

# *Grootboom*: A paradigm of individual remedies versus reasonable programmes

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## 1 Introduction

The decision of the Constitutional Court (the Court) in the case of *Government of the Republic of South Africa versus Grootboom*<sup>1</sup> was received as ground breaking by human rights practitioners, scholars and advocates the world over. If it were possible to assess the case in terms of new music releases, one would say that the 'Grootboom album' became an instant hit on the top of all music charts. The case instantly established itself as a landmark, signifying the undeniable justiciability of economic and social rights (socio-economic rights). Thus, the case became a promise that the lives of South Africans living in crisis-like situations would be changed for the better.<sup>2</sup> The Court's reasonable programme review approach instantly became the litmus test with which to determine whether government has discharged its obligations to realise the various constitutionally protected economic, socio-economic rights. Since then, the approach has dominated both academic and judicial 'dance halls' as the tune to dance to when making deliberations on the realisation of such socio-economic rights as health care,<sup>3</sup> water,<sup>4</sup> food,<sup>5</sup> and housing.<sup>6</sup>

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<sup>1</sup>2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC)

<sup>2</sup>Wickeri *Grootboom's legacy: Securing the right to access to adequate housing in South Africa?* Center for Human Rights and Global Justice, Working Paper, Economic, Social and Cultural Rights Series no 4 (May 2004) 6.

<sup>3</sup>See *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC); Bilchitz 'Health' in Woolman *et al* (eds) *Constitutional law of South Africa* (2005) (2<sup>nd</sup> ed) 56A-i.

<sup>4</sup>*Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC); 2010 4 SA 1 (CC).

<sup>5</sup>The *Grootboom* case is cited by the Food and Agriculture Organization in the Right to Food Guidelines, see FAO *Right to food guidelines: Information papers and case-studies* (2006).

<sup>6</sup>Wickeri (n 2).

However, alongside the praises, the *Grootboom* judgment was also subjected to a number of negative critiques, directed especially to the Court's rejection of the minimum core obligations approach,<sup>7</sup> in addition to critiques on the Court's approach to the issue of remedies. The biggest criticism that has been levied at the case and other socio-economic rights cases that immediately followed it is the failure of the courts to guarantee remedies that assure poor litigants individualised goods and services. Indeed, the death of Mrs Irene Grootboom in a shack attracted highly publicised criticism to the effect that the Constitution meant very little to the poor.<sup>8</sup> In his web blog, Pierre de Vos described Mrs Irene Grootboom as a true revolutionary who had put her trust in the law, the courts and politicians to help her to get access to a house. De Vos concludes, however, that true revolutionaries often die young, penniless and homeless.<sup>9</sup>

Commenting on the remedial approach of the Court, one scholar has stated that despite the cogent statements of the Court concerning the justiciability of the rights, effective remedies for their enforcement remain jurisprudentially elusive and problematic.<sup>10</sup> Early critics focused on the structural interdict, condemning the Court for its reluctance to use this form of relief.<sup>11</sup> With recent decisions showing use of the remedy, are these criticisms still valid? What explains the Court's change of approach toward willingness to order a structural interdict?

Being a ten year retrospect of the *Grootboom* case, this paper undertakes a chronological exploration and critique of the courts' approach to the subject of remedies. An assessment reveals that the approach of the courts, and particularly the Constitutional Court, has been a mixture of successes and failures. South Africa stands out as an example of the challenges of finding appropriate relief for proclaimed socio-economic rights violations. This is against a background of a perceived constitutional imperative to uphold the doctrine of separation of powers. At the same time, the approach of the courts is a reminder of how pragmatic and dynamic courts need to be when dealing with constitutional remedies. The Constitutional Court's refusal to grant a structural interdict in both the *Grootboom*

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<sup>7</sup>See Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 118 *SALJ* 484; 'The right to health care services and the minimum core: Disentangling the principled and pragmatic strands' (2006) *ESR Review* 2; 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *SALJ* 1.

<sup>8</sup>See *Mail & Guardian* 'Grootboom dies homeless and penniless' 2008-08-08.

<sup>9</sup>'Irene Grootboom died, homeless, forgotten, no C-class Mercedes in sight' available at <http://constitutionallyspeaking.co.za/irene-grootboom-died-homeless-forgotten-no-c-class-mercedes-in-sight/> (accessed 2010-12-08).

<sup>10</sup>Choma 'Constitutional enforcement of socio-economic rights: South African case study' (2009) 6 *US-China LR* 46.

<sup>11</sup>See Heywood 'Preventing mother-to-child HIV transmission in South Africa: Background strategies and outcomes of the Treatment Action Campaign case against the Minister of Health' (2003) 19 *SAJHR* 278; and Swart 'Left out in the cold? Crafting constitutional remedies for the poorest of the poor' (2005) 21 *SAJHR* 215.

and *TAC* case will be contrasted with its willingness to grant the same remedy in *Olivia* and subsequent cases. This is evidence of the fact that socio-economic (and broadly constitutional) litigation is a dynamic exercise requiring judges to be open-minded and conscious of the context within which different cases arise.

This paper is divided into three parts; part one discusses the nature of the remedial mandate of the courts as defined by sections 7, 38 and 172(1) of the Constitution. In discussing these provisions, reference is made to Klaaren's classification of the provisions either as 'primary remedy clauses' or as 'secondary remedy clauses'.<sup>12</sup> Some of the factors that have impacted on the approach of the courts in defining what is meant by 'appropriate, just and equitable relief' are briefly explored. Part two explores the approach taken in the jurisprudence of the courts in defining remedies for socio-economic rights violations. This section takes a largely chronological discussion of some of the major cases, showing that, at first, the Court adopted a largely deferential approach. This was so even in those cases where the Court deemed it necessary to grant a mandatory interdict. This period of judicial deference and reluctance to use the structural interdict is described as the 'pre-*Olivia* period', that is, before the approach of the Court in the case of *Occupiers of 15 Olivia Road v City of Johannesburg (Olivia case)*.<sup>13</sup>

Part three discuss the *Olivia* and post-*Olivia* approach, characterised by willingness to use the structural interdict and a new approach called 'meaningful engagement'. In the *Olivia* case, the Court ordered the respondents to engage the applicants for the purposes of finding a solution to the dispute that gave rise to the petition. The *Olivia* approach has since entrenched itself and has been used repeatedly, not only as a remedial measure but as a test for determining the constitutionality of the state's conduct, particularly in evictions cases. Thus, as seen in the case of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Joe Slovo case)*,<sup>14</sup> meaningful engagement has become a formidable tool for the poor even in those cases where the application is lost, yet engagement makes it possible to win the battle. It is argued that the *Olivia* approach of meaningful engagement comes as a response to the deficit of democracy created by local governments failing to involve and consult communities on decisions that have implications for access to socio-economic goods and services. The *Olivia* approach, as seen in the *Joe Slovo* case, is also important to the extent that it heralds a willingness by the Court to order the provision of concrete goods and services. This has been done in a manner reminiscent of the minimum core obligations approach.

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<sup>12</sup>Klaaren 'Judicial remedies' in Chaskalson *et al Constitutional law in South Africa* (1999) 9-i.

<sup>13</sup>2008 5 BCLR 475.

<sup>14</sup>2009 9 BCLR 847.

## 2 The Court's constitutional remedial mandate

It is important to begin any discussion of constitutional remedies with an understanding of the constitutional provisions that define the mandate of the courts to grant relief for the violation of constitutional obligations. In this regard, to identify the relevant provisions of the South African Constitution, one could borrow Klaaren's classification defining the provisions as either 'primary remedy clauses' or as 'secondary remedy clauses'.<sup>15</sup> According to Klaaren, the secondary clauses serve both to reserve part of the remedial powers granted by the primary clauses to the courts and to grant the courts the discretion to implement that relief. Based on this categorisation, Klaaren identifies sections 2, 7(2) and 38 of the Constitution as the primary clauses. Section 2 proclaims the Constitution as the primary law and invalidates any law or conduct that is inconsistent with it. On its part, section 7(2), which Klaaren refers to as 'a significant innovation in recognising the importance of non-judicial remedies'<sup>16</sup> requires the state to respect, protect, promote and fulfill the rights in the Bill of Rights. Section 38 defines the categories of persons with standing to enforce the rights in the Bill of Rights and empowers the courts upon being approached to grant appropriate relief including a declaration of rights.

Klaaren's secondary remedy clause is section 172(1), which requires courts when deciding constitutional matters to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of their inconsistency. This is in addition to making any order that is just and equitable, including: (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions to allow the competent authority to correct the defect.

An aggregation of the primary and secondary clauses places a constitutional imperative on the courts to grant 'appropriate, just and equitable' relief. The question which then follows is: what amounts to appropriate, just and equitable relief? It is fourteen years since the Constitutional Court's decision in *Fose v Minister of Safety and Security*<sup>17</sup> and this decision continues to give substance to what appropriate, just and equitable relief means. The Court held that appropriate relief will in essence be relief required to protect and enforce the Constitution. According to the Court, depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected. The Court adds that, if it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these

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<sup>15</sup>Klaaren (n 12) 9-1.

<sup>16</sup>*Id* 9-2.

<sup>17</sup>*Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC).

all-important rights.<sup>18</sup> This holding is important to the extent that it enumerates the nature of the constitutional mandate of the courts to enforce the provisions of the Constitution. The holding, as concise as it may be, is enough to make the point that the courts have a 'blank cheque' when it comes to fashioning remedies, and to such an extent that 'they may even fashion new remedies'.

What is lacking in the jurisprudence of the courts though is an elaborate and explicit discussion of the approach to the issue of remedies.<sup>19</sup> With respect to the structural interdict, the Constitutional Court has been ambivalent in determining the circumstances under which this form of relief would be considered appropriate. This is despite the fact that the Court has granted the relief in some cases. The Court has not laid down any principles and norms to guide the application of this form of relief.<sup>20</sup> As far back as 1999, one commentator observed that '[r]ather than setting out a precise method and clearly distinguishing between various approaches, courts ... have been and are likely to continue to engage in a case-by-case inquiry in appropriate relief in the circumstances'.<sup>21</sup> In my opinion, however, this does not absolve the courts from adopting principled positions that can still be flexibly applied on a case-by-case basis.

Nonetheless, an analysis of the jurisprudence of the courts discloses some factors that have implicitly influenced their various approaches adopted thus far. Elsewhere, I have analysed and given meaning to the phrase 'appropriate, just and equitable relief', arguing that among others, a court's definition of what amounts to an appropriate, just and equitable remedy depends on the form of justice toward which a court is inclined.<sup>22</sup> The conclusion is based on a thesis which classifies justice either as based on an ethos of corrective justice or on an ethos of distributive justice. The notion of corrective justice, as supported by the philosophy of libertarianism, glorifies the autonomy of an individual entitled to protection even when this is at the expense of the welfare of society as a whole.<sup>23</sup> Litigation based on this philosophy is aimed at restoring the individual to the position he or she was in before a wrong was committed against him or her. In contrast, the notion of distributive justice, supported by the philosophy of utilitarianism, disputes a position that an individual is an end in him/herself. In this context, litigation must be pursued and concluded with the interest of society as a whole in mind.

It is on the basis of the notion of distributive justice that the courts have given meaning to their constitutional imperative to grant appropriate, just and equitable

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<sup>18</sup>Fose para 19.

<sup>19</sup>Klaaren (n 12 above) 9-16A

<sup>20</sup>Mbazira 'From ambivalence to certainty: Norms and principles for the structural interdict in socio-economic rights litigation in South Africa' (2008) 24 *SAJHR* 2.

<sup>21</sup>As above.

<sup>22</sup>Mbazira "Appropriate, just and equitable relief" in socio-economic rights litigation: The tension between corrective and distributive forms of justice' (2008) 12 *SALJ* 71 at 89.

<sup>23</sup>As above 72.

relief. In *S v Bhulwana*,<sup>24</sup> the Constitutional Court held that litigants before the court should not be singled out for the grant of relief, but relief should, taking into account the obvious limitations of litigation, as far as possible, be afforded to all people who are in the same position as the litigants.<sup>25</sup> It is therefore not by accident that until recently, remedies in socio-economic rights litigation have not immediately resulted in goods and services for individual litigants. In those cases where litigants have obtained individual goods and services, generally, this has not directly resulted from court interdicts but rather from settlements between the parties.

It is against the above contextual background that the remedies which the courts, and particularly the Constitutional Court, have thus far awarded in socio-economic rights litigation should be analysed. In my opinion, although it may be a bit early to classify the jurisprudence of the Court in terms of approaches to remedies, it is true that the *Olivia* case heralds a new era as evidenced by the readiness to give structural orders. This is in addition to the new approach of ordering meaningful engagement between litigants and respondent authorities. For this reason, I use the classification of 'pre-*Olivia*' and 'post-*Olivia*' to analyse the approach to remedies thus far.

The pre-*Olivia* era was characterised by a cautious approach, guided by the need to adhere to the doctrine of separation of powers. In contrast, although still cautious, the post-*Olivia* era has witnessed structural interdicts made to secure compliance in some cases. This has been coupled with negotiated settlements resulting in immediate relief in terms of substantive goods and services to desperate litigants. However, as indicated above, in spite of this, the Court has not adopted a principled approach to the grant of structural interdicts.

### 3 The pre-*Olivia* era

The pre-*Olivia* era started on 27 November 1997 when the Court handed down judgment in the case of *Soobramoney v Minister of Health, (KwaZulu-Natal)*.<sup>26</sup> The *Soobramoney* case was followed by judgment in the *Grootboom* case which set the stage for a number of other judgments related to socio-economic rights, including, among others, *Minister of Health v Treatment Action Campaign (TAC case)*,<sup>27</sup> *Modderklip Boerdery (Pty) Ltd v President of RSA*,<sup>28</sup> and *Khosa v Minister of Social*

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<sup>24</sup>1996 1 SA 388 (CC).

<sup>25</sup>Paragraph 32. I have argued that it is on the basis of this that the Court in *Dikoko v Mokhatla*, 2006 6 SA 235 (CC), set aside an excessive award of damages in a defamation case on the ground that the award of excessive damages would have implications for freedom of expression which is the lifeblood of a democratic society (paras 54 and 92). In *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 2 SA 359 (CC), the Court rejected punitive damages as merely bringing a windfall to a single individual while similarly situated victims would not be entitled to a similar award (para 71).

<sup>26</sup>1998 1 SA 765 (CC).

<sup>27</sup>See (n 3).

<sup>28</sup>2005 8 BCLR 786 (CC).

*Development*.<sup>29</sup> An analysis of these judgments reveals that the Court was struggling to find its feet as an organ of the state in the new constitutional dispensation *vis-a-vis* the other organs of state. The Court quickly realised that it has the unenviable task of maintaining a 'delicate balance' between its powers and those of the other organs of state.<sup>30</sup> In this process, the Court opted for judicial deference and restraint not only in defining the substance of constitutional rights, but in determining the remedies that should follow their infringement.

Hence, in *Soobramoney*, the Constitutional Court reached the conclusion that '[a] court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters'.<sup>31</sup> In remedial terms, the Court chose what have been described as 'weak remedies'.<sup>32</sup> Remedies would not be 'personal and present'.<sup>33</sup> Tushnet has described weak remedies as including declarations and orders that require the state to craft programmes that hold out some promise of eliminating the violation, and once this is done the court steps back.<sup>34</sup> Another example given is the encouragement of negotiations among affected parties over the contours of a detailed plan.<sup>35</sup>

The following elaboration will, however, show that the Court did not exercise the full breadth of weak remedies described by Tushnet. In the *TAC* case the Court handed down a mandatory interdict, which when tested against Tushnet's characterisation does not qualify as 'a strong remedy'.

The Court's commitment to weak remedies is evidenced by its approach in the *Grootboom* case. This case started in the High Court with the decision of Judge Dennis Davis in *Grootboom v Oostenberg Municipality*.<sup>36</sup> The order made by Judge Davis, although crafted as a proposal for a declaratory order, was powerful enough to have the command of a mandatory interdict. Basing the order on section 28 of the Constitution, the Court declared that 'the applicant children are entitled to be provided with shelter by the appropriate organ or department' and that 'the applicant parents are entitled to be accommodated with their children in the afore-going shelter'. What made this declaration so powerful, and what transformed it into a mandatory interdict, was the retention of jurisdiction and the court's direction that respondents, within a period of three months, must present a report under oath as to the implementation of the order.

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<sup>29</sup>2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC).

<sup>30</sup>See Klaaren (ed) *A delicate balance: The place of the judiciary in constitutional democracy* (2006); Lenta 'Judicial restraint and overreach' (2004) 20 *South African Journal on Human Rights* 544; Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *South African Journal on Human Rights* 301.

<sup>31</sup>Paragraph 29 (my emphasis).

<sup>32</sup>Tushnet 'Social welfare rights and the forms of judicial review' (2004) 82 *Texas LR* 1895.

<sup>33</sup>*Id* 1909.

<sup>34</sup>*Id* 1910.

<sup>35</sup>*Ibid*.

<sup>36</sup>2000 3 BCLR 277 (C).

For one to appreciate the power of Judge Davis's order, it is important to understand the nature of a declaratory order and the principles which govern its applications. One could describe a declaratory order as a non-intrusive remedy used by the courts to pronounce on legal rights and their infringement.<sup>37</sup> In effect, this enables a court to declare the law while leaving it to the other organs to decide how the law as declared should be observed.<sup>38</sup> In my opinion, however, once accompanied by an order to report back to the court, although the respondent seemingly still has discretion, this discretion is greatly depreciated. This is because at the report back session the court if not satisfied with the approach of the respondent could order an alternative approach, which could then become an interdict.

In setting aside the decision of the High Court as regards section 28, the Constitutional Court did not comment on the structural order made by the High Court. Basing its decision on the finding that the state had violated section 26 by not having a reasonable programme in place, the Court declared that section 26(2) required the state to devise and implement within its available resources a comprehensive and coordinated programme to realise the right of access to adequate housing. The Court then enumerated the contents of such a programme.<sup>39</sup> In conclusion, the Court ended its order with a declaration that the housing programme in the Cape Metropolitan Council fell short of the requirements of a reasonable programme inasmuch as it did not make reasonable provision within its available resources for people with no access to land, no roof over their heads and who were living in intolerable conditions or crisis situations.<sup>40</sup>

In the *TAC* case the Court order started with a declaration that the government policy of reducing mother-to-child transmission of HIV fell short of the requirements of a reasonable programme. The declaration was followed by a mandatory order requiring the state, without delay, to do a number of things that would remove restrictions on access to nevirapine. This included facilitating the use of nevirapine, training counsellors on its use and extending counselling and testing facilities to all public hospitals.<sup>41</sup> The order was, however, in a manner reflecting judicial deference immediately followed by this statement:

The orders made in paragraph 3 do not preclude government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission of HIV.<sup>42</sup>

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<sup>37</sup>Mbazira *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (2009) 156.

<sup>38</sup>*Rail Commuters* case para 107.

<sup>39</sup>See para 99.

<sup>40</sup>Paragraph 99(2)(c).

<sup>41</sup>Paragraph 135(3).

<sup>42</sup>Paragraph 135(4).

It is the above deference and the failure to make a supervisory order which, when one follows Tushnet's characterisation, disqualifies the *TAC* order as a strong remedy. Tushnet defines strong remedies as mandatory injunctions that spell out in detail what government officials are to do by identifying goals, the achievement of which can be measured easily, for instance, through numerical measurements.<sup>43</sup> Tushnet adds that such injunctions also set specific deadlines for the accomplishment of the set goals and the court and state officials interact closely.<sup>44</sup>

As is clear from the *TAC* judgment, a request for a supervisory order was dismissed by the Court on the ground that 'the government has always respected and executed orders of this Court' and that there was no 'reason to believe that it will not do so'.<sup>45</sup> This conclusion was motivated by the evidence that emerged during the hearing that the government had made substantial funds available for the treatment of HIV, including the reduction of mother-to-child transmission.<sup>46</sup> In my opinion, this evidence blinded the Court to the high level of recalcitrance demonstrated by the government during the hearing, which included a declaration by the Minister of Health that government would not respect the judgment of the Court.<sup>47</sup> This alone would have justified making a supervisory order. The Court has also been castigated for not realising the severe consequences of non-compliance with the order, namely, continued loss of life.<sup>48</sup>

The failure to decree a strong remedy and to supervise its implementation in the *TAC* case could, to an extent, as limited as this may be, explain the gaps in programmes on HIV/AIDS in general and the prevention of mother-to-child transmission (PMCT) in particular. As a matter of fact, initial evidence suggested that the government took the implementation of the order seriously, especially after being threatened with contempt of court proceedings by the Treatment Action Campaign. More recent evidence, however, shows that full implementation of the PMCT programme is yet to be achieved. Thus: 'the programs are not reaching many of the women who need them, apparently in significant part because women either are not being offered HIV tests or because they are not agreeing to be tested'.<sup>49</sup> It has been explained that women may be refusing to be tested because of the quality of counselling offered.<sup>50</sup>

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<sup>43</sup>Tushnet (n 32), 1911-1912.

<sup>44</sup>As above, see also 'Enforcing socio-economic rights: Lessons from South Africa' (2005) 3 *ESR Review* 2.

<sup>45</sup>Paragraph 129.

<sup>46</sup>See para 120 of the judgment and Mbazira (n 36) 209. See also Kapczynski and Burger 'The story of the *TAC* case: The potential and limits of socio-economic rights litigation in South Africa' in Hurwitz and Satterthwaite (eds) *Human rights advocacy stories* (2008) 20.

<sup>47</sup>Mbazira (n 37).

<sup>48</sup>Budlender 'Justiciability of socio-economic rights: Some South African experiences' in Ghai and Cottrell (eds) *Economic, social and cultural rights* (2004) 358.

<sup>49</sup>Kapczynski and Burger (n 46) 24.

<sup>50</sup>*Ibid.*

### 3.1 The democracy deficit and recalcitrance

One of the factors that negatively impacted on the effective implementation of court orders during the pre-*Olivia* era was the lack of transparency on the part of government with regard to the measures it had adopted to give effect to the directions of the court. It is important to note that in many cases this problem begins long before litigation takes place, and could be a major contributing factor to the dispute that culminates in litigation. Indeed, discussions on the absence of community participation in service delivery decision-making processes are gaining ground. From the perspective of community development academics and practitioners, reference is made to the concept of participatory development, which is said to have gained prominence since the 1980s.<sup>51</sup> This concept was promoted as part of the neo-liberal agenda, which 'envisaged a diminution of the state and strengthening of the role of civil society [and] seen as a means to empower ordinary citizens, and the poor in particular, and to promote more sustainable forms of development'.<sup>52</sup> To achieve this, it is envisioned, requires vigorous participation. Participation is the involvement of local populations in the creation, content and conduct of a programme or policy designed to change their lives: 'Participation requires recognition and use of local capacities and avoids imposition of priorities from the outside'.<sup>53</sup>

In South Africa, participation has been looked at as a tool to respond to the democracy deficit by creating what has been described as new democratic spaces. The new spaces 'are opportunities created for civil society stakeholders to engage in the policy-making process in ways that seek to overcome obstacles to participation by marginalised groups'.<sup>54</sup> The democratic deficit in meaningful participation is caused by the failure to link citizens with the institutions and processes of the state, and impacts on the quality and vibrancy of the democracy and results in reduced accountability.<sup>55</sup> This deficit could explain the wave of public service delivery protests that have rocked the country since 2004. The demonstrations became so widespread that some people believed they had the potential to turn into a revolution with destabilising effects.<sup>56</sup> Similarly, it was

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<sup>51</sup>Tapscott and Thompson 'Participatory development in South Africa: Between rhetoric and practice' a paper presented to the 14<sup>th</sup> *International Research Society for Public Management Conference, Berne Switzerland, 6-8 April 2010* at 1.

<sup>52</sup>*Id* 1-2.

<sup>53</sup>Jennings *Participatory development as new paradigm: The transition of development professionalism* a paper prepared for the 'Community Based Reintegration and Rehabilitation in Post-Conflict Settings' Conference, Washington DC October 2000, as quoted by Tapscott and Thompson 2

<sup>54</sup>Bucus and Hicks 'Crafting new democratic spaces: Participatory policy making in KwaZulu-Natal, South Africa' in Pretorius (ed) *African politics: Beyond the third wave of democratisation* (2008) 150.

<sup>55</sup>*Id* 152.

<sup>56</sup>See Hough 'Violent protest at local government level in South Africa: Revolutionary potential?' (2008) 36 *Scientia Militaria: SA Journal of Military Studies* 1-13.

thought that the protests had the potential of culminating in acts of terrorism.<sup>57</sup>

According to the Institute for Democracy in Africa (IDASA), the protestors have explained that they took to the streets because there was no way for them to get to speak to government, let alone to get government to listen to them.<sup>58</sup> Indeed, it is reported that the Parliament Portfolio Committee on Co-operative Governance and Traditional Affairs in a 2009 survey discovered the problems of service delivery to include: breakdown of local democracy; poor communication and relationships of accountability with communities; weak community participation; and community alienation caused by not giving enough attention to 'bottom up' planning and consultative processes.<sup>59</sup>

The democracy deficit described above was also reflected in the implementation of court orders arising from socio-economic rights litigation. As a matter of fact, the implementation of court orders arising from socio-economic rights cases is a complex affair. Thus, although the order in the TAC case appears uncomplicated and could be summed up as simply requiring the state to begin providing nevirapine at public facilities, when internalised, the order required the government to do many things. The government had to go back to the drawing board and craft a plan for the rolling out of nevirapine and the accompanying counselling services to all public hospitals. In such a situation, it becomes inevitable that the government consults and works with a number of stakeholders, including the petitioners, to craft strategies for the effective implementation of the court order. Unfortunately, this was not so in the TAC case. Likewise, absence of transparency and information on the relocation process explains the inordinate delay experienced in the implementation of the order arising from the *Modderklip* case.<sup>60</sup> Evidence suggests that the state withheld vital information on the process and modalities of the relocation, including the timing of the relocation and the location of the alternative land.<sup>61</sup>

Indeed, during the period referred to above, the courts decided a number of cases revolving around the issue of whether or not the authorities had consulted with the affected communities and other stakeholders before making certain decisions. In the case of *Doctors for Life International v Speaker of the National*

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<sup>57</sup>*Id* 8.

<sup>58</sup>IDASA *The State of local government and service delivery in South Africa: Issues, challenges and solutions* submission made at public hearings of the Parliament Portfolio Committee on Co-operative Governance and Traditional Affairs 2010-01-22.

<sup>59</sup>Chenwi and Tissington *Engaging meaningfully with government on socio-economic rights: A focus on the right to housing* (March 2010) Socio-Economic Rights Project, Community Law Centre, University of the Western Cape 7.

<sup>60</sup>*President of the Republic of South Africa v Modderklip Boedery (Pty) Ltd* 2005 8 BCLR 786 (CC).

<sup>61</sup>Mbazira *You are the 'weakest link' in realising socio-economic rights: Goodbye. Strategies for effective implementation of court orders in South Africa* (2008) Socio-Economic Rights Project, Community Law Centre, Research Series 3 at 25.

*Assembly*,<sup>62</sup> for instance, the question concerned the nature and the scope of the constitutional obligation of a legislative organ of the state to facilitate public involvement in its legislative processes. The applicant's complaint was that during the legislative process leading to the enactment of certain statutes, the National Council of Provinces and the provincial legislature did not comply with their constitutional obligations to facilitate public involvement in their legislative processes.<sup>63</sup> Justice Ngcobo held that the right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments and consists of at least two elements: a general right to take part in the conduct of public affairs and a more specific right to vote and/or to be elected.<sup>64</sup> His Lordship added that the right imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.<sup>65</sup> The Court associated this right to the constitutional values and the principle of participatory democracy.<sup>66</sup> According to the Court:

The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.<sup>67</sup>

In *Matatiele Municipality v President of the Republic of South Africa*<sup>68</sup> the applicants contested constitutional amendments and municipal laws that had the effect of redefining provincial boundaries on the ground that concerned communities had not been involved in the process. Based on the decision in *Doctors for Life*, the Court held that the Constitution calls for open and transparent government and requires legislative organs to facilitate public participation in the making of laws by all legislative organs of the State. The Court held that failure to ensure public involvement made the amendments unconstitutional and therefore invalid

The *Matatiele* case should be contrasted with *Merafong Demarcation Forum v President of the Republic of South Africa*.<sup>69</sup> While in the *Matatiele* case there was no evidence of public hearings, in the *Merafong* case, public hearings had been held but the petitioners argued that the hearings were meaningless because the final outcome was a 'done deal'.<sup>70</sup> The Court held that public involvement

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<sup>62</sup>BCLR 1399 (CC); 2006 6 SA 416 (CC) (2006-08-17).

<sup>63</sup>Paragraph 4.

<sup>64</sup>Paragraph 90.

<sup>65</sup>Paragraph 91.

<sup>66</sup>See paras 111-116.

<sup>67</sup>Paragraph 105.

<sup>68</sup>2007 1 BCLR 47 (CC) (2006-08-18).

<sup>69</sup>2008 5 SA 171 (CC); 2008 10 BCLR 968 (CC).

<sup>70</sup>See case at para 43.

cannot be meaningful in the absence of a willingness to consider all views expressed by the public.

The pre-*Olivia* era was also characterised by failure on the part of government to implement court orders, in some cases characterised by an open and blatant disregard. The dumbfounding reaction of the Mayor of Johannesburg, Amos Masondo, to the judgment of the High Court in *Mazibuko v City of Johannesburg*<sup>71</sup> became an epitome of the widespread problem. When the decision went against the City, the Mayor publicly attacked the judges as trying to be above the law and to take over the roles of other organs. The Mayor advised that if judges want to run the country they should join political parties and stand for presidency.<sup>72</sup>

The Eastern Cape Province for its part became the 'epicentre of resistance' to court orders. Relevant court orders in this Province arose out of the mismanagement and maladministration of the social grant system in the Province. Many qualified persons had missed out on social grants because of a defective system of processing new applications, or because their names had been deleted from lists of beneficiaries without due process of law. As a result, hundreds of court orders were made against the MEC, Department of Social Development; in many cases the Department was required to process the applications, reinstate the payment of those wrongly deleted and in some cases make back pay to the date when the application would have reasonably been accepted or to the date when deletion was made.<sup>73</sup> In many of the cases the orders were disobeyed, and the payments were not made as directed.

## 4 *Olivia* and post-*Olivia* era

### 4.1 *The Olivia case*

The approach of the Court in the *Olivia* case should be understood against the context illustrated above. Like the cases described above, the *Olivia* case arose amidst social service protests and the rise of state recalcitrance when faced with court orders. I have discussed this case in detail elsewhere.<sup>74</sup> The case was instituted by over 300 residents of two derelict buildings from which the City of Johannesburg was scheduled to evict them. The City was acting in pursuit of a Regeneration Programme intended to revamp the City by, among other things, rehabilitating all dilapidated buildings. The Petitioners began their legal fight in the

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<sup>71</sup>2010 3 BCLR 239 (CC).

<sup>72</sup>See Mbazira (n 60) 31.

<sup>73</sup>See *Vumazonke v MEC Department of Social Development, Eastern Cape* 2005 6 SA 299 (SE); *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 BCLR 728 (E); and *Ngxuza v Secretary, Department of Welfare, 414 Eastern Cape Provincial Government* 2000 BCLR 1322 (E)

<sup>74</sup>Mbazira (n 61) 18-20.

High Court, where they argued that they could not be evicted without being provided with alternative accommodation.<sup>75</sup> In agreement, the Court found that the City's programme fell short of the requirement to provide suitable relief for people in the City who were in a crisis or in desperate need of housing. As a remedial measure, the Court interdicted the eviction and ordered the City to devise and implement, within its available resources, a comprehensive and coordinated programme to realise the right to adequate housing progressively for those in desperate need of accommodation.

The City was not satisfied with the above ruling and appealed to the Supreme Court of Appeal (SCA). The SCA, in agreement with the City, found the buildings unsafe and authorised the eviction of the occupiers.<sup>76</sup> The Court gave the occupiers one month to move out or risk being evicted. However, somewhat in agreement with the High Court, the Court ordered the City to provide alternative temporary shelter to those in desperate need of housing. The occupiers appealed to the Constitutional Court against the SCA's decision.

During the course of the hearing in the Constitutional Court, the Court ordered the parties 'to engage with each other meaningfully ... in an effort to resolve the differences and difficulties aired in this application'. They were also ordered to file affidavits on a stipulated date to report on the results of the engagement between them.<sup>77</sup> By this, the remedy of 'meaningful engagement' was born.<sup>78</sup> Besides being used as a remedy, the Court has in subsequent cases used meaningful engagement as a litmus test to determine whether state conduct, especially in eviction cases, is reasonable. The approach is likely to be extended to other areas of law in the same way as it has developed from the legislative processes in the cases described above. In my opinion, this approach was part of a cumulative process that began with the *Doctors for Life, Matatiele and Merfong* cases in response to the democracy deficit described. The response was only now being extended to socio-economic rights litigation. Indeed, the Court justified the order based on the fact that, as a public institution, the City had an obligation to engage vulnerable people before making decisions that adversely affected them.<sup>79</sup>

Initially, all parties thought that the directive of engagement was meant by the Court to be interim relief, intended to protect the applicants as the Court prepared to rule on the bigger questions: whether the City had a plan that was consistent with the section 26 and *Grootboom* requirements.<sup>80</sup> Thus, the interim remedy was

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<sup>75</sup>See *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W); 2006 6 BCLR 728 (W).

<sup>76</sup>See *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA); 2007 6 BCLR 643 (SCA).

<sup>77</sup>Paragraph 5.

<sup>78</sup>See Royston and Tissington *Workshop report: Meaningful engagement report of a workshop* hosted by the Centre for Applied Legal Studies (CALs) 2009-07-27.

<sup>79</sup>Paragraph 16.

<sup>80</sup>Ray *Engagement's possibilities and limits as a socioeconomic rights remedy*, available at [http://works.bepress.com/cg/viewcontent.cg?article=1002gcontext=brian\\_ray\\_3](http://works.bepress.com/cg/viewcontent.cg?article=1002gcontext=brian_ray_3) (accessed 2010-11-20).

viewed as an 'interim structural interdict'.<sup>81</sup> However, although the Court avoided the bigger question, the interim remedy was very successful. After a few months, the parties reached a settlement. The City agreed to stop evictions and instead to make the buildings safer and more habitable. The City undertook to clean the buildings, provide sanitation services, make water accessible and ensure that the toilets were functional. Later, over 400 residents were moved to better permanent housing with running water, electricity and other sanitation facilities. All this was achieved without Court intervention. The significance of this lies in the fact that the implementation of the court orders could be achieved with minimal court intervention if they arose from negotiated settlements.<sup>82</sup>

Instead of dealing with the bigger question, the Court in its final judgment emphasised the importance of engagement. According to the Court, the state has a constitutional obligation to encourage the involvement of communities and community organisations in local government.<sup>83</sup> The Court also emphasised that engagement in this regard was not to be *ad hoc* but has to be built in all the processes of a programme.<sup>84</sup> To achieve this, local authorities required a cadre of sensitive workers skilled in engagement.<sup>85</sup> According to the Court, it was necessary for the authorities to maintain the records of the engagement process to enable the Court, if necessary, to review not only the results of the engagement but the process as well.<sup>86</sup>

#### 4.2 *Post-Olivia cases*

The success scored by the Court in using engagement in the *Olivia* case motivated the Court to push ahead with this approach and apply it in subsequent cases. Indeed, subsequent litigation shows that meaningful engagement has been received by litigants not only as a remedial measure, but more so as an independent ground upon which one can challenge government conduct, policy and legislation as unconstitutional. In socio-economic rights litigation, this raises questions about the relationship between 'meaningful engagement' and the 'reasonableness programme' approach as coined in the *Grootboom* case. In my opinion, although one can argue that meaningful engagement is one of the elements of a reasonable programme, it has come in handy as a supplementary approach to reasonableness. It appears to stand out distinctively and can be used without necessarily amalgamating it in the reasonableness review. In using meaningful engagement, the decision of a court does not revolve around whether

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<sup>81</sup>Mbazira (n 60) 19.

<sup>82</sup>See Ray (n 79) 8.

<sup>83</sup>Paragraph 16.

<sup>84</sup>As above.

<sup>85</sup>Paragraph 19.

<sup>86</sup>Paragraph 15.

the decision of the state is reasonable or even rational within the parameters of the reasonableness review. The question is rather whether the available evidence suggests that the community was reasonably engaged; forget that the ultimate decision reflects their desires.

In aggregate, the power of meaningful engagement when compared to reasonableness is threefold: first, rather than wait for a reasonable programme, which in most cases is devoid of providing individual goods and services, engagement can be used as an interim measure to ensure that the applicants get access to some material goods and services. Secondly, meaningful engagement can be used to come to the aid of poor people even in circumstances where they cannot prove that their rights have been violated. Lastly, meaningful engagement appears formidable only if used against the state in circumstances where the state is willing to follow through with the process in good faith. At the same time, the applicants as well must be prepared to make some concessions, where this is reasonable.

The first case to which the approach was extended after *Olivia* is *Mamba v Minister of Social Development*.<sup>87</sup> This case arose from unfortunate events that occurred in May 2008, involving violent attacks on Zimbabwe and other African migrants. As a response to the massive displacement of several migrants, provincial administrations set up temporal camps to provide relief and security to the migrants. Government intended these camps to be temporary and moved to close them as soon as calm returned. Several CSOs working on issues of migrants and refugees opposed the proposed closures, arguing that what was required was to find solutions to the underlying factors that had resulted in the violence. The authorities did not listen. Some provinces, including Gauteng, publicly set dates for the closure of the camps. To contest these moves, several organisations, led by the Consortium for Refugees and Migrants in South Africa (CoRMSA), petitioned but lost in the High Court.<sup>88</sup> The Petitioners then applied for direct access to the Constitutional Court, which was granted on 18 August 2008. On this day, the Court granted the Petitioners an interim order interdicting the closure of the camps. Almost in the same terms as *Olivia*, the Court directed the parties to 'engage with each other meaningfully and with all other stakeholders ... in order to resolve the differences and difficulties aired in the application'.<sup>89</sup> The parties were directed to report to the Court with the results of the engagement.

Unfortunately, the engagement directive in this case did not yield the same results as had been the case in the *Olivia* case. The Gauteng province interpreted the directive narrowly as requiring merely that it keeps the petitioners and stakeholders apprised of developments towards closure of the camps.<sup>90</sup> In spite

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<sup>87</sup>CCT 65/08 (2008).

<sup>88</sup>See *Mamba v Minister of Social Development* Case no 36573/08 [2008] ZAGPHC 255 (Pretoria High Court).

<sup>89</sup>Order at para 1.

<sup>90</sup>Ray (n 80) 9-10.

of a second order reinforcing the first directive, the Gauteng government persisted in its narrow understanding of the order and closed the camps. CoRMSA withdraw the case as moot.

The successful use of engagement in the *Olivia* case and its dismal failure in the *Mamba* case illustrates that when it comes to finding appropriate remedies, there is no 'one size fits all'. Every case arises from a specific context and circumstances, and raises its own peculiar issues. This makes it important for the Court to study the circumstances of each case carefully and avoid a casual transplant of a remedy from one case to another. Brian Ray has illustrated the circumstantial and contextual differences between *Olivia* and *Mamba*. Ray sees the impact of the *Olivia* context as having arisen from the decisions of the High Court and the SCA. The High Court had interdicted the eviction and although the SCA decision allowed the eviction to go ahead, it imposed some restrictions requiring the City to revise its original plan. According to Ray:

Once the case reached the Constitutional Court, the City was already well on its way to instituting a revised policy, and the engagement order gave the residents and the groups representing them sufficient leverage to force the City to take seriously their views on the policy.<sup>91</sup>

In addition to the above, these cases show that the success of engagement is very much dependent on the good will of the state and its willingness to resolve the dispute amicably. Among others, the response of the state in this regard depends on the political issues at stake. In the *Olivia* case, a careful political reading must have given the state indications of the political cost of not resolving the dispute. As illustrated above, the country had been engulfed in violent service delivery protests; state recalcitrance could have ignited protests of dangerous proportions across the country. Additionally, the Petitioners in the case were but a fraction of the persons similarly situated. In the circumstances, the City could not risk fomenting animosity with the Petitioners and a chain of protests. In the *Mamba* case, the constituency of immigrants was not as big as that of the service delivery protestors. They were in too vulnerable and weakened a state to organise any protests. Any protests organised by them would have met with resistance from the same xenophobic groups that were responsible for their dislocated fate in the first place, and it could have descended into a situation of 'us' (South Africans) against 'them' (foreigners). Additionally, with widespread frustrations with regard to service delivery for the citizens, the political authorities never felt themselves obliged to make provision for this group in a context where the authorities were still fighting uncontrolled influxes of desperate Zimbabweans at the borders. In the mind of the political authorities, the costs of disobeying the court could have been viewed as less than the costs of sending out a message that South Africa was obliged to provide for economic refugees. This is an undeniable political reality that existed.

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<sup>91</sup>Ray (n 80) 11.

Unlike the *Mamba* case, the *Joe Slovo* case presented favourable circumstances for the use of engagement. Like the *Olivia* case, the *Joe Slovo* case involved the eviction and relocation of hundreds of residents from an informal settlement which authorities intended to up-grade by building low cost houses. The residents resisted the relocation mainly on the ground that the proposed site for relocation was too far from the City of Cape Town where most of the residents worked. Yet there was no evidence that the applicants would be given priority once the low cost houses were completed.

Although the Constitutional Court upheld a High Court order allowing for the relocation, it staggered the exercise over a period of a couple of months. The Court was divided on whether the respondents had reasonably and meaningfully engaged the applicants during the planning and implementation of the low cost housing project.<sup>92</sup> In spite of this, the Court in its final order directed the applicants and respondents, through their respective representatives, to engage meaningfully with each other with a view to reaching agreement on some of the issues. This included the date upon which the relocation would commence and the timetable for the same.<sup>93</sup> In this regard, the Court gave indications on matters that the parties should discuss in the process of engagement:

- (a) the names, details and relevant personal circumstances of those who were to be affected by each relocation;
- (b) the exact time, manner and conditions under which the relocation of each affected household would be conducted;
- (c) the precise temporary residential accommodation units to be allocated to those persons being relocated, including the need for transport to be provided to those to be relocated;
- (d) the need for transport of the possessions of the residents being relocated; and
- (e) the prospect in due course of the allocation of permanent housing to those relocated to temporary residential accommodation units.

Justice Ngcobo viewed engagement as a key requirement of implementation of a programme. According to the Judge:

Individual engagement shows respect and care for the dignity of the individuals. It enables the government to understand the needs and concerns of individual households so that, where possible, it can take steps to meet their concerns.<sup>94</sup>

In a concise manner, the Judge developed the meaning of engagement as a remedy, stressing that the process does not require the parties to agree on every issue; that what is required is good faith and reasonableness on both sides and the willingness to listen and understand the concerns of the other side. According to the judge, the goal of meaningful engagement is to find a mutually

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<sup>92</sup>See judgments of Justices Yacoob and Moseneke, para 113-118 and 166-167 respectively.

<sup>93</sup>Paragraph 7(5).

<sup>94</sup>Paragraph 238.

acceptable solution to the difficult issues confronting the residents, the government and the quest to provide adequate housing.<sup>95</sup> The Judges also stressed the fact that the above goal 'can only be achieved if all sides approach the process in good faith and with a willingness to listen and, where possible, accommodate one another'.<sup>96</sup>

On 7 September 2010, the Constitutional Court made another order of engagement in *School Governing Body of Juma Masjid Primary School v AA Essay NO.*<sup>97</sup> This case arose from an order that had been granted by the High Court for the eviction of a school, namely, the Juma Masjid Primary School. The Juma Masjid Trust, which established the school over 80 years ago, was prompted to apply for an eviction order because of the failure of the Department of Education to pay the usual rentals and maintenance fees to the Trust. The eviction was resisted on the ground that it threatened the rights of the children involved to education. The provisional order required for negotiations to be conducted between the Department of Education, the Trust and the School Governing Body with a view to finding a solution. The options the Court suggested included the possibility of entering into a section 14 agreement as envisioned by the South African Schools Act 84 of 1996, which would regulate the lease of the premises to the Department. The Court ordered that if continued operation of the school on the premises in terms of the agreement fails, the MEC for Education must report on the steps taken to secure alternative placements of the children in accordance with their right to basic education.

#### 4.2.1 *Joe Slovo* – substantive goods and services?

As mentioned at the beginning of this paper, one of the criticisms that have been levied against the *Grootboom* approach is the failure of the remedies to guarantee successful litigants individual goods and services. Closely related to this is the Constitutional Court's rejection of the minimum obligations core approach.<sup>98</sup> Academic critiques have in the past demonstrated that this has arisen from the Court's failure to give the rights substantive content.<sup>99</sup> Bilchitz, one of the outspoken critics of the reasonableness review approach, had this to say:

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<sup>95</sup>Paragraph 244.

<sup>96</sup>As above.

<sup>97</sup>CCT 29/10.

<sup>98</sup>See Alston and Quinn 'The nature and scope of states parties obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 8 *HRQ* 156-229; Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 118 *SALJ* 484-501; and Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?' (2002) 6 *LDD* 159-191.

<sup>99</sup>See Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or "what are socio-economic rights for"' in Botha, Van der Walt and Van der Walt (eds) *Rights and democracy in a transformative constitution* (2003) 33-56.

[T]he right is not just a right to have the government act reasonably when it comes to socio-economic provision in society. Deference is not owed to the government in defining the content of the right to have access to adequate housing, but only in allowing it a 'margin of appreciation' to decide which *measures* it will adopt in fulfilling its obligations. In giving effect to the right, the *measures* the government adopts must be reasonable in relation to the object it seeks to achieve, which is to realize the right of access to adequate housing. This enquiry requires the specification of some content to the right, independent of the notion of reasonableness.<sup>100</sup>

As recently as 2009, the Court has been advised to make a conscious effort to develop the normative content of the various socio-economic rights described in sections 26(1) and 27(1).<sup>101</sup> According to Liebenberg, this task should be approached by considering the purpose and values which the right seeks to promote in light of their historical and current socio-economic content.

The approach in *Joe Slovo* indicates that the Court is beginning to respond to the above criticisms and suggestions. The Court, in ordering temporary residential accommodation, described in detail the form such accommodation should take. The Court's prescription can indeed pass as the minimum core content of alternative accommodation for persons facing eviction. According to the Court, such temporary residential accommodation units have to: be at least 24m<sup>2</sup> in extent; be serviced with tarred roads; be individually numbered for purposes of identification; have walls constructed with a substance called Nutec; have a galvanised iron roof; be supplied with electricity through a pre-paid electricity meter; be situated within reasonable proximity of a communal ablution facility; there must be reasonable provision (which may be communal) for toilet facilities with water-borne sewerage; and reasonable provision (which may be communal) for fresh water.<sup>102</sup> This elaboration contrasts sharply with other cases including *Grootboom* and *Modderklip* in which there is no indication regarding the quality of alternative accommodation. What is left is to see whether the courts are going to apply the above minimum standards to subsequent cases in which alternative accommodation is at stake. This is in addition to extending this approach to cases other than those involving housing.

## 5 Conclusion

For a democracy that is only 15 years old, South Africa has made a lot of progress in abandoning the practice of parliamentary supremacy and in its place entrenching constitutional review. The world over, the jurisprudence from the

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<sup>100</sup>Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 143.

<sup>101</sup>Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2009) 180.

<sup>102</sup>Paragraph 7 of judgment.

South African courts, particularly the Constitutional Court, has become a tool for public interest law scholars and litigators. The most extraordinary in the catalogue of cases has been those enforcing socio-economic rights. Perceptions regarding the justiciability of these rights have not been the same since the year 2000 when the Constitutional Court handed down the *Grootboom* judgment. The case has spurred academic research and debates of unimaginable proportions within the human rights community.

Outside the academic realm, however, questions have been asked regarding the potential of litigation to alleviate the plight of the poor. From an academic standpoint, the question has revolved around the potential of litigation as a tool for socio-economic transformation and has led to the emergence of the phenomenon of 'transformative constitutionalism'. In the foreword to Sandra Liebenberg's seminal book, *Socio-economic rights: Adjudication under a transformative constitution*, Karl Klare summarises the academic debate (or call it dilemma) in the following words:

South Africa's transformative constitutionalism is by now a diffuse mass of doctrinal experimentation, intellectual creativity, concrete problem-solving, ambiguity, uncertainty, false starts, and, frankly, more than a few hopes and prayers.

Klare's observation is more applicable to the Constitutional Court's approach to the subject of finding remedies for socio-economic rights violations than to other areas of constitutional litigation. The Court has, in the past, tended more to select 'weak' remedies which do not result in substantive goods and services for the poor. In spite of this, to borrow a phrase from Klare, 'intellectual creativity' on the bench has resulted in such creative and 'extra-ordinary' remedies as meaningful engagement. This has, albeit on a limited scale, not extended to persons similarly situated to the litigants, or resulted in the enjoyment of substantive goods and services as the 'fruits' of litigation. The Court has infused the structural interdict into meaningful engagement by requiring parties to report their negotiations to the Court. This approach has dissipated criticism regarding the Constitutional Court's reluctance to use the structural interdict in socio-economic rights cases. What now remains to be seen is how far the Court will go, to borrow a phrase from Klare, with this 'doctrinal experimentation'.