact on the failure of local government to implement the housing policy and make a real difference to the lives of the poorest of the poor.

[199] Sakhisizwe Project Consultant 25.
[200] Sakhisizwe Project Consultant 26; Ngqushwa Project Consultant 12 and Province interview 11.
[201] This was conceded by the Sakhisizwe project manager who stated at 25 that '[t]hose that have effective systems in place to complete their projects, they are being affected now.'

Chapter 7:
Concluding remarks

In the third Bram Fischer lecture, Chaskalson remarked that dignity informs the content of all the concrete rights of our Constitution.[1] Nowhere has this been more apparent than in the application of socio-economic rights,[2] and the housing right in particular.[3] For how can there be dignity in a life lived in a shack made of cardboard or zinc, in a backyard, under stairs, precariously close to railway lines, and under highway bridges? As was stated by the Constitutional Court in *Jaftha v Schoeman; Van Rooyen v Scholtz:*[4] 'Relative to homelessness, to have a home to call one's own, even under the most basic circumstances, can be a most *empowering and dignifying human experience*.'[5]

Thus, in the last chapter of this dissertation, the value of dignity must, of necessity, inform the conclusions drawn in the preceding chapters regarding the historical and international context of housing; the interpretation of the housing right by the courts; and, finally, the reality of implementation at a local level. This is appropriate given the comments of Sachs J in the *Port Elizabeth Municipality* case that, '[a]s with all determination about the reach of constitutionally protected rights, *the starting and ending point of the analysis* must be to affirm the values of *human dignity*, equality and freedom.'[6]

This dissertation has shown that there is still much to be done by the state in order to meet its s26 obligations and, by so doing, affirm the dignity of those most vulnerable in our society. Importantly the court decisions and case

[1] A Chaskalson 'Human Dignity as a foundational value of our Constitutional order' (2000) 16 *SAJHR* 173 at 204. See, in particular, the remarks of Chaskalson P (at para 144) and O'Regan J (at para 328) regarding dignity in *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC).
[2] See Liebenberg (2005) generally.
[3] *Grootboom* paras 38 and 41. See also *Jaftha* para 21 where O'Regan J confirmed that any claim based on socio-economic rights must necessarily engage the right to dignity.
[4] 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC).
[5] *Jaftha* para 39. My italics.
[6] *Port Elizabeth Municipality* para 15.

studies indicate that these obligations require effective implementation of a *reasonable* housing plan which takes into account short-, medium- and long-term issues. Short-term planning (or 'emergency' planning) is of particular importance as it deals with those who live in desperate and intolerable conditions.[7]

Chapters 2 and 3 showed that, since 1994, law and policy makers have genuinely attempted to address the issues of racial segregation, inequality and systematic human rights violations. In the sphere of housing, these attempts have resulted in a number of housing and land initiatives designed to secure an adequate standard of living for all. Over 2.4 million houses have been built under the National Housing Subsidy Scheme and many policies have been developed at provincial and municipal level.[8] However, in considering the actual housing provision in case study areas against the courts' jurisprudence, it is clear that, despite Joe Slovo's promise in 1994 to give millions of South Africans 'the dignity that comes from having a solid roof over your head,'[9] millions of people still live in desperate and intolerable conditions.

This research demonstrates that it is not simply due to the lack of 'available resources' which keeps many people in these conditions, but rather, the lack of coherent and *reasonable* state policy and practice – especially for use at a local level. When used in the context of this research 'reasonableness' means responding in the affirmative to the three criteria developed by the courts and emphasised in chapter 4 in the form of questions, namely:

4. Has the local government institution pro-actively planned for emergency situations in their IDP or any other programme which allows for immediate relief for those in emergency situations?

[7] Significantly, the *amici* in the appeal to the Constitutional Court in *Occupiers of 51 Olivia road and another v City of Johannesburg and others* note in their heads of argument (albeit in another context) at para 25 that: 'The protection of section 26(1) is not aimed at those who live in comfortable homes in leafy suburbs: it is designed for those who are vulnerable to homelessness.' The outcome of this appeal is awaited.
[8] Special Rapporteur Report 2.
[9] Quoted by Cohen 134 and mentioned in chapter 1 of this dissertation.

5. Does the programme place adequate emphasis on co-operative governance and the need for open, accountable and responsive governance by local government?
6. Is the programme capable of securing the necessary financial and human resources and assistance from national and provincial government to deal with crisis situations on an urgent basis?

The largely negative responses to these criteria in the case studies, as set out in chapter 6, remind us that addressing the challenge of housing not only requires recognition of the housing right on paper and in the courts, but it also requires effective governance and enhanced capacity within the state.[10] This requires that the state implement and deliver against plans which will respond to the housing right in a truly progressive manner.

This research has demonstrated that effective governance and enhanced capacity is one of the greatest challenges in the Eastern Cape. This is due, in part, to the failure to recognise historical capacity issues at local government level[11] and partly the failure of the Provincial Government to assist and support local government. During the course of this research it was found:

1. The municipalities under discussion have not pro-actively planned / made provision for those in dire need.
2. There is a lack of co-operative governance between local and provincial government.
3. The management of human resources by both local and provincial government is inadequate. In particular, the management of financial resources by provincial government is inadequate, given factors such as

[10] In a similar vein, Albertyn (at viii) comments that policy needs to respond to the lived realities of the poor in order to secure their lives and livelihoods, rather than rendering themselves even more precarious.

[11] Fast (then a researcher at the Surplus Peoples Project) foresaw this problem as far back as 1998 when she commented (at 308): 'Most district and primary councils in the rural areas in South Africa are in dire straits. … Very few have the capacity to deliver services, and a significant number are unable to draw up business plans and manage their financial resources. Very little revenue is generated locally, and many councils are either not functioning or depend heavily on outside transfers to continue operations.'

under-spending, mismanagement and transferring of housing funds to municipalities without adequate controls.

Significantly, these findings have been corroborated (in general terms) by the recently-released Summary Report on Rapid Assessment of Service Delivery and Socio-Economic Survey (Abridged version).[12] The purpose of this survey was to create 'an accurate picture of the state of service delivery in the Eastern Cape.'[13] Unfortunately, as at August 2007, the Office of the Premier has yet to release the unabridged survey which contains statistics for each municipal area.[14] Once released, it would be apposite to compare some of the findings in each case study with the particular area results of the survey.

Nonetheless, some of the recommendations made in the abridged Rapid Assessment Survey validate the conclusions made in this dissertation and relate directly to the challenges faced in the individual case studies. Noteworthy in these recommendations is the acknowledgement (in the context of realising the housing right within available resources) that under-expenditure is 'the biggest problem'[15] and that '[t]he dumping of unused funds to municipalities at the end of each financial year'[16] is a real concern.

The survey further acknowledges that the need for local government to plan pro-actively 'is a serious administrative and political challenge for local authorities in the Eastern Cape where capacities are lacking.'[17] Although it is

[12] This survey was commissioned by the Premier of the Eastern Cape Government in 2005 and was undertaken over the period 1 November 2005 until 30 June 2006. The survey was prepared by the Fort Hare Institute of Social and Economic Research in partnership with Development Africa and Take Note Trading Consortium (see Rapid Assessment Survey 1). It is referred to as the 'Rapid Assessment Survey' in this chapter.
[13] Rapid Assessment Survey 1.
[14] Both the South African Human Rights Commission (SAHRC) and The Public Service Accountability Monitor (PSAM) have requested copies of the full survey report. In response, the Office of the Premier has, to date, not furnished these organisations with a copy of the full survey on the basis that it is 'an internal planning document' (e-mail communication from the Office of the Premier of the Eastern Cape to the SAHRC dated 16 March 2007). The Office of the Premier stated in a further e-mail communication (dated 17 July 2007) that 'the full doc[ument] will possibly be released in early 2008.' Notwithstanding, the PSAM has, as at August 2007, sought access to the full report via the provisions of the Promotion of Access to Information Act 2 of 2000. A response is awaited.
[15] Rapid Assessment Survey 15.
[16] Rapid Assessment Survey 15.
[17] Rapid Assessment Survey 13.

not expressly stated in the survey, it is implied that some municipalities do not have housing strategies *at all*. This conclusion is drawn from the survey's recommendation: 'Municipalities need to have housing strategies in place. This could be incorporated into their IDPs.'[18]

The survey also addresses the issue of capacity. It notes: '*Few* municipalities are geared towards housing delivery, some have no staff members assigned to do these jobs or have people with no capacity to perform.'[19] This leads one to conclude that the serious capacity issues evident in two of the three case studies[20] are by no means the exception to the rule.

The concerns expressed in this dissertation about the state's lack of co-operative governance and lack of management of resources – both financial and human[21] are identified in the Rapid Assessment Survey as serious impediments to the s26 right. It identified that a 'lack of coherent strategic direction, conducive policy environment and good governance affects housing delivery processes.'[22]

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[18] Rapid Assessment Survey 15. This comment should be seen alongside the finding in the survey (at 2) that only 10% of the municipalities in the Eastern Cape are 'able to shoulder the burden' of delivery of basic services. The survey does not indicate which municipalities fall within that 10%.

[19] Rapid Assessment Survey 15. My italics.

[20] See a discussion of capacity issues in Ngqushwa Local Municipality and Sakhisizwe Local Municipality in chapter 6.

[21] More particularly, see conclusions 2 and 3 in this chapter. The prevalence of corruption within the municipalities and the Provincial Department around housing funds could not be properly canvassed in this dissertation, although some passing comments were made on this issue in chapter 6 when the Pillay Commission heard evidence that 583 employees of the Eastern Cape Provincial Government had received housing subsidies irregularly (with approximately 283 employees actually working in the Housing Department itself). Eleven months later, none of the employees implicated had been subject to any disciplinary action. See Pillay Commission, Putu 235. It is submitted that the issue of corruption directly relates to the proper management, planning and monitoring of human and financial resources directed at realising socio-economic rights. Significantly, the Rapid Assessment Survey highlights corruption as a major problem in the housing sector at both local and provincial level. The survey states (at 15): 'Corruption in the Provincial Department must end and measures put in place to monitor processes' and 'Systems should be put in place to monitor [housing] delivery as *corruption is rife in municipalities.*' My italics. The survey was severely critical about local government generally stating (at 3) that it found that 'local government is more about shielding corruption and incompetence than providing the constitutional space for local leaders and communities to make informed choices about policy and service options.'

[22] Rapid Assessment Survey 15. It is a pity that no research is available to the general public to determine how the authors of the survey came to this statement. It will be recalled that only an abridged version of the report is available which focuses on 'recommendations' and 'key messages in housing' without providing very much in the way of empirical data.

In another recently-released report, the United Nations Special Rapporteur on adequate housing also identified similar concerns about the housing policy environment when he visited South Africa on 12 April – 24 April 2007.[23] In particular, he stated that 'the progressive realisation of access to adequate housing in South Africa is compromised by *the fragmented governmental approach* to the implementation of housing law and policy.'[24] He also questioned whether *any* level of government had actually sought to ensure that the policies put in place were effectively implemented, controlled and evaluated.[25] As a result of his preliminary observations, he recommended that there needed to be 'improved co-ordination amongst all government departments' and that 'a clear implementation strategy' was needed.[26]

The judgments of the courts (as discussed in chapter 4) speak directly to the concerns raised in the case studies, and the latest reports of the Rapid Assessment Survey and the UN Special Rapporteur. Rather than speaking about the content-specific nature of the housing right, the Constitutional Court, through the use of the reasonableness test, has emphasised the need for good governance, a conducive policy environment and strategic direction to deliver housing to the poor. Thus our Constitution recognises that housing policies and programmes must address the needs of the poor *effectively.* If this requires decisions that have extensive policy and budgetary implications, then that is what the Constitution requires.[27]

The problems that have surfaced in this dissertation reflect a lack of careful planning by the Eastern Cape Housing Provincial Department and the local government case studies to manage and monitor scarce resources. For example, the Provincial Department has stated many times that its under-

[23] See Preliminary observations as of 24 April 2007 by the United Nations Special Rapporteur on adequate housing, Mr Miloon Kothari in light of his mission to South Africa (12 April – 24 April 2007), referred to as 'UN Special Rapporteur'.
[24] UN Special Rapporteur 2.
[25] UN Special Rapporteur 2.
[26] UN Special Rapporteur 10.
[27] See, for example, the Court's comment in *Grootboom* at para 94: 'The Constitution obliges the state to give effect to [socio-economic rights]. This is an obligation that courts can, and in appropriate circumstances, must enforce.'

expenditure is attributed to capacity constraints at municipal level. However, the reasons given for such under-expenditure are questionable. If it is a question of capacity at municipal level, it is reasonable to conclude that most of the 18% reported as being under-spent in the developmental local government programme[28] should have been spent on capacity building, project management and capacitating staff at municipal level. In addition, the 29% reported as under-spent in the housing programme cannot be simply explained away because of 'lack of capacity' at municipal level when the Provincial Department under-spent in its developmental local government programme.

Ultimately, this research has shown that recognition of the housing right in the Constitution and by the courts does not necessarily translate into effective recognition and implementation by the state. The message is not totally negative though – for two reasons. First, it is hoped that the kind of research undertaken in this study will provide the state (be it national, provincial or local) and other stakeholders (be it civil society organisations or the communities themselves) with greater insight into the environment in which s26 and its supporting legislation must operate. Ideally, serious reflection on this research will lead to better planning and implementation of services that are aimed at realising socio-economic rights, and hence better living conditions for those must vulnerable in our society. The Rapid Assessment Survey and the UN Special Rapporteur both reiterate this message by suggesting that rigorous monitoring and evaluation requirements are needed to inform government planning.[29] Whilst this kind of research should be the primary concern of the relevant state organs, it should also be undertaken by Chapter 9 institutions, civil society organisations and other concerned organisations.

Second, while the purpose of this dissertation was largely exploratory (in seeking to establish how the housing right for those most vulnerable is being implemented in the Eastern Cape), the findings here suggest some exciting

[28] As discussed in chapter 6.
[29] See Rapid Assessment Survey 1 and UN Special Rapporteur 10.

possibilities for litigation in the Eastern Cape in proceedings where a violation of s26 is alleged. Here, a new research agenda is required, one in which more emphasis is placed on scrutinising the management of financial and human resources of the state in the context of the policy, planning and implementation environment.[30]

Given the findings in this dissertation, an appropriate applicant in one of the case study areas could place evidence before the court that the state has, in some instances, not allocated its available resources *at all* – correctly or incorrectly. In addition, the applicant could show that, in allocating these resources, there is inefficient control over the effective utilisation of these available resources.[31] Lack of planning, ineffective implementation and unspent housing budgets over an extended period of time surely falls foul of the reasonableness test, since such test covers both the conception (the legislation and policies drafted to effect s26) and the implementation of policies (the actual spending of the budget allocated to s26).[32]

The Constitutional Court has confirmed that a court *must* take into account the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness.[33] In addition, the Constitutional Court has indicated that, albeit in another context, a court may go further: where the state pleads 'lack of available resources' or 'lack of capacity',[34] a court will interrogate the precise character of those resource

[30] Should this research be undertaken, it would answer the supposed 'hard question' raised in the Supreme Court of Appeal in *City of Johannesburg II.* In this matter, Harms ADP commented that there was no evidence to suggest that the state had allocated its available resources incorrectly and that there was no evidence to suggest how the state might have allocated its resources differently. See *City of Johannesburg II* para 45.

[31] The Auditor-General Reports for the Eastern Cape Department of Housing, Local Government and Traditional Affairs are a rich source of information concerning effective spending. Significantly, the Auditor-General issued a disclaimer in respect of the Provincial Department for three years running. Recently (ie. for the 2006/2007 year), the Provincial Department received its fourth disclaimer.

[32] It needs to be emphasised that what is required from the courts in this type of situation does not clash with the separation of powers, legitimacy and competence arguments raised in chapter 2. This is so because, as reiterated by the Constitutional Court, the determination of reasonableness may have budgetary implications, but this determination is not, in itself, directed at rearranging budgets. See *TAC* para 38.

[33] *Khosa* para 44.

[34] See chapter 4. The Constitutional Court has already said, albeit in another context, that it will not find an organ of state to have reasonably performed a duty *simply on the basis of a*

constraints to determine reasonableness.[35] However, a court's power is only as effective as the information placed in front of it. Evidence of unspent budgets, insufficient planning and mismanagement of resources will assist the courts in focusing on the implementation aspect of s26 thus ensuring that the housing right may yet have a meaningful impact on the lives of millions of those people who are most vulnerable in society.

Finally, given reports by the UN Special Rapporteur and the SAHRC discussed in this dissertation, the research agenda suggested here should extend beyond the borders of the Eastern Cape Province. It appears that the mismanagement of housing budgets is not confined to the Eastern Cape and extends to other provinces. After a careful examination of the SAHRC reports in 2003, Newman remarked:

> 'It was fortunate for the government that the damning words of constitutional violation for falling budgets and inappropriate management of existing budgets came thirteen months after the *Grootboom* decision was handed down rather than promptly enough to precede the decision. In *Grootboom,* the judges essentially operated from a premise that the government had a reasonable housing policy as a whole and that it was unreasonable basically only in that it failed to contemplate temporary shelter for those most in need. Who knows how they might have reacted to the government's argument of a reasonable housing policy in the wake of such realisations by constitutional rights-monitoring institutions?'[36]

This lack of careful planning, it is submitted, runs contrary to the obligations imposed by the Constitution and supporting legislation. This lack of planning

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bald assertion of resource constraints. See *Rail Commuters Action Group and others v Transnet Ltd t/a Metrorail and others* 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) para 88 (*Metrorail*).

[35] *Metrorail* para 88.

[36] Newman 204.

also fails to value the human dignity of the poor.[37] As such, we are dangerously close to reliving the past.[38] With a research agenda that focuses on peoples' actual lived realities, we step further away from an undignified past and closer to a state which values human dignity, the achievement of equality and the advancement of human rights and freedoms.[39]

[37] Liebenberg (2005) 31. See the UN Special Rapporteur's comment (at 4) that he was 'very disturbed to see large numbers of people living in situations of desperation and crisis and without basic human dignity.'

[38] The poet and philosopher George Santayana is reputed to have said: 'Those who cannot remember the past are condemned to repeat it.' A recent example suffices. In *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* [2007] SCA 70 (RSA), officials from three governmental agencies in a joint operation, unlawfully expelled about one hundred persons from the rudimentary shelters they had erected and, in so doing, destroyed many of the persons' belongings. This arbitrary eviction took place despite the state's constitutional obligations in terms of s26(3) and the criteria laid down by the courts in the jurisprudence discussed in Chapter 4. In considering the remedy for such an unlawful act, Cameron JA stated at para 16: 'It is impossible not to endorse appellant's counsel's submission that in its lack of respect for the poor and the vulnerable, and in the official hubris displayed*, what happened displays a repetition of the worst of the pre-constitutional past.'* My italics. It was Cameron JA again who, in the context of the Eastern Cape government's failure to provide social security grants to people in the Eastern Cape, described the conduct of the Eastern Cape government as 'contradictory, cynical, expedient and obstructionist … as though it were at war with its own citizens, the more shamefully because those it was combatting were in terms of secular hierarchies and affluence and power the least in its sphere.' (See *Permanent Secretary, Department of Welfare, EC v Ngxuza* 2001 (4) SA 1184 (SCA); 2001 (10) BCLR 1039 (SCA) para 15).

[39] Section 1(a) of the Constitution of the Republic of South Africa, 1996.

Annexure A

Interview Questionnaire

General conceptual questions

1. What do you understand by the term ‘adequate housing’ in section 26 of the Constitution of the Republic of South Africa, 1996?
2. What do you understand by the term ‘emergency housing’?
3. What sphere of government is responsible for ‘adequate housing’ and ‘emergency housing’? (*viz.* national, provincial, local?)
4. How does local government contribute to the fulfilment of the right to have access to adequate housing in the context of
    a. the Constitution and
    b. any other statutory obligations of local government?
5. Do you consider the provision of housing to be a core function of local government?
6. Is/are there programme(s) and/or structures designed to implement the housing right at national, provincial and local level? What are these programmes / structures?

Specific questions

7. Does the municipality have a programme to address housing needs within its area?
    a. If yes, what is it and when was it implemented?
    b. If no, why not? (specify any impediments, constraints etc.)

(The next questions assume the existence of a programme:)

8. Does the programme address long, medium and short term needs? In particular, does the programme identify and have measures to deal with
    a. possible emergency housing needs;
    b. the bucket system (if operational in the municipality); and
    c. informal settlement upgrading?
9. How does the programme interact with
    a. the municipality’s spatial development plan; and

b. district, national and provincial plans in your area (if any)?

10. Are performance monitoring mechanisms in place to monitor the success of the programme. If yes, please describe (eg data collection techniques, needs based surveys etc)?
11. How is the housing programme financed?
12. Does the programme cater for marginalized groups - for example, women, HIV, child-headed households and the poor?
13. How does a person apply for housing? What are the procedures?
14. How easy or difficult is it for the municipality to apply for and obtain finance for housing developments from the provincial Department of Housing – what are the procedures?
15. What are the time lines from application to grant?
16. Is a feasibility/needs survey conducted prior to the implementation of a housing project in the municipality's area?
17. How does the municipality
    a. communicate their needs to the provincial government and national government;
    b. align their housing programme with national and provincial housing programmes.
18. Are provincial and national government responsive to requests by the municipality for assistance in drafting programmes, applying for grants etc.? In what ways do provincial and national government assist the municipality?
19. What are the conditions attached, if any, to a grant given for a housing development?
20. Have you experienced 'fiscal dumping' at end of year in respect of housing projects?
21. Does the municipality educate/advertise housing lists (where and how?) / take surveys / provide assistance (where and how?).
22. Has the municipality sought to evict people? If yes,
    a. what were the reasons for evicting a particular group?
    b. was the group consulted about the impending eviction?
    c. was alternative land and services made available?

d. If yes to (c), was previous location and livelihood strategies (e.g. informal employment in the area, family ties etc.) of the people taken into account when making the alternative land available?

25. Does the municipality have a separate programme or section of a programme making provision for people in desperate need of housing? If yes,
    a. how is financing for this kind of housing obtained?
    b. what interaction (if any) takes place between the municipality and provincial and/or national government regarding this kind of housing?
26. Does the municipality's housing programme deal with contingencies and necessary changes in direction? (e.g. is the programme flexible?) How is it flexible?

Opinion Questions

27. Do you believe that your municipality has fulfilled (and continues to fulfil) its obligations regarding provision of housing?
    a. If yes, why?
    b. If no, why (*viz.* what do you believe to be the main impediments to housing delivery?)
28. Are you satisfied that
    a. there is a clear outline of the duties of local government in housing legislation and policies;
    b. the municipality is financially able to undertake its housing obligations;
    c. the municipality has adequate human resources to undertake its housing obligations; and
    d. there are clear lines of communication between the municipality and provincial and national housing departments?
29. What would you suggest to improve the policy, legislation and regulatory environment in order to improve the municipality's ability to meet its obligations in respect of the right to housing?

30. How do you think these obligations fit with the municipality's obligation to promote economic development (*viz.* the developmental mandate of local government as set out in the Constitution)?

Specific Questions

31. Do all persons within the area of the municipality possess a degree of tenure which protects them against forced evictions and harassment either by statute or private actors? (Tenure may be in the form of rental accommodation (whether private or public), co-operative housing, lease, emergency housing, informal settlements, including occupation of land or property)
32. Do all persons have recourse to a minimum set of services? In other words, do all persons in the area have sustainable access to
    a. safe drinking water,
    b. energy for cooking,
    c. heating and lighting,
    d. sanitation and washing facilities,
    e. means of food storage, refuse disposal,
    f. site drainage and emergency services?
33. Does the municipality ensure that money spent on the provision of basic services and minimum standards (for example, those basic services set out above) is not to the detriment of other housing rights (such as housing acquired by means of subsidies, rental accommodation etc.)?
34. Are all persons in the municipality protected from cold, heat, damp, rain, wind, or other threats to health and other structural hazards (e.g. bad roads, polluted areas etc.)?
35. Is a person's social status taken into account when providing him or her access to housing? For example:
    a. Relatives of officials and councillors;
    b. Identified race groups;
    c. Vulnerable groups (see question 12 above)
36. Is the land allocated for housing

a. Suitable in terms of employment options, health care services, schools, child care and other social facilities;
b. far from polluted sites; and
c. suitable in a way that allows different cultural formations to express themselves in their different cultures?

37. Are communities affected (including the homeless and the inadequately housed) consulted before adopting a housing strategy?

Annexure B

Subsidy quantum for 30m^2 houses in the 2006/2007 financial year (see http://www.housing.gov.za/content/Subsidy%20Information/Subsidies%20Home.htm accessed 15 January 2007).

Income category	Previous subsidy	New subsidy	Contribution	Product price
Individual, Project linked and Relocation Assistance subsidies				
R0 to R1 500	R31 929,00	R36 528,00	None	R36 528,00
R1 501 to R3 500	R29 450,00	R34 049,00	R2 479,00	R36 528,00
Aged, disabled or health stricken R1 501 to R3 500	R31 929,00	R36 528,00	None	R36 528,00
Institutional subsidies				
R0 to R3 500	R29 450,00	R34 049,00	Institution must add capital	At least R36 528,00
Consolidation Subsidies				
R0 to R1 500	R18 792,00	R21 499,00	None	R21 499,00
R1 501 to R3 500	R16 313,00	R19 020,00	R2 479,00	R21 499,00
Consolidation Subsidy: Aged, disabled or health stricken R1 501 to R3 500	R18 792,00	R21,499.00	None	R21,499.00
Rural subsidies				
R0 to R3 500	R29 450,00	R34 049,00	None	R34 049,00
People's Housing Process				
R0 to R3 500	R31 929,00	R36 528,00	None	R36 528,00
Emergency Programme				
Temporary assistance*	R26 874,00	R31 952,00	None	R31 952,00
Repair to existing stock:				
Services	R13 137,82	R15,029.00	None	R15,029.00
Houses	R18 792,00	R21,499.00	None	R21,499.00