IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 11/00

In the matter between

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	First Appellant
PREMIER OF THE PROVINCE OF THE WESTERN CAPE	Second Appellant
CAPE METROPOLITAN COUNCIL	Third Appellant
OOSTENBERG MUNICIPALITY	Fourth Appellant

and

IRENE GROOTBOOM	First Respondent
THE OTHER APPLICANTS WHOSE NAMES ARE SET OUT IN ANNEXURE 'A' TO THE NOTICE OF MOTION	Second and further Respondents
HUMAN RIGHTS COMMISSION OF SOUTH AFRICA COMMUNITY LAW CENTRE	Intervening as amici curiae

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HEADS OF ARGUMENT ON BEHALF OF THE AMICI CURIAE

The issue

1 The issue in this case is whether our Constitution provides any effective remedy and relief to 390 adults and 510 children who are literally homeless; who are currently living without effective protection from the elements; who do not have anywhere they can live in security; and who, as a result of the destruction of their previous homes, do not have the basic materials from which they can construct secure shelter for themselves.

2 The attitude of the appellants appears to be that the only relief to which these people are entitled is to have their names on a waiting list for housing, on which some people have been waiting for twenty years; to wait for their names to come to the top of that list, at which time they will receive a housing subsidy in terms of the government housing programme; for the children to be removed from their parents and placed in a state-funded institution[1]; and for the respondents to continue to live in their current circumstances, where they are liable to further eviction proceedings at any moment.

3 The attitude of the *amici* is that this approach rests on an impoverished and mistaken understanding of the serious and considered promise made in the Constitution to the people of South Africa. It is, frankly, a heartless approach to a situation of desperate need, and an approach which is not contemplated by the Constitution.

The proper approach to the issues

4 A commitment to address the situation of people such as the Respondents is at the heart of the new constitutional order:

[1] It should however be pointed out that none of the appellants has actually made any positive offer or proposal as to where it is able to accommodate the children involved.

> *'We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.*[2]

5 The effective enforcement of social and economic rights is at the heart of any attempt to ensure that the new constitutional order is able to make good its commitment to address poverty in our country:

> *'It is important to realize that the traditional distinction between classical and social rights is one which operates in fact to discriminate against the poor. To be in a position to complain about state interference with rights, one has to exercise and enjoy them. But ... without access to adequate food, housing, income and medical care, it is impossible to benefit from many of the more traditional human rights guarantees. The observation also bears repeating that there is a significant difference between the judicial intervention called for by the rich and by the poor: "where the wealthy invariably want the courts to strike down actions the other branches have taken, the disadvantaged*

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2 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at para 17.

often ask the courts to take actions the other branches have decided not to take."'[3]

[3] Jackman 'The Protection of Welfare Rights Under the Charter' (1988) 20 *Ottawa Law Review* 275 at 335-6, citing Horowitz *The Courts and Social Policy* (Washington: The Brookings Institute, 1977) at 11.

6 This Court has already stated that the duty to respect, protect, promote and fulfil the rights in the Bill of Rights entails both positive and negative obligations on the part of the state. The Court has also pointed out that it is not only social and economic rights which impose positive duties which involve spending.[4]

7 Any attempt to draw a rigid distinction between social and economic rights and civil and political rights results in a false dichotomy. Of course, there are differences between different rights. However the rights, and the obligations they impose, form part of a spectrum or continuum - they do not fall into different categories. In truth, all rights impose some positive obligations and costs on government.[5]

8 The truth of this proposition has already been illustrated in relation to a classic "civil and political right" - the right to vote - where the Court had no hesitation in making an order which imposed significant costs on government.[6]

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[4] *Soobramoney* (note 2) at para 15; *ex parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 at para 76-78; *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) at para 9.

[5] O'Regan 'Introducing Socio-Economic Rights' 1 *ESR Review* 4 (1999) at 3; Holmes and Sunstein *The Cost of Rights* (WW Norton, 1999) at 127

[6] *August v Electoral Commission* 1999 (3) SA 1 (CC)

9 The First and Second Appellants assert as a matter of principle that the constitutional right of children to shelter is not 'directly exigible' against the State.[7] Although this statement is not repeated in terms in the heads of argument, it is submitted that in fact this premise underlies much of the argument on behalf of the Appellants - and that the premise is false, for the reasons stated above.

10 It is submitted that the proper approach is to determine the content of the relevant rights in the Constitution, and of the limitations on those rights. Within that framework, the rights are indeed 'directly exigible' against the state.

The content of the positive obligations imposed by social and economic rights

11 A court is of course obliged, when interpreting the Bill of Rights, to consider international law.[8]

12 As explained by Chaskalson P

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7 *Record* vol 11, 923 lines 10-12 (Notice of Application for Leave to Appeal)

8 Sec 39(1)(b) of the Constitution

> *'In the context of s 35(1) [of the interim Constitution], public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which chap 3 can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the European Commission on Human Rights, and the European Court of Human Rights and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions ...'* [9]

12 In this context, international law includes those sources of international law recognised by article 38(1) of the Statute of the International Court of Justice. These are international conventions, international custom, the general principles of law recognised by civilised nations, and judicial decisions and the teachings of the most qualified publicists of the various nations.[10]

13 It is now widely recognised that international human rights law should have a critical influence on the interpretation of domestic law.[11]

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[9] *S v Makwanyane* 1995 (3) SA 391 (CC) at para 35

[10] Dugard 'The Role of international law in interpreting the Bill of Rights' 10 (1994) *SAJHR* 208 at 212

[11] *Tavita v Minister of Immigration* [1994] 1 LRC 421 (CA New Zealand); *Vishaka v Rajasthan* [1997] 3 LRC 361 (SC India); *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR at para 70; *R v Ewanchuk* [1999] 1 SCR 330 at para 73.

14 There is not yet a comprehensive and well-established South African jurisprudence on the meaning of the rights in issue in this matter. In circumstances such as these, it becomes all the more necessary to obtain guidance from international law and agreements, and authoritative materials which explain them:

15 South Africa has signed and ratified the Convention on the Rights of the Child,[12] article 9 of which provides that 'a child may not be separated from his or her parents except when necessary for the best interests of the child.' It is submitted that to require homeless children to be separated from their parents in order to obtain the shelter to which they are constitutionally entitled, would

15.1 constitute a constructive breach of South Africa's obligations under the Convention and

15.2 involve an interpretation of the Bill of Rights which is inconsistent with international law.

16 The International Covenant on Economic, Social and Cultural Rights ('the Covenant') is of much broader significance, even though South Africa has signed it but not yet ratified it. While the Covenant is not yet binding on the South African state, it is of great significance in understanding the positive obligations created by the social and economic rights in the Constitution, for three reasons.

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[12] Heyns and Viljoen 'An Overview of International Human Rights Protection in Africa' 15 (1999) *SAJHR* 421 at 441.

17 First, the reference to international law in sec 39(1)(b) of the Constitution includes both binding and non-binding law, as explained by Chaskalson P in *S v Makwanyane*.[13]

18 Second, the socio-economic rights in the Constitution were clearly modelled on the Covenant and the Convention on the Rights of the Child:

18.1 This is self-evident as a matter of simple observation of the similarity of the provisions;

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[13] See also the discussion of the impact of non-binding international law on domestic law in *Baker v Canada* (note 11). The lone dissent by Iacobucci J is not relevant here, as it was based on the fact that in that case, it was not contended that the appellant's claim fell with the ambit of rights protected by the Canadian Charter of Rights and Freedoms (at para 81).

18.2 It is also demonstrated by the relevant *travaux preparatoire* and in particular the minutes of the meetings of Theme Committee 4 and memoranda prepared by the technical advisors to the Committee;[14]

19 Third, a State which has signed a treaty subject to ratification is obliged under international law to "refrain from acts which would defeat the object and purpose of a treaty".[15]

20 In 1985 the United Nations Economic and Social Council established the United Nations Committee on Social and Economic Rights ('the Committee').[16]

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[14] Liebenberg 'Socio-economic rights' in Chaskalson et al *Constitutional Law of South Africa* (Juta, Revision Service 5, 1999) at 41.3(a); and see for example Technical Committee 4 'Memorandum on Sections 25 and 26 of the working draft' 14 February 1996, para 3.1 at 2; and 'Memorandum of the Panel of Constitutional experts on the meaning of "progressive" in the formulations dealing with socio-economic rights in the working draft of the Constitution' (6 February 1996): Documents submitted by the Amici Curiae in terms of Rule 30' (hereinafter '*Documents*') at 1-4, 9-14

[15] Article 18 of the Vienna Convention on the Law of Treaties, 1969. See also the Commentary to this effect by the International Law Commission: Harris *Cases and Materials on International Law* (Sweet & Maxwell, 5th edition, 1998) at 787.

The mandate of the Committee, which consists of 18 independent experts, is to assist the Economic and Social Council in carrying out its responsibilities relating to the implementation of the Covenant.

21 As part of its work, the Committee has from time to time issued General Comments. The General Comments have authoritative status under international law:

> *'The Committee makes clear that the role of General Comments is overtly descriptive: to convey a sense of the existing jurisprudence of the Covenant as viewed by the Committee. However, in its fourth General Comment, the Committee has taken a more constructive approach. In outlining the essential qualitative elements of the right to housing in article 11, it could hardly be said that the Committee was merely describing its current practice or that it was merely reflecting the information collected from State reports. Instead, the Committee has used the General Comment as a means of developing a common understanding of the norms by establishing a prescriptive definition....*

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[16] The background to the establishment of the Committee, and its role in giving effect to the Covenant, are described in detail by Craven *The International Covenant on Economic, Social and Cultural Rights* (Clarendon Press, Oxford, 1995) in Chapter 2 ('The System of Supervision'), at 30 to 105.

Although the Committee's interpretations of the Covenant are not binding per se, it is undoubtedly true that they have considerable legal weight.... Indeed, the endorsement by ECOSOC and the General Assembly (in which significant numbers of States parties participate) of the Committee's annual report gives considerable weight to the Committee's interpretation [of the Covenant].... Considerable importance must be placed, therefore, upon the use of General Comments to develop a broad understanding of the norms within the Covenant'[17]

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[17] Craven (note 16) at 91-2

22 As a result of procedures introduced in 1993, economic, social and cultural rights have now become subject to an 'unofficial complaints procedure', and the Committee's review procedure is becoming fundamentally adjudicative in nature.[18]

23 The General Comments issued by the Committee are plainly at least as authoritative and arguably far more authoritative as to the content of international law, than the reports of specialised agencies such as the International Labour Organisation, to which Chaskalson P referred in *S v Makwanyane*.[19]

24 Regardless of their status as authoritative as to the content of international law, the General Comments are an authoritative exposition of the meaning of the Covenant; and the meaning of the Covenant is of great significance to the

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[18] Porter 'Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights' (2000) 15 *Journal of Law and Social Policy* 118 at 124-5, and citing Craven 'Towards an Unofficial Petition Procedure: A Review on the Role of the UN Committee on Economic, Social and Cultural Rights' in Drzewicki, Krause and Rosas (eds) *Social Rights as Human Rights: A European Challenge* (London, Marthinus Nijhoff, 1994) at 91. [A copy of the Porter article is in the *Documents* at 15-60]

[19] Note 9

interpretation of the social and economic rights in our Constitution, for the reasons set out above.

25 General Comment 3[20] (issued in 1990) deals with the nature of the obligations of states parties under the Covenant. A good deal of the General Comment deals with the duties imposed by the obligation to take steps to achieve the 'progressive realization' of the rights concerned.

26 The General Comment emphasises at para 9 that the fact that full realization over time is foreseen under the Covenant, 'should not be interpreted as depriving the obligation of all meaningful content'. It then proceeds:

[20] *Documents* at 67-69

'On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining State parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were not to be read to establish such a minimum core obligation, it would be largely deprived of its raison d'être.... In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'[21]

[21] General Comment 3, paragraph 10: *Documents* at 68 (emphasis added). See also the Limburg Principles *Documents* at 84 (para 28) and the Maastricht Guidelines *Documents* at 89 (para 9).

27 This does not imply that only the 'core' is subject to adjudication, or that meeting the minimum core requirements would satisfy all of the obligations on the State. Whether or not a State has complied with its obligations under the Charter will depend on whether it is progressively moving towards full realization of the right, and on the extent of the resources available.[22] The 'core' provides a level of minimum compliance, to which resources have to be devoted as a matter of priority. This duty clearly has to be balanced with the obligation to put into operation programmes aimed at full realisation of the right, and to move progressively towards full realization.

28 The General Comments specifically require the prioritisation of the needs of vulnerable members of society, and social groups living in unfavourable conditions.[23]

29 It is submitted that this is the appropriate approach to the interpretation of the term 'progressive realisation' in our Bill of Rights. There is an obligation to provide for the core of immediate absolutely basic human needs - which will result in special attention being given to the most vulnerable and those living in most unfavourable conditions - while at the same time working progressively towards the achievement of adequate housing for all. The implications of this for the current appeal are argued below.

The relationship between the housing right in sec 26 and the shelter right in sec 28

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[22] General Comment 3, paragraph 9: *Documents* at 68

[23] General Comment 3 para 12: *Documents* at 68; General Comment 4 para 11: *Documents* at 71-2; and see also General Comment 7 para 11: *Documents* at 75.
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30 At first glance, sec 28(1)(c) of the Constitution is puzzling, for two reasons. It clearly deals with matter similar to sec 26, yet it appears in sec 28. And sec 28(1)(c), unlike sec 26, states the right in unqualified terms. The obvious question which arises is what is the relationship between the two sections?

31 The judgment of the Court *a quo* also raises a conundrum which is connected to this issue: if the sole source of the rights of adults is a derivative right from the rights of their children; and if (for example) it should transpire that four of the 390 adults in this case have no children; should a Court order the provision of shelter for 386 adults and their 510 children, and leave the remaining four adults sleeping in the cold under plastic sheeting, waiting for their number to come up on a twenty-year waiting list, and waiting too for the inevitable application for their eviction? Can this possibly be what the Constitution means? It seems so arbitrary, unjust and bizarre a result that it is difficult to accept that it would constitute compliance with sec 26 and 28 of the Constitution.

32 It appears to be generally accepted (as it must be in the light of the provenance of the section and the meaning of the right to housing in the Covenant) that the sec 26(1) right is something more than a right not to be prevented from buying a house: it imposes on the state a duty to take positive action, and to do more than remove market impediments.

33 What then does the right mean? It must mean more than the right to wait in a queue for twenty years. That is virtually as good as saying that the right is the right to buy on the open market. What it must mean, at a minimum, is the right to some shelter in the case of crisis.

34 This is of course also the conclusion reached by the Committee in General Comment 3. The right has a 'minimum core obligation' for which people can not be expected to wait for twenty years. Without this, the right is 'largely

deprived of its *raison d'etre*'. There is a direct obligation on the state, at the very least, to provide basic shelter as part of its minimum core obligation.

35 It is submitted that this provides the key to the proper understanding of the relationship between sec 26 and sec 28(1)(c). The explanation is that in enacting sec 28(1)(c), the constitution-makers sought to specify that whatever else the housing right requires, *in relation to this vulnerable group* this is what is constitutionally required. In the language of General Comment 3, this is part of the 'minimum core' of the right to housing. The constitution-maker chose to put at least this beyond doubt or argument.

36 On this understanding, sec 28(1)(c) is a specific manifestation of the general right to housing in sec 26. When the two are read together, then in the specific circumstances of this case it becomes clear that the hypothetical four adults without children would have the same right or benefit as those adults in the community who do have children. Their right would be part of the minimum core of sec 26, and could be determined without reference to sec 28(1)(c). It is striking that the Committee contemplates a justifiable 'limitation' to the core content of the right if the state demonstrates that 'every effort has been made to use all available resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'. Similar arguments might be made under sec 36 of the Constitution.[24]

37 It is submitted that this interpretation:

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[24] The question whether lack of money can constitute a justifiable limitation ground is discussed briefly below at para 84-86

37.1 makes sense of what might otherwise appear to be an anomaly in the Constitution

37.2 is consistent with the requirements of international law, as described in the General Comments;[25]

37.3 is consistent with the requirements of international law, as described in the Convention on the Rights of the Child, in that it avoids the unnecessary separation of children from their parents;

37.4 provides a satisfactory resolution of the conundrum of parents without children;

37.5 gives real meaning to sec 26(1); and

37.6 provides a satisfactory resolution of the similar problem of the relationship between the general (and qualified) right of access to health care services in sec 27(1)(a), and the (unqualified) right of children to basic health care services in terms of sec 28(1)(c).

38 It is therefore not correct to see the right of children to shelter as a "higher order right" than the housing right. Rather, it is a specific manifestation of the housing right. The two need to be read together - and together with other relevant rights, in particular the rights to dignity and equality.

39 Children therefore have both

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[25] and, being a reasonable interpretation, is therefore to be preferred to alternative interpretations which are inconsistent with international law - sec 233 of the Constitution

39.1 an unqualified right to shelter; and

39.2 a weaker (because qualified) but larger right of access to adequate housing.

40 This approach is consistent with the approach of this Court, which has consistently stated that rights must be read together, as a mutually supportive web, rather than in isolation.[26]

What the government has done - and why this fails to meet its constitutional obligations

41 The Office of the President appears to take the view that sec 28(1)(c) is primarily a matter for the Department of Housing. This view is also reflected in the fact that in this litigation the Minister of Housing represents the Fifth

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[26] *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC) at para 27 (Mokgoro J); *S A National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) at para 8 (O'Regan J); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para 112, 114 (Sachs J); and see also *New Brunswick (Minister of Health and Community Services) v G(J)* 66 CRR (2d) at para 303

Respondent (now the First Appellant), which is the Government of the Republic of South Africa.[27]

[27] Annexure NBP3 to the affidavit of Pityana in the application of the Human Rights Commission to be admitted as an *amicus curiae: Documents* at 122; *Record* vol 8, 700 line 15 and 700 lines 2-4; *Record* vol 10, 861 lines 3-5.

42 In carrying out its constitutional duty to review government's performance of its obligations in terms of the social and economic rights in the Constitution,[28] the Human Rights Commission asked the Department of Housing how past laws and other measures had affected the Department's ability to realise children's right to shelter. The response of the Department was as follows:

> *'The Department is of the opinion that the realisation of the right of destitute children to shelter represents a specialised housing field that should be managed by the Department of Welfare. During the consultative process on the draft Housing bill, agreement was reached between the Department of Welfare and Housing that the accommodation needs of the category of people who cannot independently care for themselves and requires (sic) institutional care are the responsibility of the Department of Welfare.'*[29]

43 The Department was also asked its official interpretation of the words 'adequate housing' and of the word 'shelter' in sec 28. The answers were:

> *'"Adequate housing" means housing that meets the basic human needs that are of a standard that satisfies the minimum health and safety requirements applied by local authorities and constitutes a permanent residential structure, ensuring privacy and providing adequate protection against the elements.'*

> *'"Shelter" as contemplated in section 26(3) [presumably 28] of the Constitution, 1996 could include the definition given for "adequate*

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[28] Sec 184(3) of the Constitution

[29] The answers to this question and to those which follow appear in Human Rights Commission *Economic & Social Rights: Governmental Responses to Protocols* Vol III: *Documents* at 93-104, at 95

housing" but will also include the definition for "shelter" as contemplated by Welfare legislation and policy.'[30]

44 The Department was asked what steps had been taken to get rid of past laws and other measures, which impacted on children's right to shelter. The answer was:

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30 *Documents* at 97

'Outside our area of jurisdiction'[31]

45 The Department was asked for a brief description of any current laws and other measures which have been adopted to improve or advance the right of children to shelter. The answer was:

'See question 1 b'[32] [that is the answer quoted in para 42 above]

46 It is clear from the above that on its own version, the Department of Housing has not adopted any measures to improve or promote the right of children to shelter, because it does not understand this to be its responsibility.

47 The Department of Welfare has in turn also not addressed this matter, because it sees its functions as limited to a narrower category of children. It has not carried out any broader responsibility for fulfilling the right of children to shelter.

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[31] *Documents* at 100

[32] *Documents* at 102

48 The Department of Welfare is developing a programme to deal with the needs of children who are vulnerable to having to live away from their community and/or family on the streets or under statutory care, or who are living under statutory care.[33]

49 There is no indication anywhere in those papers, or in the Welfare reports to the HRC, or in the Annual Report of the Department of Welfare[34] that the Department of Welfare is doing anything about the right of children to shelter, in any broader sense than that described in JACC 4.

50 It is therefore clear that the Department of Welfare, too, has not undertaken responsibility for the fulfilment of the rights of children in terms of sec 28(1)(c).

51 The inescapable conclusion is that the Government of the Republic of South Africa has done and is doing nothing to promote or fulfil the right to children to shelter in terms of sec 28(1)(c) of the Constitution, except for:

51.1 the general housing programme run by the Department of Housing

51.2 the programme for "Children at Risk" run by the Department of Welfare

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33 Annexure JACC 4: Inter-Ministerial Committee on Young People at Risk *Minimum Standards: South African Child & Youth Care System*: *Record* vol 12, 986-1023 and particularly at 997 lines 7-9

34 *Record* vol 13, 1064-1133 (Annexure JACC 5)

52 The general housing programme is inadequate to meet the requirements of sec 28(1)(c) because:

52.1 on its own version, the Department of Housing does not consider this its responsibility, and has not taken any steps to improve or advance the right of children to shelter;

52.2 the general housing programme in no way gives special attention to the rights of children as explicitly required by the Constitution; and

52.3 the general housing programme fails to distinguish between "shelter" and "adequate housing": all of its efforts are focussed on the latter.

53 It is submitted that what the Constitution requires is an approach which

53.1 gives specific attention to the needs of children; and

53.2 gives specific attention to the question of 'shelter' for those who are literally homeless; and

53.3 ensures the progressive realisation of the right of access to adequate housing for all.

54 There is a wealth of international experience as to possible programmes and activities which give specific attention to the needs of children.[35] On its own version, the Government has not even applied its mind to the question of

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[35] See for example Werna, Dzikus, Ochola, and Kumarasuriyar *Implementing the Habitat Agenda: Towards Child-centred Human Settlement Development in Developing Countries* (UNCHS 1999)

whether it should adopt and implement such programmes, let alone adopt and implement them.

55 The government's housing programme deals in a uniform manner with people who are living in informal settlements, people living in 'backyard shacks', sub-tenants, and the truly homeless (ie those who require shelter). This is apparent from the statistics put up by the various Appellants, which describe the various classes of people served by the housing programme.

56 The fact of different sorts of housing situations and needs is a matter of common sense. It is also recognised internationally.[36]

57 The Government's housing programme is a "one size fits all" approach which is aimed at meeting all of the housing needs of all of those who are inadequately housed.

58 While it is admirable (and indeed constitutionally required) to develop a housing programme of this sort, this fails to meet Constitutional requirements in respect of shelter for those who are "roofless" (or in South African parlance more generally described as "homeless"). This requirement is imposed by:

58.1 sec 28(1)(c), in respect of children; and

58.2 the duty in terms of sec 26(2) to achieve the progressive realisation of the right to adequate housing. It is submitted that this imposes a duty to adopt an incremental approach both as to numbers, and as to what is provided.

[36] Werna and others (note 33) draw specific attention at 4 to the different forms of the general housing problem, which they call 'homelessness': 'rooflessness'; 'houselessness'; insecure accommodation; and inferior or substandard housing.

58.3 the minimum core of the obligation in sec 26(1) and (2)

59 It is submitted that the Constitution does not contemplate a situation in which people who are literally homeless ("roofless") might wait for more than twenty years on a waiting list before receiving any assistance whatsoever, because it is not possible before then to provide them with "adequate housing" in its full sense, when in fact it would have been possible to relieve the emergency situation in which they have been living. This is what the Appellants require the Respondents to do.

60 A good deal of the explanation by the Appellants of why they can not or should not deal with the needs of people such as the Respondents, who are in a situation of crisis, is the need for planning. No doubt planning is necessary; but the Third Appellant's own documents demonstrate that it is indeed possible to meet emergency human need within a sensible planning framework.

61 The Third Appellant has formulated an Accelerated Managed Land Settlement Programme

> *'to assist the Metropolitan Local Councils to manage the settlement of families in crisis. An incremental servicing and shelter consolidated [consolidation?] programme is proposed which allows to settle families in crisis, on sites with basic services.'*[37]

62 The features of the Programme include the following:

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[37] *Record* vol 6, 483 lines 10-20 and 511-519, where the Programme is described.

62.1 The core need for the Programme is described as follows:

> *'the existing housing situation cannot just be accepted, as there are many families living in crisis conditions, or alternatively, there are situations in the CMA where local authorities need to undertake legal proceeding (evictions) in order to administer and implement housing conditions. A new housing programme [is] needed to cater for the crisis housing conditions in the CMA.'*[38]

62.2 *'The Accelerated Managed Land Settlement Programme (AMLSP) can therefore be described as the rapid release of land for families in crisis, with the progressive provision of services.'*[39]

62.3 *'The programme excludes full services and the construction of a top structure at the initial stage. This is to allow for speedy delivery and to discourage queue jumping.'*[40]

62.4 The beneficiaries will include

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[38] *Record* vol 6, 511 lines 30-34

[39] *Record* vol 6, 512 lines 8-10

[40] *Record* vol 6, 512 lines 32-33

'families which are to be evicted, beneficiaries who in a crisis situation in an existing area (for example, in a floodline), ..[and] families from backyard shacks or on the waiting list who are in crisis situations'[41]

62.5 The Programme will do this within a planning framework determined by the authorities, on land identified by them.[42]

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41 *Record* vol 6, 515 lines 28-33

42 *Record* vol 6, 512 lines 15-18

62.6 The Programme will facilitate permanent settlement with secure tenure.[43]

63 It is submitted that this fatally undermines and negates the repeated assertion, in the affidavits and in the heads of argument filed on behalf of the First and Second Appellants, that it is not possible to implement emergency schemes because of the planning implications and related matters. A Programme of this sort would cater precisely for the needs of people such as the Respondents, and in an appropriate and sustainable manner.

64 A programme of this sort would also meet the obligation imposed by the right to adequate housing, as explained by the Committee in General Comment 7, that

> *'Evictions should not result in individuals being rendered homeless.... Where those affected are unable to provide for themselves, the State Party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement, or access to productive land, as the case may be, is available.'* [44]

65 It is indisputable that:

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[43] *Record* vol 6, 512 lines 26-26 and 513 lines 29-34

[44] *Documents* at 76 (para 17)

65.1 the Respondents are homeless (“roofless”), and have literally nowhere to go;

65.2 the Appellants propose no solution to their plight except that they must wait their turn on the waiting-list for “adequate housing”, on which some people have been waiting for twenty years. On this approach, by the time the Respondents receive any real benefit from their constitutional right of access to housing, their children will probably be adults.

66 It is submitted that this intolerable situation has arisen because the Government has

66.1 misconstrued and misunderstood its obligations under sec 28(1)(c) of the Constitution, and as a result has failed even to attempt to meet these obligations.

66.2 misconstrued and misunderstood its obligations under 26(1) and (2) of the Constitution, and accordingly failed even to attempt to meet the needs and constitutional rights of the Respondents

67 The government’s response not only shows a failure to appreciate the nature of the obligations placed on it by sec 26 and 28(1)(c). It is submitted that the response is also constitutionally flawed for the following reasons:

67.1 It discriminates both directly and indirectly against people classified as African, because it makes them wait in line on a waiting-list from which they were, until 1994, excluded as a result of racial discrimination.[45]

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45 *Record* vol 2, 126 para 3.3; vol 3, 222-237; vol 9, 752 lines 1-7

67.2 It is arbitrary and irrational, because it uses the length of time on a waiting-list rather than need, to determine priority. People who are literally homeless are treated as if they were in the same position as people who are sub-tenants or in informal housing.[46]

67.3 It is based on an incorrect belief that it would be unconstitutional to deal with applications on basis of priority need, and that government is obliged to follow a mechanistic first come, first served system.[47] This insistence on formal 'equality' is irrational and contrary to the requirements of the Constitution.

67.4 It is arbitrary and irrational because it elevates the need for planning to such an obsession that it disables itself from dealing with pressing human need and constitutional rights in a manner which, as the Third Appellant has shown, could accommodate the need for planning.[48]

68 It is submitted that it is in this context that the Court should deal with the *dictum* of Chaskalson P in *Soobramoney*, on which the Appellants rely, that

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46 *Record* vol 2, 138 para 13

47 *Record* vol 3, 155 line 21 - 156 line 3; vol 3, 280 lines 20-24; vol 8, 670 line 20 - 671 line 5

48 *Record* vol 2, 166 line 20 - 167 line 3; vol 8, 651 lines 10-14, 654 line 15 - 655 line 2

'A Court will be slow to interfere with rational decisions [about budgets and priorities] taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters'[49]

69 As was stated in the *Pharmaceutical Manufacturers* case:

[49] Note 2 at para 29

'It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action. The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle.... What the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner.... Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful.'[50]

[50] *Ex parte: In re The Pharmaceutical Manufacturers Association of South Africa* CCT 31/99 at para 85-90 (Chaskalson P)

70 It is submitted that for the reasons stated above, any 'decision' not to provide people in the position of the Respondents with basic shelter was in fact arbitrary and irrational in this sense - because the decision-maker misunderstood its obligations, asked itself the wrong questions, and applied the wrong tests.[51]

Cost as a relevant factor

71 The government parties rely heavily on the cost of giving effect to the rights determined by the Court *a quo*, and a number of very large statements are made in this regard. Perhaps the largest is that made by the Director-General: Housing:

> *'... if the applicants and in particular, the first applicant were compelled to provide shelter on a temporary basis as ordered by the Cape High Court, ... the entire housing budget would be swallowed not only by the provision of temporary shelter as determined by the Court but also by the maintenance of these shelters and the services required to be provided.'*[52]

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[51] In saying this we do not concede that simple rationality review is adequate where the Court is dealing with the minimum core obligations. *Soobramoney* of course did not deal with such an obligation - it was a claim to 'tertiary' care. However, in this case the government's conduct does not even meet the rationality standard.

[52] *Record* vol 11, 942 lines 1-6

72 It is not altogether clear in what respect the Appellants contend that the cost is legally relevant to the determination of the appeal. There appear to be three possibilities in this regard:

72.1 *As a guide to interpretation*: the right can not mean what it appears to say in plain language, because this would cost so much, so there has not been a breach

72.2 *As a ground of limitation*: the right does mean what it apparently says, and there has been a breach, but because it is so expensive to remedy this, the government is justified in not doing so

72.3 *As a reason for amending the remedy*: there has been a breach, and it is not justified, but nevertheless the court should exercise a discretion and not order the government to remedy it in the manner ordered by the Court *a quo*

73 It is submitted that the first point to be noted in this regard is that in truth, the government does not know, and has not taken the trouble to find out, how many people would actually qualify, and what it would actually cost, to give effect to the rights determined by the Court *a quo*.

74 The fact is that the government does not know how many people need *shelter* in the sense in which this is used by the Court *a quo*: all it knows is the extent of the general housing backlog. When the Human Rights Commission carried out its ‘second round’ review of the implementation of the social and economic rights in the Constitution, it asked the Department of Housing the number of homeless people. The reply from the Department was the following:

> *'The 1994 estimate of the urban housing backlog was 1,5 million units ....If shack dwellings in informal settlements and backyards, and households who have no shelter, are considered to be a measure of the formal housing that needs to be built then current figures would indicate a need for 1,45 million units....*
>
> *Further backlog calculations including a disaggregation of data which will reflect the number of homeless people (without any form of shelter at all) will be undertaken during the development of the Housing White Paper II.'*[53]

75 It is submitted that this statement is devastating to the Appellants' case that the cost would be unbearable. It explains why:

75.1 the Appellants have not put up any information to show the actual cost of implementing the judgment; and

75.2 despite repeated invitation and request, the First Appellant has been unable or unwilling to provide the material on which the statement by Ms Nxumalo is based.[54]

76 The government has the expertise and resources to do this, and has had ample time for this purpose, but has not bothered to do so. It is submitted that:

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53 Department of Housing *Socio-Economic Rights Protocol* April 1998 to March 1999: *Documents* at 118 (emphasis added)

54 *Annexures NBP4 and NBP9 to the affidavit of Pityana* in the application for admission as *amici curiae*: *Documents* at 123-126

76.1 the reality is that the Appellants do not know what implementation of the judgment would cost, have not troubled to find out, and ask the Court to refuse to make an order because it would cost too much; and

76.2 this further demonstrates the Appellants' disregard for the needs of a vulnerable group.

77 It is submitted that it is not permissible for the government to do nothing about the shelter right (whether of children or adults) for three years, and then seek to rely on the magnitude of the problem to justify its continued inactivity. If the government was anxiously trying to satisfy this right, and a claim was made by people who had not yet been reached by this programme, the government could legitimately ask for some patience. However, the government can not raise this argument when it is in any event not making any meaningful effort to comply with its obligations.

78 The Appellants appear to contend that the only duty placed on the state by sec 28(1)(c) is to provide 'shelter' in the form of state-funded institutions. Besides the fact that this 'solution' to the problem of homelessness - the removal of children from their parents - is repugnant in an open and democratic society based on human dignity, equality and freedom, it would cost vastly more than the solution ordered by the Court *a quo*. It would require the erection of permanent buildings; paying the cost of maintaining the buildings; paying the cost of services (electricity, water, etc) to the buildings; hiring staff to administer the institutions; hiring staff to care for the children; buying and cooking food for the children; etc.

79 If the number of children without shelter is as high as the Appellants imply, the cost of providing this form of shelter to all of them would be enormous.

80 There are only two reasons why the Appellants would propose this possible 'solution', in the light of their arguments about the cost of the order in the Court *a quo*:

80.1 in truth, the number of children needing shelter is much smaller than they have implied; or

80.2 the suggestion is actually cynical and heartless, and is made only because the Appellants know that most parents, faced with the awful prospect of losing their children in order to give them shelter, will keep their children with them and try to survive as best they can.

81 Against this background, we now deal with the possible relevance of the cost.

Cost as a guide to interpretation:

82 It is submitted that the plain meaning of the words in sec 28(1)(c) is so clear, and the evidence of what this meaning would cost is so lacking, that it is not possible to conclude that the plain meaning of the words in the Bill of Rights leads to such an absurd result that the words must be given another meaning:

83 Cost is of course relevant to the meaning of 'progressive realisation', as it is dependent on available resources. But to justify the failure to meet even the minimum core of this obligation, the government must show that 'every effort has been made to use all available resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'. This it cannot do, because it has not prioritised this matter and has not devoted any resources at all to meeting the minimum core obligation, except insofar as it is incidentally met by the general housing programme.

Cost as a limitation ground:

84 The question whether cost can be a reasonable and justifiable limitation ground in terms of sec 36 of the Constitution raises a number of difficult questions, with which the Supreme Court of Canada has wrestled in dealing with the analogous provisions of sec 1 of the Canadian Charter of Rights and Freedoms.[55] On the one hand, it could be contended that if the right is in reality not affordable, Parliament should amend the Constitution to set limits to the right. On the other hand, it could be contended that a law of general application could set out clearer criteria and grounds of limitation, which would do less violence to the integrity of the underlying right, and would be capable of constitutional scrutiny on a progressive basis.

85 It is submitted that this is not an appropriate case for this issue to be decided. The Appellants have not at any stage relied on sec 36; and they can not do so, for they can not point to any law of general application which would justify a limitation of the rights concerned.

86 It is therefore submitted that cost can not be used as a limitation ground in this case. As the US Supreme Court has held,

> *'it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them.'*[56]

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55 The cases are summarised in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR at para 281-284

56 *Watson v City of Memphis* 373 US 528 (1963) at 537 (Goldberg J)

Cost as relevant to remedy:

87 It is submitted that in this case, cost and budgetary constraints can therefore only go to the question of remedy. This is consistent with the approach of the Supreme Court of Canada in several of the cases referred to at note 55.

88 It is further submitted that the Court *a quo* did in fact take cost into account in ordering the remedy which it did. The nature of ‘shelter’ is capable of a range of meanings short of ‘adequate housing’. In the event, the relief which the Court ordered was anything but extravagant, and was at the lower end of the spectrum of possible meanings. It is submitted that it is clear from the context that the reason for this was the question of cost.

89 It is not suggested by any of the Appellants, and nor could it be, that the cost of providing this relief to these Applicants is beyond the public purse. The real concern is the cost of providing similar relief to other persons who are similarly placed.

90 It is submitted that this has to be dealt with in a manner which is realistic and practical There are two approaches which would be unrealistic:

90.1 It would be unrealistic to shut one’s eyes to the fact that there are other persons similarly placed, and to pretend that the case involves only the 900 adults and children in this case.

90.2 It would also be unrealistic to pretend that the day after the rendering of judgment in this case, every other homeless person in the country will arrive at a government office, identify himself or herself, and assert the right to a shelter.

91 Adopting the latter course would make it impossible to do the right thing today, for fear that others may arrive tomorrow. It would mean that one can not start the job, because one can not immediately finish.

92 The Constitution recognises that there are situations where an unconstitutional state of affairs can not immediately be remedied - for example, where a statute is unconstitutional but the declaration of invalidity is suspended. What a court then does is declare the breach; order the legislature to remedy it within a fixed time; and permit the unconstitutional state of affairs to continue for a period.[57]

93 The fact is that these applicants are now before the Court. They have a desperate need. They have nowhere else to go. They do not ask (and neither does anyone else ask) for an order on the government to provide shelter to everyone else in the country who potentially qualifies. These people ask to be helped to get out of their desperate situation. On the face of it, they have a constitutional right. It is submitted that courts should welcome the fact that people assert their rights, and assist them - not turn them away on the speculative basis that someone else may arrive later.

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[57] Sec 172(1)(b)(ii)

94 The government is under a duty to put in place a programme to deal with the needs of people who are homeless. If it puts such a programme in place, and applicants then arrive whose needs can truly not be afforded, then a Court would be able to say (on the basis of actual evidence and not speculation) that although there is a right, the order for fulfilment of the right should be suspended for a reasonable period - and perhaps some interim relief (such as preventing the eviction of the people from where they are currently living) should be granted. The Court might also require a Court-approved and Court-supervised programme for a 'bite-by-bite' implementation of the right.[58]

95 This is not such a case: there is no programme in place to fulfil the right in question; and in fact the government can afford to give relief to these particular applicants.

96 As noted above, there is in fact no evidence before the Court as to what implementation of this right would cost - merely the *ipsa dixit* of an official who has been requested to provide material supporting this allegation, but has apparently been unable to do so. It is submitted that this is a flimsy basis indeed on which to deny a right which appears on the face of it to be guaranteed by the Constitution. If the Government wishes the Court to take this step, it is under a duty to provide the Court with proper evidence which can be properly examined and considered by the Court, so that the Court can perform its constitutional role of adjudicating rights.

97 It is submitted that the statement of Sachs J in *August* is particularly apposite here:

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[58] Trengove 'Judicial Remedies for Violations of Socio-Economic Rights' 1 *ESR Review* 4 (1999) 8 at 9

> *'We cannot deny strong actual claims timeously asserted by determinate people because of the possible existence of hypothetical claims that might conceivably have been brought by indeterminate groups'*[59]

98 It is immediately conceded that the factual situation here is not exactly the same as in the *August* case: but here too, the Court is dealing with strong actual claims by determinate people, and the answer of the State is that the rights should not be enforced because of the possible cost of speculative notional claims by people whom they are not able to identify or quantify.

Deference

[59] *August v Electoral Commission* (note 6) at para 30

99 The government relies heavily on the need for deference to its decisions. Deference is not a rule which can be applied as a principle: it has to be justified by the context and applied to a particular situation.[60]

100 The courts should exercise 'appropriate constitutional modesty'.[61] However, it is submitted that it is necessary to take care that legitimate concerns with democratic process and institutional competence do not lead to an abdication of the role of the courts:

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[60] *M v H* 62 CRR (2[d]) 1 at 36 (Iacobucci J)

[61] *Soobramoney* (note 2) at para 58 (Sachs J)

'Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.'[62]

'*The notion of judicial deference to legislative choice should not ... be used to completely immunize certain kinds of legislative decisions from Charter scrutiny.'*[63]

'the deference that will be accorded to the government when legislating in these matters does not give them an unrestricted licence to disregard an individual's Charter rights.'[64]

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62 *RJR-MacDonald Inc v Canada* 127 DLR (4th) 1 at para 136 (McLachlin J)

63 *Vriend v Alberta* 156 DLR (4th) 385 at para 54 (Cory J)

64 *Tétreault-Gadoury v Canada (Employment and Immigration Commission)* 4 CRR (2d) 12 at 26 (la Forest J)

101 The fact that adjudication of a right involves an examination of a social programmes should not automatically lead to the courts withdrawing from the matter on the basis that they are not competent to deal with it:

> *'It is important to be clear about what claimants of social and economic rights are actually asking courts to do before declaring courts incompetent to do it.... Assessing whether these documented effects [of welfare cuts] infringe on constitutional rights and interpreting these rights in line with international human rights law surely engages an area of judicial, not legislative competence. Poor people such as the claimants in Masse do not advance rights claims under the Charter on the assumption that courts are expert in social policy and on that account ought to redesign programmes. Rather, they seek from courts adjudication of constitutional rights...'*[65]

102 The need for the courts to undertake this function is underscored by General Comment 9 ('The domestic application of the Covenant') issued by the Committee on Economic, Social and Cultural Rights:

> *'In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions.... It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competencies of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally*

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[65] Porter (note 18) at 157-8

already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.'[66]

103 On precisely these grounds, the Committee has criticised the decisions of provincial courts in Canada, and the pleadings submitted to courts by provincial governments:

103.1 In 1993, the Committee expressed concern that

'some provincial governments in Canada appear to take the position in courts that the rights in article 11 of the Covenant are not protected, or only minimally protected, by the Charter of Rights and Freedoms', and that

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[66] General Comment 9, *Documents* at 78-9 (para 10)

'in a few cases, courts have ruled that the right of the right to security of the person in the Charter does not protect Canadians from social and economic deprivation, or from infringements of their rights to adequate food, clothing and housing'[67]

103.2 In 1998, the Committee came back to these twin themes:

'Provincial governments have urged upon their courts in these cases an interpretation of the Charter which would deny any protection of Covenant rights and consequently leave the complainants without the basic necessities of life and without any legal remedy; and

[67] cited in Porter (note 18) at 140.

> *'The Committee is deeply concerned at the information that provincial courts in Canada have routinely opted for an interpretation of the Charter which excludes protection of the right to an adequate standard of living and other Covenant rights... despite the fact that the Supreme Court of Canada has stated, as has the Government of Canada before this Committee, that the Charter can be interpreted so as to protect these rights.'*[68]

Determining the appropriate level of deference

104 In *M v H*, Bastarache J set out a number of factors which determine the level of deference to be accorded by the courts.[69] These are the nature of the interest involved; the vulnerability of the group affected; complexity; the source of the rule or decision; and moral judgments in setting social policy. In the section of the argument which follows, we apply these factors to this appeal.

The nature of the interest involved

105 The right to housing or shelter is a fundamental interest. It is forms a platform for the enjoyment of other rights, and for human development.

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68 cited in Porter (note 18) at 144

69 note 60 at pages 110 to 116. The majority did not agree with Bastarache J in his view that deference in a general sense should be determined at the outset of an enquiry. However, they did not disagree with his analysis of the factors involved.

106 In this regard, we can not do better than refer to two cases cited on behalf of the First and Second Appellants:

> *'Basic needs of man have traditionally been accepted to be three - food, clothing and shelter. The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in ....a reasonable residence is an indispensable necessity for fulfilling the constitutional goal in the matter of the development of man and should be taken as included in "life" in Article 21.'*[70]

> *'Protection of life guaranteed by Article 21 encompasses within its ambit the right to shelter to enjoy the meaningful right to life.'*[71]

107 As pointed out by Bastarache J,

> *'The more fundamental the interest affected, the less deference a court should be prepared to accord to the Legislature.'*[72]

The vulnerability of the group affected

108 The groups affected are two of the most vulnerable in society: children and the very poor.

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70 *Shantistar Builders v Narayan Khimalal Totame* (1990) 1 SCC 520 at para 9, 13 (Ranganath Misra J on behalf of the Court)

71 *Chameli Singh v State of U. P.* (1996) 2 SCC 549 at para 4 (K Ramaswamy J)

72 Note 60 at 110.

109 As pointed out by John Hart Ely, those whose rights need particular protection through the courts are '*those groups in society to whose needs and wishes elected officials have no apparent interest in attending*.'[73]

[73] Ely *Democracy and Distrust* (Harvard University Press, 1980) at 151, cited in *Andrews v Law Society of British Columbia* 36 CRR (1st) 193 at 201.

110 Children are self-evidently in this class. They have no vote, and no voice. It is for this reason that the rights of children are so strongly stated, without qualification, in sec 28 of the Constitution.[74]

111 The very poor, too, are a marginalised and vulnerable group. Poverty is both a cause and a consequence of powerlessness. As a comprehensive and authoritative study prepared for the Government has pointed out:

> '*Vulnerability is therefore characterised by not only a lack of assets and an inability of the poor to accumulate a 'portfolio' of different assets but also an inability to devise an appropriate coping or management strategy in times of crisis.... The absence of power is almost a defining characteristic of the poor.'*[75]

Complexity

112 Complex and polycentric issues do not arise only in cases dealing with socio-economic rights.

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[74] Panel of Constitutional Experts 'Children' *Documents* at 7, para 3.3

[75] May & others *Poverty and Inequality in South Africa: Report prepared for the Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and Inequality* (Praxis Publishing, 1999) at 5, 41.

'Civil and political rights may give rise to polycentric problems upon enforcement just as social and economic do.'[76]

113 In this case, there are two questions which raise complex or polycentric issues: the budget for giving effect to the rights, and the means of giving effect to the rights.

114 As far as the budget is concerned,

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[76] O'Regan (note 5) at 3.

> *'Determining a dispute with budgetary implications is a classic polycentric problem. Each decision to allocate a sum of money to a particular function implies less money for other functions. Any change in the allocation will have a major or minor impact on all the other decisions relating to the budget.'*[77]

115 It is almost inevitable that the enforcement of positive obligations on the state will have budgetary implications, and will therefore be polycentric. That can not be an automatic bar to the enforcement of these obligation: for if it were, the effect would be to undermine the rights themselves - and as pointed out above, this Court has previously recognised that the duty to respect, protect, promote, and fulfil the rights in the Bill of Rights entails positive obligations on the state.

116 Part of the difficulty in this case is that the state has not provided any evidence to show what the cost of implementation would be. This is a question which only it can answer, and it has a duty to provide this information if it wishes the Court to show deference on this ground. This it has manifestly failed to do.

117 As far as the means of implementation of the decision is concerned, the Court *a quo* showed precisely the deference which is required - as to precisely what was to be provided to the applicants, and where and how this should be done. These are questions which are more truly polycentric or complex than budgetary decisions.

118 As Bastarache J states

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[77] O'Regan (note 5) at 3

> *'The animating principle is not that a court should shy away from difficult decisions, but rather that, with regard to certain types of questions, a greater degree of deference might be owed to non-judicial decision-makers.... Of course, complexity alone can not be a justification for a breach of a* Charter *right.'*[78]

119 At 113 Bastarache J refers to legislation *'implicating a chain of interconnecting interests of which a court can be only dimly aware in any one case brought before it.'* It is submitted that is a case of true polycentricity, which is not presented here. The polycentricity in this case is no more than one would expect in any case, whatever the right involved, which has budgetary implications.

The source of the rule or decision

120 The Supreme Court of Canada has, in considering the deference to be shown towards legislation, had regard to the nature of the legislative process resulting in the particular law. Where there has been a thorough and consultative process, the Court has been more inclined to show deference to the product.[79]

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[78] note 60 at 111, 112

[79] *R v Mills* [1999] SCJ No 68 at para 59 and 125 (McLachlin J and Iacobucci J); *RJR-MacDonald Inc* (note 62) at para 69 and 98 (La Forest J)

121 *'Rules that are the product of common law development, or which are made by unelected decision-makers, ought to be accorded less deference in the absence of other factors. Delegated decision-makers are presumptively less likely to have ensured that their decisions have taken into account the legitimate concerns of the excluded group .... processes which are more procedurally careful and open deserve greater deference.'*[80]

122 This factor is consistent with one of the underlying reasons for deference, namely the need to be respectful of democratic processes.

123 In this case, it is not legislation which is in issue. What is at issue is a decision made by an unidentified person, at an unidentified time, through an unidentified process, not to provide shelter or other basic housing to children and other homeless people in need.

124 In the case of ordinary legislation, there is a deliberative, consultative, and accessible legislative process. For example, when Parliament enacts an ordinary Bill, the draft Bill is published in advance, the Portfolio Committee of the National Assembly and the Select Committee of the NCOP hold meetings which are open to the public, they invite and receive representations, and they consider the Bill clause by clause. None of this applied here.

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[80] Bastarache J (note 60) at 114.

125 The same point may be made if it is contended that the real 'decision' in this instance was the allocation of the Housing (or Welfare, or other) budget. To the extent that the original budgetary allocation is relevant, it is worth noting that the budgetary process does not follow the normal legislative process. The budgetary allocations are announced by the Minister of Finance after a Cabinet decision, which is not preceded by an open consultative process of proposal, justification and debate. Thereafter, Parliament may only approve or reject the whole budget: it may not accept part and reject another part. There is no clause by clause or item by item consideration of the various Votes or their internal components.[81]

126 However, in truth the 'decision' which affected the rights of the Respondents was the closed, internal decision not to use part of those budgets to meet their basic needs.

127 Below we raise the question whether in reality there ever was a 'decision' not to meet the needs of the Respondents, or whether this was simply an omission by default. Assuming that such a decision was made, this happened through a process which shows none of the values of openness, justification or accountability which underlie the Constitution. If the nature of the decision is relevant to the question of how much deference should be shown, this must be at the very bottom end of the scale on that ground.

Moral judgments in setting social policy

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[81] For analysis of the budgetary process see *The Budget Process: A Guide for South African Legislators* (Health Systems Trust, 1999)

128 This criterion is designed to enable the legislature *'to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society.'*[82]

129 There is nothing in the decision which is designed for that purpose. On the contrary, the purpose proposed by the Appellants - that children in need of shelter are to be separated from their parents - is contrary to any justifiable moral purpose. It certainly does not attract any deference on that ground.

Summary on the appropriate level of deference in terms of the factors identified by Bastarache J

130 It is submitted that on this analysis, all of the identified factors militate towards less rather than more deference. The only possible exception is the complexity of the matter. Here, the decisions are no more complex than any others which have budgetary implications - and that complexity is a necessary consequence of the enforcement of the positive constitutional obligations of the state.

What is the 'decision' for which deference is sought?

131 Although the Appellants contend that there is a need for deference because this is a complex or polycentric matter, they do not identify the decision for which deference is sought. There seem to be the following possibilities in this regard:

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[82] Sopinka J in *R v Butler* 8 CRR (2[d]) 1 at 30

131.1 *a decision to do nothing specific about sec 28(1)(c) or about fulfilment of a core right in terms of sec 26:*

There does not appear to be any recorded decision in this regard. What seems more likely is that there has been a failure to do anything, or an omission by default - which is now followed by an attempted explanation and justification. There is no indication that someone took a considered decision, who that person was, when the decision was taken, and for what reasons it was taken. All we know is that if there was such a decision, it was apparently based on a misunderstanding of the requirements of the Constitution. This does not give rise to any basis for deference.

131.2 *the decision by the national and provincial governments not to comply with the request by their attorney that they provide the Respondents with temporary relief*[83]

It is not clear whether this request was for relief pending the outcome of these proceedings, or for temporary relief until the Respondents are able to obtain adequate accommodation. If the former, it is plainly not relevant to the determination of this appeal. If the latter, then the reason is known:

> *'because the provision of housing and shelter has to take place in an orderly manner and in accordance with the provisions of the Housing Act 107 of 1997 and other relevant legislation ... housing and shelter cannot be provided on demand and is limited*

[83] *Record* Vol 2, 166-7 para 4

to the resources available to the Provincial and National Government'

Here the reasons are known, although it is submitted that for the reasons set out above, they are so weak that they attract no deference at all. Temporary relief could plainly be provided in an orderly manner and in accordance with the relevant legislation. And the cost of doing so would plainly be affordable. The 'decision' appears to have been made by relatively junior officials, through a process which attracts none of the deference due to the democratic process. There is no indication at all of any considered balancing of interests.

131.3 *the decision how much to allocate to the Housing (or Welfare, or other) budgets*

As submitted above, it is not the overall Departmental budget allocations which determined whether the Respondents would receive any relief. It is the decisions made administratively on how to use those budgets. Again, there is no indication that someone took a considered decision, who that person was, when the decision was taken, and for what reasons it was taken. There is no evidence of balancing of interests, or of consideration of the relevant constitutional obligations. These are the sorts of matters which should be placed before the Courts if deference is sought. *McKinney* is probably the high-water mark for deference in Supreme Court of Canada and was a truly complex and polycentric matter. La Forest J rigorously reviewed the evidence of 'balancing' and concluded in dealing with a <u>legislative</u> decision:

'The Legislature sought to provide protection for a group which it perceived to be most in need and did not include others for

> *rational and serious considerations which, it had reasonable grounds to believe, would seriously affect the rights of others.'*[84]

132 It is submitted that if the failure to make any provision for the Respondents was in fact the result of a decision rather than an omission by default, the weakest possible deference is due to such decision.

[84] *McKinney v University of Guelph* 2 CRR (2d) 1 at 62

133 The 'decision' here may usefully be contrasted with the decision in *Soobramoney*.[85] In that case, there was a considered policy decision. It was clear who was responsible for the decision, how it had been made, and why it had been made. There had been a considered balancing of the interests involved. The decision was recorded and available as a means of explanation of the allocation which followed from it. The allocation could be tested against this policy. It is difficult to think of a case more different from the present case.

Where is deference relevant?

134 Assuming that some deference is appropriate, where it is relevant? There are three contexts in which deference could be applicable:

134.1 in determining whether the state has performed its constitutional obligation to take 'reasonable' measures to achieve the progressive realisation of the right in sec 26

134.2 as part of a limitations test, in the balancing of interests. This does not arise here.

134.3 in determining the appropriate remedy.

135 The question of question of 'reasonableness' arises where there are several possible ways of complying with the constitutional obligation, and state has chosen one. In that instance, the court may choose not rule on what might have been the best means, if the course chosen by the government meets the test.

[85] note 2 at para 2 to 4

136 In this instance, the government's action can not possible meet the test, for

136.1 it has failed even to attempt to comply with the requirements of sec 28(1)(c), and has similarly failed even to attempt to meet the core requirements of sec 26 with regard to a minimum core and giving priority to vulnerable groups such as the homeless. It has simply ignored the rights. There can not be deference to ignoring Constitutional rights.

> *'The exclusion constitutes total, not minimal, impairment of the Charter guarantee of equality. In these circumstances, the call for judicial deference is inappropriate.'*[86]

136.2 it has fundamentally misconceived its obligations. There can not be deference to a misconception of what the Constitution requires.

137 Deference is however appropriate to the question of remedy. It is submitted that it would be inappropriate for the court - in the absence of deliberate or persistent delinquency - itself to fashion a detailed remedy. In a matter such as this, what a court should do is require the government to formulate the means of redressing the breach of the rights, and then adjudicate whether the government's plan meets the requirements of the Constitution. This is precisely what the Court *a quo* did.

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[86] *Vriend v Alberta* (note 63) at para 127 (Iacobucci J)

> *'..in this case ... there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not the court's role to dictate how this is to be accomplished.'*[87]

138 It would not be correct to adopt a deferential approach in respect of a whole category of rights, or even at the outset of a particular case, without analysing the evidence and specific issues raised by the particular case before the court.[88] This seems to be what the Appellants ask the court to do.

Conclusion

139 The Court *a quo* did not make any finding as to which sphere of government is liable to perform the various constitutional obligations it determined. As this question is therefore not currently before the Court, and in order to avoid over-burdening these heads of argument, a memorandum analysing this issue (prepared by the *amicus* Community Law Centre) is submitted with the other documents in terms of Rule 30.[89]

140 It is common knowledge that when the Constitution was enacted, there was vigorous and extensive debate on whether social and economic rights should be

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[87] *Eldridge v British Columbia (Attorney General)* 46 CRR (2d) 189 at 233 (la Forest J)

[88] Iacobucci J for the majority in *M v H* (note 60) at 36.

[89] *Documents* at 127-145

included in the Bill of Rights. That debate was resolved through the democratic process.

141 It can not be disputed that the enforcement of social and economic rights raises many difficult questions. This case raises very directly the question whether those rights will be subject of effective remedies. Rights without remedies are of course no rights at all.

142 In a curious way, this case and the *Soobramoney case* represent the opposite ends of the 'spectrum' of social and economic rights claims under the Constitution:

142.1 *Soobramoney* was a claim for high-tech 'tertiary care'; it challenged an identifiable, rational and considered decision on the allocation of resources; and the harsh and unfortunate truth was that given the appellant's poor state of health, the relief could at best provide a temporary benefit.

142.1 *Grootboom* is a claim for the most basic and fundamental human need; it challenges unidentifiable, arbitrary and misconceived decisions on the allocation of resources (if any conscious decision was ever made); and the relief could substantially transform the lives of some of the most vulnerable people in our society.

143 It is respectfully submitted that if the social and economic rights in the Constitution are to have any substantive meaning with regard to the positive obligations imposed on government, then this appeal must be dismissed.

144 It is further submitted that by dismissing the appeal, the Court will do no more and no less than is required of it by the structure of rights upon which our Constitution and our nation are now founded.

> *'It is suggested that this appeal represents a contest between the power of the democratically elected legislatures to pass the laws they see fit, and the power of the courts to disallow those laws, or to dictate that certain matters be included in those laws. To put the issue in this way is misleading and erroneous. Quite simply, it is not the courts which limit the legislatures. Rather, it is the Constitution, which must be interpreted by the courts, which limits the legislatures. This is necessarily true of all constitutional democracies.'*[90]
>
> *'... it should be emphasized again that our Charter's introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy. Our constitutional design was refashioned to state that henceforth the legislatures and the executive must perform their roles in conformity with the newly conferred constitutional rights and freedoms. That the courts were the trustees of these rights insofar as disputes arose concerning their application was a necessary part of the new design.*
> *'So courts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen.'*[91]

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[90] *Vriend v Alberta* (note 63) 385 at para 56 (Cory J)

[91] *Vriend v Alberta* (note 63) at para 134 (Iacobucci J)