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Housing Rights Litigation

Grootboom and Beyond

*Malcolm Langford**

1. INTRODUCTION

I can sleep without fear for the first time. . . . But now we must begin a new fight.

– Resident, Gabon Settlement, after the *Modderklip* judgment[1]

Housing rights litigation bequeathed a juridical face to socio-economic rights in South Africa. In the landmark *Grootboom* case, an impoverished community facing displacement (for the third time) turned to the law. The Constitutional Court responded by establishing the general contours of the State's obligations: policy must be reasonably directed towards realising socio-economic rights, particularly for those in desperate need.[2]

As much as the *Grootboom* judgment has been lauded for its lucidity and progressivity, it has spawned a series of critiques. Some of these are doctrinal. The Court has been chastised for failing to impose immediate obligations to ensure a minimum level of socio-economic rights or institute a more robust form of review (Bilchitz, 2007).[3] Conversely, and more rarely, the judgment has been faulted for illegitimately intruding into the sphere of Parliament and the executive (Flanagan, 2008; Friedman, 2000).

A more persistent concern in the scholarship is the apparent lack of enforcement or impact. Pieterse (2007: 808) concludes that "there was limited compliance with

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[1] Interview by author with focus group of residents, Gabon settlement, June 2010.

[2] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (*Grootboom*).

[3] See discussion in chapter 2, by Wilson and Dugard, in this volume.

the order", and more "significantly, the order did not result in the alleviation of the housing needs of the successful litigants". This critique was heightened by the death of the lead applicant. In August 2008, Mrs Grootboom died "homeless and penniless" in her shack in Wallacedene (Joubert, 2008: 1).

These perceptions of the judgment's effects have elicited a range of reactions and proposals. Some have dismissed the capacity of socio-economic rights litigation in South Africa to improve the plight of the poor (Hirschl, 2004) or have called for stronger remedies and supervisory jurisdiction to ensure compliance (Mbazira, 2008). In discussions over public interest litigation strategy, the case is often held up as an example of 'what not to do'. Unlike the case of *Treatment Action Campaign*,[4] the *Grootboom* litigation was accompanied by no significant social mobilisation and follow-up (Marcus and Budlender, 2008).

Although there is some truth in all these perspectives about impact, this chapter argues that they require deeper interrogation. They obscure different methodological assumptions and the evidence is second-hand and out-dated: newspaper articles from 2004 and 2005 are the most commonly cited source or just presumptions about no impact (see Berger, 2008; Hirschl and Rosevear, 2012). Moreover, the research has failed to test the conclusions against almost identical cases that have subsequently emerged. Engaging in such an endeavour may lead us to a more nuanced picture of impact.

Using a range of sources (e.g. interviews, statistics, policy documents, jurisprudence), this chapter sets out to assess the impact of different housing rights strategies from *Grootboom* onwards and the appropriate lessons to be drawn. In doing so, the study has two limitations. First, the focus is restricted to case studies involving courts even though the nature of civil action varies. This is partly because of the attention generated by the *Grootboom* judgment but also because of the central role of adjudication in the field: Forced evictions generate litigation more quickly because of the perceived urgency; the ease of community mobilisation; and the lack of concrete political alternatives for many isolated settlements. However, in each case, litigation was complemented by other strategies. It is these shades of difference between the cases that form a key focal point for analysis. Second, for the sake of manageability, the focus is on cases involving informal settlements in urban areas.[5]

The first half of the chapter briefly sets out the historical and policy context of housing in South Africa (Section 2) which is followed by an in-depth analysis of the background and impact of the *Grootboom* judgment (Section 3). It then moves on

[4] *Treatment Action Campaign v Minister of Health* (No. 2) 2002 (5) SA 721 (CC) (*TAC*).

[5] There are many other groups in urban areas that face significant housing rights challenges, particularly renters, backyard dwellers, hostel dwellers, farm dwellers, low-income property owners facing eviction, and those in the 'gap market' who do not qualify for RDP housing or private housing loans because their income is too high for the former and too low for the latter. For an overview of the challenges for these groups, see Tissington (2011b: 30–42). In some cases, litigation has been used, particularly for small property owners facing eviction. See *Jaftha v Schoeman; Van Rooyen v Scholtz* 2005 (2) SA 140 (CC).

with the observation that the *Grootboom* case began as a forced eviction struggle and is comparable to a range of other eviction cases. In many of these, positive obligations by the State were asserted as a counter-claim, or the litigation process was used as a lever to negotiate for improved housing. A selection of eight cases are thus briefly described in Section 4 and analysed in terms of their background; characteristics; and degree of impact. The chapter concludes in Section 5 by arguing that the results of these comparative analyses and experiences should make us rethink both housing policy and civil society strategy.

2. HISTORICAL AND POLICY CONTEXT

Within a global perspective, the rapid growth of informal settlements and the presence of spatial segregation on racial grounds is not unique. However, the determination of the apartheid State in South Africa to control the flow and form of urban development was more steadfast and pernicious than elsewhere. From the end of nineteenth century, influx controls and various policies were systemically used to exclude black South Africans from the rapidly growing cities (Van Onselen, 2001). In 1901, the first segregated and planned township was formally created in Cape Town, and Africans and Indians were expelled from Johannesburg in 1904 and settled in what is present-day Soweto. After that came a cascading series of laws and policies that sought to stem the urban tide. The Natives (Urban Areas) Act of 1923 dramatically reduced legal tenure options for Africans outside the townships: the Slums Act 53 of 1934 facilitated large-scale inner-city clearances and dumping of residents outside the city on 'health and safety grounds', and the application of the Group Areas Act of 1950 and development of Bantustans created areas to which the apartheid State could 'repatriate' Africans who were surplus to the labour requirements of 'white' cities and farms. By the end of the 1970s, the result was the following:

> [W]hile some Africans still managed to live illegally in white urban areas, and thousands more lived illegally in townships outside the Bantustans, the racial scheme of spatial apartheid had reached its most advanced state. (Centre on the Housing Rights and Evictions (COHRE), 2005: 16)

As these controls were lifted during the 1980s, the inevitable result was rapid urban growth in former white urban areas. This phenomenon was amplified by limited economic opportunities and ongoing displacement in rural areas,[6] the collapse of the already-meagre level of support to townships, and enhanced political confidence and activism amongst black South Africans. By 1990, the racial composition of inner-city areas was undergoing a dramatic transformation as black South Africans rented apartments or occupied abandoned buildings while the number of informal settlements, often on the periphery of urban areas, rose steadily.

[6] See discussion in chapter 6, by Cousins and Hall.

Before the formal transition in 1996, post-apartheid housing policy was taking shape (Government of South Africa (GOSA), 1994). A multi-stakeholder National Housing Forum had debated whether to aim deep (quickly providing formal four-room housing for some) or broad (facilitating some housing improvement for all) (Tissington, 2011b); and whether to prioritise home ownership or rental housing. Although the broad approach was initially adopted in the form of 'starter houses' in the early 1990s (Tissington, 2011b: 58–61), the national policy settled on depth and ownership. This was chiefly based on the premise that the State should not facilitate second-class housing for black South Africans.

Under the new National Housing Subsidy Scheme (NHSS), a capital subsidy was made available to enable the building of one million housing units over five years for low-income South Africans. At that pace, the backlog would be eradicated in ten years and new demands satiated. The exact form of these 'RDP' (Reconstruction and Development Programme) houses has varied but has evolved in the main to 30 square metres of floor space on a 250-square-metre stand.

The construction of RDP houses represented the Government's flagship housing strategy but was complemented by other policies and laws. Institutional subsidies were provided to housing organisations (private, governmental, and NGOs) to provide social housing. In 1997, framework legislation in the form of the Housing Act was passed along with the more regulatory oriented Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 (PIE), the Extension of Security of Tenure Act 62 of 1997 (primarily for rural areas), the Rental Housing Act 50 of 1999, and the National Norm and Standards for Construction of Stand Alone Residential Dwellings (1999). The PIE legislation was notable for its attempt to provide a robust procedural framework to prevent forced eviction of informal occupants without adequate alternative housing. In 1998, the People's Housing Process was adopted by the housing minister after pressure from the South African Homeless People's Federation: Communities could supervise and drive the housing delivery process themselves. Their 'sweat equity' would be provided in lieu of the own capital contribution required by the NHSS.

By early 2001, the housing policy showed signs of mixed success. Almost on schedule, the Government had provided a total of 1.1 million housing subsidies covering 5 million of the 12.5 million South Africans requiring housing (Lodge, 2003). But the backlog was growing faster than delivery. The programme also appeared to accentuate the apartheid spatial divide. Housing was largely built on the peripheries of cities, and building quality was questionable, leaving what the Unicity Commission (2003: 3) described as a space "full of racial, political and social divisions". And no effort was expended on taking the People's Housing Process to scale. So far, it has enjoyed only a brief period of popularity in the mid-2000s in selected municipalities (Tissington, 2011b: 63).

One of the principal consequences was the spectacular growth in informal settlements. By 1999, there were three hundred informal settlements in the Gauteng

TABLE 7.1. *Total population living in informal settlements, 2001*

	Informal Pop.	Percentage of Total Pop.	Percentage of Urban	Planned Units
Eastern Cape	416,956	6.64 %	23.06 %	237,765
Free State	257,068	9.50 %	19.47 %	104,046
Gauteng Province	1,011,387	11.02 %	14.80 %	999,190
KwaZulu-Natal	1,016,596	10.61 %	31.27 %	303,081
Limpopo Province	70,415	1.41 %	21.20 %	146,908
Mpumalanga	190,782	5.67 %	23.45 %	155,434
Northern Cape	31,405	3.17 %	12.47 %	42,730
North West	212,443	6.65 %	29.40 %	149,690
Western Cape	353,331	7.81 %	11.07 %	228,789
Total	330,3572	7.37 %	17.83 %	2,367,633

Source: Total and urban population figures are from the 2001 census (http://www.citypopulation.de/SouthAfrica-Mun.html). Total urban population was calculated by adding the population of urban areas in all provinces (towns exceeding twenty thousand persons).

province, a 1,500 per cent increase from a decade earlier, and more than two hundred buildings in downtown Johannesburg were informally occupied (COHRE, 2005). Nationally, the number of informal settlements had risen to more than one thousand (Moladi, 2010), with KwaZulu-Natal carrying the highest proportion. Table 7.1 shows the numbers of persons living informally in each province in 2001 (GOSA, 2004) and calculates the proportion of those persons to the total provincial population generally and those living in urban areas. The last column shows the number of planned housing units at that time (GOSA, 2004), although the 'waiting list' includes South Africans not living in settlements. What is notable is that, in almost all provinces, informal occupants account for a fifth to a third of urban dwellers, and the number of planned units is considerably lower than the informal population.

The official response to settlement growth was increasingly one of eviction and a discourse that sought to criminalise 'slum dwelling'. Although demolitions had continued from the apartheid era into the early and mid-1990s, Royston (1998) argues that they were largely driven by market forces (often involving tenants or private owners) rather than large-scale State-driven attempts to remove informal urban presence. She also claims that the Supreme Court, despite the presence of the Prevention of Illegal Squatting Act ('PISA') of 1951 on the statute books, were sympathetic to informal residents, such that it "was unusual to hear of a court ordering the removal of squatters unless alternative accommodation or land was available for resettlement" (Royston, 1998: Conclusion). Municipalities were also in a state of

flux: local government was being re-born from the ashes of apartheid segregation, and some local governments, such as Gauteng, even adopted a rapid land-release policy. Nonetheless, COHRE's (1998: 61) international eviction monitor reported a number of cases in this period, for example:

> On 19 December 1995, the same types of armoured vehicles that had inspired fear under apartheid were deployed in an operation to destroy at least 500 homes occupied by some 3,000 poor people in Gauteng Province (formerly Transvaal). The Gauteng government subsequently refused to provide alternative land for those made homeless on the grounds that this "would set a precedent".

By the end of the 1990s as municipalities were consolidated, local urban and economic plans began to take shape. As the value of urban land began to rise with economic growth and commercial opportunity, a harsher and more consistent attitude appeared to emerge. Accurate numbers are difficult to obtain but there are many qualitative accounts of large-scale evictions in major urban areas.

It is in this context that the *Grootboom* case arose.

3. *GROOTBOOM*

3.1. *Origins of the Case and Judgment*

The *Grootboom* 'community' consisted of 390 adults and 510 children who originally resided in the Wallacedene informal settlement. Located on the eastern fringe of the Cape Metropolitan Area, the settlement's residents were extremely poor, with 25 per cent in 1997 being assessed as having no income at all. Heavy winter rainfall had left their part of the settlement waterlogged, and in September 1998 they moved onto an adjacent vacant property. However, the land was privately owned and earmarked for low-cost housing. On 8 December 1998, the landowner secured a court order for an eviction, even though the community was unrepresented. The community decided to remain on the land, however, as the previous site in Wallacedene was then occupied.

After securing funds to carry out an eviction, the landowner returned to court in March 1999 for a fresh eviction order. This time, the magistrate asked a local private lawyer to represent the community. The result was a negotiated agreement with the Oostenburg municipality: The community would vacate the land by 19 May 1999, and the municipality promised that it would seek to identify alternative land. The lawyer was under the impression (falsely, it seems) that there was little chance of legal success in fighting the eviction and that the municipality would negotiate in good faith: Oostenburg had earlier and privately concluded that no alternative sites were available. On 18 May 1999, the municipality sent in bulldozers to demolish and burn the settlement. Rendered homeless, the community members took shelter on the Wallacedene sports field.

With the encouragement of a former African National Congress (ANC) councillor, the community marched on the local offices of the municipality, controlled by the New National Party. However, the only substantive response engendered was the request by municipality to an ANC politician to "sort out the problem" (Marcus and Budlender, 2008). During the subsequent discussions with this politician, it was decided that legal action would be taken against local, provincial, and national government. After one further attempt to settle, the case was launched on 31 May 1999. The applicants requested that the respondents "provide adequate and sufficient basic temporary shelter and/or housing for the applicants and their children" pending permanent accommodation and that "adequate and sufficient basic nutrition, shelter, health and care services and social services" be provided to all of the applicants' children in the interim.

Justice Davis conducted an *in loco* inspection and issued judgment on 17 December 1999. The rights of the children under Section 28 of the Constitution were upheld and the High Court ordered that "tents, portable latrines and a regular supply of water" be provided within three months to families. However, no order was given for adults without children. Section 26, which provides that everyone has the right of access to adequate housing, is expressly limited by the requirement of available resources. The municipality immediately appealed the order to the Constitutional Court, and the Community Law Centre, which had given some advice to the applicants, joined as amicus curiae (Liebenberg, 2003). This intervention proved influential given the eventual court order.

At the start of the hearing, the Constitutional Court issued an order pursuant to an agreement between the parties. The municipality was to provide immediate funding for materials and delivery of temporary toilet and sanitation facilities, as well as materials to waterproof residents' shacks. A unanimous judgment then addressed the broader issues. Writing for the Court, Justice Yacoob held that the nationwide housing program fell short of the obligations on the national government under Section 26 of the Constitution. There was a failure by the authorities to take into account or make provisions for the immediate temporary amelioration of the circumstances of those in desperate need. A declaratory order was issued to that effect, which stated that Section 26 of the Constitution imposes on the national government obligations to devise, fund, implement, and supervise measures to provide relief to those in desperate need.[7] In passing, the Constitutional Court commented that the "manner in which the eviction was carried out" was a "breach" of the negative obligation not to forcibly evict enshrined in Section 26 of the Constitution. The High Court's order under Section 28 was also struck out as

[7] The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

the Court read progressive realisation and the defence of available resources into the provision.[8]

The Constitutional Court noted that the second amicus curiae, the South African Human Rights Commission (SAHRC), had promised to "monitor and, if necessary, report in terms of these powers on the efforts made by the State to comply with its Section 26 obligations in accordance with this judgment."[9] Whether this statement by the Constitutional Court constituted an actual order is disputed (cf. Berger, 2008; Liebenberg, 2010: 402–3). The SAHRC nonetheless reported on the implementation. Pillay (2002a) and Liebenberg (2010) describe its extensive efforts to monitor local and provincial plans to provide permanent accommodation to the community and on 14 November 2001 the SAHRC made an extensive report to the Constitutional Court concerning the dispute between branches of government over responsibility for implementation and the lack of clarity over the content of the declaratory order; but the court refused to entertain it, saying that it did not possess an ongoing oversight role. However, many are critical of the commission's failure to continue to monitor the broader declaratory order (Berger, 2008: 77).

3.2. *Assessing Impact*

Assessing the impact of the *Grootboom* litigation is challenging. The case acutely raises the full gamut of methodological issues discussed at the beginning of this book. First, should one adopt a 'before and after' approach or an 'idealist expectations' approach to the baseline? The former approach permits the identification of a range of positive impacts; the latter presages a more pessimistic reading, particularly if emphasis is placed on the community's short-term anticipations immediately after the judgment. Second, should the focus be on the impact for the *Grootboom* community (who were the authors of the litigation strategy) or the broader changes in housing and eviction policy (which was the focus of the judgment)? Third, how much weight should be given to the respective material (rights realisation and policies and institutional change), political (power relations), and symbolic (perceptive/attitudinal) impacts that emerged from the case? Fourth, what time period is reasonable for the assessment, particularly as some key impacts occurred five to ten years after the judgment?

This chapter does not seek to resolve these tensions but rather to highlight the critical role of methodological choices. As to the baseline, the chapter adopts a hybrid approach. It uses neither the terms of the judgment nor the community's interpretation of it, but rather the community's original demands before the High Court for adequate temporary shelter pending permanent accommodation and basic nutrition and services for children. This baseline seems reasonable, as it represents a conscious attempt by the community and their lawyers to take into account the legal,

[8] This interpretation has been much criticised from the perspective of children's rights (Sloth-Nielsen, 2001).

[9] *Grootboom*, para. 97.

TABLE 7.2. *Impacts of the Grootboom community's legal strategy*

	Grootboom Community	Systemic Effects
Material	Building materials and services (2001–) Protection from eviction[a] (2001–) Permanent housing for community (2007–9)[a]	National Emergency Housing Policy (2005) Western Cape and Wallacedene Housing Policy (2001–) Socio-economic rights and eviction jurisprudence (2001–)[a] Slum Upgrading Policy (2005) *Grootboom* proofing of policies[a] (2002–10)
Political	Increased leverage with municipality Some but marginal alliance building by community Less active after choosing litigation option?[b]	Judgment used in mobilisation and leverage power in other communities[a] (see Section 4)
Symbolic	Community self-perceptions?[b]	Slum dwellers viewed as rights holders by *some* officials, media But marginal effects on broader perceptions of slum dwellers

[a] An impact that can be viewed as significant.
[b] An impact that can be viewed as negative.

economic and bureaucratic constraints.[10] In addition to the community's baseline, the broader effects of the judgment are also recorded.

These different impacts are set out in Table 7.2 with the columns divided between community and systemic impacts. The rest of this section analyses the reasons behind these conclusions for the *Grootboom* community and more broadly.

3.3. Grootboom *Community*

Material

What were the material effects of the judgment for the community measured against the original demand? On the eve of the Constitutional Court hearing, the community was successful in securing a settlement agreement for the first leg of their claim – temporary settlement. However, it was immediately breached by the municipality, which took no steps to provide the promised materials, water, and sanitation (Berger, 2008). This required a follow-up application to have the agreement made

[10] Whether it reflected the community's actual demand is difficult to know because of the involvement of lawyers.

an order of court.[11] The materials and facilities were then provided, but complaints emerged over the quality of the water and sanitation facilities, and overall conditions improved little (Langford, 2003). Community leaders complained of broken pipes, lack of cleaning materials, and being shunted between local and provincial governments when trying to solve maintenance problems.[12] As Pillay (2002b: 2) put it, the "part of the order requiring once-off involvement" was fulfilled but "other parts of the order, which require continuous involvement – like maintenance and the provision of services – have not been". Moreover, and critically, the original demand of the parties for accessible social services for children was very much lost in the settlement agreement and the Constitutional Court's judgment.

At the same time, the agreement facilitated security of tenure for the community. The litigation effectively removed the prior eviction threat and dissolved the community's initial acquiescence to it. It was tacitly agreed amongst the parties that the community could reside on the sports field despite complaints from sporting associations (Liebenberg, 2010). Although this may seem like a marginal victory, it is to be contrasted with two other evictions that occurred in 2001. Huchzermeyer (2003) records the eviction of six thousand households from Alexandria and ten thousand from Bredell.

Much of the debate over the judgment has focused on the slow progress of the community's securing of permanent housing (Joubert, 2008; Pieterse, 2007). In 2002, the community leader said, "We won the championship, but where's the trophy?"[13] But there was, of course, no court order for the community to be given permanent housing, and it was not even claimed by the community when they first approached the High Court. The Constitutional Court even acknowledges, in largely glowing terms, the government's broader efforts in building houses for the poor.[14] Marcus and Budlender (2008: 63) conclude that the community's "over-inflated expectations and consequent disillusionment" concerning the import of the judgment seem to have arisen from the "lack of clear communication between the lawyer and his clients about the likely and actual outcomes of the case".

However, progress on access to permanent housing is worth investigating, not only in terms of the community's legitimate medium- to long-term expectations but also in light of the usefulness of constitutional rights–based litigation strategies. The Court has been particularly critiqued for "focusing on the coherence, rationality,

[11] *Grootboom v Government of the Republic of South Africa* (unreported order in Case no. CCt/00), 21 September 2001.

[12] 'Treated with contempt', *Times Live*, 21 May 2004, http://www.timeslive.co.za/sundaytimes/article88628.ece.

[13] Interview with Lucky Gwaza, February 2002.

[14] "What has been done in execution of this program is a major achievement. Large sums of money have been spent and a significant number of houses have been built. Considerable thought, energy, resources and expertise have been and continue to be devoted to the process of effective housing delivery": *Grootboom*, para. 53.

inclusiveness, and flexibility of legislative or policy measures" instead of "the alleviation of the concrete consequences of socioeconomic hardship" (Pieterse, 2007: 811).

The full and entire story of the community's attainment of permanent housing has been subject to little analysis. It is complicated. The initial obstacle was the lack of bureaucratic coordination. The City of Cape Town and the Western Cape provincial government took one year to decide on the 'locus of responsibility' for the implementation of the judgment (Pillay, 2002a). Interestingly, their first plan focused on the Wallacedene area – to ensure permanent resettlement for all residents there – rather than on the required broader reforms to emergency housing policy (which came later). Pillay (2002a) is actually critical of the municipality for this decision as the judgment was focused on ensuring emergence assistance to all persons within the remit of each level of political authority (see further Section 3.4 herein on the implementation of the actual declaratory order). But this policy development demonstrates that the litigation had an impact for the *Grootboom* community in terms of directing municipal attention to the needs of their locality.

The Wallacadene plan involved a series of phased resettlements whereby residents could choose between contractor-built housing (RDP houses) and the People's Housing Process. The nearby 130-hectare Blue Ridge Farm would be purchased for the construction of low-cost housing for 6,800 households while another 2,000 would be developed in existing Wallacedene (LRC, 2002). But in March 2002, when members of the *Grootboom* community were presented with the plan, their leader, Lucky Gwaza, expressed sadness: "relocating his people would only be undertaken during phase three of the development, which could be five or six years away" (LRC, 2002). The plan allowed for ten phases, and the *Grootboom* community was slated for phase 4 (to be completed in 2008). Other communities were deemed to be in greater need. This was clearly a let down for the *Grootboom* community but at least demonstrates that the principles of the judgment were being followed: the most disadvantaged were being prioritised. One of the other community leaders Mawethu Sila acknowledged that the community thought "that the ruling was going to be for thirty applicants" but they came to accept the need for a broader plan such that the "judgment, as much as it helped us, it didn't only help us".[15]

By 2008, the plan had been achieved for the community who had chosen the People's Housing Process. Those who chose contractor-built housing, including Mrs Grootboom, were stuck encumbered with delays. While three thousand of these houses had been constructed in the Wallacedene area (Nicholson, 2008a), construction of the remainder had stymied repeatedly by myriad bureaucratic quagmires, most notably, the cancellation of a contractor's tender due to allegations of corruption.[16] There were also concerns over the quality of construction, type of

[15] Interview with Mawethu Sila, Wallacedene, 2 June 2012. Carried out by Wilmien Wicomb, Legal Resources Centre for the author.

[16] Interview with Steve Kahanovitz, Legal Resources Centre, Cape Town, 17 April 2010.

building foundation, location of houses, and availability of alternative accommodation during construction. As a consequence, in May 2008, when Mrs Grootboom died, she was still waiting for relocation (Joubert, 2008). But this group was informed that it would be included in the next round.[17] In 2012, Sila advised that 90 per cent had accessed permanent housing although disagreements with contractors and the municipality over quality and location has meant a number of the remainder have refused the offers.

Thus, the community managed to achieve permanent housing, and it was the judgment that accelerated this process by prompting the Wallacedene plan. At the funeral of Mrs Grootboom, tribute was given to her for precisely this. Her sixteen-year-old niece stated, "She was very loving and would do anything for anyone. She did a lot for the people in the community. If it wasn't for her they wouldn't have houses now" (Nicholson, 2008b: 1). At the same time, the community lived in appalling conditions for many years, and it is difficult to calculate by how many years the judgment reduced the likely attainment of permanent housing. But there is a clear causal connection between the judgment and the creation of the plan, and potentially its implementation, given the high-profile nature of the case.

Political and Symbolic Impacts

Beyond these material impacts, the 'political' and 'symbolic' impacts have been mixed or ambiguous. The litigation clearly shifted the power relationship between the community evictees and municipality; enhancing the community's 'power to' in Gaventa's (2006) terms. This is evident in the forestalment of the forced eviction and the development of a plan for permanent resettlement. However, it is clear that the shift only went so far. The community was not able to attain more political leverage from the victory.

It was here that the particular circumstances of the case come into play. The community seemed to have missed the chance to expand their 'power with' and 'power within'. They quickly lost access to their private lawyer, Julian Apollos: he merged his small law firm with a larger firm that represented the municipality, thus creating a conflict of interest. The LRC attempted to assist the community in negotiating with the authorities, but Marcus and Budlender (2008: 63) argue that there seems to be a "lack of effective leadership in the community which made the process extremely difficult". The community was able to form alliances with civil society organisations such as Development Action Group and the housing-oriented Community Organisation Resource Centre (CORC), but the cooperation did not always last, and the community was not connected to broader and emerging urban movements. However, in an interview, Sila indicated that the Wallacedene housing plan had facilitated the development of a broader Wallacedene community forum. A number of members of the Grootboom community were active in the

[17] Ibid.

forum leadership. In this respect, the judgment facilitated the creation of a new community organisation.

Overall, the legacy of the litigation was more empowering than disempowering. If the baseline is the year 2000, it clearly helped unite a heavily marginalised community living in highly precarious conditions and give birth to a new representative entity that negotiated with the municipality.

3.4. *Systemic Impact*

Although the community's claim addressed its own situation, the judgment was focused on the broader obligations of the State, particularly towards all those in desperate need. The decision thus carried the seeds for catalysing a wider systemic impact. The BBC reported in October 2000, for example, that although the judgment was unclear in "practical terms", it "could lead to a total overhaul of the government's housing policy" (Barrow, 2000). With slightly less optimism as to housing policy, the representative for the amicus curiae in the case, the LRC, pointed towards the judgment's latent destabilising role in housing policy and legal jurisprudence. The LRC noted that the case was a "watershed moment in [South Africa's] constitutional democracy" and heralded political change: "something very fundamental has shifted subtly in South Africa: the power of desperately poor people to leverage assistance from the state" (LRC, 2002: 4). Each of these potential effects is examined in turn.

Emergency Housing Policy

In August 2003, two and half years after the judgment, the national and provincial ministers approved a new programme called Housing Assistance in Emergency Situations. The programme document explicitly acknowledges that it was devised as a direct result of the *Grootboom* judgment as well as the severe floods in Limpopo Province in 2000 (see page 5). It discusses the judgment in some detail, noting that the Court found that current programmes "do not satisfy the requirements of the Constitution" and "suggested that a reasonable part of the national budget be devoted to providing relief for those in desperate need". In April 1994, the policy was incorporated in the National Housing Code:[18]

> [It] deals with the rules for exceptional urgent housing situation . . . [for] people who, for reasons beyond their control, find themselves in a situation of exceptional and urgent housing need. . . . The assistance provided consists of funds in the form of grants to municipalities to give effect to accelerated land development, the provision of basic municipal engineering services and shelter.

Exceptional or urgent need was defined as an emergency housing situation (e.g. destruction or major damage to an existing shelter) or a situation that poses an

[18] Section 4 of the National Housing Act 107 of 1997 provides for the publication of a National Housing Code by the Minister of Housing.

immediate danger to life, health and safety, or eviction (or the threat of imminent eviction). Although the Court referred only vaguely to the provision of adequate budgetary support, the National Treasury Department undertook to allocate a fixed 0.8 per cent of the annual national housing budget to the implementation of the policy. This was gazetted, but was not ultimately implemented on the grounds that the Department of Housing was regularly failing to spend all of its existing budget so there would be no need to ringfence a particular allocation.[19]

In 2009, the programme provided R22,416 (US$2,741 at the time) for the repair of existing services and up to the individual subsidy quantum amount for the reconstruction of existing houses. For temporary assistance, R4,230 is provided for municipal engineering services and R47,659 for the construction of temporary shelters.[20] For temporary settlements, guidelines mandate a maximum level of basic engineering services and shelter requirements, as the programme was not intended to constitute provision of formal or permanent housing.[21]

Although the policy was a direct response to the judgment, implementation has been hampered by numerous problems. Only municipalities (not communities) may apply for funding, and only when they can demonstrate an emergency situation. The use of the Emergency Housing Programme by municipalities has been minimal and largely ad hoc (Tissington, 2011b). Social Housing Foundation and Urban Landmark (2010) have demonstrated that only six of the nine provinces have so far claimed funds, and most grants were disbursed for disasters and floods in rural areas, although this does not reflect State-initiated uses of the funds. One of the core problems has been the narrow definition of emergency combined with burdensome institutional procedures, with processes taking up to eighteen months and sometimes leading to questionable rejection (Tissington, 2011b). This seems to confirm Liebenberg's (2010) conclusion that the policy is not fully compatible with the judgment. The constitutionality of the programme was partly raised by applicants in *Nokotyana* before the Constitutional Court in 2010, but only in relation to the standard of temporary sanitation facilities and the provision of high-mast lighting.[22]

More problematic, where the policy has been deployed in urban areas, the primary purpose has been to evict residents. Residents are moved to temporary relocation areas (TRAS), or 'transit camps'. Apparently, this is to help address housing backlogs, but Tissington (2011b: 96) argues:

[19] Kahanovitz e-mail correspondence, October 2012.

[20] Department of Human Settlements, 'Subsidy quantum – Incremental interventions', Pt. 3, Vol. 4, National Housing Code (2009) 4.

[21] Access to water means a water point or tap for every twenty-five families; temporary sanitation facilities may vary from area to area; where possible ventilated improved pit (VIP) latrines must be provided as a first option on the basis of one per five families, whereas high-mast lighting may be provided in special circumstances.

[22] *Nokotyana and Others v Ekurhuleni Municipality* 2010 (4) BCLR 312 (CC) (*Nokotyana*). For discussion and criticism, see Wilson and Dugard, chapter 2, in this volume.

> Households are moved from shacks they have occupied, often for many years, to these areas where they are often left indefinitely with no timeline of when they will receive permanent accommodation. They are, in effect, off the "backlog radar" as they are neither informal nor occupants of formal RDP or bond houses. Because of their so-called temporary nature, City officials are unwilling to invest much in infrastructure in these areas and in fact, the Emergency Housing Programme explicitly discourages this.

One of the few exceptions has been the creative use of the policy to catalyse a relocation and in situ upgrade: this occurred in the Bardale litigation (see Section 4). But in the main, the appropriation of the policy to facilitate 'relocations' has been mostly devastating for urban residents, leaving them worse off than in their original situation (Hunter, 2010).

But are there indirect policy effects? Has the judgment and national policy meant that municipalities are more likely to provide temporary services regardless of access to national funds? This is difficult to tell. In the case of Stellenbosch, there was high awareness of potential litigation against the municipality.[23] Officials describe a policy of immediately providing water and sanitation points in the mushrooming informal settlements.[24] In other municipalities, it seems that little progress has been made, particularly in KwaZulu-Natal, the Eastern Cape, and Ekurhuleni in Gauteng. Locating the data to gain precise figures on provision of basic water, sanitation, and electricity to informal settlements is not simple. Data from the Department for Water Services and Forestry suggests that its provision increased at a faster rate since at least 2008: 'below RDP' water service across the whole country was rising more quickly from 2000 than 'above RDP' service. By 2008 this had begun to taper off as the latter caught up. However, these figures include rural areas and small towns, making it difficult to interpret. But anecdotal evidence suggests a move to at least identifying informal settlements, providing services (often rudimentary and varying between settlements and municipalities), and sketching plans for the future development.

Informal Settlements Programme and Housing Budget

By 2001, there was widespread recognition that housing policy needed comprehensive reform. In 2002 and 2003, a government review process identified the problems across the sector, including the housing backlog and the continued growth of informal settlements. The emerging thinking was that local government should play a central role (Tissington, 2011b). Although the eventual outcome, Breaking New Ground (2004), broke only partially with existing policy, a new Informal Settlements Programme was adopted and included in chapter 13 of the Housing Code. Housing policy would be broad as well as deep. Informal settlements could be upgraded in situ, or relocations could occur in exceptional circumstances. Municipalities were

[23] Kahanovitz e-mail correspondence, 2010.

[24] Interview with director of water and sanitation services, Stellenbosch Local Municipality, Stellenbosch, February 2008.

to access grants for the four different phases of the upgrading with individual-based (or other) subsidies to be used in the final construction phase.

It is likely that the *Grootboom* judgment played a part in influencing the development of the policy given its timing. In a recent decision, the Constitutional Court noted that the policy was an attempt by the government to implement the right to housing in the Constitution.[25] However, such influence was perhaps minimal. The policy reflected the zeitgeist of the time – as many in the sector began to recognise that the RDP housing policy would not cope with the growing backlog. Nonetheless, the judgment at least contributed to legitimising the existence of informal settlements and their residents as constitutional rights holders.

In any case, it is not clear that the policy has led to any significant achievements. Between 2004 and 2010, little upgrading has occurred in major urban areas (Huchzermeyer, 2010), although it has proceeded in some smaller towns.[26] In those few cases where the programme commenced, it was soon stymied by attempts to evict the communities (e.g. the *Joe Slovo* upgrade) (see Section 4.3), or long bureaucratic delays and major breakdowns in the municipality-community relationship (e.g. Hangberg settlement, Cape Town) (see Soeker and Bhana, 2010). For the most part, local municipalities seem resistant to the policy, and it was largely overshadowed by State's growing discursive emphasis on the eradication rather than the upgrading of informal settlements.

Given the programme's complexity and decentralised nature (Van Wyk, 2007), the mobilising or creation of local and provincial political will is decisive. Chapter 13 can be relied on only once the local Member of Executive Council (MEC) for Housing has made a decision to upgrade the settlement. Indeed, in *Nokotyana*, the Constitutional Court chastised the MEC for a three-year delay in making a decision, although it permitted a further fourteen months.[27] Moreover, the Court stunningly interpreted the programme as not allowing services for the initial phases to be commenced while a final decision was awaited. This was despite such provision being expressly permissible under the policy (Huchzermeyer, 2009).

One possible piece of hope was the presidential announcement in 2010 of a quantitative target for upgrading: four hundred thousand households by 2014. However, it is likely that most progress will come from mobilisation from below. Paradoxically, as we will see, in practice upgrading has principally occurred after resistance to eviction attempts by municipalities.

Jurisprudence

The LRC's prediction of the *Grootboom* judgment's importance for constitutional jurisprudence was largely on the mark. As Wilson and Dugard show in chapter 2 of

[25] *Nokotyana*, para. 24.
[26] Kahanovitz e-mail correspondence, 2010.
[27] *Nokotyana*, para. 23.

this volume, all of the key socio-economic rights cases in South African jurisprudence (from housing to health to social security) have built on the principles set out in *Grootboom*. Other NGOs and social movements have indicated their legal debt to the decision (Marcus and Budlender, 2008: 66).

In the domain of housing rights and evictions, the decision has clearly formed the basis for an extensive range of jurisprudence. Some of these cases are analysed in Section 4 of this chapter,[28] but suffice it to note here that they entrench the right to alternative accommodation in cases of eviction,[29] extend constitutional protections against eviction to debt defaulters[30] and occupiers of private land[31] and housing,[32] set out the minimum standards for alternative accommodation,[33] establish a duty of the municipality to meaningfully engage with a community,[34] provide the right to restoration of shelters and return to land after a forced eviction,[35] and prevent retrogression in legislative protections against evictions.[36] In some eviction cases, the *Grootboom* judgment has been proactively used as shield: the absence of an effective housing programme precluded the granting of eviction orders because occupiers would be left in desperate circumstances (see Section 4 for discussion of the Valhalla and Gabon cases).

At the same time, High court judges have ordered evictions that do not meet these constitutional standards: see Huchzermeyer, 2003; Wilson, 2006; and discussion of *Makause* case later in this chapter. However, Geoff Budlender argues that over the decade, most urban-based judges have become conscious of the constitutional principles and the chances of avoiding a forced eviction through court action have improved markedly.[37]

Grootboom Proofing Social Policy

Perhaps the most significant policy effect is one that is almost impossible to measure: the *Grootboom*-proofing of social policy. Senior officials in departments such as water and social security have acknowledged that the precedent affected policy

[28] For a deep analysis of this jurisprudence, see Liebenberg (2010).
[29] In particular, see *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (*Port Elizabeth Municipality*).
[30] *Jaftha v Schoeman; Van Rooyen v Scholtz* 2005 (2) SA 140 (CC) (*Jaftha*).
[31] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA).
[32] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 39 (Pty) Ltd and Another (338/10) [2011] ZASCA 47 (30 March 2011) (note that this is the Supreme Court of Appeal's judgment).
[33] *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) (*Thubelisha Homes*).
[34] *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) (*Olivia Road*).
[35] *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality*, 2007 SCA 70 (RSA) (note that this is the Supreme Court of Appeal's judgment, but it was not appealed).
[36] *Abahlali baseMjondolo v Premier of KwaZulu-Natal Province and Others* 2010 (2) BCLR 99 (CC).
[37] Interview with Geoff Budlender, February 2010.

calculations.[38] If progress was not achieved fast enough, there was a concern that departments could be subject to litigation. Marcus and Budlender (2008: 66) found a similar effect amongst their respondents, concluding that "the government has begun factoring these issues into its budgetmaking processes and has become far more responsive to lawyers".

In the specific field of housing, a similar theme emerged in interviews in February and March 2010 with housing officials in Cape Town and Johannesburg municipalities. They viewed *Grootboom* (and some subsequent judgments) as helpfully pushing them to review the adequacy of policy. Although, the officials evinced a strong resistance to any potential ruling that would direct them in their budgetary allocations, there has also been a significant increase in the housing budget over the past decade. However, it is difficult to say whether this was due to the *Grootboom* judgment. The political temperature was rising in the sector as a result of growing 'backlog' and outbreak of 'service delivery' protests since 2004 (see Dugard, chapter 10, in this volume).

It is also not clear how much *Grootboom* and its successors have affected the practice of forced evictions. No systemic data have been collected. But it is relatively clear that the number of large-scale government-initiated evictions has substantially decreased, if not disappeared. Evictions are cited as a cause of the service delivery protests since 2004 but they are nowhere near the leading cause compared to energy, water, and broader housing concerns (see Jain 2010). As the next section demonstrates, there are more accounts of evictions being successfully resisted with the use of legal tactics, which has led to an increase in the economic and political cost of an eviction. One sign of this is the targeting by municipalities of smaller or newer groups of residents (e.g. in Western Cape) or their encouragement of private landowners to take the lead in evicting.[39]

Politics and Perceptions

The judgment arguably created a tool that could be used in the political arena. The *Grootboom* proofing of social policy and use of the precedent in subsequent cases is evidence that there has been a shift in power relations. However, the case has been more of a background variable in these developments, not the foreground on which particular achievements were fought for and established. In this respect, it is easy to accept the argument that the absence of a 'social movement' in this litigation meant that there was a lost opportunity to use the judgment to directly and quickly leverage other gains. The greater post-judgment outcomes in the *TAC*

[38] See Caspar Human (2006), from the Department of Water Affairs and Forestry, and statements he made at the International Conference on Right to Water, Berlin, in October 2005. See also statements by Thabo Rakoloti, Chief Director of Social Assistance, Department of Social Development, at the International Conference on the Right to Social Security in Development, Berlin, 19–20 October 2009.

[39] Interview with Stuart Wilson, SERI, Johannesburg, April 2011.

case – in material, political, and symbolic terms – is said to be attributed to the primacy of social movements in this case: the broad coalition of NGO, unions, communities, and churches. Already well-versed in legal mobilisation after its legal-political victory against pharmaceutical companies in 1999, the Treatment Action Committee persistently followed up on the decision and used the narrow order for the rolling out of nevirapine as a springboard to advance other agendas, such as access to antiretroviral medicines.

This common narrative contains many truths. The importance of civil society organisations in determining the magnitude of the enforcement and impact of a decision pressure is partly corroborated by Berger's (2008) survey of health, education, and social security rights litigation in South Africa. This result should not be surprising in the lawyer-led litigation and enforcement model of the common law.[40] Strategy is very much in the hands of the parties at every stage.

At the same time, one should be wary about using the *TAC* case as a rigid prototype (Dugard and Langford, 2011). First, there are precedents from India and Colombia that demonstrate how a 'lonely' judgment has helped catalyse a social movement for compliance (Muralidhar, 2008; Rodríguez Garavito, 2011). In *Grootboom*, there was an emerging informal settlements movement, the Homeless People's Federation, closely affiliated with the professional-based People's Dialogue on Land and Shelter. They were engaged in negotiations on creating the People's Housing Process as an alternative to RDP housing and worked to a certain extent in the Wallacedene area. However, this organisation is somewhat sceptical of rights-based approaches – as it complicated relationships with the authorities in their view – and did not view the judgment as a platform for transformative policy changes. Moreover, there were no policy-oriented NGOs or university law centres with a strong focus on housing, unlike health. Thus, it could be said that *Grootboom* fell on fallow ground, a mobilisation idea whose time had not yet come. Indeed, it was only in the second half of the 2000s that South Africa has witnessed bottom-up housing rights movements that moved beyond a locality, such as Abahlali base Mjondolo (ABM), Western Cape Anti-Eviction Campaign, and the Unemployed Peoples' Movement. Only in later cases have communities been able to garner the strength of these growing alliances and develop more stable relationships with legally oriented civil society organisations.

Second, it is not clear that the *TAC* model can be applied directly to the housing sector and informal settlements, which is highly local and provincial in nature, in both design and politics, and concerns collectives/communities rather than individuals and the general public. Although health is certainly complex, the variable of land in housing policy can create havoc when not properly managed – it is intimately connected with the market, it is limited, and it carries deep symbolic and cultural value. Even in highly successful social democratic countries like Norway, housing

[40] Contrast the more judge-led litigation revolutions in the civil law systems of Colombia and Costa Rica (Wilson, 2009).

has been described as a 'shaky pillar'. Making cross-class and cross-sectoral alliances may also be more difficult. Access to housing is exclusively determined by socio-economic status, unlike HIV/AIDS. However, it is interesting that newer movements like Abahlali baseMjondolo have formed alliances locally with the NGO Church Land Programme. But creating alliances with experts can be more difficult: many actors in the housing sector are profit oriented or tied to government consultancies.

Third, housing litigation often arises in a different way. The initial concern of the *Grootboom* community was to simply avoid forced eviction. These types of cases are common and are driven by the acute concerns of local communities rather than broad movements. Thus, social movements often need to find ways to help maximise the results of such litigation rather than lead them. In this sense, the two cases may simply be incommensurable.

Symbolic Effects

Have there been any symbolic effects? It is hard to tell. In 2002, the LRC stated that the judgment had "changed the debate about social and economic rights – away from discussions about budgetary implications, towards the manner in which government approaches people living in dire circumstances" (LRC, 2002: 4). This is true to a certain extent. Within the national bureaucracy and some municipalities, *Grootboom* may have contributed to a more progressive view on the rights of those living in informal settlements and emergency situations. As is clear from the news media, Mrs Grootboom partly gave a human face to slum dwellers and may have boosted the journalistic focus and partly shifted the narrative on informal settlements. Moreover, the ability to whip up hysteria over land invaders as was done in 2001 during the Bredell eviction seems to have subsided.

However, any symbolic victories from the *Grootboom* judgment, and other efforts to render informal settlers more visible, have run headlong into a new counter-discourse. Pithouse (2009: 1–2) describes it as a shift to a "security driven approach to the urban poor". Informal settlements are viewed through a criminal justice lens and seen as a threat; leading to an anti-poor discourse of "eradicating slums", which may also explain the half-hearted change in policy in 2004. Some authors link this trend to the rising and assertive middle class, arguing that the "invaders distort the State's normative vision of integration as predominantly middle class and its form in urban development" (Lemanski and Oldfield, 2009: 643). Although some attempts to legislate away from protections to slum dwellers were foiled by social movements in the Constitutional Court, the security discourse has meant that slum dwellers have struggled to maintain sufficient public standing. The attacks on the movements such as Abahlali baseMjondolo are indicative of a simmering and deep hostility against shack dwellers and social movements (Amnesty, 2009). Moreover, the growing jurisprudence on housing rights and evictions appears to have created some backlash itself amongst officials and some ANC leaders (Marcus and Budlender, 2008: 66) and explains attempts to roll back PIE.

4. POST-*GROOTBOOM* HOUSING LITIGATION

4.1. *Comparing Forced Eviction Cases*

Without over-playing the scale of the effects, the foregoing discussion indicates that the impact of *Grootboom* may be deeper and more diffuse than is popularly, or scholarly, imagined. The community prevented further eviction, improved access to basic services (to a limited extent), gained access to permanent housing, catalysed the development of an emergency housing policy (although poorly implemented), developed the jurisprudential foundation for socio-economic rights litigation and helped slow or eliminate a pattern of large-scale evictions.

Even less analysed, though, is the impact of subsequent housing rights litigation that emerged from identical circumstances, that is, attempted forced evictions by public authorities.[41] In addition, in many of these cases, a similar kind of jujitsu strategy was employed. Negative violations triggered positive demands: communities invoked the right to housing as they mounted counter-claims for better housing or improved alternative accommodation.

These cases therefore present an opportunity to try to identify some broader trends in impact and conditions. The constitutional protections on the right of access to housing combined with legislation offers a potentially attractive legal opportunity structure for communities facing eviction. To a certain extent, a civil society support infrastructure, particularly in the form of not-for-profit legal services, has been available, with some lawyers experienced in fighting apartheid-era removals. Moreover, legal aid and university clinics represent thousands of potential evictees in courts every day, both magistrates' courts and the High Court.

However, the way in which communities have legalised their struggles has taken different routes. In the cases discussed here, communities contacted lawyers directly, or High Court judges called on lawyers to represent defendant communities (as in *Grootboom*). But in only one case (*Olivia Road*) was a proactive litigation strategy developed from the outset, with a broader civil society coalition as part of a larger city-wide strategy.

The seven chosen cases emerged from attempted forced evictions of urban settlements in Western Cape and Gauteng. They are set out in Table 7.3 and described in Section 4.1. The selection was motivated by trying to ensure a variance in background characteristics: different courts, different legal outcomes, and size of community. Moreover, the cases vary in the distribution of variables that are commonly or sometimes said to influence impact (e.g. type of lawyers, presence of social movement). During the course of the research it also became apparent that the degree of community organisation may be key. The remainder of the section examines each case, the respective impact, and concludes with a comparative analysis.

[41] The exceptions are Wilson (2006, 2011a, 2011b) on the *Mandelaville* and *Olivia Road* cases and Tissington (2011a) on *Modderklip*. Berger (2008) briefly analyses the latter.

TABLE 7.3. *Characteristics of forced eviction (FE) cases*

Case Name	Year of FE threat	Settlement/ Building	Size of settlement at time of threat	Court Level	Judgment	Remedy	Lawyers	Amicus	Initial Community Organisation	Follow-up	Social Movement or External Support
Western Cape											
Grootboom	1999	Grootboom	900	CC	Won	Medium	Private	Yes	Medium	No	No
Rudolph	2003	Valhalla	50	HC	Won	Strong	LRC	No	Strong	Yes	Yes
Bardale	2005	Bardale	5000	HC	Settled	n.a.	LRC	No	Medium	Yes	No
Thubelisha/Joe Slovo	2008	Joe Slovo	20000	CC	Draw	n.a.	LRC	Yes	Strong	Yes	Yes
Gauteng											
Olivia Road	2003	Olivia Rd	400	CC	Won	Strong	CALS	Yes	Weak	Yes	Yes
Modderklip	2002	Gabon	40000	CC	Won	Medium	Private	Yes	Medium	No	No
Ndawoyache	2007	Makause	10000	HC	Partly won	Weak	Private	No	Medium	No?	No
Mandelaville		Mandelaville	7500[a]	HC	Lost	n.a.	Private	No	Medium	No	No

[a]1500 households.

4.2. *Forced Evictions Case in Western Cape*

Rudolph (Valhalla)

In 2002, the City of Cape Town brought an urgent application to evict and demolish the homes of almost fifty individuals who were living unlawfully in shacks in a public park in the suburb of Valhalla Park. By resorting to 'self-help', the City claimed the respondents had effectively 'jumped the queue' and obtained an unfair advantage over the thousands on the waiting list. The residents and a local civic action group, United Civic Front, opposed the eviction request and responded with a counter-application. They claimed that the City had failed to deliver adequate housing in Valhalla Park and that the City's housing policy did not satisfy the requirements in *Grootboom* (Valhalla Park United Civic Front Organisation and Environment and Geographical Science Department, 2007). All the residents faced desperate housing situations: they were mostly unemployed and could not afford to pay nominal rent. Many had also been on the housing waiting list for more than a decade.

Justice Selikowitz dismissed the City's urgent eviction application on the basis that it did not meet various pre-requisites under the PIE. There was no real and imminent danger of substantial injury or damage to any person or property from the occupation, the balance of hardship did not favour the granting of the order, and there were other effective remedies available to City. He also upheld the counter-application, finding that the City had failed to implement a program to address the immediate situation of people in crisis situations. Holding that a declaratory order alone would not suffice, as the City had already failed to comply with *Grootboom*, a structural interdict was made. The City was ordered to deliver within four months a report stating the steps it had taken and would take to comply.[42]

The City subsequently delivered four reports, but the adequacy of steps taken was contested by the residents. Justice Selikowitz found that City had acknowledged, albeit inconsistently, what needed to be done but had failed to implement the necessary measures. In particular, there was no evidence of any program in place intended to deal with those in desperate circumstances, including the applicants. A declaratory order was issued to this effect.[43] However, Selikowitz declined to grant a further structural interdict, as the occupants no longer faced eviction and the City had at least recognised the applicants' rights and commenced action.

The impacts of the decision mirrored that of the *Grootboom* case. Interviews with the City in February 2010 indicated that housing policy was partly reformed in the aftermath of the judgment. Moreover, no occupants of Valhalla Park were evicted. The residents took action to improve the condition of the settlement, and interviews in 2007 indicated a certain communal pride in this achievement but

[42] *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C).

[43] The judge noted that the applicants could, of course, always approach the court in the future to assert their rights if they were dissatisfied with the City's compliance and could show an unjustifiable disregard for those rights.

also frustration that they could not go further (Valhalla Park United Civic Front Organisation and Environment and Geographical Science Department, 2007). In 2008, the City budgeted for the upgrading of the settlement and had begun formal low-cost housing development in the area for the applicants. It is pertinent to note that the City in its founding papers in the case stated that this was not possible.

Bardale

By 2001, a rapidly growing community of some 1,410 families was living alongside the main railway line in Khayelitsha, just outside Cape Town. The landowner, MetroRail, required the land to expand the rail services. For two years, the occupants repeatedly requested that different government authorities make alternative and safer land available for them, often citing *Grootboom*. The City of Cape Town did attempt to evict them but a human chain was formed. Despite injuries from police rubber bullets, the demolition was halted – and the community attained a new impetus in developing its leadership structures.[44]

By early 2003, MetroRail had received no response from the City and instituted court proceedings for eviction under PIE. The judge ordered that the papers be served on the SAHRC and the Legal Resources Centre (LRC), which then represented the new community committee. The community joined the three spheres of government in the litigation, requiring them to file reports setting out their programme for providing for those in desperate need as per the *Grootboom* judgment.[45] The matter was set down for hearing in the High Court in 2005 but was settled shortly before.

The settlement agreement sparked a number of innovations in housing policy and practice. Land was purchased at Bardale Farm for the relocation, and using funding from the Emergency Housing Programme (EHP),[46] the City provided a higher level of services for the settlement to fulfil the requirements of phase 1 of the Informal Settlement Programme. This included installation of communal water and sanitation infrastructure (shared amongst five sites), tarred key roads, a primary school, and eventually electrification for each site. A multi-purpose centre for phase 1 and a secondary school for phase 2 have since been built, and the layout plan has provision for clinics, further schools, and day care centres (LandFirst, 2010). The process has also benefitted a much larger group: some 5,947 sites have been planned, with 3,787 households having moved in by 2010 from eight other informal settlements. However, not enough attention has yet been paid to livelihoods in the planning of the relocation and the sufficiency of bus services.

[44] Interview with community leadership, Bardale Settlement, Cape Town, February 2010.

[45] Interview with Steve Kahanovitz, Legal Resources Centre, Cape Town, June 2010.

[46] It should be noted that the first attempt to relocate in December 2007 was unsuccessful, as residents from the Mfuleni community (in which the Bardale Farm is located) were opposed to the relocation of outsiders onto land that they believed should be used for the housing needs of people in their own community. After negotiations, the move was achieved in April 2008, and the Mfuleni residents were included in a much more advanced phase of the programme.

The beneficiaries were to receive full tenure under the agreement. However, as the formal registration process took time, beneficiaries initially received confirmation of their right to occupy their respective sites.[47] There is also no municipal plan for the development of formal housing – with the City citing the existence of 220 other informal settlements in Cape Town. But residents hope that a People's Housing Process could be developed in the near future. With the assistance of the LRC, they also worked with the City to create a new procedure: an official application form to physically extend a shack. This would protect residents from threats by municipal officers to destroy extra rooms built for relatives, children or others.[48]

One aspect to note is that the eviction struggle and litigation clearly catalysed the emergence of strong community leadership and cohesion. The leaders played key roles in the often difficult process of land allocation, planning, and upgrading negotiations. But splits have since emerged in the community representation structures, partly along the lines of the different sections of the relocation. The community's lawyer, Kahanovitz (2011: 2), put a more positive gloss on the issue: "The problems they now bring us are not of a threatened community facing eviction, but of a new community setting up home, settling into the school and coming across ordinary problems like the shortage of teachers, absence of speedbumps, leaking water taps, etc."

Joe Slovo

The threatened eviction of the Joe Slovo settlement attained more publicity. Located on the N2 Gateway near the airport, the authorities proposed a rollover upgrading for the approximately twenty thousand residents. It was ostensibly motivated by an attempt to solve Cape Town's ever-growing housing crisis and to provide a national pilot for the Breaking New Ground strategy through mixed housing (70 per cent of the houses were to be allocated to the community). But it was soon viewed as a highly politicised prestige project for the football World Cup (Millstein, 2011). Key to the plan was a relocation of the inhabitants of the informal settlement to Delft further out of the city.

Although residents supported upgrading, they were aware that the temporary location site at Delft was plagued by controversy and there was a risk that they may never return from it. Resistance to the project bloomed, and the national and provincial ministers of housing together with the contracted housing company petitioned the High Court for an eviction. Justice John Hlophe assented to the request, but the community appealed directly to the Constitutional Court. Five of the judges wrote separate judgments, but all dismissed the appeal. They found there had been no consent to the occupation and that the eviction was reasonable even

[47] Beneficiaries who are not qualified to receive a subsidy can possibly continue to rent their site.
[48] The use of the form has been extended to another settlement by the LRC.

in the absence of meaningful engagement with the community.[49] However, their order for eviction was conditioned on adequate alternative accommodation being provided and the original allocation of 70 per cent being met. Detailed orders for the temporary accommodation site were set out, including individual engagement with households before their move and the provision of adequate accommodation, basic services, schools, and clinics.

The decision has been heavily criticised but the eviction order was never executed. In early 2011, the Court rescinded it as the authorities had failed to meet the timetable and circumstances had changed.[50] This was partly due to the appointment of a new national minister of housing, and political control of the Western Cape Provincial Government had passed from the ANC to the Democratic Alliance, which had always opposed the project. Moreover, the stringent conditions for alternative accommodation made relocation relatively costly, and negotiating a relocation with a well-mobilised community was daunting. As these political, economic, and legal stars aligned, the provincial government agreed to look again at upgrading on site. This was an option it had previously told the Court was impossible but that the applicants had sought all along. By late 2009 an in situ upgrade was agreed on, as well as the fact that all houses would be for Joe Slovo residents.

Thus, despite the formal loss in the Constitutional Court, the community achieved its original demands (and more). Although the broader political changes clearly helped, the community demonstrated a high level of internal organisation and an ability to make multiple alliances with civil society organisations, experts, and bureaucrats who were unhappy with the approach of the project to leverage what gains they made through the legal process. Although it is still too early to make any demonstrative conclusions on impact, the extent of the community's control over the land is perhaps best illustrated by its recent hosting of, and becoming, the leased site for the production of a major Hollywood film.

4.3. *Forced Evictions Case in Gauteng*

Mandelaville

Between 1976 and 2002, a piece of open land in the centre of Diepkloof, Soweto, was steadily occupied, with the bulk of the more than 1,500 households arriving after the lifting of influx controls in the mid-1980s (Wilson, 2006). In 1996, a ward councillor promised community members that they would be relocated to formal housing on another site, and in 2001 it was announced that the site would be the Sol Plaatje Project. The site was in reality an abandoned mining compound – and after

[49] *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes & Others* 2010 (3) SA 454 (CC). See discussion of legal dimensions of case in Chapter 2 by Wilson and Dugard.

[50] This was despite the authorities' request for it to be maintained notwithstanding the political decision to begin the slum upgrading process: *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (CCT 22/08) [2011] ZACC 8 (31 March 2011).

a visit the community discovered a complete absence of formal housing, facilities, schools, and social services. It was fifteen kilometres from Soweto and in the opposite direction from industrial and domestic work. Concerns were communicated to the municipality, which simply responded by launching of a court application for eviction in December 2001.

Legal representation was quickly secured, but Wilson (2006) argues that a number of procedural decisions, made at the judge's discretion, essentially predetermined the outcome. The hearing was held on an urgent basis – which prevented proper preparation – despite the community's long tenure at Diepkloof and the lack of imminent danger to community members or others. It was then continued on an urgent basis even though there was dissensus between the parties on the facts, such as the condition of the Sol Plaatje site, which should have triggered a postponement for a full hearing. And the judge heard a witness from a municipality but refused to hear one from the community. Throughout, the judge was described as acting in a "belligerent way to the community and its lawyers, and adhering to an excessive formalism when it suited the municipality" (Wilson, 2006: 554).

The upshot was that the characterisation of the case by the municipality was accepted: it was acting in good faith to provide alternative accommodation, even though 'certain elements' were stirring up resistance and Diepkloof was plagued by criminality and land invasions. The judge concluded:

> I take judicial cognisance of the fact that there are many poor people in this country living in informal settlements that are not satisfactory. . . . It will serve no purpose whatsoever for people to resist the government which is trying to address the problem.[51]

The impact of the judgment was dramatic for the community. The residents were displaced and dumped at Sol Plaatje (Dlamini, 2007). For five years, they lived without electricity, clean water, and municipal services, with unemployment rising to 70 per cent (Donnelly, 2007). Stuart Wilson (2006: 556) also describes the negative symbolic impacts on the community: "Common to the consciousness of both groups was a sense that the law had failed to take account of their particular needs and vulnerabilities, and had objectified them as faceless and anonymous social nuisance." In addition, law was associated with the brutal way in which the residents were evicted and left to fend for themselves.

Nonetheless, in 2007, the promised development finally arrived. Since then, the Sol Plaatje settlement has been gradually transformed into a full-fledged town, with houses, roads, and services, with the support of the Johannesburg Social Housing Company. Interviewed residents have expressed relief and delight over the development (Donnelly, 2007). By the end of 2009, 2,259 units were built, with the first families moving in early 2007.

[51] *City of Johannesburg v Unlawful Occupiers of the Mandela Informal Settlement* (WLD, Case No. 2001/25440), p. 5.

Gabon (Modderklip Case)

In comparison, the Gabon community's struggle against eviction was more successful in terms of mobilisation. In May 2002, a small group (about four hundred people) moved onto the Modderklip farm, east of Johannesburg, after being evicted from a larger and overcrowded settlement by the State. By October 2003 the community had grown to between sixteen thousand to eighteen thousand (later forty thousand) persons and the landowner, Duvenage, was unsuccessful in attempting to remove the occupiers or in persuading the City Council to expropriate it. He then secured an eviction order from the Johannesburg High Court but was not able to enforce it: the sheriff required a deposit of R1.8 million for the costs of removing the residents. Duvenage subsequently sued the State in the Pretoria High Court for failing to respect his property rights. The community was not initially included but later joined with a number of NGOs as amici. In this case, the community's lawyers were private, but Berger (2008: 89) notes:

> [This is] a interesting example of how a small firm – led by a larger-then-life, tenacious attorney – collaborated with residents of the informal settlement: the disciplined Gabon community. . . . Making use of an outdoor "community office" where meetings were held, the community made decisions on the basis of consensus-building and inclusivity.

The eventual judgment in the Constitutional Court found that the State cannot fulfil property rights by simply establishing formal mechanisms and institutions. Duvenage's right to the rule of law was infringed, as he could not enforce the initial court order; and it was unreasonable of the State not to assist when it was impossible for Modderklip to evict such a large group of occupiers whose dire circumstances had to be taken into account. The Constitutional Court held that the authorities should compensate Modderklip for the unlawful occupation and pay rent for the occupiers, the occupation of which would continue until the occupiers obtained suitable alternative accommodation.

Although the judgment effectively halted the eviction order against the Gabon community, the requirement to pay ongoing compensation provided a 'catalyst' for the municipality to address the community's needs (Liebenberg, 2010: 442). The Department of Housing developed a plan, and in 2006, work began on a new township, Chief Albert Luthuli Extension 6. It would provide 7,278 'housing opportunities' in a mixed-housing environment to Gabon residents and those from neighbouring settlements and on the general waiting list (Tissington, 2011a). During that time, the community managed to extract extra concessions, "basic services – including fresh water and weekly refuse removal" and use of "a school and clinic in the nearby formal township of Daveyton" (Berger, 2008: 76–77). Although residents in interviews in June 2010 noted the continuing lack of sanitation and were critical of attempts to introduce chemical toilets.

The development of permanent housing proceeded at a slightly faster pace than in *Grootboom* – possibly because of the compensation requirement – but it has been dogged by complications.[52] A first phase of relocations to the new township occurred in 2009. However, the remaining community claimed that strangers to Gabon moved in the night before to secure the allocations – possibly up to 70 per cent of the first phase. Those carrying relocation papers – but who had been denied a house – faced sudden eviction. On 11 May 2010, the Red Ants and Metro police moved in to destroy the shacks of those who "had moved". Sixty-nine families (350 persons) were evicted and 2 persons were shot with live ammunition. The current community leadership puts much blame on the older leadership – who were part of this first phase of relocation – for collaborating corruptly with municipal officials. There were also reports that some houses in the township were being sold on the private market by council officials. A new struggle has therefore emerged for the community, which lamented the lack of information, lack of responsiveness from the municipality, and inability to obtain media coverage despite promises from journalists. There is some hope that the community will be reallocated soon, but renewed litigation is emerging as a possible response.

Ndawoyache (Makause Settlement)

Makause settlement lies halfway between Gabon and Johannesburg in the East Rand, and its ten thousand residents live on land that is mostly owned by mining companies, which have ceased operations. In 2006, a woman fell down an old mine opening, which triggered a plan by the municipality to relocate the community using funds from the Emergency Housing Programme on the grounds of safety – although recent evidence suggests that the municipality may have been encouraged by a developer who bought one of the plots.[53] In January 2007, the municipality vaguely announced its relocation plan, but some residents realised that a forced eviction was in the offing. A resident council was formed quickly (Makause Community Development Forum), and on 2 February 2007, when an eviction notice was issued, the community responded with a request to the court for an urgent injunction. On 11 February it obtained an order, but it was relatively weak: eviction was permitted if a resident consented in front of third-party observer police after an interview.[54]

The municipality and police subsequently took a bundle of pre-signed eviction consent forms that were stamped in front of a high-ranking police officer.[55] The forms were distributed to people under the pretence that they were food vouchers. The following day, members of the community marched to the council to present a memorandum but there was no official response. Instead, evictions began to gather

[52] Based on interviews with Gabon residents, June 2010. Attempts to interview municipal officials have been unsuccessful.

[53] See Letter from Rose Acres to MEC for Local Government and Housing, February 2011.

[54] *Mphambo Ndawoyache & Others v Ekurhuleni Metropolitan & MEC Housing*.

[55] Interview with General Moyo, Community Development Forum, Makause Settlement, June 2010.

pace with the hiring. Residents were moved to the resettlement site – Tsakane Extension 10 – forty kilometres away from Makause (and their livelihoods), where plastic tents were provided on small plots. However, resistance grew as stories came back from Tsakane. Residents began reading the original court order to security officials and using physical force to resist dispossession. On 19 May 2007, they marched and delivered a new memorandum to the municipality, which gave them fourteen days' notice to reverse the evictions or face both resistance and new legal action (with a new lawyer). Six days later, a *Mail & Guardian* journalist published an article about the struggle that took the municipality by surprise. The municipality relented and said that residents could return if they wished. Of the 3,368 residents who had been evicted by that stage, two-thirds returned permanently, and others reside at Tsakane only on the weekends.

In the past three years, the Community Development Forum (CDF) at Makause has begun to take steps to improve living conditions and secure tenure. Although this municipality has been heavily resistant to any informal settlement upgrading (ostensibly on the structural grounds of dolomite and mining holes), the community has been able to advance in some areas. They negotiated better access to water and electricity (although the municipality provided only half the water points and masts agreed on), created a community centre (mostly for local dispute resolution), and commenced negotiations for direct purchase of the land from the owners. The CDF has a relatively broad-based leadership across the settlement, with a high representation of women: according to the chairperson, "Women became more involved after the eviction[;] it was seen as man's job as having to fight before that."[56] The community has also formed alliances with other settlements, NGOs, and increasingly lawyers as it became involved in land negotiations.[57]

Although the court order was weak, the community leadership credited it with giving them a basic level of rights to secure tenure.[58] It is clear that the eviction itself was the key catalyst for the mobilisation of the community, and the community was aided some by the emergence of some strong leaders such as General Moyo. But the litigation appears to have strengthened rather than diminished the struggle. The community viewed the weak judgment as primarily the fault of the lawyer (who was quickly dismissed), and the community planned to secure a new one should it have to return to court. Moreover, what is noticeable is that community demands were increasingly framed in constitutional rights and legal terms. For instance, the May memorandum reads, "This is against the law. . . . [I]t is illegal for Ekurhuleni Housing to evict us without a court order," and "We are asking for our rights to be implemented in fairness" and in "accordance with the Bill of Rights in our Constitution."

[56] Ibid.
[57] Interview with General Moyo, Community Development Forum, Makause Settlement, March 2011.
[58] Interview with members of the Community Development Forum, Makause Settlement, March 2010.

Olivia Road

The communities in the *Olivia Road* case were occupants of two buildings that came under eviction threat from the Inner City Regeneration Strategy, which sought to stimulate inner-city private-sector investment (Wilson, 2011a). By 2006, it was estimated that ten thousand of the sixty-seven thousand residents in such 'bad buildings' had been evicted, often without notice and by force, under apartheid-era health and safety laws and regulations (Wilson, 2011b). Residents usually found themselves homeless or living in settlements on the periphery of the city (COHRE, 2005). In 2003 and 2004, with the assistance of the Inner-City Resource Centre – a residents' rights organisation – and the Centre of Applied Legal Studies (CALS), occupants were able to convince judges in three urgent cases brought by the municipality that eviction orders should not be granted.[59] In 2005, despite these successes and a growing public debate and criticism by civil society organisations, the eviction campaign accelerated.

However, when the City sought to remove residents from Olivia Road and Joel Street in Berea, the organisations and CALS lawyers developed a more strategic response. A full defence was mobilised, together with a counter-claim by the communities, on behalf of all persons living in such buildings, that the municipalities' policy was unconstitutional. The High Court agreed and ordered a halt to the evictions until alternative accommodation was provided. A year later, the Supreme Court of Appeal upheld the appeal of the municipality but ordered the City to provide alternative shelter (consistent with the post-*Grootboom* Housing Code) to those who need it upon eviction. The occupants appealed, but after hearing argument and before handing down its decision, the Constitutional Court ordered the parties to engage in a meaningful dialogue to see whether they could agree on a mutual solution. In November 2007, the parties reached a partial agreement. The occupiers were to be provided with affordable and safe alternative accommodation in the inner city of Johannesburg, secure against eviction, and several policy issues were referred back to the Constitutional Court. The Constitutional Court addressed only some of them. Importantly, it found that the City must engage meaningfully with occupants if an eviction is likely to result in homelessness and ongoing occupation can be considered illegal only after a court has ordered an eviction. This precedent has subsequently proved critical in other cases.

The impact of this case for the community has been significant: 450 residents were successfully temporarily relocated within City-owned 'communal' housing in one year. An empty building was partly refurbished, with one room per family and shared cooking and sanitation facilities. The rent is subsidised, and basic services have been provided.

[59] *Occupiers of Junel House & Others v City of Johannesburg* (2003); *Chancellor House* (2003) and *Park Court* (2004). See further discussion of the case in Chapter 2, by Wilson and Dugard, and Chapter 4, by Bentley and Calland, in this volume.

However, tensions have emerged over the lack of thoroughgoing maintenance and the lack of engagement on a permanent housing solution. This is partly because the case has had only a limited effect, so far, on Johannesburg's broader housing strategy. During the Constitutional Court hearings, the City demonstrated at least a change of heart and adopted the Inner City Regeneration Charter, which would provide 'inclusionary housing' in the inner city. However, there has been little progress in implementation. Instead, what has emerged is a new eviction strategy driven by owners (often new owners) of the buildings. As Stuart Wilson commented in an interview, the *Olivia Road* decision compressed the eviction "balloon" in one place but "exposed" it in another.[60] This has required a new round of strategic litigation against private owners, which has been so far successful. In *Blue Moonlight*, the Supreme Court of Appeal drew on the Constitutional Court's decisions in *Olivia Road* (and *Modderklip*) to limit the ability of private owners to carry out evictions and require the municipality to provide support for alternative accommodation.[61] One may therefore need to wait for the municipality to exhaust all its eviction options before it begins to effectively address inner-city housing issues for low-income residents.[62]

4.4. *Synthesising the Case Outcomes*

In drawing together what we know about the different cases – largely material and political impacts – we can plot them in binary form. Table 7.4 lists five types of direct impacts for communities together with two broader indirect impacts. A score of 1 is given if there was a substantial change in these dependent variables after litigation and 0 if there was not. The results suggest that, in the majority of cases, litigation has helped prevent evictions, immediately improve basic services (although to varying degrees), strengthened community organisation, and forced local municipalities to innovate their policies. In the cases that commenced more than five years ago, permanent housing has been achieved, and in each case the litigation appears to have played a role in accelerating the timetable. However, the impact is more inconsistent for the other factors, particularly the securing of permanent or formal housing in a shorter period. The last column of Table 7.4 also gives the average score across all factors. If we use *Grootboom* as a yardstick, it is notable that these seven impacts – if weighted equally – were greater in some of the subsequent cases, such as Gabon, Olivia Road, and Joe Slovo. However, the Makause and Mandelaville cases have had much less impact, particularly Mandelaville.

[60] Interview with Stuart Wilson, SERI, Johannesburg, April 2011.

[61] See *supra* n. 30.

[62] Whether this is inevitable is obviously an open question. The state's failure to provide low-cost rental housing is now readily apparent and could soon result in a crisis as private landlords refuse to wait any longer before enforcing evictions orders. The return of the conflict to the courts is more likely in the short-term than a policy solution.

TABLE 7.4. *Community and systemic impacts of eight 'evictions' cases*

Case	Not Evicted or Relocated to Lower Standard	Improved Services or Emergency Housing in Short Run	Formal Housing in 5 Years	Formal Housing in 10 Years	Improved Community Organisation	Policy Change or Innovation	Legal Precedent Used	Average
	88 %	63 %	50 %	100 %	69 %	75 %	63 %	65 %
Grootboom	1	1	0	1	0	1	1	0.71
Valhalla	1	1	1	1	1	1	1	0.64
Modderklip	1	1	1	1	1	1	1	1
Olivia Road	1	1	0,5	n.a	1	1	1	0.92
Bardale	1	1	1	1	0,5	1	0	0.71
Joe Slovo	1	0	0,5	n.a	1	1	1	0.83
Makause	1	0	0	n.a.	1	0	0	0.25
Mandelaville	0	0	0	1	0	0	0	0.14

What is not captured in this summary is the collective contribution of all these cases and others to the decrease in evictions and demolitions that many interviewees pointed towards. An interview with Abahlali baseMjondolo in Durban revealed that defensive litigation was having a similar impact in KwaZulu-Natal – litigation and resistance were tactically combined with considerable success.[63] Wilson has also noted that the number of inner-city evictions was dramatically reduced after the *Olivia Road* case.[64]

As with *Grootboom*, assessing the symbolic impact of this litigation is challenging. For many respondents, it tends to be highly correlated with perception of impact at any time. It is also possible that symbolic impact is driven through the material change: for example, forced innovation due to court orders could transform some of the political and technocratic discourse. The recent tactical use of both the ANC and the Democratic Alliance of courts in the 'open toilets' case suggests a certain legitimation amongst the political elite of rights discourse and litigation for those living in informal settlements.[65]

If we also recall the characteristics of these communities, it is notable that the degree of community organisation and support are the most highly correlated with the level of impact. Community organisations that possessed strong leadership or cohesion, or achieved this through the litigation process and managed to build alliances with social movements and/or professional or grassroots NGOs, were more likely to achieve higher impacts. Enhanced effects were also leveraged in cases involving specialised public-interest litigation NGOs (such as the LRC and CALS), but this is not always the case (e.g. *Modderklip*).

5. CONCLUSION

This chapter set out to examine the impact and lessons learned from urban communities living in informal settlements that turned to courts in the face of the eviction. The seminal case of *Grootboom* reveals that a degree of impact was achieved at the community level in preventing an eviction, improving basic services (to a limited extent), and accelerating the provision of permanent housing. It also forced authorities to innovate their policies (particularly on emergency housing) and to develop the jurisprudential foundation for socio-economic rights litigation, and it

[63] Interview with S'bu Zikode, President of Abahlali baseMjondolo, 31 May 2010.

[64] Interview with Stuart Wilson, SERI, Johannesburg, April 2011.

[65] *Beja and Others v Premier of the Western Cape and Others* [2011] 3 All SA 401 (WCC)) [2011] ZAWCHC 97, 21332/10 (29 April 2011). The ANC Youth League launched a legal challenge against the persistence of unenclosed toilets in an informal settlement, Khayelitsha, in the City of Cape Town which is controlled by the national opposition party, the Democratic Alliance. Justice Erasmus issued a strong judgment in the Western Cape case upholding almost all claims of the applicants and significantly pushing the government policy further than it currently existed. The Court decided that one toilet per five families during a slum upgrading process could not be justified under existing legislation and that unenclosed toilets provided on this basis violated constitutional safeguards.

helped slow or eliminate a pattern of large-scale evictions. In the other seven similar cases studied, a higher level of impact was sometimes achieved, particularly in relation to political impact, in the provision of temporary and permanent housing. Of course, if one has idealist expectations or uses the early results of the *TAC* case as a benchmark, the results seem less impressive. But if the baseline is the community's situation on the eve of eviction, one can be more optimistic.

An interview with the S'bu Zikode, president of Abahlali baseMjondolo, suggests that these experiences are not sui generis:

> The Durban municipality is using new tactics of divide and rule by selectively relocating some members to RDP housing and using land invasions to register people but then demolish or relocate, or targeting just parts of settlements. . . . However, the communities have earned respect from using the courts in five recent cases – telling the municipality or security guards to speak to their lawyers! But they have starting to couple this with much more with political action, pressure, marches etc. Lawyers are expensive and are only a last resort so we are trying to strengthen the political strategies. The Constitutional Court did have a major impact, more than expected, and has been a very important mobilising tool. It has helped people gain respect: they were working with the law, not just the lawyers, and challenging it.[66]

In sifting through the various casual factors behind patterns of impact, two stand out, and neither concerns victory in the courts. The first is bureaucratic and legislative contingency. The enforcement or leveraging of the judgment quickly slowed once applicants came in contact with the core of the 'housing system'. Its dysfunction and, to a lesser extent, economic limitations soon became apparent, particularly in relation to the provision of permanent housing and improved services. The second is political – both 'power over' and 'power with'. The degree of internal community cohesion and the extent of external alliances appear critical. To this can be added the party politics of local government (particularly in the *Grootboom* and *Joe Slovo* cases) and the lottery of the allocation of High Court judges to a case (with their different political temperaments).

These key themes suggest a number of ways forward for improving the effectiveness of housing rights strategies when courts are implicated or available. The first is the development of a responsive model of litigation (and broader advocacy). Social movements, experts, lawyers, and NGOs need to be ready to work with communities to 'snatch victory from the jaws of defeat' in eviction cases. Indeed, the model developed in the *Olivia Road* litigation can be considered partially illustrative: early scattered and tactical legal representation later developed into city-wide strategic litigation. Another is the case taken against the KwaZulu-Natal slum clearance law (see the discussion in chapter 2, by Wilson and Dugard, and chapter 4, by Madlingozi), where this broad responsive litigation model was used to great effect

[66] Interview with S'bu Zikode, President of Abahlali baseMjondolo, 31 May 2010.

by Abahlali baseMjondolo in alliance with experts and NGOs.[67] Moreover, it is important to stress that such a responsive model could begin with existing eviction cases but also with communities who need support in the post-judgment phase (see Dugard and Langford, 2011). Of course, courts could be pushed to play a greater role in providing stronger and supervisory remedies where the authorities appear to be less cooperative or the community lacks broader support.

As part of this, one could wish for a broad and empowered national housing movement: a movement that stimulates broader transformation in the housing sector, leverages gains achieved in litigation, and even helps obviate the need for lengthy and expensive litigation in the first place. However, such a movement does not exist. The closest is ABM which now covers a number of provinces. It has been able to leverage significant gains from its defeat of the Slums Act in the Constitutional Court (see analysis by Madlingozi in chapter 4). But one should guard against excessive optimism in the housing sector. Even with the outbreak of local protest across the entire country, which has increasingly defined local and national elections, movement building and the garnering of sustained public support is challenging. Even blossoming local social movements and NGOs face multiple challenges in seeking to work with the thousand-plus informal settlements in South Africa. Transforming the housing sector from the bottom is likely to be a task for decades, not years.

Second, the case studies do reveal the role that a rights framework can play in shifting the attention of the top-down and State-centric housing model to the voices and demands from the bottom. This suggests that the model needs to be made more community-centric, which can be partly achieved through a rights-based approach. For example, unlike South Africa's People's Housing Process or Informal Settlement Upgrading Programme, Brazilian legislation allows slum dwellers to initiate slum-upgrading processes with the backing of administrative courts. Thailand has established an independent housing agency that works with communities to upgrade housing according to a city-wide plan and matching funds. In their early years some Scandinavian social welfare States developed and funded aggressive social housing agencies. Fusing rights-based strategies with the emancipatory potential of community struggle and the flexible resources of State may be a more hopeful way forward.

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[67] *Abahlali baseMjondolo v Premier of KwaZulu-Natal Province and Others* 2010 (2) BCLR 99 (CC).

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