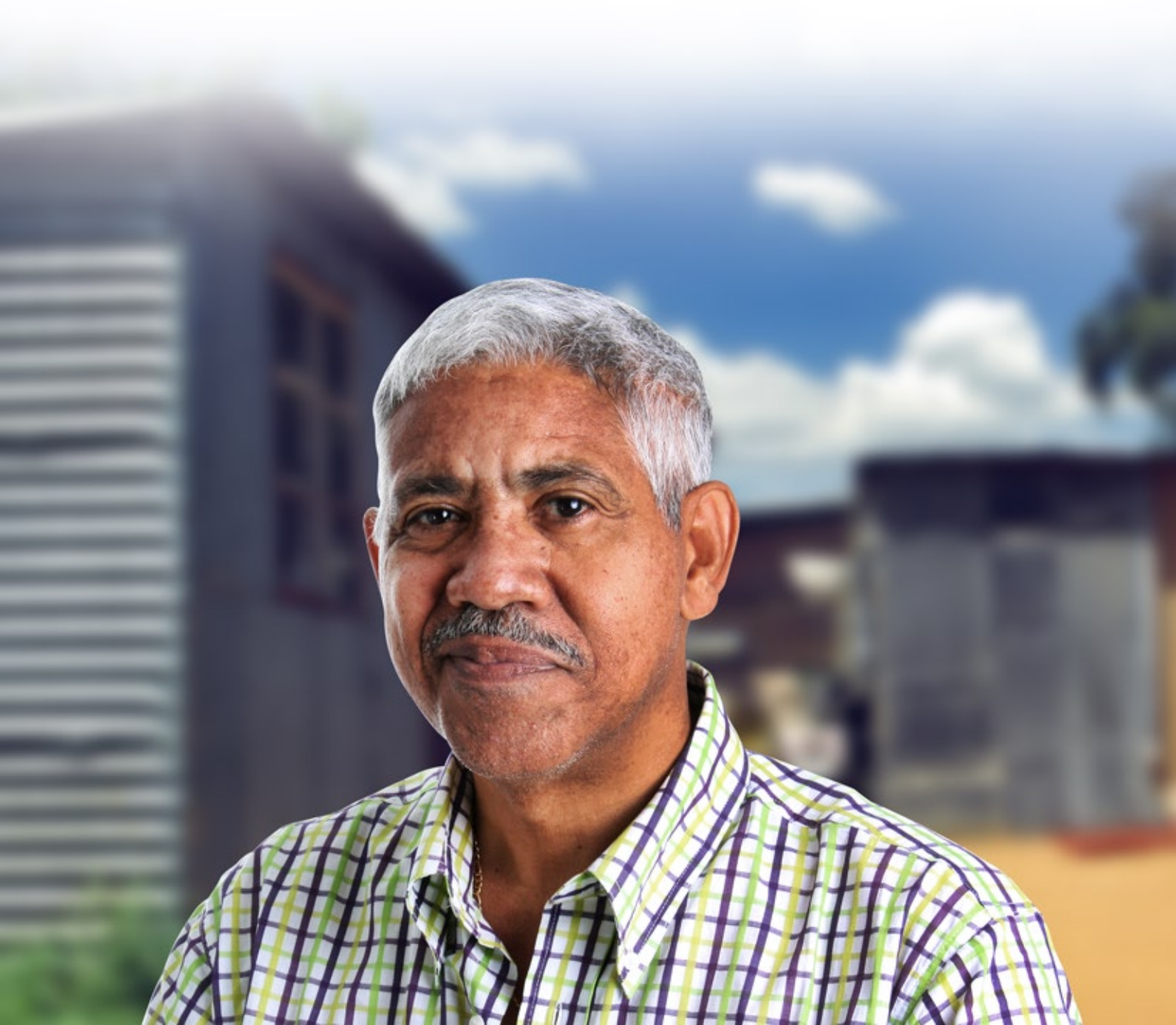
NUSP
National Upgrading Support Programme

FACILITATORS

Module 1
Facilitation Resources



Module 1 Facilitator Resource

Constitutional Court Cases

THE GROOTBOOM CASE

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

Facts

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

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

The Decision

1. According to the Constitutional Court, the question was not whether socio-economic rights were justiciable under the Constitution, "but how to enforce them in a given case." This could not be decided in abstract, but would have to be "carefully explored on a case-by-case basis." (para 20)
2. The Court held that the state had an obligation to ensure, at the very least, that the eviction was executed humanely. The fact that the eviction was carried out a day earlier and that the possessions and building materials of the respondents were destroyed and burnt amounted to a breach of the negative obligation embodied in

the right of access to adequate housing recognised under section 26(1) of the Constitution.

3. Housing "entails more than bricks and mortar". It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have "access to" adequate housing all of these conditions must be met: "there must be land, there must be services, there must be a dwelling." (para 33)

4. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of housing, "but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing." The state's duty is to "create the conditions for access to adequate housing for people at all economic levels of our society." (para 35)

5. The Court rejected the contention that section 26(1) created a minimum core obligation to provide basic shelter enforceable immediately upon demand. It held that section 26(1) should be read together with subsection 2, which enjoins the state to realise this right progressively within available resources.

6. Thus, in any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), "the question will be whether the legislative and other measures taken by the state are reasonable." The Court emphasised that it would not enquire "whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent". (para 41) The housing programme must include measures that are reasonable both in their conception and in implementation.

7. A given measure will pass the reasonableness test if it is comprehensive and well coordinated; is capable of facilitating the right in question albeit on a progressive basis; is balanced, flexible and does not exclude a significant segment of society; and responds to the urgent needs of those in desperate circumstances.

8. The Court interpreted the phrase "progressive realisation" in section 26(2) to impose a duty on the state to progressively facilitate the accessibility of housing by examining legal, administrative, operational and financial hurdles and, where possible, lowering these over time. Housing should be made accessible "not only to a larger number of people but to a wider range of people as time progresses." (para 45)

9. The phrase "within available resources" was interpreted to mean that "both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the

availability of resources". (para 46) According to the Court, section 26 "does not expect more than is achievable within (the state's) available resources". (para 46)

10. In the present case, it was held that, although the programme satisfied all the other requirements of the reasonableness test, it was nevertheless unreasonable in that "no provision was made for relief to the categories of people in desperate need". The state was therefore found to be in violation of section 26(2) of the Constitution. Accordingly, a declaratory order was made requiring the government to act to meet the obligations imposed on it by section 26(2), which included the obligation to devise, fund, implement and supervise measures aimed at providing relief to those in desperate need.
11. The Court found no violation of the right of children to shelter in terms of s 28(1)(c), contrary to the High Courts decision, holding that that the State incurs an immediate obligation to provide shelter only in respect of those children who are removed from their families. The primary duty to fulfil the children's socio-economic rights in section 28(1)(c) rests on the parents or family and only, failing such care, on the State. As children in this case were under the care of their parents or families, the Court did not grant any relief based on section 28(1)(c).

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

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

THE PE MUNICIPALITY CASE

PE Municipality v Various Occupiers Case CCT 53/03

This case was first heard as an eviction application in the South Eastern Cape Local Division of the High Court. The applicant in this matter was the Port Elizabeth Municipality in whose jurisdiction the alleged unlawful occupation took place.

Facts of the Case

This case was first heard as an eviction application in the South Eastern Cape Local Division of the High Court. The applicant in this matter was the Port Elizabeth Municipality in whose jurisdiction the alleged unlawful occupation took place.

The eviction application was sought against 68 people (including 23 children) who had occupied private, undeveloped land within the Municipality's jurisdiction. The application was based on section 6 of The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), which states that 'an organ of State may institute proceedings for the eviction of an unlawful occupier within its area of jurisdiction'.

At the time of the application the respondents had been living on the land for periods ranging from two to eight years. Most of them had moved onto the land after being evicted from land that they had previously occupied. The respondents indicated their willingness to vacate the property, provided that they were given suitable alternative land to which they could move. They however rejected a proposal made by the Municipality that they move to a place called Walmer Township. They did so on the basis that amongst other negative considerations, no form of security of tenure had been provided and that they would subsequently be liable for further eviction if they relocated to the identified land.

The Municipality argued that while it was cognisant of its constitutional obligations to provide housing, it could not be seen to give the occupiers preferential treatment by providing them with alternate land. To do so, it was argued, would disrupt the existing housing programme currently in place, and would effectively amount to 'queue-jumping' by the occupiers. The High Court therefore granted the application for eviction on the basis that it saw no reason why the eviction order should not be granted. The respondents successfully appealed this order to the Supreme Court of Appeal (SCA).

The SCA in its judgment, held that the occupiers were not seeking preferential treatment. They were in fact not asking that housing be made available to them at the expense of other people on the housing waiting list, but only that alternate land be identified for their occupation, where they could enjoy a degree of security of tenure.

The Municipality appealed this decision to the Constitutional Court on the basis that it is not constitutionally bound to provide alternative accommodation or land when it seeks the eviction of unlawful occupiers.

The Decision of the Constitutional Court:

1. The Court recognised the complexities involved in balancing the constitutional rights of landowners and unlawful occupiers. In the context of the history of unfair eviction procedures in the past, the Court held that in reaching a 'just and equitable decision' in eviction cases, the provisions of both section 26 of the Bill of Rights and the PIE Act must be interpreted within its constitutional framework and the rehabilitative and reformative purpose of these provisions.
2. The need for dealing with homelessness in a sensitive and orderly manner was emphasised.
3. It furthermore held that in eviction proceedings, municipalities must show equal accountability to occupiers and landowners. The Court held however that municipalities, unlike private landowners, have particular duties in terms of section 26 of the Constitution. These duties have a bearing on considerations of whether it is 'just and equitable' to make an eviction order in terms of section 6 of PIE.
4. The 'relevant circumstances' to be taken into account include: 'the circumstances of the occupation of the land'; 'the period of unlawful occupation'; and 'the availability of suitable accommodation or land';
5. The Court found however that the relevant circumstances identified in section 6 of PIE, is not an exhaustive list. It held that 'justice and equity' would take into account factors like the extent to which negotiations had taken place to reach an equitable solution. Given the special nature of the competing circumstances involved in section 6 applications, the Court held that 'it would not ordinarily be just and equitable to order eviction if proper discussions and or mediation at not been attempted.
6. In this particular case, given the length of occupation of the land, the fact that no steps had been taken to address the problem before launching the application, and that the land was not needed for immediate use by either the landowner or the municipality, the Court found that it was not 'just and equitable' to evict the occupiers.
7. The application of leave to appeal the SCA order therefore failed and the municipality was ordered to pay the costs of the respondents.

THE ABAHLALI CASE

In a major legal victory for poor people's rights to housing and shelter, the Constitutional Court this week struck down the KwaZulu-Natal Slums Act. The court upheld shackdweller movement Abahlali base Mjondolo's (ABM) application that the Act was unconstitutional.

The KwaZulu-Natal Slums Act empowered municipalities to evict illegal occupants from state land and derelict buildings, and to force private landowners to do likewise or face fines or imprisonment—all at the behest of the provincial housing minister.

The Act also empowered the minister to determine the time frames for all these actions and, via section 16, gave provincial housing ministers untrammelled powers to instigate eviction procedures against communities.

ABM fought this legislation on two fronts. It argued in the Constitutional Court that the Act actually dealt with land and land tenure, and so was not within the ambit of the provincial legislature to implement.

And it contended that section 16 of the Act was in contravention of section 26 (2) of the Constitution, which requires the state to take "reasonable legislative and other measures ... to achieve the progressive realisation of [the Constitutional] right" of every South African to access to adequate housing.

The social movement further contended that section 16 was inconsistent with national legislation and instruments such as the Prevention of Illegal Eviction Act, the National Housing Act and the National Housing Code.

The full Bench of the Constitutional Court unanimously found that, despite ABM's argument, the Act did, in fact, deal with housing matters.

Nevertheless, the court struck down the legislation because of section 16.

Judge Moseneke found that section 16 would lead "those in slums and informal settlements who wouldn't face eviction to now do so". He also found that the section "erodes and considerably undermines the protections against the arbitrary institution of eviction proceedings" safeguarded by national legislation such as the Prevention of Illegal Eviction Act.

Moseneke further found that section 16 "was silent" on the National Housing Code and the National Housing Act's stipulations that unlawful occupiers must be ejected from their homes only as a last resort. The judgment also questioned whether the section permitted reasonable engagement between government and communities.

In addition, Judge Yacoob noted that "all applications for eviction must comply with the requirements expressly stipulated in the Prevention of Illegal Eviction Act and the Constitution as well as with all other requirements that have been judicially stipulated".

The Constitutional Court had previously found that government can only evict after meaningful engagement (the Olivia Road judgment) and if it provides adequate housing alternatives to those affected (the Grootboom judgment).

In the Abahlali case, Yacoob went further: "If it appears as a result of the process of engagement, for example, that the property concerned can be upgraded without the eviction of the unlawful occupiers, the municipality cannot institute eviction proceedings. This is because it would not be acting reasonably in the engagement process."

ABM president Sbu Zikode said "Shackdwellers have been recognised as human by the Constitutional Court and its findings that there needs to be more engagement between government and the poor. Hopefully, this judgment will also see the end of forced removals to transit camps and temporary relocation areas."

NOKOTYANA CASE

The Harry Gwala informal settlement in Wattville had been resisting relocation since 2004. As soon as the Harry Gwala Civic Committee found out about the Upgrading of Informal Settlement Programme introduced into the National Housing Code in 2004, it requested that the feasibility for upgrading be investigated. It engaged the municipality through a legal representative. The Municipality agreed that a feasibility study should be undertaken, however that it was the role of the provincial government to commission this investigation. Several years later, the municipality indicated it had no powers to speed up this investigation. The Harry Gwala Civic Committee, led by Johnston Nokotyana, then requested interim services (communal taps, one pit latrine per household, high mast lighting and refuse collection). It did so through the High Court. The Court ordered that five additional taps be installed, and that refuse collection be resumed immediately.

Given that the High Court did not support the request for high mast lighting and basic sanitation, the Harry Gwala Civic Committee appealed to the Constitutional Court. Ekurhuleni Metropolitan Municipality, joined by the provincial and national government, came to the Constitutional Court hearing with an offer of a temporary toilet roll-out to all informal settlements across Ekurhuleni with several households sharing one toilet. The Harry Gwala Civic Committee rejected this, insisting that no more than two households should have to share a temporary toilet. It indicated its preference for pit latrines over chemical toilets, citing cost to the municipality among other factors such as night-time safety for women. In what came to be known as the 'Nokotyana case', the Constitutional Court in 2009 felt it did not have the technical knowledge to rule on the detail of the basic services. Instead, it centered its judgment on the problem of delay (on the part of the provincial government) in establishing feasibility for in situ upgrading. It cited the Constitution on the requirement that all obligations must be performed without delay, and ordered that feasibility for in situ upgrading be established within 14 months.