

Socio-economic Gains and Losses: The South African Constitutional Court and Social Change*

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Abstract

The inclusion of socio-economic rights in South Africa's transformative Constitution, it was felt, would make the Constitution relevant to the majority of South Africans, in particular the previously oppressed. Accordingly, the courts, the Constitutional Court in particular, have sought to translate these rights into concrete benefits that make a real difference for those for whom poverty is a lived reality, demonstrating that they are willing to enforce not just the negative prohibitions but also the positive duties imposed by socio-economic rights. Notwithstanding this, the extent to which the decisions of the Constitutional Court contribute to social change has been limited by a number of factors including inadequate implementation of court orders. This article illustrates that, though significant progress has been made, much still needs to be done to promote socio-economic transformation in the interests of the poor and disadvantaged.

Keywords

Social transformation, social change, socio-economic rights, health care, housing and evictions, social assistance, water, reasonableness review, court decisions, poverty

Introduction

The South African Constitution of 1996 (the Constitution) is characterised by its extensive commitment to socio-economic rights. The first sign of progress with

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respect to strengthening the legal status of socio-economic rights in South Africa was in the area of justiciability. Prior to recognising these rights as justiciable, objections were raised regarding their inclusion in a bill of rights. The objectors did not consider socio-economic rights as universally-accepted fundamental rights to be included in a bill of rights, and felt that their inclusion was inconsistent with a doctrine of separation of powers (Davis, 1992; 2004). The justiciability debate resulted in an argument before the Constitutional Court, in the process of certification of the 1993 Interim Constitution of South Africa. The Court rejected the objections and was of the view that courts can, and at least sometimes will, provide a remedy for aggrieved individuals claiming a violation of socio-economic rights (Ex-parte chairperson of the constitutional assembly: in re-certification of the Constitution of the Republic of South Africa 1996 (First certification judgement) 1996 (4) SA 744 (CC) paras 77–78). The Court's judgement opened the door to the inclusion of a range of socio-economic rights in the 1996 Constitution and subsequent judicial enforcement of these rights. These include environmental rights (Section 24), land/property rights (Section 25), right to housing (Section 26), rights to health care, food, water, and social security and assistance (Section 27), socio-economic rights of children—to basic nutrition, shelter, basic health care services and social services (Section 28), right to education (Section 29) and socio-economic rights of detained persons—to adequate accommodation, nutrition, reading material and medical treatment at state expense (Section 35[2][e]).

It was felt that including socio-economic rights in the Constitution would make the Constitution relevant to the majority of South Africans, in particular the previously oppressed (Goldstone, 2006: 4). It was also in recognition of the fact that a lack of access to socio-economic resources and services constitutes a major impediment to people's ability to participate as equals in a democracy (Liebenberg, 2007: 3). South Africa went further than most countries by incorporating the socio-economic rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR) along with other rights, such as access to water and to a clean and healthy environment, not explicitly stated in the ICESCR.

However, over a decade into democracy, though some progress has been made in enforcing these rights (Ndletyana et al., 2008) socio-economic concerns still plague the South African society. The extent of poverty in the country is evidenced by, among other things, shacks, homelessness, unemployment and lack of access to basic services. HIV/AIDS, food and housing insecurity are still major problems. A majority of the population continue to be deprived of access to basic services and their participation in decision-making processes of government and service delivery projects is limited.

This article therefore looks at the South African Constitutional Court's role in social change. 'Social change' and 'social transformation' are used in this article interchangeably. The article considers how the Court has endeavoured to

translate socio-economic rights into concrete benefits that make a real difference for those for whom poverty is a lived reality and the impact of its decisions on society. The focus on the Constitutional Court does not, however, overlook or rule out the ability of other courts to bring about social change (see, for example, *Mazibuko v City of Johannesburg* 2008 (4) SA 471 (W), a case in which a lower court (the High Court) adopted a progressive approach to the realisation of the rights of the poor).

The Constitution as an Instrument of Social Change

The Constitution has been described by many as a transformative Constitution. It is committed to transforming the South African society from one based on economic deprivation to one based on equal distribution of resources (Klare, 1998). The aim of the Constitution is to advance the socio-economic needs of the poor in order to uplift their human dignity, thus facilitating social change (Liebenberg, 2002: 160). The concept 'transformative Constitution', as observed by Liebenberg, implies two things: on the one hand, it means an undoing of the injustices of colonial and apartheid rule in the political, social, economic and cultural realms; and on the other hand, it means the building of a new and better society, founded on democratic values, social justice and fundamental human rights. Liebenberg (2007: 3) adds that fundamental transformation 'requires exposing all sources of public and private power to critical scrutiny, and developing new mechanisms of political and legal accountability'.

Giving effect to the transformative goals of the Constitution is an on-going process and democratic participation is crucial in this process. As Justice Langa observes,

Transformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional Constitution. This is the perspective that sees the Constitution as not transformative because of its peculiar historical position or its particular socio-economic goals but because it envisions a society that will always be defined by transformation. (Langa, 2006: 354)

Similarly, the Constitutional Court has seen participatory democracy to be of 'special importance to those who are relatively disempowered in a country such as [South Africa] where great disparity of wealth and influence exist' (*Doctors for Life International v The Speaker of the National Assembly and Others* 2006 [12] BCLR 1399 [CC], para 108).

Courts and Social Change

Courts are relevant to social change, as their decisions have an impact on society. A court's transformative performance, as observed by Gloppen (2006: 38), is 'their contribution to the altering of structured inequalities and power relations'. Social transformation has been defined as 'the altering of structured inequalities and power relations in society that reduce the weight of morally irrelevant circumstances such as socio-economic status/class, gender, race, religion or social orientation' (Domingo, 2006: 2; Gloppen, 2006: 37–38). Put differently, do courts serve as an institutional voice for the poor and contribute to social inclusion of the disadvantaged and marginalised groups? (Gloppen, 2006: 38). Writing with regard to the South African context, Budlender (2007) observes that courts have an important role to play in achieving the transformative goals of the Constitution.

Courts can contribute to social change directly or indirectly. Directly by (a) providing a space where the concerns of marginalised groups can be raised as legal claims and providing legal redress in ways that have implications for law, policy and administrative action; and (b) protecting existing pro-poor institutional arrangements and reinforcing pro-poor state policies. Indirectly by (a) enabling marginalised groups to effectively fight for social transformation in other arenas through securing their rights of political participation and to information; and (b) passively serving as a platform where claims can be articulated. For example, as a central point for mobilisation and publicity that may result in important political effects even in the absence of the judgement (Gloppen, 2006: 38).

Litigation is often pursued as an important strategy to bring about social change, especially regarding inequalities and access to services by the poor. Litigation can result in policy formulation or reformulation, lead to political mobilisation and achieve legal enforcement of legal standards (Mbazira, 2008: 5–6). It may, however, fail to drive socio-economic transformation as rapidly as expected (Mbazira, 2008: 5).

A number of variables in the litigation process impact on the court's role in social transformation. Differences in courts' transformation performance can be explained in terms of variations at the four stages of litigation, identified by Gloppen (2006: 36–37, 43), namely: (a) voice—the ability of marginalised groups to effectively articulate their demands through legal action; (b) responsiveness—the willingness of the courts to respond to the concerns of the marginalised; (c) capability—the judge's ability to give legal effect to socio-economic rights in ways that affect the marginalised groups; and (d) compliance—the extent to which judicial decisions are politically authoritative and whether political branches comply with them and implement and reflect them in legislation and policies.

Hence, litigation can either lead to improvements, limited or no improvements in the lives of the poor. Accordingly, in relation to the South African context, Mbazira (2007: 5) has observed that though the realisation of socio-economic rights means amelioration of the conditions of the poor and the beginning of a generation that is free from socio-economic need, this is not always the case. Due

to the normative construction of socio-economic rights or the weakness of the remedies ordered, 'court victories may either be followed by very minimal improvements or no improvements at all'. Budlender (2007: 9) also identifies (a) the difficulties in finding appropriate remedies for breaches of socio-economic rights; and (b) the tendency to view these rights as exotic and fundamentally different from civil and political rights, as obstacles to the courts' ability to effectively achieve the transformative potential of the Constitution.

The subsequent paragraphs consider the Constitutional Court's socio-economic rights jurisprudence, with the aim of establishing its role as an instrument of social change and in furthering the interests of the poor and disadvantaged. It should be noted that individual judges' orientation to social change is also a relevant factor in understanding the capacity of a court to contribute to progressive social change.

The Constitutional Court's Socio-economic Rights Jurisprudence

The Constitutional Court, as Dugard and Roux (2006: 108) point out, is committed to overseeing the transformation of the South African legal system so as to reflect the needs, values and aspirations of the poor. Their study is instructive on the extent to which the Constitutional Court has provided an institutional voice for the poor. Liebenberg's studies (as seen below) are also useful in understanding the transformative potential of the Constitutional Court's socio-economic rights jurisprudence.

Following the inclusions of socio-economic rights in the South African Constitution, the courts have sought to translate these rights into enforceable legal claims. They have protected socio-economic rights in different ways, including hearing challenges to the constitutionality of any rule of statutory, common or customary law on the basis of a constitutional socio-economic right, or challenges to state or private conduct as inconsistent with a socio-economic right. The courts have readily engaged with legislation in attempts to broaden the protection of socio-economic rights, and have demonstrated that they are willing to enforce not just the negative prohibitions but also the positive duties imposed by socio-economic rights.

The Constitutional Court has dealt with and handed down judgement in several socio-economic rights cases, eleven of which are considered below. The judgement in all the cases, but for two, has been favourable (to some extent) to the applicants.

Right to health care

Soobramoney v Minister of Health (KwaZulu-Natal) 1998 (1) SA 765 (CC) was the first case on the right to health care and also the first socio-economic rights case that the Constitutional Court heard. It concerned a challenge to the resource rationing policy of a state hospital, according to which Soobramoney, who suffered from chronic renal failure, was excluded from a renal dialysis treatment programme due to his general state of health and the fact that his condition was irreversible. The Court found in this case that the constitutional right not to be

refused emergency medical treatment (section 27[3] of the Constitution) did not extend to renal dialysis. It was of the view that emergency treatment is the sort of treatment that an individual receives in trauma and emergency wards following a serious accident and Soobramoney's situation did not require such level of care (Paras 13–22). Hence, no relief was granted to the applicant, who subsequently died of kidney failure shortly after the judgement.

The second case on the right to health care was *Minister of Health and Others v Treatment Action Campaign [TAC] 2002 (5) SA 721 (CC)*, which concerned a challenge to the state's policy on the prevention of mother-to-child transmission of HIV, which was challenged as inconsistent with the right to have access to health care services. As part of efforts aimed at combating HIV, the government devised a programme for the prevention of mother-to-child transmission of HIV at birth using the antiretroviral (ARV) drug, nevirapine. According to the programme, use of the drug was permissible at limited number of pilot sites, with the result that only about 10 per cent of all births in the public sector could benefit from the policy. The Court found the government's programme to be unreasonable in that it was inflexible and failed to take into account the needs of a particularly vulnerable group (HIV-positive mothers and children who did not have access to the pilot sites). The programme also restricted the provision of the drug and failed to provide for training of counsellors in the use of the drug for the purposes of reducing mother-to-child transmission of HIV. The Court granted both declaratory and mandatory orders. It declared the government's policy to be unreasonable. The Court also directed that the restrictions on the use of the antiretroviral (ARV) drug outside of the selected research sites be removed and that the drug be administered in other public hospitals and clinics, and counselling facilities be extended to them as well (Para 135).

Liebenberg (2005: 5) has argued that the Court could have done more to address the extreme inequality in access to health care services. This is based on the fact that the judgement contains no analysis of the vastly unequal distribution of resources between the public and private health care sectors. Such an analysis is crucial as it could result in the unravelling of factors that give rise to deprivations or limit access to health care, which will in turn enable the Court to effectively enforce the right in a way that results in social change on the ground.

Right to housing

Seven of the cases that the Constitutional Court has dealt with concerned housing rights, mainly in the context of an eviction. The first housing rights case considered by the Court was *Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)*. It concerned the right to have access to adequate housing for those subject to evictions. The Court held that the obligation imposed on the government is to put in place a reasonable programme, subject to available resources, to realise the right of access to adequate housing. It found the government's housing programme to be unreasonable because it made no provision for access to housing for people in desperate need, thus in violation

of the right to have access to adequate housing. The Court granted a declaratory order, requiring the state to adopt, implement and supervise a comprehensive and coordinated programme that addressed effectively the situation of those desperately in need of housing. That is, those ‘who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations’ (Para 99).

Subsequently, the National Housing Programme: Housing Assistance in Emergency Circumstances (Emergency Housing Programme) was adopted in April 2004, which would temporarily alleviate the housing problems faced by many poor South Africans. The programme aims to assist groups of people faced with urgent housing problems, such as evictions, floods and fires, by providing temporary assistance in the form of municipal grants. Such grants would enable the Municipality to respond to emergencies by providing secure access to land, boosting infrastructure and basic services, and improving access to shelter through voluntary relocation and resettlement. Municipalities are encouraged to assess in advance the emergency housing needs in their areas and take concrete steps to address them. The programme thus increases the possibility of those in desperate need to receive relief or assistance from the government, thus providing a safety net in situations where communities are faced with evictions that will leave them in crisis. Prior to *Grootboom*, the government had shown no sign of putting such a programme in place.

The *Grootboom* decision has generally had a huge impact on subsequent socio-economic rights cases—these cases have relied on the principles laid down in *Grootboom*. For example, in the *TAC* case, the reasonableness review approach that the Court adopted in *Grootboom* (discussed further below) was used to achieve a major victory in the provision of drugs for the prevention of mother-to-child transmission of HIV/AIDS.

The case of *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) is a leading case on how housing legislation can be interpreted to promote the purpose and values underlying the constitutional right to have access to adequate housing and the protection against arbitrary eviction. The municipality argued in this case that giving alternative land to the occupiers concerned would be preferential treatment, would disrupt the existing housing programme and would be ‘queue-jumping’. The Constitutional Court rejected this argument, finding that the municipality was obliged to provide alternative accommodation or land prior to an eviction (Paras 29–30, 39–47 and 56–59). The municipality had also not engaged in any discussions with the occupiers to identify their particular circumstances or needs, which the Court found to be at odds with its constitutional obligations (Paras 45, 56 and 61).

In addition to clarifying the state’s negative obligation, the Court also read positive obligations into the constitutional right to be protected from arbitrary evictions (section 26[3] of the Constitution). The state has to take reasonable steps to get an agreed mediated solution and to provide suitable alternative accommodation particularly for vulnerable groups such as the elderly, children,

disabled persons and female-headed households (paras 30 and 61). The Court's judgement, as Dugard and Roux (2006: 114) rightly observe, 'provide concrete benefits to poor people, in as much as municipal evictions may not proceed without a proper plan of relocation'. In addition, the Court's approach helps unravel factors that give rise to deprivation through its careful analysis of the historical, socio-economic, political and legal factors that stimulate eviction of poor people from their homes. The *Port Elizabeth Municipality* case is also important in that it aims to strike a balance between property rights and housing rights (Para 23).

Another case that attempts to strike such a balance is *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC), concerning a private landowner's efforts to execute an eviction order granted by the High Court against a community occupying its land. The landowner was unsuccessful in getting various organs of the state to assist him in enforcing the order. The case reinforces the obligation of the state to provide alternative accommodation to vulnerable people. The Court held that the residents are entitled to occupy the land until alternative land is made available to them by the state, or provincial, or local authority (Para 68). The Court also held that progressive realisation of the right to have access to adequate housing for the homeless requires 'careful planning', 'fair procedures' and 'orderly and predictable processes' (Para 49). The Court further found that, by failing to do anything to stop the occupation of the land and assisting in enforcing the eviction order, the state infringed the landowner's right to an effective remedy. Accordingly, the Court required the state to compensate the landowner for the occupation of his land—a novel remedy. The Court's judgement in this case prevented the eviction of the occupiers from the land and the landowner was compensated for bearing the duty of accommodating the occupiers. Froneman (2007: 23) lists the *Modderklip* case as one of the cases in which the Court has found a way of dealing with factual situations of basic need.

The case of *Jafitha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (1) BCLR 78 (CC) reinforces the constitutional protection of people against loss of their homes without alternatives. It was a challenge to the constitutionality of the Magistrates' Court Act 32 of 1944 that permitted the sale in execution of people's homes in order to satisfy debts. The effect of the sale in execution would be the eviction of people from their homes, without the provision of suitable alternative accommodation. The Constitutional Court found this to be an unjustifiable limitation of the constitutional right to have access to adequate housing (Paras 34 and 39). Considering, inter alia, the issue of security of tenure in the light of the historical context, the Court's remedy was to 'read-in' words into the Magistrates' Court Act to ensure that people's homes can only be sold if a court has ordered so after considering all the relevant circumstances (Paras 34 and 39). In other words, judicial oversight was therefore seen as an appropriate remedy. Judicial oversight is, in fact, crucial in ensuring that constitutional rights are adequately enforced. Dugard and Roux (2006: 118) have observed that *Jafitha*

indicates the Court's willingness 'to listen and respond to concerns of the poor where doing so does not involve it in second-guessing the wisdom of post-apartheid transformation policies'.

Another housing rights case that represents a victory for poor people facing eviction for health and safety reasons is that of *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC) [*Olivia Road*]. The case raised the difficult issue of how to reconcile respect for the inadequate accommodation which people living on the margins (desperately poor people) have managed to secure, and the statutory powers and duties of local authorities to ensure that conditions of accommodation do not constitute a threat to the safety of these persons (Chenwi and Liebenberg, 2008). The decision reaffirms the Constitution's transformative role. The judgement reinforced the obligation to engage with people meaningfully before evicting them and the provision of suitable alternative accommodation or land, as well as underscoring the requirement of judicial oversight over all evictions (Paras 16–19, 21 and 43–44). The decision further develops the reasonableness standard though it was not based on the reasonableness test developed in *Grootboom*. In citing section 26(2) as one of the bases for meaningful engagement, the Court grounds the engagement process in the reasonableness concept and expands the reasonableness criteria to include meaningful engagement in the context of an eviction. This interpretation is supported by subsequent decisions of the Constitutional Court in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* Case 2009 (9) BCLR 847 (CC) (Para 117) where reasonable engagement was considered in determining whether an eviction was a reasonable measure to facilitate the government's housing development programme; and *Mazibuko & Others v City of Johannesburg & Others* 2010 (3) BCLR 239 (CC) (Paras 133 and 134) where the Court considered adequate public consultation in determining the reasonableness of pre-paid water meters.

The *Olivia Road* judgement further defines the obligations of local authorities with regard to the occupiers of abandoned or dilapidated buildings. The Court recognises the core importance of fostering participation and gives content to the right of participation by those faced with eviction as well as develops the principle of accountability. It thus enhances the possibilities for the kind of participatory democracy that forms part of the constitutional vision of democracy. In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* 2006 (8) BCLR 872 (CC) paras 111, 625 and 627, the Constitutional Court stated that the Constitution contemplates participatory democracy that is accountable, transparent, responsive, open and makes provision for the participation of society in decision-making processes. The Court in *Olivia Road* thus contributes to the promotion of participatory citizenship by the poor and recognises and enhances the dignity of the poor. The Court further 'read-in' words into the challenged legislation (the National Building Regulations and Building Standards Act 103 of 1977), so as to provide for judicial oversight of evictions in terms of the legislation. This case illustrates that when laws or conduct that deprive poor people of existing

access to socio-economic rights are at issue, the Court is willing to apply a stringent standard of review (Liebenberg, 2008: 95).

The *Olivia Road* case has, however, been seen as one of the cases in which the Court failed to use the opportunity to pronounce on potentially transformative issues such as whether the right of access to adequate housing requires a consideration of location in the provision of alternative accommodation and whether the municipality's inner city housing plans' failure to make provision for the poor was unconstitutional. The Court did not develop the right to housing jurisprudence beyond its decision in *Grootboom* and therefore 'failed to tackle the policies and practices at the core of the vulnerability of poor people living in locations earmarked for commercial developments' and 'to establish critical rights-based safeguards for extremely vulnerable groupings' (Dugard, 2008: 237–38).

The subsequent cases of *Joe Slovo* and *Abahlali base Mjondolo Movement of South Africa and Another v Premier of the Province of KwaZulu–Natal and Others* 2010 (2) BCLR 99 (CC) also represent victories for the poor. The *Joe Slovo* case was about the eviction of a large and settled community from their homes in the Joe Slovo informal settlement in Cape Town to make way for formal housing under the N2 Gateway Housing Project. This project was a joint programme by the national Housing Department, the Western Cape Provincial Government and the City of Cape (Municipality), aimed at upgrading informal settlements in Gugulethu, Cross Roads, Khayelitsha, and Langa as a lead pilot project. Though the Constitutional Court ordered the eviction of the residents, it specified a number of pro-poor issues. The Court specified in detail the quality and nature of the temporary housing where the people are to be relocated to, including the provision of services and facilities (Para 7). It further required the respondents in the case (Thubelisha Homes, the national Minister of Housing and the Western Cape provincial Minister of Local Government and Housing) to engage meaningfully with the residents on the timeframe of the relocation and also to consult with affected residents on each individual's relocation. The Court was more robust as regards the engagement process, providing a detailed engagement order including a range of issues on which the government is required to consult, which it pointed out were not exhaustive (Para 7). The Court also ordered the respondents to ensure that 70 per cent of the new homes to be built at Joe Slovo were allocated to current Joe Slovo residents, or former residents who had moved to Delft previously to make way for the N2 Gateway Project (Paras 5 and 7). The remaining 30 per cent were to be allocated to people living in backyard shacks in the neighbouring township of Langa (Paras 187, 248 and 307). The eviction order has been suspended based on the government's concern that there is no plan to accommodate those who would not benefit from the new houses and that the relocation might end up costing more than upgrading Joe Slovo settlement (Majavu, 2009).

The *Abahlali* case concerned the constitutionality of the KwaZulu–Natal Elimination and Prevention of Re-Emergence of Slums Act 6 of 2007 (the Slums Act). The Act aims to eliminate slums, prevent the re-emergence of slums, to upgrade and control of existing slums and improve the living conditions of

communities. On the contrary, the Slums Act paved the way for evictions that are contrary to the Constitution—it precludes meaningful engagement between municipalities and unlawful occupiers, violates the principle that evictions should be a measure of last resort, and mandates the institution of eviction proceedings. The Constitutional Court, while finding that the province had the competence to pass the Act, found the Act to be unconstitutional as it contravenes the framework for the eviction of unlawful occupiers contained in the Constitution and housing legislation, that ensure that housing rights are not violated without proper notice and consideration of all alternatives (Paras 110–129). The decision prevented the eviction of many poor people without adequate safeguards for their housing rights had the Slums Act been implemented in its current form. The government is therefore required to ensure that its approach to informal settlements or slum conditions is pro-poor and acknowledges peoples' existing circumstances and that it directs efforts more at the improvement of the lives of those who live in slums and informal settlements rather than at the 'eradication' of slums.

Right to social security and assistance

The extension to others of a socio-economic benefit provided to one class was also at issue in the case of *Khosa v Minister of Social Development* (2004) 6 SA 505 (CC). This case concerned a challenge to the provisions of the Social Assistance Act 59 of 1992 for excluding people with permanent residence status from accessing social assistance. The Constitutional Court upheld this challenge on the grounds that the exclusion violated the right to have access to social assistance and unfairly discriminated against permanent residents in violation of the right to equality, in particular, the right not to be unfairly discriminated against. The Court rejected the government's contention that it does not have the required resources. It was in fact of the view that the importance of realising the rights of permanent residents outweighed the financial considerations that the state relied on; this is because a denial impacts on their life and dignity (Para 82). The Court's remedy, a relatively intrusive one, was to 'read-in' the excluded group (Paras 86–96). The Court's remedy in the *Khosa* case, therefore, allowed permanent residents to have the same social assistance benefits as South African citizens.

Right to water

The *Mazibuko* case was not a victory for the poor residents of Phiri, a township in Soweto. The case concerned the lawfulness of prepayment water meters (PPMs) and the sufficiency of the City of Johannesburg's free basic water (FBW) policy and. The High Court and Supreme Court of Appeal in the case had both found in favour of the applicants, finding PPMs to be unlawful and also that the 25 litres per person per day water allocation. The High Court found 50 litres of water per person per day to constitute sufficient water in terms of Section 27(1) of the Constitution guaranteeing the right of access to sufficient water, while the Supreme Court of Appeal found 42 litres of water per person per day to be sufficient. Conversely, the Constitutional Court adopted a restrictive approach to its role in determining the content of socio-economic rights. The Court did not find it appropriate to give a

quantified content to what constitutes 'sufficient water' because it is a matter for the government to decide. The Court held:

[O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice. (Para 61)

The Constitutional Court was again, as in *Grootboom* and *TAC*, unwilling to recognise a minimum core approach, which would have entitled the residents of Phiri to the provision of sufficient water from the state.

The Constitutional Court's Approach: Reasonableness vs Minimum Core

The government's socio-economic rights obligation, as set out in the South African Constitution (for example, Sections 24(5), 26(2) and 27(2)), requires it to adopt reasonable legislative and other measures that make it possible for those in need to access socio-economic goods and services and to provide material goods and services when the need arises. This has resulted in the Constitutional Court adopting a reasonableness approach in reviewing compliance with this obligation.

The 'reasonableness review' approach was first adopted by the Court in the *Grootboom* case. In order for measures to be reasonable, they must aim at the effective and expeditious progressive realisation of the right in question, within the states' available resources for implementation. The measures must be comprehensive, coherent, inclusive, balanced, flexible, transparent, be properly conceived and properly implemented, and make short-, medium- and long-term provision for those in desperate need or in crisis situations. The measures must further clearly set out the responsibilities of the different spheres of government and ensure that financial and human resources are available for their implementation. This approach has been criticised on the basis that it creates a number of difficulties for the enforcement of socio-economic rights by individuals and groups living in poverty. This difficulty, as pointed out by Liebenberg (2005: 6), arises from the fact that the applicants would have to marshal a considerable array of economic and expert evidence to convince a court that the government's social policy is unreasonable, which poor applicants might not be able to do (see also Liebenberg, 2008). Similarly, Dugard and Roux (2006: 113, 116) observe that the approach 'requires litigants to have a sophisticated understanding of often complex policy and budgetary issues', which 'has the potential to diminish the capacity of the Court to function as an institutional voice for the poor' and

discourages the poor to bring cases unless they are able to secure 'substantial legal and other expert support'. Placing the burden of proving reasonableness of its lack of provisioning on the state, as has been suggested by Liebenberg (2008: 91), would address the above concern. The state would therefore have to show that it had exhausted all reasonable alternatives to ensure that disadvantaged groups do not experience a total denial of access to basic needs.

However, the advantage of the reasonableness approach is that it gives wide latitude to the political branches of government to make the appropriate policy choices to meet their socio-economic rights obligations, with the court's role being to determine whether they fall within the bounds of 'reasonableness'; thus addressing separation of power concerns. In addition, the fact that the reasonableness approach is determined on a case-by-case basis and is context sensitive creates the on-going possibility of challenging socio-economic deprivations in the light of changing historical, social and economic contexts (*Grootboom*, Paras 43–44 and 82–83). Liebenberg (2005: 5) has also stated that the reasonableness review approach 'can facilitate the creation of a participatory, dialogical space for considering social rights claims'.

The reasonableness approach is applied in relation to the positive obligations of the government. When it comes to violations of negative obligations, a more stringent standard is applied because such violations can only be justified in terms of the general limitation clause of the Constitution (Section 36).

In adopting the reasonableness approach, the Constitutional Court turned a deaf ear to the minimum core approach, which would entitle individuals to the provision of basic levels of socio-economic goods and services from the government. The minimum core approach is aimed at protecting the most vulnerable groups of society. It involves identifying such subsistence levels in respect of each socio-economic right and insisting that the provision of 'core' goods and services enjoys immediate priority. It thus represents a 'floor' of immediately enforceable entitlements from which progressive realisation should proceed (Pieterse, 2006: 481). In *Grootboom*, the Court stated that it is not possible to determine a minimum threshold for the right to adequate housing without first identifying the needs and opportunities for the enjoyment of the right (Para 32). In the *TAC* case, the Court stated that the socio-economic rights in the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them, without considerations of progressive realisation and resource availability (Paras 34 and 39). The Court's reluctance to endorse the minimum core approach in a subsequent case has been based on institutional and democratic concerns. It is important to note that some have argued that the minimum core approach is not appropriate for judicial review of positive socio-economic rights claims (Sachs, 2003; Wesson, 2004).

Notwithstanding the Court's reluctance, the reasonableness approach thus has some elements of minimum core obligations. While emphasising the progressive realisation of socio-economic rights, the Constitutional Court also holds that people in desperate need should not be left without any form of assistance,

intrinsically implying recognition of minimum core. Bilchitz has thus stated that in attempting to avoid recognising a minimum core obligation, the Court has in fact incorporated an obligation to meet, at the very minimum, the short-term needs into the notion of reasonableness (Bilchitz, 2007: 149).

Compliance with Judicial Decisions

In order for litigation to improve the rights situation on the ground, the relevant authorities must comply with judicial decisions and political action must be taken to implement court orders (Gloppen, 2006: 53). Put differently, ‘the ability of litigation to effect real social change depends in large part on the government’s willingness to respect and implement the court’s judgments’ (Marcus and Budlender, 2008). Though the Constitutional Court has laid down a number of pro-poor principles and rules, compliance with these have been an issue of concern, with the consequence being that successful litigants are unable to benefit fully from the orders arising from their victories. Consequently, they continue to live in poverty and socio-economic deprivation.

Gloppen (2006: 54–55) has identified a number of factors that influence compliance with judicial decisions. These include: first, factors within the judicial system such as the professionalism and capacity of the judges to devise acceptable legal remedies, and whether the decisions include enforcement mechanisms such as mandatory or supervisory orders or contempt of court orders in cases of non-compliance; second, factors outside the legal system such as the political and economic context, the legitimacy of the court in various sectors of the society; and the capacity of the government to implement the decisions. In addition, Muralidhar (2002) has observed that states are more sluggish to enforce declaratory orders than mandatory orders.

Some of the above factors have accounted for the slow implementation of court orders in South Africa. For instance, the nature of the order in the *Grootboom* case—a weak, declaratory order—has been identified as a contributing factor to its relatively tardy implementation (Liebenberg, 2008; Pillay 2002a; 2002b). It should be noted that even the interlocutory order, which was initiated by the government and should have been relatively simple to implement, took months to be put in place as reported by Marcus and Budlender (2008: 61). They further reported that ‘the majority of the Grootboom community continues to live in appalling conditions to this day and many are deeply disillusioned with the legal processes involved in the case’. They, however, add that whatever the limits of *Grootboom* for social change in the Grootboom community, it continues to play a key role in achieving tangible social change for others in a variety of areas (Marcus and Budlender, 2008: 62, 66). Also, as noted above, the implementation of the Emergency Housing Programme arising from this judgement has been rather slow. Furthermore, the communities involved in the *Modderklip* case are still faced with illegal evictions.

The *TAC* case was also followed by a lack of urgency in implementing the Court's orders at both national and provincial levels. This prompted the applicants to undertake a range of actions to ensure proper implementation. They held meetings with various government officials and threatened instituting contempt of court proceedings (Marcus and Budlender, 2008: 89). The *Olivia Road* case, on the other hand, has been seen as one of the cases that show that the state can be compliant after all due to the, comparatively, short time-frame within which the judgement was enforced (Mbazira, 2008: 20). The eviction order in *Joe Slovo* has been suspended, while the government ascertains the possibility of in-situ upgrade.

The slow implementation of court orders has resulted in calls for a structural interdict as a means of ensuring compliance (Budlender, 2007: 11; Mbazira, 2007: 310–92; 2008: 17). In the *TAC* case (Paras 106–114), the Constitutional Court did not find the granting of a structural interdict to be appropriate in this case. In addition, Thipanyane (2004) has suggested that parliament and respective provincial legislatures have to be more active in holding the executive branch of government to account for delays in implementing decisions of the judiciary.

Conclusion

The Constitutional Court, in its socio-economic rights jurisprudence, has laid down a number of pro-poor principles and rules. It has acknowledged the poor as a vulnerable group whose needs require special attention, by subjecting the state's justifications to more stringent scrutiny when disadvantaged groups are deprived of access to essential services and resources. The Court has promoted a culture of justification by requiring the state to justify its socio-economic priority-setting, which as Liebenberg (2008: 90) observed, is 'an important element in South Africa's project of transformative constitutionalism'.

In addition, the Constitutional Court's decisions have impacted significantly on the government's attitude towards socio-economic rights, making it more responsive to socio-economic concerns and though not clearly at the pace and to the extent people expect. The decisions on housing rights have changed the law on housing and eviction; affording protection to the poor and vulnerable. It has offered them, at the very least, some degree of security of tenure that they would not otherwise have had. The following words by Budlender (Langford 2003: 98) sum up the strength of the *TAC* case in achieving social change: 'The *TAC* case has literally saved the lives of very many thousands of kids'. The *Khosa* case resulted in permanent residents having access to a social benefit that they initially could not have access to. The *Olivia Road* case, through the meaningful engagement ordered, created a voice for the poor and marginalised and contributed to social inclusion of the poor, disadvantaged and marginalised people in remedial decision-making. Meaningful engagement with communities on socio-economic rights was further emphasised in *Joe Slovo*, *Abahlali* and *Mazibuko*, thus

accentuating and enhancing participatory democracy in the realisation of socio-economic rights.

Notwithstanding, while acknowledging the Constitutional Court's role in facilitating social change, Dugard and Roux (2006: 113, 114, 118) found the Court's socio-economic rights jurisprudence to be 'a little disappointing from a pro-poor perspective'. Their conclusion is based on the fact that none of the judgements they considered (between the period 1994 and 2004) provided any 'direct, substantive relief to the applicants' (they mandated that the applicable government policy be change), and the standard of review adopted by the Court makes it difficult for the poor to litigate cases. Hence, much still needs to be done to promote socio-economic transformation in the interests of the poor and disadvantaged, including improving access to the courts by the poor in order to bring cases that could result in social change.

On the question of access to legal representation by the poor, a factor that impacts on the ability of the poor to bring cases, Dugard (2008: 217–26, 232) has observed that the judiciary, as an institution, has done little to address this issue. Though acknowledging that it is unfair to place such a burden on the judiciary, she argues that the judiciary could have meaningfully advanced access to justice for the poor through (a) prioritising the delineation of a comprehensive right to legal representation at state expense for both civil and criminal matters; and (b) being actively involved in strengthening and promoting the courts' internal system for securing legal representation to the poor. She also suggested that by utilising the direct access mechanism—allowing constitutional matters to be brought directly to it by poor people who have been unable to secure legal representation—the Constitutional Court could live up to its transformative promises of being an institutional voice for the poor. The question of finding an appropriate remedy is still a challenge. There is also the need to strengthen the participation of the poor in decision-making processes and service delivery projects.

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