Government of the Republic of South Africa and Others vs. Grootboom (Grootboom) 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)

Children's rights - basic shelter; Evictions - right not to be evicted without court order; Housing rights- access to adequate housing; Socio-economic rights - minimum core obligations.

Facts

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

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

The Decision

1. According to the Constitutional Court, the question was not whether socio-economic rights were justiciable under the Constitution, "but how to enforce them in a given case." This could not be decided in abstract, but would have to be "carefully explored on a case-by-case basis." (para 20)
2. The Court held that the state had an obligation to ensure, at the very least, that the eviction was executed humanely. The fact that the eviction was carried out a day earlier and that the possessions and building materials of the respondents were destroyed and burnt amounted to a breach of the negative obligation embodied in the right of access to adequate housing recognised under section 26(1) of the Constitution.
3. Housing "entails more than bricks and mortar". It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have "access to" adequate housing all of these conditions must be met: "there must be land, there must be services, there must be a dwelling." (para 33)
4. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of housing, "but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing." The state's duty is to "create the conditions for access to adequate housing for people at all economic levels of our society." (para 35)

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

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

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