IN THE HIGH COURT OF SOUTH AFRICA
(Cape of Good Hope Provincial Division)

Case No. 6826/99

In the matter between

IRENE GROOTBOOM	**First Applicant**
(AND OTHER APPLICANTS WHOSE NAMES ARE SET OUT IN ANNEXURE "A" HERETO).	

and

OOSTENBERG MUNICIPALITY	**First Respondent**
CAPE METROPOLITAN COUNCIL	**Second Respondent**
THE PREMIER OF THE PROVINCE OF THE WESTERN CAPE	**Third Respondent**
NATIONAL HOUSING BOARD	**Fourth Respondent**
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	**Fifth Respondent**

JUDGMENT DELIVERED ON 17 DECEMBER 1999

DAVIS J

INTRODUCTION

Applicants are all squatters. They have lived in Wallacedene, Kraaifontein, Western Cape for varying periods of time. From the evidence it is clear that their living conditions were extremely poor and as a result they moved to what they considered to be vacant land known as 'New Rust".

During December 1998 an application was brought in the Kuilsriver Magistrate's Court for the removal of the applicants in the present case from "New Rust" in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998. By agreement between the owners of "New Rust" and the applicants the latter consented to vacate New Rust on or before 15 May 1999, failing which the sheriff would be authorised to take the necessary

steps to evict them from this property. The applicants failed to vacate the land by 15 May and they were evicted accordingly. By this time, however, the space which they had occupied at the Wallacedene squatter camp had been taken by others. They were thus unable to return. The applicants had become truly homeless. They now camped on the sportsfield adjacent to the community centre at Wallacedene.

On 31 May 1999 applicants launched an urgent application which was heard by **Josman AJ** on an urgent basis on 1 June 1999. In terms of that application applicants sought an order in the following terms:

"(i) Directing first respondent, alternatively one or more of the other respondents, forthwith to provide adequate and sufficient basic temporary shelter and/or housing for the applicants and their children in such premises, and/or on such land, as is/may be owned and/or leased by one or more of the respondents, pending applicants and their children obtaining permanent accommodation;

(ii) Directing first respondent, alternatively one or more of the other respondents, forthwith to provide adequate and sufficient basic nutrition, shelter, health and care services and social services to all of the applicants children."

As respondents had not filed detailed answering affidavits on 1 June 1999 the matter was postponed to 3 June 1999. After having conducted an inspection in loco **Josman AJ** made the following order**:**

"Pending a further hearing of this application on Tuesday 22 June 1999, respondents jointly and severally are ordered 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 children who require supervision, one

parent/adult for each such child."

By agreement the hearing which was to take place on 22 June 1999 was postponed .Applicants have now come to court seeking the relief in terms of the Notice of Motion as set out above. Prayer(i) is substantially based on section 26 of the Constitution of the Republic of South Africa Act 108of 1996('the Constitution ').Prayer (ii) ,which is essentially in the alternative , is substantially based upon s28 of the Constitution .

THE BACKGROUND

The group of applicants comprise some 390 adults and 510 children. All of these people lived in Wallacedene or in an area adjacent to Wallacedene. First applicant describes the conditions in which applicants found themselves in her founding affidavit thus, "My family and I lived with my sister and her husband who have three children. We lived in a small shack which was approximately 20 square metres in size. The living conditions for me and my common law husband and our child became increasingly unsatisfactory in that the limited space which we had, allowed for no privacy. The further applicants, as far as I have personal knowledge in that regard, lived with their extended families and in many instances there were three to four families living in structures similar to the one of my sister. Certain applicants lived in an area in Wallacedene that had a water table problem resulting in the areas around such structures always being waterlogged. This situation was not suitable for the health of them and their children and asthma, flu and other illnesses were common in the said area".

Certain of the applicants applied for the grant of subsidised low cost housing from first respondent or its predecessors but received no indication as to when accommodation would be

provided. As a result of poor living conditions and the inability to obtain any measure of clarity as to prospects for alternative adequate housing, applicants decided to move to the vacant land, called New Rust.

Although there was a dispute as to whether the applicants were aware at the time of occupation that New Rust had been earmarked for low cost housing and that it was privately owned land , it was common cause that the land was owned by Jonhass Properties CC. On 4 November 1998 applicants were informed that the owner intended to remove the unlawful structures from its land. On 9 November 1998 an application for eviction was served on applicants and they were informed that the matter would be heard in the Magistrate's Court, Kuilsriver on 8 December 1998. On 8 December 1998 applicants were ordered to vacate New Rust by 21December 1998. This order was granted without any of the applicants or their legal representatives being present in court. The applicants refused to move.

On 15 March 1999 a **rule nisi** was issued in the Magistrate's Court, Kuilsriver, ordering the applicants to show cause why they should not be removed from the land. On 8 April 1999 the applicants opposed the application to evict them . The matter was postponed for a day in order that applicants could obtain proper legal advice. Acting on the legal advice obtained applicants decided not to oppose the eviction but to negotiate with first respondent in order to obtain alternative accommodation as well as to secure agreement to a deferred date for the move from New Rust.

A final order was granted in the Magistrate's Court, Kuilsriver on 13 April 1998 in terms of which applicants were ordered to dismantle the structures which they had constructed on New

Rust and vacate the property. The order made provision for :

"'n bemiddelingsproses tussen die eerste and tweede Applikant, Respondente se gemagtigde afgevaardigdes en die Oostenberg Munisipaliteit onverwyld in aanvang neem ten einde beskikbare alternatiewe grond vir tydelike en/of permanente verblyf vir die respondente te identifiseer."

There was some dispute as to the exact meaning and implication of "bemiddelingsproses", particularly regarding the question of whether mediation would entail the identification of the site to which applicants could be relocated. However it is common cause that on 18 May 1999 the eviction from New Rust took place. First applicant was highly critical of the manner in which the eviction was carried out. In her founding affidavit she states "Our structures were simply bulldozed and there was no opportunity for us to attempt to salvage our personal belongings. For instance, we were unable to gather our clothes, furniture and the likes and where certain of the applicants had gone to work on 18 May 1999, they returned to find their shacks demolished. We sought to recover as much as we could of what had remained after the demolition. The situation was exacerbated by the fact that our shack materials were burnt by the persons effecting the demolitions, including members of the police, allegedly for the purpose of clearing the property".

In his answering affidavit Mr Cecil Africa, Director of Housing of first respondent, did not deny the allegations contained in first applicant's affidavit, save that he disputed that applicants were not given sufficient opportunity to remove their property.

Having been evicted from New Rust applicants attempted to erect temporary structures on the Wallacedene sports field. These proved inadequate partially because ,with much of their material having been destroyed, applicants lacked sufficient building materials . Once it rained on Tuesday

25 May 1999 the temporary plastic structures which had been erected proved to be wholly inadequate and provided no protection against the elements particularly for the children who were so housed.

In her replying affidavit first applicant set out the nature of the relief which applicants seek. She claimed that the right to adequate housing includes the right to basic shelter and that furthermore "the rights of our children to basic shelter has been totally denied to them and none of the affidavits which have been filed on behalf of respondent have suggested there is any interim plan in place to make provision for shelter in respect of any of applicants, let alone in respect of their children. Were it not for the interim order granted by **Josman AJ** applicants would be destitute". In short applicants rely upon sections 26 and 28 of the Constitution to justify their submission that respondents have a duty to provide them or their children with basic shelter.
The relief sought as set out in prayer (ii) of the notice of motion included the provision of nutrition, health care and social services for the children of applicants .This relief was effectively abandoned and hence there is no need to canvass these issues. The applicants persisted in the prayer for shelter for the children.

HOUSING

Section 26 of the Constitution provides as follows:

(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 a progressive realisation of this right.

Mr Gauntlett, who appeared together with Mr Schippers and Ms Bawa on behalf of third and fifth

respondents, submitted that what is contemplated by section 26 (1) is not an unqualified obligation on the State to provide free housing on demand. The right contained in section 26(1) is in effect limited by the provisions of section 26(2) in two fundamental respects. The right of access to housing is directly dependant on resources available to the State. Secondly there is an express recognition by the framers of the Constitution that the right to housing cannot be effected immediately. For this reason the requirement of reasonable legislative and other measures to achieve the progressive realisation of the right was included in section 26(2).

The relationship between 26(1) and (2) has been clarified by the judgment of the Constitutional Court in **Soobramoney v The Minister of Health, Kwazulu Natal** 1998(1) SA 765(CC) where **Chaskalson P** said "What is apparent from these provisions is that the obligations imposed on the State.... are dependant upon the resources available for such purposes, that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled." (at para. 11).

Soobramoney concerned **inter alia,** the constitutional provision of health care, food, water and social security in terms of section 27(2) which like s26(2) concerns a socio-economic right in which the State is obliged to take reasonable legislative and other measures to achieve their progressive realisation. For this reason the approach of the Constitutional Court in **Soobramoney** is applicable to the facts of the present case. In dealing with the question of limited resources **Chaskalson P** said "The Provincial Administration which is responsible for health services in Kwazulu Natal has to make decisions about the funding which has been made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political levy in fixing the health budget, at the functional level in deciding upon the priorities to be met. 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." (at para 29).

Mr Gauntlett submitted that although the right of access to housing is a right and not merely a human aspiration it is imperfectly justiciable. This concept of imperfect justiciability is sourced in the provisions of section 26(2) namely, that so long as the relevant public authority can justify its response to this right in terms of a plan or programme designed to give effect to the right, the courts should not employ their review function to "second guess" the suitability of a programme rationally conceived and implemented.

Mr Gauntlett submitted that any assessment to whether a housing programme met this test of rationality depended upon an understanding of the needs and financial constraints within which the relevant public bodies operated. . According to figures contained in the answering affidavit of third respondent the total Cape Metropolitan housing backlog as at 1995 was approximately 134,000 residential units. Between 1995 and 2005 there would be a further demand for 211,000 units.

In terms of figures calculated on 16 October 1998 the backlog in the municipal region of first respondent was as follows:

Waiting List	8007
Squatters	9300
Backyard dwellers	4300
Sub-tenants	3500.

During the 1998/1999 financial year third respondents received an amount of R380 million

which was available for housing and overspent by an amount of R11 million. In terms of the approach of the National Department of Housing provinces are now expected to absorb any overspending from their future allocations. Accordingly third respondent will have less funds available in the financial year 1999/2000.

Within the context of these financial constraints third respondent has required all municipalities to develop a scale of priorities for the housing needs in their area. As Mr John Africa, the Deputy Director General of the Department of Planning, Local Government and Housing of third respondent, stated in his affidavit "Given the limited resources at the disposal of the Department, these municipalities are required to prioritise projects relating to access to land and housing delivery". A specific plan had been drawn up in respect of first respondent .Funds had been allocated for financial years ending in 2002 and such funds were to be applied for specific projects. As Mr Afrika stated "this is in accordance with the principle that access to land and housing must be made in an orderly manner, based upon integrated planning as required by the Housing Act and the Local Transition Act 209 of 1993".

Mr Olivier, who appeared on behalf of first and second respondents, relied upon similar evidence to submit that within the financial constraints of first and second respondent a rational housing programme was to be implemented. First respondent was in the process of constructing some 5000 housing units notwithstanding severe financial constraints partly caused by an inability to obtain payment for services rendered. In terms of section 10 G(4)(b) the Local Government Transition Act the authorities were restricted to an annual increase of 5.5% in respect of budgeted expenditure. Even with these financial constraints the respondent had financed 15 medical clinics, a mobile x-ray unit as well as social and recreational facilities.

Mr Olivier conceded that there was a major crisis in the delivery of assisted housing in the Cape Metropolitan area mainly as a result of a large discrepancy between the demand for housing, the supply and availability of funds. According to Mr Davidson, the head of the Department of Housing of second respondent, second respondent had formulated an accelerated managed land settlement programme to assist local councils to manage the settlement of families in crises. This would entail an incremental servicing and shelter consolidation programme which would allow families in crises to settle on sites with basic services. In order to implement this programme a bridging finance mechanism developed by the local council, second respondent and the Provincial Housing Development Board of third respondent would be required. This was is in the process of being implemented, until which time second respondent would continue to establish a number of housing projects utilising the national housing subsidy.

In short respondents are faced with a massive shortage in available housing and an extremely constrained budget. Furthermore in terms of the pressing demands and scare resources respondents had implemented a housing programme in an attempt to maximise available resources to redress the housing shortage. For this reason it could not be said that respondents had not taken reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right to have access to adequate housing.

Mr Hodes, who appeared together with Mr Jamie and Mr Musikanth on behalf of applicants submitted that the inability of the State to provide immediate access to adequate housing did not justify failure to take any steps to provide some form of housing or shelter however inadequate during the period in which it implements its programme to provide access to adequate housing. Thus the right of access to adequate housing must be interpreted to include a minimum core

entitlement to shelter.

In support his submission Mr Hodes referred to General Comment No. 3 of the Committee on Economic, Social and Cultural Rights which dealt with the nature of the State's obligation in terms of article 2 para 1 of the International Covenant on Economic, Social and Cultural Rights ('the international covenant'). Article 2(1) provides that each State party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, special economic and technical, to the maximum available resources with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. Section 26(2) of the Constitution bears similar wording and for this reason Mr Hodes submitted that the General Comment was of persuasive force

In paragraph 9 of General Comment 3 the Committee says "The concept of progressive realisation constitutes a recognition of the fact that full realisation of economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in Article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless the fact that the realisation over time or in other words progressively is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. The Committee is of the view that a minimum core obligation to ensure the satisfaction of at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care or basic shelter and housing, or the most basic form of education is **prima facie** failing to discharge its obligations under the

Covenant".

A detailed analysis of the international covenant was undertaken by a group of international lawyers under the aegis of the International Commission of Jurists. This analysis is referred to as the **Limburg** principles. Dealing with the concept of "to achieve progressively the full realisation of the rights" the **Limburg** principles interpret this phrase as follows:

2.1 "The obligation to achieve progressively the full realisation of the rights requires the State parties to move as expeditiously as possible towards the realisation of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realisation. On the contrary all State parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant.

2.2 Some obligations under the Covenant require immediate implementation in full by all State parties such as the prohibition of discrimination in article 2(2) of the Covenant.

2.3 The obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available.

2.4 Progressive realisation can be effected not only by increasing resources but also by the development of societal resources necessary for the realisation by everyone of the rights recognised in the Covenant."

A municipal example of the implementation of the Limburg principles can be found in the judgment of the Indian Supreme Court in **Ahemedabad Municipal Corporation v Newab Khan Gulab Khan** (1997)11SCC 121. Although the court dealt with the interpretation of the right to life as guaranteed in terms of s21 of the Indian Constitution within the context of the Directive Principles of the constitution as opposed to a direct socio- economic right the court emphasised that the State has a constitutional duty to provide adequate facilities and opportunities by

distributing its wealth and resources to provide all citizens with shelter. In this way the right to life became more meaningful and effective.

The Constitutional Court has cautioned against an excessively generous approach to these rights and has emphasised the need for deference to the legislature and the executive in these matters. Thus Sachs J said in **Soobramoney** (supra) "the provisions of the bill of rights should furthermore not be interpreted in a way which results in Courts feeling themselves unduly pressurised by the fear of gambling with the lives of claimants into ordering hospitals to furnish the most expensive and improbable procedures, thereby diverting scarce medical resources and prejudicing the claims of others. Unfortunately the resources are limited and I can find no reason to interfere with the allocation undertaken by those better equipped than I to deal with the agonising choices that have to be made" (at paras. 58-59). In his judgment **Chaskalson P** said "the provincial administration which is responsible for health services in KwaZulu Natal has to make decisions about the funding which is to be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the house budget, and at the functional level in deciding upon the priorities to be met. The 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" (at para 29).

In my view respondents produced clear evidence that a rational housing programme has been initiated at all levels of government and that such programme has been designed to solve a pressing problem in the context of the scarce financial resources. Any evaluation of government's housing programme in relation to the rights contained in s26 needs to take account of the fact that these rights only came into force on 4 February 1997. A period of less than three years provides

an extremely short time frame to solve the kind of housing crisis which is described in the papers. The only argument which applicants have raised to place this conclusion in dispute concerns the decision as to whether there is an obligation to provide some form of shelter pursuant to the State's obligation in terms of section 26(1) read with (2) even in circumstances where a rational housing programme has been implemented. Respondents submit that the imposition of such an obligation would create impediments towards the implementation of their housing programme because it would dilute scarce resources. Given the express wording of section 26(1) and (2)and the interpretation by the court in **Soobramony** (supra) to the concept of 'progressive implementation ' applicants have not shown that they are entitled to the relief sought in the notice of motion based upon the rights contained in section 26(1) and (2) read together.

CHILDREN'S RIGHTS

Section 28(1)(c) of the Constitution provides that every child has the right to basic nutrition, shelter, basic health care services and social services. Section 28(2) provides that a child's best interests are of paramount importance in every matter concerning the child. Applicants rely upon these provisions and submit that as children have an unqualified right to shelter there is a duty imposed upon respondents to provide such shelter to the children of applicants. Furthermore as it is in the best interest of a child to remain with his or her parents [see s28(1)(b)] it was submitted that the right to such shelter should be extended to the parents so that children can remain within the family unit.

Mr Gauntlett submitted that the word 'shelter' should be given its ordinary meaning. Shelter is defined in the Shorter Oxford English Dictionary as "a structure affording protection from rain, wind or sun; any screen or place of refuge from the weather. A place of temporary lodging for the homeless poor"

A definition is contained in the Child Care Amendment Act 96 of 1996 in which shelter is defined as "any building or premises maintained or used for the reception, protection or temporary care of more than 6 children in especially difficult circumstances." In short the right which children enjoy in terms of section 28(1)(c) does not contemplate housing in a family context but rather means a place of safety. Accordingly the right cannot be invoked to justify the relief sought by applicants.

Chapter 5 of the Child Care Act 74 of 1983, as amended, makes provision for the establishment and maintenance of places of safety for the reception, custody, observation, examination and treatment of children under the Act. It is difficult to envisage how a right to shelter in terms of section 28(1)(c) of the Constitution which connotes a place of temporary lodging short of adequate housing can be reconciled with a statutorily approved place of shelter as provided for in chapter 5 of the Child Care Act.

Were the concept of shelter to be given a meaning congruent with the Child Care Act it would render section 28 (1)(b) of the Constitution somewhat redundant .This section provides that every child has the right to family care or parental care or to appropriate alternative care when removed from the family environment. If a children's right to shelter in terms of section 28(1)(c) implies that the right exists only in terms of being housed in a State institution it would not necessarily offer a significantly different right to that provided for in terms of section 28(1)(b), namely alternative care when removed from the family environment. Accordingly s28(1)(c) appears to provide for a right to be protected from the elements in circumstances where there is no need to remove such children from their parents. See in general **Erika De Wet The Constitutional Enforceability of Economic and Social Rights Act** at 108.

The primary obligation to maintain a child rests upon the parents Such an obligation clearly includes the provision of shelter. In the event that the parents are unable to provide shelter for their children, s 28 (1) (c) imposes an obligation on the State to do so , albeit that by the use of the word shelter the constitution envisaged that such an obligation falls far short of adequate housing. Although the section does not employ the adjective 'basic' to qualify the concept 'shelter' as is the case with 'nutrition' and 'health care' , it follows from the dictionary definition that shelter is a significantly more rudimentary form of protection from the elements than is provided by a house.

The further question concerns the provision of shelter for the parents. Mr Gauntlett used this link between parent and child to argue for a different interpretation of section 28.

He submitted that children do not live alone and if the right to shelter is interpreted to mean housing in a family context it would render the provisions of section 26 nugatory. Everyone who has a child would then enjoy an enforceable claim against the State to be provided with housing on demand. He argued further that the recognition of the right to shelter, even temporary shelter in the family context, would have a dramatic impact on respondents' budget inasmuch as all persons with children would be able to enforce this right.

There is always a temptation to employ a particular definition to lend support to an argument; in this case to promote an argument that warns against imposing impossible financial demands upon the State. However the use of a definition should strive within a constitutional context to promote the very purpose of the right . As shelter connotes a form of temporary lodging the potential extension of such a right to parents cannot possibly impose an obligation upon the State to provide housing to such applicants.

Similarly the fact that the right to shelter as guaranteed in section 28(1)(c) cannot be equated with the right to housing does not however mean that the right is inevitably to to be found in the concept of shelter as employed in the Child Care Act.

Were the right to shelter to be so interpreted, it would inevitably result in these children being wrenched from their family context and any form of parental control and placed in a State institution even in cases such as the present one where there is no suggestion that the parents have neglected their children.

Were this to be the case section 28(1)(c) would effectively be at war with section 28(2) which provides that children's best interests are of paramount importance in every matter concerning the child. It would surely not be in the interests of a child to be taken away from his or her parents in order to be provided with shelter.

As **Julia Sloth-Nielsen** writes "The inclusion of a general standard (' the best interest of a child)' for the protection of children's rights in the constitution can become a benchmark review of all proceedings in which decisions are taken regarding children. Courts and administrative authorities will be constitutionally bound to give consideration to the effect their decisions will have on children's lives". 1996 Acta Juridica 6 at 26.

The interpretation of section 28(1)(c) can be no different. There is no suggestion that, absent lack of financial resources , the parents of children who are applicants do not have the best interests of their children uppermost in their minds. In this regard guideline 12 of the United Nations

Guidelines of the Prevention of Juvenile Delinquency (cited by Anne Skelton 1996 Acta Juridica 180 at 184) is of particular importance. It emphasizes the involvement of the family as follows: "Since the family is the central unit responsible for the primary socialisation of children, governmental and social efforts to preserve the integrity of the family, including the extended family should be pursued. The society has a responsibility to assist the family in providing care and protection and in ensuring the physical and mental well-being of children."

Section 28(1)(c) makes the child the bearer of the right. .In effect applicants have sought to argue that reading s28(1)(b) together with section 28(1)(c) justifies the creation of a derivative right , namely one possessed by the parents . As the family must be maintained as a unit parents of the children who are granted shelter should also be entitled to such shelter. The bearer of the right now becomes the family . The justification for such a conclusion is that a failure to recognise the parents would prevent the children from remaining within the family fabric. This would penalise the children and indeed their parents who, to a considerable extent owing to the ravages of apartheid, are unable to provide adequate shelter for their own children.

There is understandable concern that this interpretation of section 28(1)(c) could be used by parents to obtain access to housing which would otherwise be denied them on the basis of the interpretation of section 26 of the Constitution . It is important however to emphasize that section 28(1)(c) envisages the concept of temporary shelter. The provision of shelter to the children should of such a nature that their parents may join them . This does not mean that the parents become the bearers of a constitutional right which expressly provides that the children have such right . However an order which enforces a child' s right to shelter should take 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 s28 read as a whole.

Respondents have a legitimate concern about the potential consequences of this interpretation of s.28(1)(c). They may fear a flood of applications or demands by other squatters that shelter be provided for their children, and also for them as parents of those children. In this way, the respondents may be forced to provide inadequate housing under the guize of shelter, thereby disrupting the housing programme and delicate decisions already made about allocation of scarce resources. It is as well, therefore, to set out some limitations which are implicit in this judgment. It must be emphasised that the children applicants in the present case are in fact homeless, or will be when the order granted by **Josman AJ** is lifted, and thus in need of shelter. The same may not always be the case with children who belong to and live with squatter families. The parent applicants in the present case are unable to provide the requisite shelter for their children, which it is their primary duty to provide. Again, the same may not always be the case. In the present case it is in the best interests of the children applicants that they be accompanied by their parents, as contemplated by s.28(1)(b), though not necessarily by extended families. I think it is feasible for the respondents to accommodate both the present children applicants and their parent applicants in the future.

In the present case applicants were evicted from land in circumstances where their building materials were destroyed. In dealing with the implementation of the international covenant, paragraph 17 of General Comment 7 states " eviction should not result in individuals being rendered homeless or vulnerable to the violations of other human rights. Where those affected are unable to provide for themselves, the State Party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available."

The circumstances of the occupation, the eviction and the loss suffered by applicants pursuant to the eviction are particular circumstances of which account must be taken in the context of the present case.

It is also important to consider the particular circumstances of African applicants applying for housing in the Western Cape. Mr Wilkinson of the School of Architecture and Planning in the University of Cape Town makes clear in his affidavit that an adequate housing policy to deal with rapid urbanisation in the Western Cape was constrained by the government's attempt to retain the "coloured labour preference policy". Africans in the Western Cape only had access to housing opportunities on equal basis to other South Africans from 1994. Mr Wilkinson testified to the difficulty experienced by all low income households in obtaining access to housing and of the added difficulty for African households, given the specific historical context of African settlement in Cape Town.

Much of respondents argument against the application of section 28 to the present case concerned the limitation of financial resources. Thus Dr Suttcliffe deposed to an affidavit on behalf of the third respondent in which the basic premise is set out thus:' their case must be seen in the context of the needs which the Department of Health and Social Services , Provincial administration , Western Cape ...has to meet.....I say that this is particularly so given the problem of scarce resources and the significant demands for nutrition , health and social services placed on the Department.'

The wording of section 28 differs from that of section 26 in that there is no similar qualification to the constitutional right as appears, for example, in section 26(2). Section 28(1)(c) is drafted

as an unqualified constitutional right. Problems of scarce resources and the inconsistency of such rights with the doctrine of separation of powers was raised before the Constitutional Court in **In re: Certification of the Constitution of the Republic of South Africa**, 1996 (10)BCLR 1253 (CC). In this connection the court said " Certain objections with the inclusion of these rights in the NT's inconsistent separation of powers required by CP VI because the judiciary would have to encroach upon the proper terrain of the Legislature and Executive. In particular the objectors argued it would result in the courts dictating to the government how the budget should be allocated. It is true that the inclusion of socio economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. The court may require the provisions of legal aid or the extension of State benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio economic rights within the bill of rights, a task is conferred upon the court so different from that ordinarily conferred upon them by a bill of rights which results in a breach of the separation of powers.... As we have stated in the previous paragraph, many of the civil and political rights entrenched in the NT will give rise to similar budgetary implications without compromising their justiciability. The fact that socio economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio economic rights can be negatively protected from improper invasion". (at paras 77-78).

Accordingly the question of budgetary limitations is not applicable to the determination of rights in terms of section 28(1) (c) .Mr Gauntlett's submission that the recognition of the right to shelter , even temporary shelter would have a dramatic impact on the budget inasmuch as all

persons with children would be able to enforce this right on demand cannot be sustained. The right is conferred upon children .That right has not been made subject to a qualification of availability of financial resources. The right cannot be enforced on demand by all persons with children. Each case will have to be evaluated in terms of its own particular facts.

I have already emphasised the particular nature of the facts of the present case and that in this case the shelter provided pursuant to section 28(1) (c) should be of such a nature that the parents may join their children .

In the present case there are 276 children who are younger than 8 years old. In **Republic of South Africa v Hugo** 1997(4) SA 1 CC at para 41 **Goldstone J** said "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitution and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society within the context of our deeply inegalitarian past will not be easy but that that is the goal of the Constitution should not be forgotten or overlooked".

The rights in terms of this Constitution must be interpreted in order to give effect to this broad purpose of our new constitutional and democratic order. A parsimonious interpretation of section 28(1)(c) which denied shelter to 276 infants as well as other children would be incongruent with a constitutional instrument which envisages the establishment of a society based on freedom, equality and dignity. To implement the right in this case so that shelter will be provided for the children in circumstances where they will be denied the psychological comfort and social support of their parents would be to permit the breakup of family life of a kind which the new Constitution is determined to prevent. In my view such a conclusion cannot be justified and hence

the relief given must allow the parents to move with their children to the shelter provided to the latter as the bearers of such a right.

THE RELIEF

For the reasons given it is my view that the applicants have in principle made out a case for shelter pursuant to s.28(1)(c) of the Constitution, but that they have failed to make out a case for housing pursuant to s.26. I say in principle, because relatively little attention was given in the papers to the nature of the shelter to be provided, to its location, or to which of the respondents should be responsible therefor. Indeed, it was only in the replying affidavits that the applicants, through their attorney, made some practical suggestions as to the nature of the relief.

Mr Gauntlett correctly cautioned against an order which would be so general that the respondents would not know what was required of them. It seems to me that the relief which can properly be granted at this stage on the available evidence is at best declaratory. The next step, is to endeavour to give some practical content to the declaration. It will serve no worthwhile purpose to direct the parties to begin again on new papers. For this purpose more information is needed than is presently before us. In fairness to the respondents, who now know where their duty lies, they should be given an opportunity of proposing a practical solution. In fairness to the applicants, now that they know where their rights lie, respondents should be directed to make such proposals within a reasonable time. The applicants should furthermore have the opportunity of commenting on the proposals, and the respondents should be allowed to respond to such comment.

Section 38 of the Constitution provides that, whenever a right in the Bill of Rights has been

infringed or threatened, a court may grant appropriate relief, including a declaration of rights. In **Fose v Minister of Safety and Security** 1997(3) SA 786(CC) at para 19 **Ackermann J** said of the concept 'appropriate relief':

"Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a **mandamus** or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights." See also **Kriegler J** in **Fose** (supra) at para 100.

In terms of s.172(1)(b) of the Constitution, this Court, when deciding a constitutional issue, has the power to make any order which is just and equitable. Thus s 38 and s 172(1)(b) provide the court with wide powers: wide enough I think, to cover the mandatory relief which is contained in the terms of the order which is proposed. Based upon these sections and the judgment in **Fose** (supra) **Wim Trengrove** submits that appropriate relief within the context of socio-economic rights would include an order "directing the legislative and executive branches of government to bring about reforms defined in terms of their objective and then to retain a supervisory jurisdiction to supervise the implementation of those reforms." [(1998) 1 ESR Review 8 at 9]. Sections 38 and 172 of the Constitution empower a court to issue an order which identifies the violation of a constitutional right and then defines the reform that must be implemented while affording the responsible state agency the opportunity to choose the means of compliance.

In my view this is a most helpful suggestion. The children of applicants have a constitutional right which must be enforced against one or all of respondents. At this stage I do not wish to be

prescriptive about the solutions which the respondents are called upon to suggest to discharge their constitutional obligation. But in order to contain any future debate, I would say provisionally that tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum. Perhaps something better can be offered. The choice of an appropriate site presents another difficulty. The convenience of the applicants, and proximity to existing jobs, is but one factor to be taken into account. The applicants' immediate interests regarding location may have to yield to other constraints. On the other hand, as was mentioned during the argument, the respondents can hardly allocate a site in the middle of the Karoo. I feel sure that a place can be found within the area of the first respondent (the Oostenberg Municipality) or at any rate within the area of the second respondent (the Cape Metropolitan Council).

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

With regard to the costs of suit, I am of the view that no costs order should be made in respect of this leg of the proceedings for the following reasons:

(i) this is a constitutional matter, in which orders for costs are less readily granted than in other litigation;

(ii) the rights in issue are a new form of right being socio economic rights. The Court, and the parties, have had to traverse largely unchartered waters;

(iii) while the applicants have enjoyed a measure of success, they have failed on an important part of their case. The applicants have further failed adequately to identify which of the respondent is under a duty to provide shelter;

(iv) there was never a prospect that the applicants, parents or children, who are among the very poor, would be able to pay the costs of the respondents in the event of the applicants losing.

I consider in the circumstances that it would be just and fair that the costs incurred thus far be where they fall.

I propose that an order shall be issued in the following terms:

(1) The application insofar as it relates to housing or adequate housing, and insofar as it is based on s.26 of the Constitution, fails and it is dismissed;

(2) It is declared, in terms of s.28 of the Constitution that;

  (a) the applicant children are entitled to be provided with shelter by the appropriate organ or department of state;

  (b) the applicant parents are entitled to be accommodated with their children in the aforegoing shelter; and

  (c) the appropriate organ or department of state is obliged to provide the applicant children, and their accompanying parents, with such shelter until such time as the parents are able to shelter their own children;

(3) The several respondents are directed to present under oath a report or reports to this Court as to the implementation of paragraph (2) above within a period of three months from the date of this order;

(4) The applicants shall have a period of one month, after presentation of the aforegoing report, to deliver their commentary thereon under oath;

(5) The respondents shall have a further period of two weeks to deliver their replies under oath to the applicants' commentary;

(6) There will be no order as to the costs of these proceedings up to the date of this judgment;

(7) The case is postponed to a date to be fixed by the Registrar for consideration and determination of the aforesaid report, commentary and replies;

(8) The order of **Josman AJ** dated 4 June 1999 will remain in force until such time as the further proceedings contemplated by the preceding paragraph have been completed.

____

D M DAVIS

JUDGE

I agree, and it is so ordered.

____

R G COMRIE

JUDGE