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# MASTER-THESIS

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„Beyond the justiciability of socio-economic rights:  
Examining the efficacy of Constitutional Court  
judgements in transforming South Africa“

Verfasser

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### **DECLARATION**

I declare that the thesis, which I hereby submit for the degree Master of Arts (MA) in Human Rights, at the University of Vienna, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution

.....

Fhatuwani David Muvhango

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**ABBREVIATIONS AND ACRONYMS**

|        |                                                                                  |
|--------|----------------------------------------------------------------------------------|
| AIDS   | Immunodeficiency Syndrome                                                        |
| ANC    | African national Congress                                                        |
| CALS   | Centre for Applied Legal Studies                                                 |
| CESCR  | Committee on economic, Social and Cultural Rights                                |
| CODESA | Convention for the Democratic South Africa                                       |
| CRC    | United Nations Convention on the Rights of the Child                             |
| HIV    | Human Immunodeficiency Virus                                                     |
| ICESCR | International Covenant on Economic, Social and Cultural Rights                   |
| ICCPR  | International Covenant on Civil and Political Rights                             |
| NDP    | National Development Programme                                                   |
| MPNP   | Multi-Party negotiation Process                                                  |
| NVP    | Neverapine                                                                       |
| PIE    | Prevention of Illegal Eviction from and Unlawful Occupation of<br>Land Act, 1998 |
| RDP    | Reconstruction and Development Programme                                         |
| SAHRC  | South African Human Rights Commission                                            |
| SANNC  | South African Native National Congress                                           |
| SCA    | Supreme Court of Appeal                                                          |
| TAC    | Treatment Action Campaign                                                        |
| UN     | United Nations                                                                   |
| UNDP   | United Nations Development Programme                                             |
| UDHR   | Universal Declaration of Human Rights                                            |

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## CHAPTER 1

### 1. BACKGROUND AND PROBLEM STATEMENT

A simple vote, without food, shelter and health care is to use first generation rights as a smokescreen to obscure the deep underlying forces which dehumanise people. It is to create an appearance of equality and justice, while by implication socio-economic inequality is entrenched. We do not want freedom without bread, nor do we want bread without freedom. We must provide for all the fundamental rights and freedoms associated with a democratic society.<sup>1</sup>

Nelson Mandela

#### 1.1 Introduction

As a country emerging from a political system labelled by the international community as a crime against humanity, South Africa adopted a new Constitution<sup>2</sup> which guarantees social justice, freedom, equality and human dignity to all citizens.<sup>3</sup> Unlike all other previous Constitutions, the new Constitution of the Republic of South Africa enshrines socio-economic rights as well as civil and political rights.<sup>4</sup> The purpose of the including socio-economic rights in the Constitution is to advance the socio-economic needs of the poor.<sup>5</sup> To help realise all rights enshrined in the Constitution and free the country from the lingering legacy of apartheid and colonialism,<sup>6</sup> the Constitutional Court has been conferred with enough competence and powers to grant appropriate and effective remedy for violation of any right in the Bill of Rights.<sup>7</sup> At the centre of this thesis lies an attempt to assess the impact of social litigation in addressing socio-economic challenges in South Africa.

South Africa has just celebrated its 20 years of democracy. Over the past 20 years, the Constitutional Court had dealt with numerous socio-economic rights cases. Most of the socio-economic rights cases were brought by or on behalf of the poor communities, hoping to advance their socio-economic needs. To some degree, South Africa is today better off because of social litigation. In other instances, social litigation has not led to acquisition of tangible socio-economic benefits anticipated by the poor communities.

In retrospect, the record of South African socio-economic jurisprudence in advancing the needs of the poor is somewhat indeterminate. Given the prominence accorded to the socio-

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<sup>1</sup> N R Mandela 'Address: On occasion of the ANC's Bill of Rights Conference ' in A Bill of Rights for a Democratic South Africa: Papers and Report of a conference convened by the ANC Constitutional Committee (1991) 9-14 at 12.

<sup>2</sup> The Constitution of the Republic of South Africa, 1996, (the Constitution).

<sup>3</sup> See the Preamble to the Constitution.

<sup>4</sup> See chapter two of the Constitution. See also Currie and De Waal, 2005, p.2.

<sup>5</sup> Mbazira, 2009, p. 1.

<sup>6</sup> *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* (Constitutional Court of South Africa, 2009) (*Nokotyana*). Just as recent as 2009, in *Nokotyana* judgement the court made the following remarks about the legacy of apartheid and colonialism: Our history is one of land dispossession, institutionalised discrimination and systemic deprivation. The need for housing and basic services is still enormous and the differences between the wealthy and the poor are vast

<sup>7</sup> See sections 38 and 172 of the Constitution.

economic rights in the Constitution and the role assigned to Constitutional Court to ensure socio-economic are fully and effectively realised,<sup>8</sup> this thesis set out to assess the impact of social litigation in advancing the socio-economic conditions in South Africa. Has the socio-economic jurisprudence led to the manifestation of the vision of new South Africa that is embodied in preamble of the Constitution?<sup>9</sup>

## **1.2 Objective of the study**

The objective of this study is to assess the impact of socio-economic jurisprudence in contributing to social justice and transformation in South Africa.

## **1.3 Research question**

The central research question of the study is: How efficient are the Constitutional Court decisions and orders in vindicating socio-economic rights?

## **1.4 Sub-questions**

To analyse the efficacy of Constitutional court decisions, the thesis will seek to give answers to the following sub-questions:

- What competence does the Constitutional Court have in adjudicating socio-economic rights?
- What kind of remedies has the Constitutional court awarded for violation of or threat to socio-economic rights?
- What approaches are followed by the Constitutional court in adjudicating socio-economic rights?
- What are the shortcomings and strengths of the Constitutional Court decisions and orders?
- Who are the role actors in the legal actions involving socio-economic rights, and what role do they play?
- What impact does the court decisions and orders have in realizing socio-economic rights and bringing about social justice in South Africa?

## **1.5 Research Methodology**

This thesis deals with the impact of socio-economic jurisprudence in South Africa. It uses a primarily analytical method. However, there are instances in which descriptive method is used. The latter method is useful to provide enough information necessary for the analysis of the court decisions and their impact in South Africa.

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<sup>8</sup>Ibidem.

<sup>9</sup> The preamble provides that the adoption of the constitution was made so as to establish a new South Africa founded on social justice, freedom, equality and human dignity. It also makes an undertaking to have every citizen's potential realised.

The study uses both primary and secondary sources. It analyses the Constitution of the Republic of South Africa, different Constitutional Court decisions on socio-economic rights and government policies. It also analyses available literature on the impact of socio-economic jurisprudence.

### 1.6 Literature review

From the available literature, there is a mixed picture about the efficacy of Court decisions and orders in delivering socio-economic goods. The picture shows inherent shortcomings as well as some resounding success stories. Whilst the *Treatment Action Campaign*<sup>10</sup> decision was a land mark in ensuring that the court order has positive ripple effect throughout South Africa. There are still some court decisions which do not go far enough. In the *Grootboom*,<sup>11</sup> case, the successful litigant died, eight years after the judgment, before she could become a beneficiary of the low-cost housing. Despite this fact and that the Grootboom community's original application was for the provision of rudimentary services; they also became beneficiaries of the state's permanent housing. In *Nokotyana* and *Mazibuko*, the Constitutional Court was satisfied with the steps taken by the state to realise socio-economic rights, that is, in spite of the plight of the applicants.

The indeterminate nature of the record of South African socio-economic jurisprudence in contributing to social change makes this study worthwhile.

### 1.7 Outline of the thesis

This thesis is made up of eight chapters.

This introductory chapter gives background to the thesis. This includes the general introduction of the thesis, problem statement, and purpose of the thesis, research methodology and an overview of the thesis.

The second chapter sets out the background against which South Africa had adopted a new Constitution in 1996, and in particular the inclusion of socio-economic rights in the Constitution. The chapter further explains the aim of the adoption of the Constitution, as to help South Africa shed its past of colonialism and apartheid; and transform into a new democracy of equality, freedom and social justice.

The third and fourth chapters locate socio-economic rights within the international human rights instruments and the Constitution of the Republic of South Africa. Chapter four shows that the Constitution has equipped the Constitutional Court with enough powers and

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<sup>10</sup>*Treatment Action Campaign v. Minister of Health* (South African Constitutional Court, 2002)(TAC). In TAC case, the Constitutional Court ordered the state to provide Nevirapine to all public hospitals, thereby helping to prevent transmission of HIV virus from HIV positive mothers to their babies at birth.

<sup>11</sup>*Government of the Republic of South Africa v. Grootboom* (South African Constitutional Court, 2000) (*Grootboom*).

competence to deal with the legacy of the past. The two chapters will show that socio-economic rights in South Africa enjoy dual claim for validity: international human rights institution and the Constitution of the Republic of South Africa.

The fifth and sixth chapters deal with some socio-economic rights cases. The focus is on the claims to the right of access to adequate housing, right to social security and right to health. In the fifth chapter, different approaches used by the court to adjudicate socio-economic rights are assessed. The sixth chapter assesses the impact of the Constitutional Court decisions on the lives and the plight of the poor; and in bringing about social justice in South Africa.

Chapter seven evaluates the effectiveness of social litigation as a relevant tool for transformation in South Africa. It looks at the inherent weaknesses which impede the Court from realising their full potential in bringing about social change. It also makes some suggestions on what could be done to enhance the performance of Constitutional Court in enforcing socio-economic rights.

Chapter eight concludes the thesis.

## **1.8 Limitation**

This thesis gives a synoptic view on the impact of the Constitutional Court in enforcing socio-economic rights. Even though the Constitution has covered numerous socio-economic rights, for the purpose of this thesis, the focus will be primarily on the right of access to adequate housing, right to health and social security. The thesis does not deal with economic policies of the South Africa. Its focus is on the impact of socio-economic litigation. There is enough material to enable the writer to assess the impact of court decisions on socio-economic rights.



## CHAPTER 2

### 2. BACKGROUND TO THE ADOPTION OF SOUTH AFRICA'S TRANSFORMATIVE CONSTITUTION

#### 2.1. Introduction

When South Africa emerged from the devious era of apartheid, which was labelled by the international community as a crime against humanity,<sup>12</sup> it adopted a new Constitution.<sup>13</sup> The Constitution became a blueprint for the South Africa's journey into a new future. The Constitution envisions the new South Africa to be based on the values of dignity, equality and freedom.<sup>14</sup> It also envisions a future in which there would be social justice, and the potential of every citizen would be realised.<sup>15</sup> Through its Constitution, South Africa has committed itself to bridge the racial divisions and to redress the injustices which were the hallmarks of apartheid era.<sup>16</sup> Through the new Constitution, South Africa aims to transcend the injustices of the past and ensure social justice for all.

This chapter looks at the sources of South Africa's economic troubles. It traces them back to the apartheid era and beyond. It also considers the effects of apartheid and colonialism in the new South Africa. It takes the reader from the apartheid era, through the period of the struggle against apartheid, up to the adoption of the new Constitution. It further examines the Constitution as a transformative tool which was adopted to help South Africa to transcend its ugly past. As the thesis seeks to evaluate the role of the courts and their effects in transforming the South African society, this chapter will also shed light on the role of the Constitution as a transformative tool.

#### 2.1.1 Genesis of South Africa's socio-economic troubles

The roots of the socio-economic troubles faced by South Africa today are traceable to colonial and apartheid eras<sup>17</sup>. The ascendancy of the National Party of South Africa to power in 1948 marked the highest point in the long quest for racial domination and segregation by

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<sup>12</sup>Article 1 of the Security Council Resolution 556 of 23 October 1984. In 1966, the General Assembly labelled apartheid as a crime against humanity (Resolution 2202 A (XXI) of 16 December 1966).

<sup>13</sup>The Constitution of the Republic of South Africa, 1996. Hereinafter referred to as the Constitution.

<sup>14</sup>Preamble to the Constitution.

<sup>15</sup>*Ibidem*.

<sup>16</sup>*Ibidem*.

<sup>17</sup>See *Soobramoney v Minister of Health, KwaZulu-Natal*, (Constitutional Court of South Africa, 1998) (*Soobramoney*). In *Soobramoney* para 8, the court traced the origin of social injustice to the period before the new dispensation. See also Nancy L. Clark and Worger, *South Africa: The Rise and Fall of Apartheid*, 2ed. (2011), p.37.

previous white South African regimes.<sup>18</sup> As indicated by Clark and Worger, the pursuit of racial discrimination was an overriding obsession pursued by several white administrations which preceded the apartheid government.<sup>19</sup> They all had a common purpose: to separate South Africa into racial groups without success.<sup>20</sup>

### 2.1.2. Defining apartheid

In showing that apartheid was not just a fluke or an overnight development, Clark and Worger<sup>21</sup> described apartheid as a logical extension of South Africa's history of segregation. Many apartheid laws were therefore only a mere elaboration on the colonial policies and segregation legislations.<sup>22</sup>

*Apartheid* is an Afrikaans word for 'apart-ness' or 'apart-hood'.<sup>23</sup> It was a racially discriminatory policy designed and pursued by the national party after it took power in South Africa in 1948. The nationalist government used apartheid policy as a vehicle to advance Afrikaner<sup>24</sup> ethnic goals as well as white racial goals.<sup>25</sup> In exalting white South Africans to a privileged status, the apartheid regime pushed and relegated black South Africans to the periphery of life.<sup>26</sup> In essence, apartheid policy was developed as social engineering whose purpose was to keep "the black man in his place, and that place was working for the white man".<sup>27</sup> But the National party used apartheid intelligently as a ploy to "secure its political base by providing for Afrikaners' material interests and economic power gained through political power".<sup>28</sup>

To hide its true intendment, the national party government used apartheid as a pretext for trying to solve the perceived problem of incompatibility between whites and blacks.<sup>29</sup> In his

<sup>18</sup> <http://www.sahistory.org.za/topic/national-party-np> visited on 10 December 2013.

<sup>19</sup> See Clark and Worger, 2011, p.37.

<sup>20</sup> Ibidem.

<sup>21</sup> Ibidem.

<sup>22</sup> The colonial period in South Africa was from 1652 until 1917, <http://www.sahistory.org.za/pre-mandela-period-colonial-history-south-africa-1652-1917>, visited on 16 November 2013

<sup>23</sup> Cf. supra note 19.

<sup>24</sup> The word Afrikaner refers to Afrikaans-speaking white person in South Africa, especially one descended from the Dutch and Huguenot settlers of the 17th century.

<sup>25</sup> Thompson, 1990, p. 188.

<sup>26</sup> Ibidem, p.190.

<sup>27</sup> MacKinnon, 2012, p. 235.

<sup>28</sup> Ibidem.

<sup>29</sup> Previous governments had tried to deal with the native question without success. In 1913, the government passed a legislation in which the 'reserves' were introduced. These were areas demarcated for Blacks. General Jan Christian Smuts, the Prime Minister of South Africa also attempted to solve this question, but no avail.

speech in London on 22 May 1917, general Jan Christian Smuts<sup>30</sup> advocated the development of separate institutions as a viable solution. He stated:

We have felt more and more that if we are to solve our native question it is useless to try to govern black and white in the same system, to subject them to the same institutions of government and legislation. They are different not only in colour but in minds and in political capacity, and their political institutions should be different, while always proceeding on the basis of self-government.

Despite the above averments, the National Party government never conceded that its ultimate goal was a complete racial segregation in South Africa. Even DF Malan denied that the end point of the apartheid government was total separation in South Africa.<sup>31</sup> As a consequence, it is difficult to find an objective definition of Apartheid from the leaders of apartheid who had developed it as a concept.<sup>32</sup> However, Mokgatle's definition seems to capture the essence and meaning of apartheid<sup>33</sup>.

“Apartheid means total segregation of the African people and all non-Europeans in the country, permanent denial of human rights, permanent *baaskap*<sup>34</sup>, master race, and inferiority for anything non-white”.

### 2.1.3. Basis of the apartheid policy

Apartheid government derived legitimacy for its existence from several racist laws.<sup>35</sup> As it will be shown in the subsequent paragraphs, the Apartheid regime passed numerous legislations as a way to legitimize its existence and justify racial segregation and marginalisation of black South Africans. According to Clark and Worger<sup>36</sup>, “the centrepiece of Apartheid was the belief that the complete separation of all races and ethnic groups would ensure stability and control”. This belief was in turn based on four ideas, which were cumulatively aimed at giving white South Africans unfair advantage over blacks.<sup>37</sup>

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<sup>30</sup> Jan Smuts became a Prime Minister of South Africa in 1919, available at <http://www.nam.ac.uk/exhibitions/online-exhibitions/britains-greatest-general/jan-smuts>, visited on 6 January 2014.

<sup>31</sup> In his explanation of Apartheid, D F Malan, the then prime Minister of South Africa, indicated that total segregation was not the policy of government. See also Posel, 1991, p. 62.

<sup>32</sup> *ibidem*.

<sup>33</sup> Mokgatle, 1971, p. 271. See also Trevor Huddleston, 1956, pp. 252-253.

<sup>34</sup> *Baaskap* is an Afrikaans word for white supremacy. It refers to control of black South Africans by white people.

<sup>35</sup> Thompson (n 25 above), p. 190.

<sup>36</sup> Clark and Worger (n 19 above), p. 69.

<sup>37</sup> Cf. *supra* note 35.

Thompson,<sup>38</sup> list the four ideas as follows: First, each racial group<sup>39</sup> has its own inherent culture. Second, white had the absolute power over the state. Third, white interests should supersede black interests. Fourth, white nation formed a single nation, while Africans were fragmented into distinct tribes.

## 2.2. Selected apartheid laws

Acting on the mistaken belief of white supremacy, the apartheid regime passed different legislations to push black South Africans to the margins of society. For example: Upon its assumption of political power in 1948, the National party government passed a number of legislative acts which were aimed at separating whites and blacks. With the Prohibition of Mixed Marriages Act,<sup>40</sup> the government intended to prevent people deemed to be of different races from marrying.<sup>41</sup> The state passed the Population Registration Act<sup>42</sup> and used it as a legal instrument for identifying and categorising race types. According to MacKinnon,<sup>43</sup> in some instances the apartheid laws had ludicrous, but shocking consequences. The same family members were classified as coloured or white,<sup>44</sup> thereby separating husband from wife and parents from their children.

Under the Group Areas Act,<sup>45</sup> the Union of South Africa was sliced into different racial zones. The Bantu<sup>46</sup> Resettlement Act<sup>47</sup> empowered the apartheid government to remove Africans from areas set aside for whites. According to Clark and Worger<sup>48</sup> 3, 5 million Africans were forcibly removed from the so called 'white' areas. This process became known as "erasing black spots",<sup>49</sup> from white areas.

The Bantu Homeland Constitution Act(1971) empowered the South African government to grant independence to any homeland that so desired.<sup>50</sup> Through this Act, the government

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<sup>38</sup> *Ibidem*.

<sup>39</sup> There were four racial groups: White, Black, Coloureds and Indian.

<sup>40</sup> The Prohibition of Mixed Marriages Act 55 of 1949.

<sup>41</sup> Cf. *supra* note 27.

<sup>42</sup> Population Registration Act 30 of 1950.

<sup>43</sup> Cf. *supra* note, 27.

<sup>44</sup> *Ibidem*, p. 236.

<sup>45</sup> The Group Areas Act 41 of 1950.

<sup>46</sup> The word Bantu is derived from the word-*ntu*-meaning a person. *Abathu* means people. It is a collective term used to address indigenous people of southern Africa.

<sup>47</sup> Group Areas Act 41 of 1950.

<sup>48</sup> Cf. *supra* note 19, p.68.

<sup>49</sup> *Ibidem*, p. 70.

<sup>50</sup> The following homelands accepted independence, i.e. Transkei, Bophuthatswana, Venda and Ciskei. See also Leonard Thompson, *A History of South Africa*, (New Haven and London, 1990), p 191.

deprived native South Africans of their citizenships and shepherded them into homelands. According to the general circular issued by the Department of Bantu Administration and Development in 1967, all Africans were made temporary sojourners in the so-called white areas of South Africa:

It is accepted Government policy that the Bantu are only temporarily resident in the European areas of the Republic for as long as they offer their labour there. As soon as they become, for one reason or another, no longer fit for work or superfluous in the labour market, they are supposed to return to their country of origin or the territory of the national unity where they fit ethnically if they were not born and bred in the homeland<sup>51</sup>.

The Bantu Education Act<sup>52</sup> provided for the establishment of a separate educational system on a racial basis. The Act was aimed at providing Blacks with inferior education and skills to serve their own people in the homelands or to work in labouring jobs under Whites. Verwoerd<sup>53</sup> explained his racially discriminatory education policy as follows:

There is no place for the Bantu in the European community above the level of certain forms of labour. Until now he has been subjected to a school system which drew him away from his own community and misled him by showing him green pastures of European society in which he was not allowed to graze.<sup>54</sup>

Justifying the provision of inferior education to black South Africans, Hendrik Verwoerd<sup>55</sup> showed that black South Africans were unwanted in South Africa or European community:

There is no place for him [the African] in the European community above the level of certain forms of labour. Within his own community, however, all doors are open. For that reason it is to no avail for him to receive a training which has as its aim absorption in the European community, where he cannot be absorbed.

Hendrik F. Verwoerd (1954)

### **2.3. Effects of apartheid**

The enormity of the apartheid is visible from the reaction of United Nations. In reaction to apartheid, the General Assembly of the United Nations adopted an International Convention

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<sup>51</sup>General Circular No. 25, of 1967, Issued by the Department of Bantu Administration and Development.

<sup>52</sup>Bantu Education Act 47 of 1953.

<sup>53</sup>Chief architect of Apartheid education and Minister of Native Affairs.

<sup>54</sup>Part of H F Verwoerd speech when the passing of Bantu Education Act in 1953.

<sup>55</sup>Hendrick Verwoerd became a Prime minister of South Africa in 1958, available at <http://www.sahistory.org.za/people/hendrik-frensch-verwoerd>, visited on 03 March 2014.

on the Suppression and Punishment of the Crime.<sup>56</sup> Article 1 of the Convention declares Apartheid as a crime against humanity. It provides as follows:

The State parties to the present convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the charter of the United Nations, and constituting a serious threat to international peace and security.

Alarmed by the depravity and wickedness of apartheid policy adopted by the South African government of the day, the UN Security Council passed Resolution 556<sup>57</sup> in which it reiterated the condemnation of apartheid as a crime against humanity.<sup>58</sup> Because of apartheid's depravity, apartheid was condemned by the international Community as unlawful and a crime against humanity for which a prompt action was needed. In its Resolution, the Security Council called for the immediate eradication of apartheid.<sup>59</sup>

The impact apartheid had on the South African society was very huge. It still pervades every sphere of life.<sup>60</sup> As it could be seen from the above legislations, apartheid was orchestrated to have a devastating impact on the South African society: namely tearing the country into separate racial groups, stripping black South Africans of their citizenship, undermining their human dignity, robbing them of their freedom and sense of equality. Apartheid may be gone, but its stubborn legacy still affects South Africans in numerous ways: poverty, unemployment, lack of housing, crime, inequality and racial discrimination.<sup>61</sup> The effects of apartheid in South Africa will be shown on the paragraphs below.

### 2.3.1 Land and housing crises

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<sup>56</sup>International Convention on the Suppression and Punishment of the Crime of *Apartheid*, G.A. res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, *entered into force* July 18, 1976.

<sup>57</sup> UN Security Council Resolution 556 of 23 October 1984.

<sup>58</sup>Article 1 of the Security Council Resolution 556 of 1984.

<sup>59</sup>Article 6 of Security Council Resolution 556 of 1984.

<sup>60</sup> In *Nokotyana* para 1, the Court made the following remarks about the legacy of apartheid: Our history is one of land dispossession, institutionalised discrimination and systemic deprivation. The need for housing and basic services is still enormous and the differences between the wealthy and the poor are vast.

<sup>61</sup>*Grootboom*, para. 8.

Under the Natives Land Act<sup>62</sup>, only seven per cent of the South African land was reserved for Africans. According to Clark and Worger<sup>63</sup>, that 7 per cent was later expanded to 13, 5 per cent in 1936<sup>64</sup>. White South Africans arrogated 87 per cent of the land to themselves.

The Natives Land Act of 1913 had very adverse effects in South Africa; namely impoverishing black South Africans by dispossessing them their land.<sup>65</sup> The process of land redistribution in the new South Africa has not yet succeeded in redressing the past injustices. Ashton<sup>66</sup> laments the fact that only 8 per cent of agricultural land has so far been transferred. This is contrary to the promise made by the South African government to transfer 30 per cent by 2014.<sup>67</sup>

To compound the land problems, the apartheid government granted independence to several homelands. It was mistakenly believed by the apartheid regime that it was only in the homelands that Africans would be able to fulfil their separate destiny.<sup>68</sup> In essence, this was an apartheid measure calculated at controlling influx of black South Africans into what was known as white South Africa. It was also aimed at cutting financial ties with what the apartheid regime considered to be an 'unproductive' section of the population.<sup>69</sup> As indicated by MacKinnon, granting homelands independence was nothing but an apartheid regime's "hollow attempt at decolonisation".<sup>70</sup>

To get rid of black South Africans from the "white areas", the apartheid regime literally starved them of the basic social services. Fewer hospitals, schools, electricity lines, and water supplies were provided to Africans who lived in white areas.<sup>71</sup> According to Clark and Worger "not a single house for an African family was constructed between 1967 and 1976."<sup>72</sup>

### 2.3.2 Unequal society

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<sup>62</sup>The Natives Land Act 47 of 1913.

<sup>63</sup>Clark and Worger (n 19 above) p. 70.

<sup>64</sup>*ibidem*.

<sup>65</sup> See *Nokotyana* para 1.

<sup>66</sup> Glenn Ashton, Land Reform in South Africa: An unfulfilled Obligation, available at <http://sacsis.org.za/site/article/1475>, accessed on 24 March 2014.

<sup>67</sup>*ibidem*.

<sup>68</sup> See MacKinnon (n 27 above), pp. 246-247.

<sup>69</sup> Clark and Worger (n 19 above), p. 71.

<sup>70</sup> MacKinnon (n 27above), p. 249.

<sup>71</sup>Clark and Worger (n 19 above), p71.

<sup>72</sup>*ibidem*.

Apartheid had a varied impact on different racial groups in South Africa. As a government whose policies were designed to advance the interests of white South Africans, apartheid benefitted whites more than any other racial group. For an example: As a consequence of a steady economic growth experienced by South Africa during the apartheid era, the living standard for whites was ranked "higher than in most western developed countries".<sup>73</sup> For black South Africans, apartheid meant nothing but continuous impoverishment. As described by Thompson<sup>74</sup>, public services for blacks were either inadequate or non-existent. Consequently, the unequal treatment between whites and blacks resulted in South Africa being ranked as one of the most unequal nations in the world.

The inequality had become unbearable by the 1980s. According to Clark and Worger,<sup>75</sup> by the 1980s South Africa was ranked one of the most unequal countries in the whole world. The income gap between white and black South Africans was so wide that it posed a threat to lives. The infant mortality rate was 13 times higher for African and Coloured infants than for whites. 25 per cent of African and Coloured children could not live long enough to see their first birthday.<sup>76</sup>

Marais<sup>77</sup> paints a very dismal picture regarding income distribution in South Africa. In the last years of apartheid, i.e. between 1975 and 1990, the income of the poorest 60 percent of the population dropped by 36 percent.<sup>78</sup> The gap between rich and poor grew tremendously. By 1996, South Africa ranked third amongst the most unequal countries in the world.<sup>79</sup>

### 2.3.3 Poverty

According to Marais, poverty in South Africa was estimated at 45 percent during the apartheid years.<sup>80</sup> More than 18 million citizens lived below the poverty line. The situation was worse in the rural areas, where 50 percent of the lived below poverty line.<sup>81</sup> By 1990, 53

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<sup>73</sup> Clark and Worger (n 19 above), p. 68. See also Thompson (n 25 above), p. 200. White South Africans were described as prosperous as the middle and upper classes in Europe and North America.

<sup>74</sup> Thompson (n 25 above), pp. 200-201.

<sup>75</sup> Clark and Worger (n 19 above), p. 68.

<sup>76</sup> *ibidem*, p. 69.

<sup>77</sup> Marais, 2001, p. 193.

<sup>78</sup> *ibidem*..

<sup>79</sup> *ibidem*.

<sup>80</sup> *ibidem*, p. 194.

<sup>81</sup> *ibidem*.



per cent of Africans lived below poverty line compared to 2 per cent of all white South Africans<sup>82</sup>.

### 2.3.4 Unequal Education

Herbst<sup>83</sup> shows how biased the provision of education was during the apartheid era. The apartheid government invested very heavily in the education of white children and showed very little interest in the education of black children. In 1990, the apartheid government spent R2, 910 for each white child in primary school. In the same year, the amount of R660 was spent for each African child.<sup>84</sup> While there were 307, 000 vacancies in white schools; 2 million black students were without school places.

The situation was even worse in the workplace. According to Herbst<sup>85</sup>, there were 180,000 whites in managerial, technical and professional positions compared to only 3, 000 blacks, there was one black mine manager in seventy-seven years, and there was not a single black actuary<sup>86</sup>.

### 2.3.5 The health sector

As depicted by Thompson<sup>87</sup>, the apartheid regime showed little regard for the health and welfare of black South Africans. Due to the biased attention given to whites in the provision of medical services, there was a big difference in the infant mortality rates between different races. White South Africans had a low infant mortality rate, estimated at 14,9 per thousand live births in 1978. They also enjoyed long life expectancy, estimated at 64,5 years for males and 72,3 years for females in 1969-71.

On the other hand, the official estimate of the African infant mortality rate in South Africa as a whole was much worse. In 1974, the rate of African infant mortality rate in South Africa “was 100 to 110 per 1,000”.<sup>88</sup> The African infant mortality rate “was worse than every

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<sup>82</sup> Herbst, 1994, p. 30.

<sup>83</sup> *Ibidem*.

<sup>84</sup> *Ibidem*.

<sup>85</sup> *Ibidem*.

<sup>86</sup> *Ibidem*.

<sup>87</sup> Thompson, (n. 25 above), pp.202-203.

<sup>88</sup> *Ibidem*.

country in Africa except Burkina Faso and Sierra Leone''.<sup>89</sup> Life expectancy for Africans was estimated 'at 51.2 for males and 58.9 for females in 1965-70'.<sup>90</sup>

## 2.4. Struggle against apartheid

It was against this background of oppression and marginalisation that black South Africans launched their struggle against the apartheid regime, which was principally led by African National Congress (ANC)<sup>91</sup>.

The introduction of apartheid government in 1948 saw intensification in the black South Africans' efforts to resist apartheid.<sup>92</sup> There was a concerted defence action on a number of fronts. In 1949, the ANC adopted a radical programme of action, which set out a policy of mass action, boycotts, strikes and civil disobedience<sup>93</sup>. Despite numerous efforts to resist apartheid, the regime continued to entrench its authority. The struggle against apartheid continued until the early 1990s when the main belligerents decided to bury their hatchets in favour of a negotiated settlement. The final end of apartheid was marked by the inauguration of a democratically elected government of South Africa, led by the late president Nelson Mandela.<sup>94</sup>

## 2.5. Negotiations for a new South Africa

Official negotiation in South Africa came about in the 1990s after a long time of engagement between the white and black South Africans. Numerous international, regional and national factors made the apartheid government and the liberation movement to sit around the negotiating table, and decide the new South Africa.<sup>95</sup> The South African situation was not conducive for either the ruling party or the liberation movement to score a decisive victory on the apartheid war. Even though the ANC was popular and had enjoyed overwhelming support among South African and the international community, it lack the military means to unseat the nationalist government.<sup>96</sup> On the other hand, the apartheid regime had all the necessary

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<sup>89</sup> *Ibidem*.

<sup>90</sup> *Ibidem*.

<sup>91</sup> The struggle against segregation legislation started as a response to the drafting of the natives' Land Bill in 1911. The Bill was aimed at dispossessing Africans of their land. The Africans responded to this draft bill by establishing the South African Native National Congress (SANNC) in 1912. In 1923, the SANNC was renamed the African National Congress (ANC).

<sup>92</sup> MacKinnon (n 27 above), p. 252.

<sup>93</sup> *Ibidem*.

<sup>94</sup> Nelson Mandela was sworn in as the first democratically elected president of South Africa on 10 May 1994.

<sup>95</sup> Segal and Cort, 2012, p. 55.

<sup>96</sup> *Ibidem*, p. 57.

economic, military and political advantage to withstand the attack from the liberation movement and the international community. But it had already lost legitimacy to rule.

As neither the ANC nor the Nationalist government could win the apartheid war, they started to conduct secret talks, with the aim of overcoming the political impasse; and establishing a transition from the apartheid to democracy.<sup>97</sup> The negotiation process was beset with two major challenges; namely: Firstly, the negotiators were not elected to draft a constitution. They were drawn from political parties which participated in the multi-party negotiations for democratic South Africa known as Convention for the Democratic South Africa (CODESA).<sup>98</sup> It was later became known as the Multi-Party Negotiation Process (MPNP). Secondly, there was a fear among white constituency that the elected constitutional Assembly would not consider interests and needs of white.<sup>99</sup>

Consequently, the negotiating parties agreed on a two-stage process. First, the unrepresentative body, drawn from the political parties, would draw an interim constitution.<sup>100</sup> The government conceded to the ANC's demand that an elected constitution-making body would draft and adopt a final constitution and the ANC agreed to the government's demand that the Constitution-making body would be bound by "agreed Constitutional Principles" that would emerge from the Multi-Party Negotiating Process (MPNP).<sup>101</sup> The 34 Constitutional Principles were agreed upon by the parties at the MPNP, that they would guide the drafting of the final Constitution. For the constitution to be certified by the Constitutional Court, it was required that the Constitution should comply with the Constitutional Principles.<sup>102</sup>

## 2.6 The Interim Constitution, 1993

The adoption of Interim Constitution of the Republic of South Africa, 1993<sup>103</sup>, was something very new in the history of South Africa. The interim Constitution was preceded by three Constitutions with which it differs fundamentally.<sup>104</sup> According to Currie and de

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<sup>97</sup> *Ibidem*.

<sup>98</sup> *Ibidem*, pp. 58-59.

<sup>99</sup> *Ibidem*, p. 57.

<sup>100</sup> *Ibidem*.

<sup>101</sup> Welsh, 1994, p. 25.

<sup>102</sup> <http://www.sahistory.org.za/drafting-and-acceptance-constitution>, visited on 26 arch 2014.

<sup>103</sup> Interim Constitution of South Africa, 1993. Hereinafter referred to as the Interim Constitution.

<sup>104</sup> There are three Constitutions which preceded the Interim Constitution: The Union Constitution ( South Africa Act 32 of 1909), The Republic Constitution ( Constitution of the republic of South Africa Act 32 of 1961) and the Tricameral Constitution ( Constitution of the Republic of South Africa Act 110 of 1983).

Waal,<sup>105</sup> none of those three preceding Constitutions had supreme status. Each of them was subject to the Parliament which could easily amend them by simple procedures.<sup>106</sup>

So, the Interim Constitution marked a quantum leap from one era of parliamentary sovereignty to another era of constitutional supremacy. The explanatory memorandum to the parliament described the interim constitution as a bridge from the past of apartheid to a future of democracy. It memorandum states that the interim constitution "provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of colour, race, class, belief or sex."<sup>107</sup>

This transition is well also captured by Mureinik<sup>108</sup>, who described the interim Constitution in a metaphorical language as a bridge from an era of untold suffering to a future founded on human rights and social justice.<sup>109</sup> According Mureinik<sup>110</sup>, the new order must be of a community based on persuasion, not coercion.

Again, in *Shabalala and Others v Attorney-General of the Transvaal and Others*<sup>111</sup> the Constitutional Court reiterated the same point when it stated:

[I]t (Constitution) constitutes a decisive break from a culture of Apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is "justifiable in an open and democratic society based on freedom and equality".

From the above descriptions of the Interim Constitution, it is an apparent concurrence that the Constitution acts as an embodiment of transition from authoritarian rule of apartheid to a democratic era which is anchored on the values of human dignity, freedom, equality and

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<sup>105</sup> Currie and De Waal, 2013, p. 3.

<sup>106</sup> Ibidem.

<sup>107</sup> Available at <http://www.justice.gov.za/trc/legal/bill.htm>, visited on 25 December 2013.

<sup>108</sup> Mureinik, 1994, p. 32.

<sup>109</sup> Ibidem.

<sup>110</sup> Ibidem.

<sup>111</sup> *Shabalala and Others v Attorney-general of the Transvaal and Another*, (Constitutional Court of South Africa, 1995).

social justice. As illustrated by Currie and de Waal<sup>112</sup>, the Interim Constitution was a transitional measure which set out the procedures for negotiations and drafting of the final Constitution. In other words the interim Constitution paved way for the final Constitution.

## **2.7 The Constitution of the Republic of South Africa, 1996**

Law has always played a pivotal role in the history of South Africa. As indicated above, apartheid government derived its existence from the apartheid laws. The new South Africa was also established on a Constitutional foundation. The Preamble to the Constitution of the Republic of South Africa states this point very explicitly:

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to establish a society based on democratic values, social justice and fundamental human rights

The fact that law constitutes the foundation the new South Africa is well-acknowledged by Liebenberg<sup>113</sup>:

The Constitution of the Republic of South Africa created the legal foundation for the establishment of democracy in South Africa and the building of post-apartheid society.

In other words, the Constitution constitutes a foundation for the new South Africa. The Constitutional Court has since acknowledged the poor legacy of apartheid, and that the Constitution was adopted for the express purpose of transforming the South African society:

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

### **2.7.1 Justiciability of socio-economic rights**

Unlike the Interim Constitution, which resulted from political negotiations, the final Constitution was a product of the elected Constitutional Assembly. The Constitutional Assembly was given a period of two years to produce a Constitution which should conform

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<sup>112</sup> Currie and De Waal (n 105 above), p. 6.

<sup>113</sup> Liebenberg, Sandra, *Socio-Economic Rights adjudication under a transformative Constitution*. Claremont: JUTA, 2012.

with 34 Constitutional Principles<sup>114</sup> agreed to during the multi-parting negotiations. To ensure there was no deviation from Constitutional Principles, the Constitutional Court was given a mandate to certify the Constitution.<sup>115</sup>

The Certification process was marked by fierce objections to the inclusion of socio-economic rights in the Constitution<sup>116</sup>. Young<sup>117</sup> defines Economic and social rights (socio-economic rights) as those rights that include the rights to access food, water, housing, health care, education, and social security-what might approximate the goods and services necessary to secure a dignified existence.

Some of the objections raised against the inclusion of socio-economic rights include the following: socio-economic rights are not human rights; courts will not and cannot adjudicate policy questions; courts cannot adjudicate positive rights; adjudicating social rights will lead to violation of separation of powers and social rights are too vague.<sup>118</sup>

The Constitutional Court confirmed the justiciability of socio-economic rights when it held:

It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the rights to a fair trial, the order it makes will often have such implications... In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.<sup>119</sup>

The Court went on to state in no uncertain terms that socio-economic rights are justiciable: [a]t the very minimum socio-economic rights can be negatively protected from improper invasion''.<sup>120</sup>

However, Langa asserted that full realisation of socio-economic rights should encompass both the enforcement of both negative and positive duties.<sup>121</sup> These state obligations are enshrined in section 7(2) of the Constitution, which lists protection, promotion, fulfilment as the obligations to be shouldered by the state in ensuring the realisation of all rights in the Bill of Rights:

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<sup>114</sup> See Schedule 4- Constitutional Principles of the Interim Constitution Act 200 of 1993.

<sup>115</sup> Currie and De Waal (n 105 above), p. 6.

<sup>116</sup> *Certification of the Constitution of the Republic of South Africa*, (Constitutional Court of South Africa, 1996) (*Certification of the Constitution*).

<sup>117</sup> Young, 2010, p. 386.

<sup>118</sup> Jeff King, *Judging Social Rights* (Cambridge University Press: United Kingdom) 2012, p4-5

<sup>119</sup> *Certification of the Constitution*, para. 77.

<sup>120</sup> Para. 78.

<sup>121</sup> Langa, 2012, p. 8.

### 2.7.2 Transformative Constitution

At the heart of the new Constitutional order lies the country's quest to transform into a society based on dignity, equality and freedom.<sup>122</sup> The transformation envisaged in the Constitution is well defined in Klare's seminal paper on, 'Legal Culture and Transformative Constitutionalism',<sup>123</sup>:

By *transformative constitutionalism* I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relations in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform', but something short of or different from 'revolution' in any traditional sense of the word. In the background is the idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the 'private sphere'.<sup>124</sup>

Klare's definition of a transformative Constitution mirrors and encapsulates what the Constitution of the Republic of South Africa has envisioned for the country: The preamble to the Constitution states the vision for the country in very similar terms. The Constitution was adopted so as to: transform the apartheid wretched country into a society based on social justice, democratic values and human rights; improve the quality of life of all the citizens and free the potential of each person.<sup>125</sup>

In shedding more light on the concept of transformative constitution, Liebenberg describes the Constitution as both "backward- and forward-looking."<sup>126</sup> The Constitution's backward-looking aspect aims to facilitate transformation through correcting the wrongs of the past. The forward-looking aspect of the Constitution aims to help South Africa transcend its history of apartheid and colonialism. It aims to establish a new South Africa, with "a new political, social and economic order, based on democratic values, social justice and fundamental human rights."<sup>127</sup>

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<sup>122</sup> Preamble to the Constitution and the Constitutional Court has affirmed this as a new goal for the new dispensation in South Africa.

<sup>123</sup> Klare, 1998, p. 150.

<sup>124</sup> Ibidem.

<sup>125</sup> Preamble to the Constitution.

<sup>126</sup> Liebenberg (n 113 above), p. 25.

<sup>127</sup> Ibidem, p.27.

## 2.8 Current challenges and successes

In his inaugural speech as the first democratically elected president of South Africa, Nelson Mandela stated that political freedom did not signal the end of the struggle for freedom.<sup>128</sup> In his words, he stated that South Africa still needs to fight and win the battle on socio-economic front:

We have, at last, achieved our political emancipation. We pledge ourselves to liberate all our people from the continuing bondage of poverty, deprivation, suffering, gender and other discrimination<sup>129</sup>.

Despite the huge strides already made in the transformation of society, the stubborn legacy of apartheid continues to derail South Africa from attaining its expressed goal of improving quality of life of all its citizens. The United Nations Development Programme (UNDP) report on South Africa shows a very impressive achievement in providing South Africans with running water.<sup>130</sup> According to the UNDP report, out of 51.8 million South Africans, 70 per cent now have access to running water<sup>131</sup>. By the end of 2012/ 13 financial year, more than 30 per cent of South Africans received assistance through social grants.<sup>132</sup> These figures demonstrate a phenomenal improvement in delivery services.

But there are some recalcitrant challenges that continue to pose a threat to South Africa's fledgling democracy, namely unemployment, poverty, crime and inequality. Currently, the rates of unemployment, poverty and crime are soaring. The unemployment rate is estimated to be at 34, 5 per cent among the youth (aged between 15 to 35 years of age).<sup>133</sup>

Despite the great progress portrayed above, most South Africans still remain trapped in abject poverty. The level of inequality is also unacceptably high. According to *Aljazeera* report 47 percent of South Africans remain poor<sup>134</sup>. Unemployment rate is at 24.10 percent. *The Economist* report revealed that the situation would much more dire, if the 2 million or so

<sup>128</sup> Mandela Inaugural speech, Pretoria, 10/5/1994 available at [http://www.africa.upenn.edu/Articles\\_Gen/Inaugural\\_Speech\\_17984.html](http://www.africa.upenn.edu/Articles_Gen/Inaugural_Speech_17984.html) visited on 02 January 2014.

<sup>129</sup> Ibidem.

<sup>130</sup> Available at [http://www.za.undp.org/content/south\\_africa/en/home/countryinfo/](http://www.za.undp.org/content/south_africa/en/home/countryinfo/) visited on 20 March 2014

<sup>131</sup> [http://beta2.statssa.gov.za/?page\\_id=595](http://beta2.statssa.gov.za/?page_id=595) visited on 19 March 2014

<sup>132</sup> Jeanette Clark, "The case of Social grants" available at <http://www.moneyweb.co.za/moneyweb-2013-budget/the-case-for-social-grants>, visited on 16 December 2013.

<sup>133</sup> [http://beta2.statssa.gov.za/?page\\_id=595](http://beta2.statssa.gov.za/?page_id=595) visited on 19 March 2014.

<sup>134</sup> Lana Pasic, *South Africa after Mandela*, <http://www.aljazeera.com/indepth/opinion/2013/12/south-africa-needs-another-mandela-20131279221987639.html>, Accessed: 20 January 2014.



adults who have given up looking for work were to be included. The actual unemployment rate would then rise to 37 percent.<sup>135</sup>

## 2.9. Failures of the current administration

Despite the roots of socio-economic problems being traceable to the apartheid era, some of the ruling party's top leaders have already started to indicate that it was high time that the current ANC administration should accept some of the blame for failing to redress the legacy of apartheid.<sup>136</sup> Trevor Manuel<sup>137</sup> was quoted as saying:

We [government] should no longer say it's apartheid's fault." He further said that "we should get up every morning and recognise we have responsibility. There is no longer the Botha regime looking over our shoulder, we are responsible ourselves".<sup>138</sup>

In retrospect, there is no clear line of demarcation between the different eras and their impact on the socio-economic challenges facing the country. Even though socio-economic troubles have had their roots in the past, they continue to subsist to this day and are perpetuated by the current administration's missed opportunity.

## 2.10 Concluding remarks

This chapter has considered the origins of the socio-economic challenges facing South Africa today. While these origins are traceable to the apartheid and colonial eras, some blame is attributable to the current administration's failure to use its 20 year incumbency to fruitfully address the legacy of the past. While huge strides have been made in addressing socio-economic legacy of apartheid, South Africa has missed opportunities to tackle the socio-economic problems because of corruption and maladministration<sup>139</sup>- thereby elongating and complicating the journey to eventual liberation of South Africans from poverty and

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<sup>135</sup> South Africa after Mandela: A Question of Leadership, available at <http://www.economist.com/news/middle-east-and-africa/21591643-nelson-mandela-set-standard-his-successors-have-struggled-match>, Accessed on 03 January 2014.

<sup>136</sup> <http://www.thoughtleader.co.za/readerblog/2013/04/16/forget-apartheid-time-government-took-responsibility/comment-page-1/>, visited on 5 November 2013.

<sup>137</sup> A former South African Minister in the office of the Presidency responsible for national planning Commission.

<sup>138</sup> <http://www.thoughtleader.co.za/readerblog/2013/04/16/forget-apartheid-time-government-took-responsibility/comment-page-1/>, visited on 5 November 2013.

<sup>139</sup> According to News24 South Africa has suffered an illegal outflow of R185 billion due to corruption in the public sector between 1994 and 2008. This is the amount of money which could have been used to better people's lives, available at <http://www.news24.com/MyNews24/Corruption-SA-Counting-The-Cost-20120508>, Accessed on 6 February 2014.

unemployment. As a consequence, a few 'multiracial elite has prospered' from the new dispensation, but the majority remain in deplorable conditions<sup>140</sup>.

As pointed out by Seekings<sup>141</sup>, South Africa has become more unequal than it was in the past. The need to deal with socio-economic challenges decisively and expeditiously was highlighted by President Zuma when he promised his second term in office to be a "new radical phase" of socio-economic transformation.<sup>142</sup>

This is an acknowledgement of the fact that a lot still need to be done to bring social justice in South Africa. The thesis' focus is on the evaluation of the impact of the courts in contributing to transformation and social justice in South Africa. In the next chapter, I will look at different instruments protecting socio-economic rights in South Africa.

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<sup>140</sup> Stuart Wilson and Jackie Dugard, 'Constitutional Jurisprudence: The First and Second Waves' in Langford M et al, *Socio-economic rights in South Africa: Symbols or Substance*, 1,35

<sup>141</sup> Jeremy ,Seekings, (2007) , ' Poverty and inequality after apartheid' ( Working Paper No. 200, Centre for Social Scientific Research: University of Cape Town, Cape Town). P 11

<sup>142</sup> <http://www.bdlive.co.za/national/politics/2014/02/21/zuma-promises-new-radical-phase-after-may-election>, visited on 15 June 2014.

## CHAPTER 3

### 3. LEGAL FRAMEWORKS FOR SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA

#### 3.1 Introduction

This chapter traces the sources of socio-economic rights to International Human rights instruments: the Universal Declaration of Human Rights (UDHR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) and African Charter on Human and Peoples' Rights. The chapter argues that despite South Africa's hesitance to embrace and ratify ICESCR,<sup>143</sup> South Africa is compelled by its Constitution<sup>144</sup> and obligations to other international treaties to give effect to socio-economic rights.<sup>145</sup> It also considers some of the reasonable legislative steps taken by the state to ensure that socio-economic rights are realised in South Africa.<sup>146</sup>

#### 3.2. International human rights instruments dealing with socio-economic rights

##### 3.2.1. International Bill of Human Rights

The origins of socio-economic rights entrenched in the Constitution of the Republic of South Africa today are traceable to the International Bill of Human Rights, which include the Universal Declaration of Human Rights (UDHR) and the two Covenants, namely, International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>147</sup>. The two Covenants were derived from the UDHR.<sup>148</sup>

##### 3.2.2. Universal Declaration of Human Rights

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<sup>143</sup> At the time of writing of this thesis, South Africa has not yet ratified ICESCR. The South African Cabinet had announced on the 11<sup>th</sup> of October 2012, that it would ratify the ICESCR.

<sup>144</sup> Chapter 2 of the Constitution encapsulates and gives protection to all kinds of human rights and fundamental freedoms.

<sup>145</sup> For example: South Africa has already ratified the Convention on the Rights of the Child. This Convention contains socio-economic rights of the child.

<sup>146</sup> Article 2 of the ICESCR provides that each state party shall adopt legislative measures to ensure progressive realisation of socio-economic rights. Subsections 26(2) and 27(2) make it obligatory for the state to take legislative measures to ensure realisation of socio-economic rights. They provide as follows: The state must take reasonable legislative and other measures, within its available resources to, to achieve progressive realisation of each of these rights.

<sup>147</sup> Nowak, 2002, p 73

<sup>148</sup> AsbjornEide, 1995, p. 21.

The adoption of UDHR on the 10th of December 1948 constituted a major achievement in the promotion of rule of law at the international and national level.<sup>149</sup> The UDHR encapsulates almost all of what constitute the present day's human rights and fundamental freedoms in 'one consolidated text'.<sup>150</sup> The UDHR puts all human rights and fundamental freedoms on the same footing.<sup>151</sup> Even though the description of human rights as interdependent, indivisible and universal gained prominence only after the Vienna Declaration and Programme of Action in 1993,<sup>152</sup> the UDHR had long shown respect for the doctrine of interdependence and indivisibility of all human rights.<sup>153</sup> It did this by including all human rights in one consolidated text.

The UDHR is a non-binding resolution of UN General Assembly. The fact that it has non-binding status under the international law does not make it to be of secondary importance. As stated by Nowak, the UDHR 'represents an authoritative interpretation of the term 'human rights' in the UN Charter''.<sup>154</sup> As a result, the UDHR could be considered as to be 'indirectly constituting international law treaty'.<sup>155</sup> Additionally, the UDHR is of paramount importance because it constitutes the primary source from which the two covenants; and all conventions and declarations have sprung.<sup>156</sup>

### 3.2.1.1. Fallacious division of human rights

Following the adoption of UDHR, the next assignment for the United Nations Commission on Human Rights was to draft legally binding Convention<sup>157</sup>. Because of the geo-politics of the day between the West and East, the Commission was divided on whether there should be one or two covenants. The western powers were in favour of dividing the Declaration into two different treaties, modelled along the lines of the Council of Europe.<sup>158</sup> The socialist

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<sup>149</sup> *Ibidem*, p. 15.

<sup>150</sup> *Ibidem*, p. 22.

<sup>151</sup> Nowak (n 147 above), p. 76.

<sup>152</sup> See paragraph 5 of the Vienna Declaration and Programme of Action (1993).

<sup>153</sup> Nowak (n 147 above), p. 76.

<sup>154</sup> Nowak, p 73.

<sup>155</sup> *Ibidem*.

<sup>156</sup> Eide (n 148 above), p. 21.

<sup>157</sup> Nowak (n 147 above), p. 76. Nowak mentions three tasks which were assigned to the Human Rights Commission, namely, to pronounce a non-binding declaration as a basis for a legally binding convention and to create a international implementation mechanisms.

<sup>158</sup> *Ibidem*, p. 78.

states were in favour of one convention, representing ‘the interdependence and indivisibility of all human rights’’.<sup>159</sup>

When the Commission turned question to the General Assembly, the resolution was passed in favour of one covenant. Notwithstanding the General Assembly's Resolution, the Western powers were able to ‘reverse the decision’ and get the Human Rights Commission to divide the UDHR into two International Covenants: International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, which were adopted by the United Nations (UN) General Assembly in 1966.<sup>160</sup>

Different reasons are advanced for dividing human rights into two main categories, popularly known as ‘first generation’ of civil and political rights and ‘the second generation of human rights’ (economic, social and cultural rights).<sup>161</sup>

Firstly, it was argued that the two sets of rights have different natures and characters and therefore required different instruments. Civil and political rights were viewed to be absolute rights which could be met immediately. On the other, socio-economic rights were considered to be programmatic and require progressive realisation.<sup>162</sup>

Secondly, it was argued that civil and political rights were free and therefore not too costly to the state. On the other hand, the realisation of socio-economic rights was considered to be too costly.<sup>163</sup>

The third argument was based on the difference between the obligations of conduct and obligations of result. It was argued that civil and political rights imply obligations that would yield results. On the other hand, socio-economic rights connote obligations to take action.<sup>164</sup>

Lastly, it was argued that civil and political rights were ‘justiciable’ because they could be applied by the courts with ease. Socio-economic rights were considered to be of a political

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<sup>159</sup> Ibidem.

<sup>160</sup> Eide, and Rosas, 1995, p. 15.. See also Manfred Nowak, *U.N. Covenant on Civil and Political Rights:CCPR Commentary*, 1993, p.xx. See also General ASSEMBLY RESOLUTION 543 (IV) of 5 February 1952.

<sup>161</sup> Nowak (n 147 above), p. 76.

<sup>162</sup> Eide( n 147 above), p. 22. See also B. G. Ramcharan (ed), *Judicial Protection of economic, Social and Cultural Rights*, ( MartinusNijhoff Publishers: leiden/Boston) 2005, p. 18.

<sup>163</sup> Ibidem.

<sup>164</sup> Ibidem.

nature and incapable of immediate application.<sup>165</sup> In other words, they were deemed to be programmatic.

### 3.2.1.2 International Covenant on Economic Social and Cultural Rights

The socio-economic rights are rights which correspond to the rights reflected in the ICESCR.<sup>166</sup> Economic and social rights (socio-economic rights) as those rights that include the rights to access food, water, housing, health care, education, and social security. This entails the goods and services necessary to secure a dignified existence<sup>167</sup> Ramcharan lists economic, social and cultural rights as follows:<sup>168</sup> peoples' rights to self-determination and protection of their means of subsistence<sup>169</sup>, the rights to work,<sup>170</sup> enjoyment of just and favourable conditions of work<sup>171</sup>; to form and join trade unions of one's choice;<sup>172</sup> social security;<sup>173</sup> an adequate standard of living;<sup>174</sup> the fundamental right to be free from hunger<sup>175</sup>, the right to enjoyment of the highest attainable standard of physical and mental health;<sup>176</sup> the right to education;<sup>177</sup> the liberty of parents and legal guardians to choose and establish schools for their children;<sup>178</sup> the liberty of individuals and bodies to establish and direct educational institutions;<sup>179</sup> the right to take part in cultural life;<sup>180</sup> the right to enjoy the benefits of scientific progress and its application;<sup>181</sup> the right to benefit from the protection of moral and material interests resulting from one's creations<sup>182</sup> and according of protection and assistance to the family and to children.<sup>183</sup>

### 3.2.3. The African Charter on Human and Peoples' Rights

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<sup>165</sup> Ibidem.

<sup>166</sup> Gloppen, 2005, p. 153.

<sup>167</sup> Young (n 117 above), p. 386.

<sup>168</sup> See Ramcharan, 2005, pp. 18-19.

<sup>169</sup> Article 1 of the ICESCR.

<sup>170</sup> Article 6 of the ICESCR.

<sup>171</sup> Article 7 of the ICESCR.

<sup>172</sup> Article 8 of the ICESCR.

<sup>173</sup> Article 9 of the ICESCR.

<sup>174</sup> Article 11 of the ICESCR.

<sup>175</sup> Article 11 of the ICESCR.

<sup>176</sup> Article 12 of the ICESCR..

<sup>177</sup> Article 13 of the ICESCR.

<sup>178</sup> Article 13(3) of the ICESCR.

<sup>179</sup> Article 13(3) of the ICESCR.

<sup>180</sup> Article 15(1) of the ICESCR.

<sup>181</sup> Article 15(1) of the ICESCR.

<sup>182</sup> Article 15(1) of the ICESCR.

<sup>183</sup> Article 10 of the ICESCR.

The African Charter on Human and Peoples' Rights (the Banjul Charter),<sup>184</sup> to which South Africa is a member state, gives protection to socio-economic rights.<sup>185</sup> These rights include: right to work (article 15), right to health (article 16) right to education (article 17) and right to development (article 22). As a Member State to the Banjul Charter, South Africa has the responsibility to give effect to the rights enshrined in the Charter. Article 1 of the Charter imposes an obligation on the member states to recognise the rights, duties and freedoms enshrined in the Charter and to adopt legislations and other measures to give effect to them. As indicated above, the Charter includes socio-economic rights.

### 3.2.4 South Africa's obligations in terms of other international treaties

Even though South Africa is too hesitant to ratify the ICESCR, it has been always "a state party to other international human rights treaties protecting some economic, social and cultural rights".<sup>186</sup> Such international human rights treaties include Banjul Charter and United Nations Convention on the Rights of the Child (CRC)<sup>187</sup> to which South Africa is a state party protect socio-economic rights as well. For an example, the CRC to which South Africa is a state party<sup>188</sup> includes the following socio-economic rights of the child: enjoyment of the highest attainable standard of health;<sup>189</sup> the right to benefit from social security;<sup>190</sup> right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.<sup>191</sup> By virtue of being a state party to other treaties that encapsulate socio-economic rights, South Africa is bound, in terms of its international obligations, to give effect to the provisions of those treaties.

### 3.2.5 South Africa's obligations to consider international law

Besides incurring obligations to give effect to socio-economic rights from different international treaties, South Africa is also obliged by its Constitution to consider international

<sup>184</sup> African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986

<sup>185</sup> South Africa ratified the Banjul Charter on the 9<sup>th</sup> of July 1996 available at <http://www.achpr.org/instruments/achpr/ratification/> visited on 01 January 2014.

<sup>186</sup> Ssenyonjo, 2009, p. 164.

<sup>187</sup> Ibidem. See also the United Nations Convention on the Rights of the Child (CRC), 1989

<sup>188</sup> South Africa ratified CRC on the 16 June 1995. Available at <http://unchildrights.blogspot.com/2011/01/chronological-order-ratifications-crc.html>. Visited on 12 December 2013.

<sup>189</sup> Article 24.

<sup>190</sup> Article 25.

<sup>191</sup> Article 27.

law.<sup>192</sup> International Conventions or treaties form part of the sources of international law.<sup>193</sup> As provided in the Constitution, international treaties are of great relevance to South Africa. Section 39 of the Constitution makes it mandatory for the court or tribunal to consider international law.

(1)(b) When interpreting the Bill of Rights, a court, tribunal or forum must consider international law

Section 231 makes international treaties binding on South Africa. Treaties become binding only after they have been “ approved by resolution in both the National Assembly and the National Council of Provinces “ or are self-executing.<sup>194</sup> Furthermore, section 232 of the Constitution makes customary international law binding upon the Republic of South Africa, unless it is proven to be inconsistent with the Constitution. Lastly, when interpreting any legislation, the courts have a duty to prefer any reasonable interpretation that is consistent with international law over any that is inconsistent with international law.<sup>195</sup>

Given the above Constitutional provisions, it is apparent that South Africa is bound by its constitution and international treaties to protect socio-economic rights. So, notwithstanding South Africa's slow pace or reluctance to adopt ICESCR, it is not possible for the country to ignore the provisions of ICESCR. Similar obligations to give effect to socio-economic rights are enshrined in other treaties to which South Africa is a state party.

### **3.2.6. Vienna Declaration and Programme of Action, 1993**

The inclusion of all rights in the Bill of Rights in South Africa is in line with the dominant and emerging trend in the international human rights instruments. Despite the earlier division of human rights into two regimes, the late trends show the re-emergence of human rights regime as a universal, interdependent, indivisible and interrelated system.<sup>196</sup>

The trend of human rights as universal and interdependent made its first appearance in The Proclamation of Teheran (1968)<sup>197</sup>. Paragraph 1 of the Proclamation provides:

<sup>192</sup>Section 39 of the Constitution.

<sup>193</sup>Article 38 of the Statute of International Court of Justice. See also Dixon, 2013, p. 24.

<sup>194</sup>See subsections 2 and 3 of section 39 of the Constitution.

<sup>195</sup>Section 33 of the Constitution.

<sup>196</sup>See Vienna Declaration and Programme of Action (1993). See also Gandhi, 2012, p. 456.

<sup>197</sup>The Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968).



It is imperative that members of international community fulfil their solemn obligations to promote and encourage *respect for human rights and fundamental freedoms for all without distinctions* (own emphasis) of any kind such as race, colour, sex, language, religion, political or other opinions.

In the preamble to African Charter on Human and Peoples' Rights, the interdependence and interrelatedness of human rights was further confirmed:

.... Civil and political rights cannot be disconnected from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.<sup>198</sup>

Paragraph 5 of the Vienna Declaration and Programme of Action is more forthright and unambiguous about the interdependence and indivisibility of all human rights. Not only does it provide for the interdependence, interrelatedness, indivisibility and universality of human rights, but it further states in no uncertain terms that all human rights and fundamental freedoms should be treated equally:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of State, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.<sup>199</sup>

With the adoption of Vienna Declaration and programme of Action in 1993, the indivisibility, interdependence and universality of all human rights a major revival and reaffirmation. This came after a period of almost 27 years in which human rights system reflected a house divided against itself.<sup>200</sup> On the one hand, Civil and political rights were regarded as genuine human rights and therefore justiciable. On the other hand, socio-economic rights were deemed to be second generation, making them appear like younger than the civil and political.

Notwithstanding the spurious divisions within the human rights system, the Universal Declaration of Human Rights and the two covenants constitute the International Bill of Human Rights have always constituted the backbone of the United Nations human rights

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<sup>198</sup> Preamble to the African Charter on Human and Peoples' Rights (adopted on 27 June 1981, entered into force 21 October 1986).

<sup>199</sup> Paragraph 5 of the Vienna Declaration and Programme of Action, 1993.

<sup>200</sup> The official division of human rights happened in 1966 when the UN General Assembly adopted two covenants.

programme.<sup>201</sup> This International Bill of Rights finds resonance in the chapter 2 of the Constitution of the Republic of South Africa, which includes all human rights and fundamental freedoms in one consolidated text<sup>202</sup>

Reflecting on the interdependence of the South African Constitution, Langa<sup>203</sup> said the following words:

Legal guarantees of political rights are indivisible from constitutional protection for social and economic rights. Without economic security and independence, individuals will be unable to realise individual freedom and express themselves freely in the social and political sphere. They will be unable to educate themselves, a prerequisite for robust political participation. Without economic security and independence, culture and civil society cannot flourish. Individuals without the means to support themselves will find themselves turning to crime and violence and disrespecting the legal system.<sup>204</sup>

### **3.3 Socio-economic rights in the Constitution of South Africa**

As stated earlier on, socio-economic rights are rights which correspond to the rights reflected in the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>205</sup> After the division of human rights system into two categories, socio-economic rights were classified under the ICESCR.

#### **3.3.1 Similarities between the Constitution and the ICESCR**

Even though South Africa has been too hesitant to ratify the ICESCR,<sup>206</sup> its approach on socio-economic rights is similar to the provisions of the ICESCR. In their content and wording, the socio-economic rights in South African Constitution are nothing but a mirror of the ICESCR.

#### **3.3.2 Conditions for realisation of socio-economic rights**

Both the ICESCR and the Constitution set pre-conditions for the realisation of socio-economic rights. For example; Article 2 of ICESCR subjects the realisation of socio-economic rights to three conditions: reasonable legislative and other measures, progressive

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<sup>201</sup>Nowak, 2005, p. xi.

<sup>202</sup>Chapter 2 of the Constitution is also known as the Bill of Rights. It embodies all different kinds of fundamental rights and freedoms.

<sup>203</sup>The late and former Chief Justice of the Constitutional Court of South Africa.

<sup>204</sup>Langa (n 121 above), p. 5.

<sup>205</sup>Gloppen (n 166 above), p. 153.

<sup>206</sup>At the time of writing of this thesis, South Africa has not yet ratified ICESR. The South African Cabinet had announced on the 11<sup>th</sup> of October 2012, that it would ratify the ICESR.

realisation and availability of resources<sup>207</sup>. The same conditions are included in the Constitution of the Republic of South Africa. The realisation of socio-economic rights contained in sections 26 and 27 of the Constitution is dependent upon taking reasonable legislative and other measures, the availability of resources and progressiveness/ and reasonableness of the state measures.<sup>208</sup>

Subsections 2 of sections 26 and 27 of the Constitution are identical and provide:

The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

In short, the obligations imposed on the state to fulfil socio-economic rights are neither absolute nor unqualified. Subsections 2 of Sections 26 and 27, make the fulfilment of these rights contingent upon three conditions: the obligation to take “reasonable legislative and other measures; “to achieve the progressive realisation” of the right; and “within available resources”<sup>209</sup>.

### 3.3.3 Similar obligations

The ICESCR imposes obligations on the member states to ensure progressive realisation of socio-economic rights. These state obligations are similar to the obligations imposed by the Constitution on the South African government. According to Ramcharan<sup>210</sup>, the key words used in the ICESCR to describe the state obligations are: “to take steps”<sup>211</sup>; “to guarantee”<sup>212</sup>; “to ensure”<sup>213</sup>; “to respect”<sup>214</sup>; “to undertake”<sup>215</sup> and “to promote”<sup>216</sup>. On the other hand section 7(2) of the Constitution imposes the following obligations on the state: to respect; protect, promote and fulfil the rights in the Bill of Rights.

### 3.4. Sections dealing with socio-economic rights

The Constitution enumerates the following socio-economic rights: right to have access to adequate housing (section 26), right to have access to health care services (section 27),

<sup>207</sup> Ghandi (n 196 above), p. 50.

<sup>208</sup> Sections 26(2) and 27(2) of the Constitution.

<sup>209</sup> See *Grootboom*, para. 38.

<sup>210</sup> Ramcharan (n 168 above), pp. 19-2.0

<sup>211</sup> Article 2(1).

<sup>212</sup> Article 2(2).

<sup>213</sup> Article 3.

<sup>214</sup> Article 13(3).

<sup>215</sup> Article 2(1).

<sup>216</sup> Article 1(3).

children's right to basic nutrition, shelter, basic health care services and social services (section 28(1)(c), right to a basic education, including adult basic education (section 29(1)(a) and right of the arrested or detained person (section 35) of the Constitution.

### **3.4.1. Categories of socio-economic rights**

According to Mbazira, the socio-economic rights can be divided into three discernable categories: rights with internal limitation, rights without internal limitation and the negative rights.<sup>217</sup>

#### **3.4.1.1. First category of socio-economic rights**

Mbazira<sup>218</sup> describes the first category of right as those giving everyone access to a right, eg right to access adequate housing and right to have access to health care services. All these rights are subject to internal limitation, which requires the state 'to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights' (sub-sections 26(2) and 27(2)). They do not assure anyone of immediate realisation of or entitlement to a right.

#### **3.4.1.2. Second category of socio-economic rights**

The second group of rights is not contingent upon any internal limitation. They include children's rights to nutrition, shelter, basic health care services and social services (sec 28(1) (c). They also include right to basic education sec 29(1) and the rights of the detained persons to adequate accommodation, nutrition, reading materials and medical treatment (sec 35(2)(e). The realisation of the second group of socio-economic rights is not dependent on the state taking reasonable legislative and other measures within its available resources to progressively realise them. In other words such rights are available on demand.

#### **3.4.1.3 Third Category of socio-economic rights**

The third group of rights prescribes a number of prohibitions, which includes the right of everyone not to be evicted from their home or not to have their home demolished without an order of court made after considering all the relevant circumstances (sec 26(3). The other

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<sup>217</sup> Mbazira, 2009, p. 3.

<sup>218</sup> Ibidem.

right in this category is the prohibition of refusal of emergency medical treatment to anyone (section 27(3)).<sup>219</sup>

### 3.4.2. A different way of categorising socio-economic rights

Liebenberg<sup>220</sup> describes the socio-economic rights included in the South African constitution terms of drafting styles. According to her there are three distinctive drafting styles: the first set of category is described as 'unqualified'. It includes 'basic' rights consisting of children's socio-economic rights, the right of everyone to basic education, including adult basic education, and the socio-economic rights of detained persons, including the sentenced persons. These rights are not qualified by any reference to reasonable measures, progressive realisation or resources constraint

The second category entails the right of "everyone" to "have access to adequate housing, health care services, including reproductive health care, sufficient food and water, and social security. A subsection requires the state to "take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of each of these rights.

Liebenberg<sup>221</sup> describes the third category of socio-economic rights as rights located in sections 26(3) and 27(3). Section 26(3) provides as follows: no one may be evicted from their home, or have their home demolished, without an order of the court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions. Section 27(3) provides: No one may be refused emergency medical treatment.

These rights impose both negative and positive obligations, in the sense that "they impose duties of non-interference with fundamental material interests and of positive provision of the goods and services necessary to secure them".<sup>222</sup>

Owing to their origins from two sources, socio-economic rights enjoy "dual legal and normative validity".<sup>223</sup> They can claim their validity from the international human rights norms<sup>224</sup> as well as the democratic constitution making process.

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<sup>219</sup>Of the Constitution.

<sup>220</sup> Liebenberg, 2002, pp. 162-163.

<sup>221</sup>Ibidem.

<sup>222</sup> Young (n 117 above), p. 389.

<sup>223</sup>Gloppen, (n. 166 above), p. 154.

### 3.5. Focus of the thesis

For the purposes of this thesis, the primary focus will be on sections 26 and 27 of the Constitution.

Section 26, which deals with the right to housing, provides as follows:

- (1) Everyone has the right to have access to adequate housing
- (2) The state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right
- (3) No one may be evicted from their home, or have their home demolished, without an order of the court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Section 27 provides as follows:

- (1) Everyone has the right to have access to
  - (a) Health care services, including reproductive health care
  - (b) Sufficient food and water; and
  - (c) Social security, including , if they are unable to support themselves and their dependants, appropriate social assistance
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights
- (3) No one may be refused emergency medical treatment

### 3.6 State obligations to realise socio-economic rights

For the realisation of the rights in the Bill of Rights, the Constitution places obligations on the state: to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>225</sup> The Constitution imposes both negative and positive obligations<sup>226</sup>. What do these duties or obligation really entail? Liebenberg describes the duties as follows<sup>227</sup>: the duty to respect as requiring the state to refrain from law or conduct that would interfere in people's rights. On the other hand the duty to protect places a duty on the state to take legislative and other measures to protect vulnerable groups against violations of their rights by more powerful

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<sup>224</sup> Socio-economic rights are contained in the Universal Declaration of Human Rights and International Covenant on Economic, Social and Cultural Rights. They are also enshrined in chapter two of the Constitution of the Republic of South Africa.

<sup>225</sup> See Section 7(2) of the Constitution.

<sup>226</sup> Liebenberg (n. 220 above), p. 163.

<sup>227</sup> Ibidem, pp. 163-164.

private parties. The duty to promote and fulfil requires the state to take positive measures to ensure that those persons who currently lack access to the rights gain access to them.

The UN Committee on Economic, Social and Cultural Rights (CESCR) has identified two aspects of the duty to fulfil<sup>228</sup>: the duty to enable communities to gain access to socio-economic rights. This will entail adopting framework policies and legislation that facilitate and regulate access to socio-economic rights. The second duty is to provide the right directly, whenever an individual or group is unable, for reasons beyond their control, to gain access to the right through the means at their disposal.

### **3.7 Fulfilment of legislative measures**

#### **3.7.1 Relevant legislations and departments**

The prerequisite for the state to realise socio-economic rights is to take reasonable legislative measures.<sup>229</sup> In most instances, South Africa has already met this prerequisite. So far the apartheid laws have been wiped out of the way. They were replaced by new legislations which are conducive for the transformation of South Africa. This in itself is a major achievement. Without changing the legal framework, transformation would be unthinkable. As shown in the second chapter, the socio-economic destruction of South Africa was possible because of apartheid laws which had legitimised such a wanton rampage.

Besides the adoption of the transformative constitution, numerous legislations have been passed, and different departments have been established. All these measures have been undertaken for the purpose of bringing about transformation in South Africa: Housing Act 1997,<sup>230</sup> Water Services Act 1997,<sup>231</sup> Employment Equity Act 1998,<sup>232</sup> Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998 (PIE),<sup>233</sup> Social Assistance Act 2004, the Extension of Security Tenure Act 62 of 1997, the Rental Housing Act 50 of 1999. New departments or ministries such as the Department of Housing/ Human Settlement, Education Department, Department of Women, Children and People with Disabilities and Department of Social Welfare and Development were also established.

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<sup>228</sup> See CESCR General Comment No. 12, para 15 and General Comment No. 14 para. 37.

<sup>229</sup> See sections 26(2) and 27(2) of the Constitution.

<sup>230</sup> Housing Act 107 of 1997.

<sup>231</sup> Water Services Act 108 of 1997.

<sup>232</sup> Employment Equity Act 55 of 1998.

<sup>233</sup> Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

All these legislations and departments were passed and established to fulfil the state's obligations to "take reasonable legislative and other" measures so as to ensure progressive realisation of the rights enshrined in the Bill of Rights.<sup>234</sup> De Vos describes these Acts as forming "a web of protection" for the vulnerable groups.<sup>235</sup>

However, no matter how reasonable and progressive the legislative measures might be, on their own such measures are not sufficient. The standard set for the satisfaction of state obligations regarding realisation of socio-economic rights is much higher. As the Constitutional Court held in the *Grootboom* judgment, legislative measures are, on their own, insufficient:

The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.<sup>236</sup>

### 3.8 Concluding remarks

This chapter has considered the legal framework for socio-economic rights. It has discussed the International Bill of Human Rights as the original source of the socio-economic rights which are today enshrined in the Constitution of South Africa. The chapter has argued that despite government's slow pace to ratify the ICESR, South Africa has always been saddled with the duty to give effect to socio-economic rights. This is so because South Africa has ratified other treaties in which socio-economic rights are enshrined. In addition to that, South Africa has enshrined socio-economic rights in its Constitution. As if this obligation on the South African state to give effect to socio-economic rights were not enough, the Constitution enjoins the Court, when interpreting the Bill of Rights, to take heed of international law.

This chapter has shown that socio-economic rights in South Africa have two sources from which they can claim their validity and legitimacy: the Constitution and International Human Rights Instruments.

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<sup>234</sup> Sections 26(2)(b) and 27(2)(b) of the Constitution.

<sup>235</sup> De Vos, 2004, p. 94.

<sup>236</sup> *Grootboom*, para. 43.



## CHAPTER 4

### 4. CONSTITUTIONAL COURT: AN APPROPRIATE VEHICLE FOR REALISATION OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA

#### 4.1 The competence of the Constitutional Court

##### 4.1.1 Introduction

This chapter looks at the competence and powers conferred on the Constitutional Court to deal with the rights in the Bill of Rights. It seeks to answer the question whether the courts are equipped with enough powers to make a difference by enforcing socio-economic rights. It is apparent from different constitutional provisions that enough powers have been conferred on the courts. Besides the powers conferred by the Constitution, the courts also enjoy wide discretion to grant appropriate and effective remedies for a violation of any rights enshrined in the Bill of Rights. This includes socio-economic rights.

While the writer subscribes to the notion of indivisibility and interdependence of all human rights and fundamental freedoms, for the purpose of this thesis a fallacious distinction will be drawn between civil and political rights on the one hand, and socio-economic rights on the other hand. Putting socio-economic rights under the spotlight will enable the writer to assess the impact social litigation in improving the improvement of socio-economic conditions in South Africa. The writer is also well aware of the fact that the term 'socio-economic rights' is not broad enough to encapsulate all the rights contained in the ICESCR.<sup>237</sup> While cultural rights have been left out of the picture, this does not imply that they play second fiddle. The writer has chosen to analyse socio-economic rights jurisprudence so as to assess if their enforcement has an impact on the social transformation of South Africa.

##### 4.1.2 The role of the court in enforcing socio-economic rights

Even though the primary responsibility of bringing transformation and social change in South Africa lies with the legislative and executive,<sup>238</sup> the judiciary, too, has a vital role to play. The Constitution confers enough powers on the Constitutional Court to enforce rights enshrined in the Bill of Rights.<sup>239</sup> The late and former Chief Justice of the Constitutional Court of South Africa, Pius Langa, highlighted the role that the courts play in the addressing socio-economic problems in South Africa. According to Langa, the Constitution has made a clarion call for

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<sup>237</sup> In essence, the term socio-economic right leaves cultural rights out of the picture.

<sup>238</sup> Liebenberg (n 113 above), p. 328.

<sup>239</sup> See sections 38 and 172 of the Constitution.

the eradication of poverty in South Africa. Langa mentioned the law as one of the instruments to be used in the eradication poverty.<sup>240</sup>

#### **4.1.3 Relevant Constitutional provisions**

To help South Africa transform into a society based on human dignity, freedom and equality, the Constitution assigns a pivotal role to the courts. Different provisions of the Constitution confer the powers on the Constitutional Court to grant appropriate relief:

#### **4.1.4 A specialist Court**

To start with, Section 167(3) describes the Constitutional Court as a specialist court that deals only with Constitutional matters. Section 167(3) of the Constitution provides as follows:

The Constitutional Court

- (a) Is the highest court in all constitutional matter;
- (b) May decide only constitutional matters, issues connected with decisions on constitutional matters; and
- (c) Makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter

#### **4.1.5 Defining Constitutional matters**

Section 167(7) defines a constitutional matter as follows: a constitutional matter includes any issue involving then interpretation, protection and enforcement of the constitution. This will include the interpretation, protection and enforcement of socio-economic rights as they are also enshrined in the Constitution.

#### **4.2 *Locus standi* and remedies**

Section 38 of the Constitution provides for the legal standing, and the remedies that the court can grant for violation of any right in the Bill of Rights. It provides as follows:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including declaration of rights. The persons who may approach a court are-

- (a) Anyone acting in their own interest
- (b) Anyone acting on behalf of another person who cannot act in their own name;
- (c) Anyone acting as a member of, or in the interest of, a group or class of persons;

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<sup>240</sup>Langa (n. 121 above), p. 1.

- (d) Anyone acting in the public interest; and
- (e) An association acting in the interest of its members<sup>241</sup>

#### 4.2.1 Constitutional remedies

Section 38 governs remedies where there is a direct application of the Bill of Rights. It provides that the court may grant "appropriate" relief in case of violation of or threat to fundamental rights<sup>242</sup>. With the exception of a declaration of rights, section 38 is conspicuously silent on the specificity of other remedies available to the Constitutional Court for the violation of or threat to a right enshrined in the Bill of Rights.

At least, section 172 of the Constitution sheds some light on the possible remedies that a court could mete out. Section 172 provides as follows:

- (1) When deciding a constitutional matter within its power, a court-
  - (a) Must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
  - (b) May make any order that is just and equitable

The Constitutional Court has stated in numerous cases that the Courts are not confined to any specific standard. The courts enjoy a wider discretion that enables them to grant appropriate relief and make orders which are just and equitable.<sup>243</sup>

#### 4.2.2 Courts' discretion to make appropriate relief

As stated by Kriegler J in *Sanderson v Attorney-General, Eastern Cape*, in granting a relief, the Courts enjoy greater flexibility:

[O]ur flexibility in providing remedies may affect our understanding of the right<sup>244</sup>

Again in *Fose v Minister of Safety and Security*<sup>245</sup> the court has reiterated the flexibility and wide discretion they enjoy in fashioning appropriate remedies. The Constitutional Court has stated that the courts have the competence to develop appropriate tools to ensure that rights in the Bill of Rights are realised:

<sup>241</sup>Section 38 of the Constitution.

<sup>242</sup> See Currie and De Waal, 2005, p. 191.

<sup>243</sup> See sections 38 and 172 of the Constitution.

<sup>244</sup> *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 27.

<sup>245</sup> *Fose v Minister of Safety and Security* (Constitutional Court of South Africa, 1997) (*Fose*).

[I]t is left to the courts to decide what would be appropriate in any particular case. Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, and interdict, a mandamus or such other relief as may be required to ensure that the enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.<sup>246</sup>

In short, where an infringement of any right or a threat thereof has taken place, a court has an obligation to ensure that effective relief is granted. The appropriate relief to be awarded will be dependent on the nature of the right infringed and the nature of infringement<sup>247</sup>.

The Constitutional Court has also stated that it has the responsibility to make sure that'' within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights enshrined in it''.<sup>248</sup>

### **4.2.3 Importance of effective remedies**

It is important that the courts should grant effective relief for the violation of rights and fundamental freedoms. Without an appropriate relief and effective remedy, South Africa's constitutional project would be undermined. The values of human dignity, freedom and equality, on which the South Africa's democracy is founded, will "have a hollow ring."<sup>249</sup>

### **4.2.4 Further remedies**

#### **4.2.4.1 Insufficiency of constitutional remedies**

In addition to the declaration of rights, the Constitution empowers the courts to award other remedies: declaration of invalidity and giving just and equitable orders.<sup>250</sup> However, there may be instances where the declaration of rights and invalidity may not be sufficient to ensure protection and enjoyment of the rights in the Bill of Rights.<sup>251</sup>

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<sup>246</sup> *Fose*, para. 19.

<sup>247</sup> *TAC*, para. 106.

<sup>248</sup> *Fose*, para 69.

<sup>249</sup> *Soombramoney*, para 8.

<sup>250</sup> Section 172 of the Constitution.

<sup>251</sup> *Currie and De Waal* (n 242 above), p. 194.

Where such constitutional remedies are inappropriate<sup>252</sup> and do not offer sufficient protection, different solutions may be possible: positive action from the government and the courts may grant mandatory interdict or a structural interdict.<sup>253</sup>

Furthermore, section 8(3) of the Constitution obliges the court to look for additional remedy from the legislation.<sup>254</sup> In other words, the remedies that the Court can grant are not limited to the provisions of the Constitution. Where the Constitution's remedies are not sufficient, the courts are at liberty to seek for appropriate remedies from the existing legislation.

Where the legislation provides no appropriate and effective remedy; the court's options are never depleted. There is still an alternative. Sections 8(3) (a) of the Constitution empowers the court to develop common law to give effect to the Bill of Rights.

In short, there are different types of constitutional remedies: declarations of rights and invalidity, prohibitory and mandatory interdicts and awards of Constitutional damages, remedies from legislations or developing common law.<sup>255</sup> All these array of remedies are geared at ensuring that there is sufficient, appropriate and effective remedy for the violation of any right in the Bill of Rights.

In addition to the above-mentioned remedies, the Courts still enjoy wide discretion to "fashion new remedies to secure the protection and enforcement" of human rights.<sup>256</sup>

According to Pillay<sup>257</sup>, the courts are granted wider discretion to fashion appropriate and innovative remedies to meet the needs of the poor and destitute.

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<sup>252</sup> Example of such a case will be making a declaration of invalidity for private violations. See also Currie and De Waal (n 242 above), p. 194.

<sup>253</sup> Currie and De Waal (n 242 above), p. 217. Structural Interdict is an interdict in terms of which the court directs the violator to rectify the breach of fundamental rights under its supervision. It entails five elements: the court declares the respects in which the government conduct is inconsistent with the Constitution, the court orders the government to comply with its obligations, the court orders the government to produce a compliance report, the applicant is then afforded an opportunity to reply to the report, and the matter is enrolled, if satisfactory, the report is made an order of the court.

<sup>254</sup> Section 8(3) of the Constitution provides: When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-(a) in order to give effect to a right in the Bill of Right, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limit is in accordance with section 36 (1).

<sup>255</sup> Currie and De Waal (n 242 above), p. 194.

<sup>256</sup> Fose, para. 19.

<sup>257</sup> Pillay, 2002, p. 258.

To help South Africa address the intolerable socio-economic conditions in the country, the courts should grant remedies which are both appropriate and effective. This fact was pointed out in the *Fose* judgment:<sup>258</sup>

In our context an appropriate an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it is effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.<sup>259</sup>

What could be inferred from the above Court decision is that, where the available remedies are not sufficient, the courts have the responsibility to forge new tools or remedies which would ensure that the rights in the Bill of Rights are fully vindicated. In other words, the courts enjoy wider discretion to fashion appropriate and effective remedies. The Courts are called upon to be innovative and come up with remedies which are appropriate to vindicate rights in the Bill of Rights.

### 4.3 Interpretation of the Bill of Rights

In interpreting the rights in the Bill of Rights, the Courts are placed under an obligation to promote values that underlie and open and democratic society based on human dignity, equality and freedom.<sup>260</sup> Thus, it can be said in enforcing the rights in the Bill of Rights, the Courts have an obligation to support the country in its social transformation. It has the duty to reconcile and align the real world with the ideal world envisioned by the Constitution with the real world. Despite the fact that the society envisioned by the Constitution might be still far from becoming manifest, the courts are still called upon to give an interpretation of the bill of Rights in a way that seeks to promote values that underlie an open and democratic society. Section 39 provides as follows

- (1) When interpreting the Bill of Rights, a court , tribunal or forum-  
Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom
- (1) When interpreting any legislation, and when developing the common law or customary law, every  
court or forum must promote the spirit, purport and objects of the Bill of Rights

<sup>258</sup> *Fose*, para. 69.

<sup>259</sup> *Ibidem*.

<sup>260</sup> Section 39 of the Constitution.

As the Court had stated in *Fose* judgment, the interpretation of rights in the Bill of Rights should be linked to the realisation of the ideal world, envisioned by the Constitution. In awarding the remedies, the Courts should“ attempt to synchronise the real world with the ideal construct of that constitutional world.”<sup>261</sup>

#### **4.4 Concluding remarks**

The chapter has considered the relevance and competence of the Constitutional Court as a vehicle for the delivery and enjoyment of the rights enshrined in the Constitution. The chapter has shown that the Constitution has conferred vast powers to the Courts to adjudicate socio-economic rights. The question then is: With such vast powers and wider discretion in their hands, have the courts lived up to their constitutional mandate of ensuring that appropriate and effective remedies are granted for violation or threat to the rights in the Bill of rights? This question lies at the centre of the next chapter. Given the vast remedial powers conferred on the Constitutional Court, the next chapter will examine some key socio-economic cases, the court's strategies and remedies/orders.

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<sup>261</sup>*Fose* para 94

## CHAPTER 5

### 5 CRITICAL EXAMINATION OF SOUTH AFRICAN SOCIO-ECONOMIC JURISPRUDENCE

#### 5.1 Introduction

Since its inception, the Constitutional Court has adjudicated on different types of socio-economic rights cases. These include cases on the rights of access to adequate housing, to education, to health, social security, water etc. All of those claims were in one way or another aimed at advancing the socio-economic conditions of the poor applicants.

In this chapter, the focus will be on the rights of access to adequate housing, health care and social security. These rights are enshrined in sections 26 and 27(1) (a) and (c) of the Constitution, respectively. The writer has chosen to focus on these rights because most of the applications which came before the Constitutional Court have revolved around these kinds of socio-economic rights.

First, this chapter discusses socio-economic rights cases and their court judgments and orders. It then discusses the approaches adopted by the Court to adjudicate socio-economic rights claims. Lastly, the chapter analyses the weaknesses and strengths of the Court's approaches and remedies.

#### 5.2 South African socio-economic jurisprudence

##### 5.2.1 The right to access to health care services

###### 5.2.1.1 The *Soobramoney* case<sup>262</sup>

The first case to come before the Constitutional Court was based on section 27 of the Constitution. This section provides everyone with the right to access to health care services and prohibits the refusal of emergency treatment to any person.<sup>263</sup>

Mr Thiagraj Soobramoney, the applicant, was a diabetic suffering from a chronic renal failure. His condition had become incurable. To prolong his life, Mr Soobramoney needed regular kidney dialysis. Since he had already exhausted his medical aid to cover for his treatment at a private hospital, Mr Soobramoney approached the renal unit of Addington state hospital for treatment.

The state hospital denied him the regular dialysis he required. Several reasons were given:<sup>264</sup> the Addington hospital did not have enough resources to provide dialysis for all patients

<sup>262</sup> *Soobramoney v. Minister of Health KwaZulu-Natal*, (South Africa: Constitutional Court, 1997).

<sup>263</sup> See sections 27(1) (a) and (c) of the Constitution.



suffering from chronic dialysis; the limited resources prompted the hospital to develop a policy on the use of the dialysis resources. The policy provided that only patients who suffer from acute renal failure which could be treated by renal dialysis would have automatic access to renal dialysis at the hospital. Furthermore, a set of guidelines was adopted to determine who qualifies for dialysis treatment: such a patient must be eligible for kidney transplantation; the patient should be free of significant vascular or cardiac disease.<sup>265</sup>

Unfortunately, Mr Soobramoney suffered from ischaemic heart disease and cerebra-vascular disease. He was therefore not eligible for a kidney transplant. Consequently, he was denied the treatment he requested.

In response to being denied dialysis treatment, Mr Soobramoney approached the Durban and Coast Local Division of the High Court seeking an order directing the Addington Hospital to provide him with ongoing dialysis treatment and interdicting the respondent from refusing him admission to the renal unit of the hospital. He based his application on section 27(3) of the Constitution, which provides that no one may be refused emergency medical treatment. He further argued that section 27(3) should be read consistently with section 11 of the Constitution. Section 11 of the Constitution provides that everyone has the right to life. The High Court dismissed the application. Mr Soobramoney appealed against the decision of the High Court to the Constitutional Court.

#### **5.2.1.2 Constitutional Court decision in the *Soobramoney* case**

The court held that Mr Soobramoney's health condition did not fall within the definition of emergency. He was suffering from chronic renal failure. As a result section 27(3) did not apply.<sup>266</sup>

The court further held that it would be slow to interfere with the rational decisions taken in good faith by the political organs and medical authorities as it is their responsibility to deal with such matters.<sup>267</sup> The court held that the appellant did not meet the criteria for admission to the renal dialysis program.<sup>268</sup> Consequently, Mr Soobramoney's application was dismissed.

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<sup>264</sup> *Soobramoney*, paras. 2-3.

<sup>265</sup> *Soobramoney*, paras. 3-4.

<sup>266</sup> *Soobramoney*, para. 21.

<sup>267</sup> *Soobramoney*, para. 29.

<sup>268</sup> *Soobramoney*, para. 31.

### 5.2.1.3 Critique of the *Soobramoney* decision

As the first socio-economic rights case to come before the Constitutional Court, the *Soobramoney* judgment had numerous shortcomings. This is understandable as the Constitutional Court had neither the standard nor the precedent to use as a yardstick to adjudicate socio-economic rights. At the outset socio-economic jurisprudence, the Constitutional Court had to proceed very tentatively as it did not have any framework to guide it in enforcing socio-economic rights. For these reasons, the Constitutional Court has been criticised for the judgment it handed down in the *Soobramoney* case.

Liebenberg criticises the court's decision in the *Soobramoney* case<sup>269</sup> for being too deferential to the executive and legislature. As a result of the court's deference, a large margin of discretion was given to the provincial government to set budgetary priorities.<sup>270</sup> In showing too much deference to the executives, the Court held that it will be slow to interfere with rational decisions taken by state organs in good faith.<sup>271</sup> According to Liebenberg, this approach had limited the scope of the right to emergency medical treatment to a right to receive immediate remedial treatment that is "necessary and available" to avert harm in the case of a sudden emergency situation.<sup>272</sup>

The implication of the Court ruling was that the court would proceed with caution in developing its jurisprudence on socio-economic rights, thereby giving political and administrative organs of the state wide latitude in setting social and budgetary priorities<sup>273</sup>.

From the very first case on socio-economic rights, the Court showed signs of reluctance to tackle socio-economic claims head on. It has also displayed aversion to recognising an individual right to socio-economic right. The Court had also sent out a signal showing that it would adopt a different standard to enforce socio-economic rights than it does to civil and political rights.<sup>274</sup> It was on in the *Soobramoney* case where the court used a rationality review standard to adjudicate socio-economic rights claims.<sup>275</sup> Basically, it is a differential review

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<sup>269</sup> Liebenberg (n 220 above), pp. 165-7.

<sup>270</sup> *Ibidem*.

<sup>271</sup> *Soobramoney*, para 29

<sup>272</sup> Liebenberg (n 220 above), p. 165.

<sup>273</sup> Liebenberg (n 220 above), p. 167.

<sup>274</sup> *Ibidem*.

<sup>275</sup> *Grootboom*, para. 29. The Court held as follows: These choices involve difficult decision to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibilities it is to deal with such matters.

standard in which the court would not interfere with the decisions made by the responsible state organs, provided such decisions are rational and were made in good faith. In deciding the *Soobramoney* case, the Constitutional Court adopted a deferential review standard in matters concerning social and economic policy. It held 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>276</sup>

Even though the court did not pursue this standard further, it crystallised later in the *Grootboom* case as a reasonableness test.

Another criticism of the *Soobramoney* judgment is made by Van Bueren.<sup>277</sup> She criticises the Constitutional Court’s approach in the *Soobramoney* judgment for appearing to “describe social and economic rights as only directives” instead of defining them as constitutionally entrenched rights.<sup>278</sup> In *Soobramoney*, the court held: “[s]ome rights in the Constitution are the ideal and something to be strived for”.<sup>279</sup> This unequal treatment of rights in the Bill of Rights by the Courts appears to be a vindication of the objections raised against the inclusion of socio-economic rights in the Constitution as they were deemed to be non-justiciable.<sup>280</sup> Among the objections raised against the inclusion of socio-economic rights in Constitution was the argument that socio-economic rights are not capable of being realised immediately. It was argued that socio-economic rights require positive obligations which oblige the state to undertake positive action.<sup>281</sup>

#### 5.2.1.4 The court’s cautious approach

The approach taken by the Court in the first socio-economic rights was very cautious and tentative. According to Wilson and Dugard,<sup>282</sup> the approach of the Constitutional Court during the first socio-economic rights claims was two-fold: to find an interpretive paradigm with which to enforce socio-economic rights; and to maintain its institutional stability. As indicated by Roux<sup>283</sup>, the courts were anxious not to upset the executives. When the

<sup>276</sup> *Soobramoney* para. 29.

<sup>277</sup> Van Bueren, 1999, p. 55.

<sup>278</sup> *Ibidem*.

<sup>279</sup> Madala J in *Soobramoney*, para. 42.

<sup>280</sup> King, 2012, p. 4.

<sup>281</sup> McLean, 2009, p. 96.

<sup>282</sup> Wilson and Dugard, 2014, p. 37.

<sup>283</sup> See Roux, Theunis, ‘Legitimizing transformation: Political resource allocation in the South African Constitutional Court’, in Gloppen, Seri, Gargarella, Roberto and Skaar, Elin (eds.), *Democratisation and the judiciary: The accountability function of courts in new democracies*. London: Frank Cass, 2004.

executives feel that the Courts are antagonistic towards them, they will not hesitate to limit powers of the court or replace judges. At least in South Africa, members of the Constitutional court felt that embracing a severely critical and interventionist approach to the enforcement of socio-economic rights would be incompatible with the court's institutional consolidation<sup>284</sup>. This explains why the Constitutional Court has embraced a cautious approach in enforcing the first socio-economic rights claims.

### **5.2.2 *Minister of Health v. Treatment Action Campaign(TAC)***<sup>285</sup>

In this landmark case, the Constitutional Court was called upon to adjudicate on the right of access to health care services. *TAC* brought a challenge against the state policy or programme regarding the HIV-AIDS transmission from mother to child. The state has identified Neverapine (NVP), as a drug to be used to stop mother-to-child transmission of HIV (a virus that causes AIDS). However, the state imposed restrictions on the availability of the drug. The state limited the availability of the drug to research and training sites. There were only two such sites per province. This limitation would mean that the vast majority of poor mothers could not access the drug from public hospitals and clinics. The limitation put the lives of mothers and their new-born babies in jeopardy.

The *TAC* challenged the state's measures to stop transmission from mother to child as defective and unreasonable because they were limited to research sites and left many poor mothers who depend on the public hospitals and clinics at risk of transmitting HIV to their babies. *TAC* also challenged the state for failing to plan and implement an effective, comprehensive and progressive nationwide program to deal with the transmission of HIV from mother to child.<sup>286</sup>

For its failure to accelerate the provision of NVP to all state hospitals and clinics, the state raised three grounds of justification<sup>287</sup>: Firstly, the drug could not be immediately rolled out as its efficacy had not yet been determined. Secondly, the state has to determine the safety of the drug. Finally, the state claimed that it did not have the capacity to roll out NVP nationwide.

<sup>284</sup> Wilson and Dugard (n 282 above), p. 37.

<sup>285</sup> *Minister of Health and other v. Treatment Action Campaign and other (No.2)* ( South African Constitutional Court, 2002)

<sup>286</sup> *TAC*, para. 44.

<sup>287</sup> *TAC*, paras. 51-54.

The High Court had ruled in favour of the applicants: that the state should make NVP available to public hospitals and clinics where it is medically indicated. The court ordered the state to plan and implement an effective, comprehensive and progressive nationwide programme on the mother-to-child transmission of HIV.

The state appealed against the decision of the High Court to the Constitutional court. The Constitutional Court held that the state's policy was too inflexible, and had therefore denied indigent mothers and their new-born babies a potentially lifesaving drug.<sup>288</sup> It further held that by continuing to confine the use of NVP to the research sites, the state violated its obligations under section 27(2) and section 27(1) (a) of the Constitution. The Court found that the government's policy fails to meet Constitutional standard of reasonableness because it excluded those who could reasonably be included where such treatment is medically indicated.<sup>289</sup>

The Constitutional Court ordered the Government to remove, at once, the restrictions that prevent NVP from being made available for the purpose of reducing the risk of mother-to-child-transmission of HIV at public hospitals and clinics that are not research and training sites.<sup>290</sup>

### 5.2.3. Right of access to adequate housing

#### 5.2.3.1 *Government of the Republic of South Africa v Grootboom*<sup>291</sup>

This is the second socio-economic rights case to come before the Constitutional Court. The *Grootboom* case is a direct result of the acute housing shortage in South Africa. This housing shortage was, in turn, triggered by the apartheid policy which imposed influx control to Africans who wanted to live in the urban areas.<sup>292</sup> The Court stated the same view in this case when it held:

The cause of the acute housing shortage lies in apartheid. A central feature of that policy was a system of influx control that sought to limit African occupation of urban areas.<sup>293</sup>

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<sup>288</sup>TAC para. 80.

<sup>289</sup>TAC para. 125.

<sup>290</sup>TAC para. 135.

<sup>291</sup>*Government of the Republic of South Africa and Others v Grootboom and Others*(Constitutional Court of South Africa, 2000)

<sup>292</sup>De Vos (n 235 above), p. 85.

<sup>293</sup>*Grootboom*, para. 6.

The Constitutional Court gave a precise portrayal of the hurdles faced by the African people regarding access to adequate housing:

The cycle of the apartheid era, therefore, was one of untenable restrictions on the movement of the African people into urban areas, the inexorable tide of rural poor to the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removal.<sup>294</sup>

Section 26 of the Constitution provides for the right of access to adequate housing to everyone. It shows the state's intention to address the apartheid legacy.

Basically, this case is about the community residing at Wallacedene, a informal settlement located on the eastern border of the Cape Metropolitan Area. It was a small community of 390 adults and 510 children. They lived in abject poverty. Due to heavy winter rainfall which had left their area waterlogged, they decided to move onto a nearby unoccupied land in September 1998. Unbeknown to them was the fact that this unoccupied land was privately owned. The same land had also been set aside for low cost housing. The invasion of a private land by the Wallecedene provoked the owner to seek an eviction order in December 1998.<sup>295</sup> Despite the landowner securing the eviction order, the occupiers were not prepared to leave. They had no other alternative. They could not return to their previous site in Wallacedene because it had already been taken over by other informal residents.

In March 1999, the landowner approached the court again for a new eviction order. Unlike in the first instance, this time the court asked a local lawyer to represent the community.<sup>296</sup> The negotiations between the community and the municipality resulted in the following agreement: the community would leave the land by 19 May 1999 and municipality would identify an alternative land to accommodate the community.

The municipality sent in bulldozers to erase the informal settlement from the face of the earth. Once their shelters have been destroyed, the community took refuge on the Wallacedene sports field.<sup>297</sup> It was against this background that the community launched a legal action against the local, provincial and national government on 31 May 1999.

### 5.2.3.2 Core issues

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<sup>294</sup> *Grootboom*, para. 6.

<sup>295</sup> *Grootboom*, para. 9.

<sup>296</sup> *Ibidem.*

<sup>297</sup> *Grootboom*, para. 11.

In their application, the Wallecedene community wanted the government to provide them with "adequate and sufficient basic temporary shelter and /or housing for the applicants and their children" pending permanent accommodation and that "adequate and sufficient basic nutrition, shelter, health and care services and social services" be provided to all of the applicants with children in the interim.<sup>298</sup> The community's application was based on the two sections of the Constitution: section 28 (1) (c) and section 26 (1). Section 28(1)(c) provides every child with the right to basic nutrition, shelter, basic health care services and social services. Section 26(1) provides everyone with the right of access to adequate housing.

### 5.2.3.3 High court finding

The High Court held that the state did not violate section 26 of the Constitution because the state had succeeded in producing sufficient evidence which showed that its housing programme was rational and made in good faith. The court upheld children's rights and ordered that provision of rudimentary services be made within three months to families.<sup>299</sup> It ordered the respondents to report back to it on the implementation of the order and giving the applications an opportunity to deliver their commentary on the state's report.<sup>300</sup>

The municipality appealed against the High Court decision to the Constitutional Court. At the outset of the hearing the Constitutional Court made an order following the agreement between the parties: that the municipality should provide immediate funding for materials and delivery of temporary toilet and sanitation facilities, as well as materials to waterproof resident's shacks waterproof.

### 5.2.3.4 Constitutional Court findings and order in *Grootboom*

The court was not prepared to endorse the notion of minimum core obligation raised by *amici curiae* in relation to section 26. The *amici curiae* raised this issue as a result of the anomaly of the High Court judgment which would exclude parents without children from shelter in crisis situation. Their concern was to reconcile the qualified rights of everyone to adequate housing with unqualified right of children to shelter in section 28(1)(c).<sup>301</sup> Paragraph 10 of the CESR describes minimum core obligations in General Comment 3 as follows:

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<sup>298</sup> *Grootboom*, para13.

<sup>299</sup> *Grootboom*, para 16.

<sup>300</sup> *Ibidem*.

<sup>301</sup> Liebenberg (n 202 above), p. 169.

[A]minimum core obligation [is] to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.<sup>302</sup>

The Court held that there was no violation of unqualified socio-economic rights of children in section 28(1)(c)- the right of children to shelter. It read sections 28(1)(b) and (c) together and held that while the former defines those who are responsible to give care to children, the latter ‘‘lists various aspects of the care entitlements’’<sup>303</sup>. In view of this, the Court held that the primary duty to meet the socio-economic rights of a child lies with that child’s family. The state only incurs the obligation to provide shelter, where a child is deprived of family care. The Court held that the children were taken care of by their parents or families. They were neither in the care of the state nor abandoned. As a result, they were not entitled to relief in terms of section 28(1) (c).<sup>304</sup>

The Court further held that the nationwide housing program fell short of the state obligations under section 26 of the Constitution. Even though the program is commendable, it has failed to cater for the immediate temporary relief of the circumstances of those in crisis situation or desperate need.<sup>305</sup> The court issued a declaratory order,<sup>306</sup> stating that the government is obliged, under section 26 of the Constitution to devise, fund, implement and supervise measures to provide relief to those in crisis situation.<sup>307</sup> The court also commented that the ‘‘manner in which the eviction was carried out’’ was in breach of the negative obligation not to forcibly evict people.<sup>308</sup>

The court rejected the notion of minimum core obligation on the state to provide a basic level of services to every individual in need.

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<sup>302</sup> CESCR General Comment No. 3: The Nature of States Parties’ Obligations, Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23).

<sup>303</sup> *Grootboom*, para. 76.

<sup>304</sup> *Ibidem*.

<sup>305</sup> *Grootboom*, para. 99.

<sup>306</sup> *Grootboom*, para. 96.

<sup>307</sup> *Grootboom*, para. 99.

<sup>308</sup> See Langford, 2014, p. 193.



The Court developed a standard to be used in the enforcement of socio-economic rights. It held that the real question in a challenge based on a failure to fulfil the positive obligation under section 26(2) was whether the legislative and other measures taken were 'reasonable.'<sup>309</sup> This marked the beginning of the standard of reasonableness, which was used later in the adjudication of socio-economic rights claims.

The Court held that although the state housing programme represented a significant achievement and 'systemic approach to pressing social need',<sup>310</sup> it did not comply with section 26(2):

[I]n that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.<sup>311</sup>

## 5.2.4 Critique of the *Grootboom* decision

### 5.2.4.1 Weaknesses of *Grootboom* judgment

The court refused to endorse the notion of minimum core obligation. According to Liebenberg, given the critical importance of socio-economic rights in South Africa, the court was supposed to have embraced the notion of minimum core obligation. This could have ensured that no one would fall below a basic 'floor of social provisioning'<sup>312</sup>. The court argued against the notion of minimum core obligation. The court reasoned that it would be impossible to determine in abstract what the minimum threshold should be for the realisation of the rights as the opportunities for fulfilling these rights varied considerably and the needs of the people are diverse<sup>313</sup>.

Liebenberg finds the court's rejection of the notion of minimum core obligations on the basis of its complexity to be unfortunate and unpersuasive. She argues that some interpretive problems arise in relation to determining the full scope of other rights such the right to human dignity, life, freedom and security of person.<sup>314</sup> Yet these rights are enforced by the Court without using the test of reasonableness. In emphasising the importance of minimum core

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<sup>309</sup> *Grootboom* para 41

<sup>310</sup> *Grootboom* paras 53-54

<sup>311</sup> *Grootboom* para 99.

<sup>312</sup> Liebenberg (n 220 above), p. 168.

<sup>313</sup> *Grootboom* paras 32-33

<sup>314</sup> Liebenberg (n 220 above), p. 174.

obligation on the state, Liebenberg<sup>315</sup> argues that failure to recognise this basic standard, leads to putting other rights in jeopardy. According to Liebenberg, the minimum core is essential for the protection of survival interests of human beings and provision of platform for their participation in society.<sup>316</sup>

As the court has rightly pointed out, the minimum core obligation “is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question.”<sup>317</sup> In view of this, one is of the opinion that there need not be any complications in setting out the minimum core obligations. The focus will be those in desperate need. Those who have the wherewithal could be left out.<sup>318</sup>

#### 5.2.4.2 Discarding minimum core obligation

Furthermore, Goldstone argues that the ruling on the minimum core obligation did not mean the Court had rejected the minimum core obligation approach out of hand.<sup>319</sup> According to Goldstone, future litigants can still rely on the minimum core obligation as long as they have enough information to adduce before the court to enable it to determine the minimum core in any given context.<sup>320</sup> The possibility of relying on the minimum core obligation was made implicit in the *Grootboom* judgment. As such the Court’s ruling was not a signal to lawyers to abandon their reliance on the minimum core obligation. Instead, the court posed a challenge to future litigants to adduce sufficient information or data which will enable the court to make a determination of the minimum core obligation. The fact there is still a room for the court to consider minimum core obligation is evident from the judgment:

There may be a case where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core in any given context. *In this case we do not have sufficient information to determine what would compromise the minimum core obligation in the context of our Constitution* (Emphasis added).<sup>321</sup>

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<sup>315</sup> Ibidem.

<sup>316</sup> Ibidem.

<sup>317</sup> *Grootboom* paras 31 and 36.

<sup>318</sup> Liebenberg (n 220 above), p. 175.

<sup>319</sup> Goldstone, 2008, p. xii.

<sup>320</sup> Ibidem. See also *Grootboom* para 33

<sup>321</sup> *Grootboom*, para. 33.

From the above ruling, it is apparent that the Court did not close the door on the possibility of future litigants to rely on the minimum core obligation. Basically, what the court did was to pose a challenge to future litigants, to adduce sufficient data so as to help the court to determine what would comprise a minimum core obligation.

#### **5.2.4.3 Vague standard of reasonableness**

The standard used by the Constitutional Court to adjudicate socio-economic rights is shrouded in ambiguity. Liebenberg<sup>322</sup> criticises the standard of enforcing socio-economic rights for being too vague. The reasonableness test requires the government programmes to provide relief to those in desperate need and living in the most deplorable conditions. Given the pervasive and extreme poverty in South Africa, it is difficult to define who should be the exact beneficiaries of the government's programme.

#### **5.2.4.4 No individual claims**

Liebenberg criticises the *Grootboom* decision for not conferring 'a right upon any individual to claim any tangible from the state'.<sup>323</sup> The right recognised in *Grootboom* judgement is a right to demand or spur the state to adopt a reasonable programme which would ensure that relief is extended to a significant number of people in desperate need. The individual litigants are not entitled to a direct relief from instituting legal proceedings.<sup>324</sup> The practical implications for the poor individuals who want to use litigation to advance their socio-economic rights, is that they may derive indirect benefits from the court judgments and orders.

As a consequence, social litigation is not a very suitable vehicle for individual claimants who 'will understandably wish to see something geared more to their own situation and are unlikely to wish to bring constitutional case purely to serve as constitutional triggers for general policy processes.'<sup>325</sup>

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<sup>322</sup> See Liebenberg (n 220 above), p. 175.

<sup>323</sup> Ibidem, p. 176.

<sup>324</sup> *Grootboom*, para, 95.

<sup>325</sup> Liebenberg, (n. 220 above) p.176.

### 5.2.4.5 Strengths of the *Grootboom* judgment

In the *Grootboom* judgment, the court has endorsed the Committee on Economic, Social and Cultural Rights (CESCR)'s views on "retrogressive measures."<sup>326</sup> The Committee provides that:

.. any deliberative retrogressive measures... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources<sup>327</sup>.

Liebenberg discusses the following advantages of *Grootboom* decision:<sup>328</sup>

Firstly, the court has recognised the negative duty to respect socio-economic rights under first subsections of sections 26 and 27.

Secondly, the *Grootboom* decision has shown that socio-economic rights are enforceable by the court. In *Grootboom* the court developed a more thorough and detailed test to gauge the government programme. As a consequence, the court can now intervene where there is violation of socio-economic rights: where the government programme excludes short-term measures for relieve those in crisis situations, unreasonable implementation of laws, policies and programme and retrogressive measures such as reducing access to socio-economic rights and the quality of socio-economic benefits.

Thirdly, the decision in *Grootboom* case has provided the government with a precedent and defence it could use in the protection of the rights of the most vulnerable communities in the subsequent cases. In *Minister of public Works and others v Kyalami Ridge Environmental Association and others*,<sup>329</sup> the government established a transit camp to accommodate people from Alexandra, Johannesburg, after they had been displaced by floods. The Association of Kyalami residents challenged the government for setting up a transit camp in the proximity of their neighbourhood. They argued that the transit camp constituted an infringement to the town planning scheme and land and environmental laws. The government was able to defend its decision to set up the transit camp successfully against the court action instituted by the association of Kyalami residents. The government based its defence on the principle

<sup>326</sup> *Grootboom* para 45

<sup>327</sup> General Comment No.3 (Fifth session, 1990) *The nature of states obligations (art 2(1) of the Covenant)* UN doc. E/1991/23, par 9.

<sup>328</sup> Liebenberg (n 220), pp. 177-180.

<sup>329</sup> *Minister of public Works and others v Kyalami Ridge Environmental Association and others* 2001 (7) BCLR 652(CC).

developed in the *Grootboom* judgment, namely, that the state has an obligation to assist those who are in crisis conditions.

### 5.3 Housing cases following the *Grootboom* case

*Grootboom* was a trend-setting case on the right of access to adequate housing. It has had an impact on the subsequent cases. Following the *Grootboom* judgment, the court continued to apply the same standard of reasonableness. However, there has been a shift on the emphasis. The focus was on the satisfaction of procedural aspects of socio-economic rights rather than deepening the contextual reasonableness standard developed in *Grootboom*.<sup>330</sup>

#### 5.3.1 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*<sup>331</sup>

In this case, the City of Johannesburg sought to evict about 400 illegal occupiers from two buildings in the inner city of Johannesburg on the basis that the buildings were unsafe and unhealthy.<sup>332</sup> The appellants challenged the Supreme Court of Appeal's judgment and order which authorised their eviction.<sup>333</sup>

In making its finding, the Court took cognisance of numerous procedural steps that the municipality had failed to meet in its attempt to evict the dwellers: the city took no steps to ascertain the identity or housing needs of the occupiers, it sought no consultation with them on what the consequences of the eviction might be<sup>334</sup>. In view of these procedural failures and, on the other hand, the city's readiness to consider occupiers' demand for alternative shelter, the Court made its first engagement order, requiring the municipality and the occupiers to "engage meaningfully" with one another in an attempt to resolve the dispute.<sup>335</sup> That marked the beginning of the standard of meaningful engagement in adjudicating socio-economic rights.

<sup>330</sup> Wilson and Dugard (n 282), p. 45.

<sup>331</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC) ; 2008 (5) BCLR 475 (CC), (*Olivia Road*)

<sup>332</sup> *Olivia Road*, para. 1.

<sup>333</sup> *Ibidem*.

<sup>334</sup> Wilson and Dugard (n 282 above), p. 46.

<sup>335</sup> *Olivia Road*, para. 5.

## 5.4 The court's strategies and their effects

Despite the justiciability of socio-economic rights having been confirmed by the Constitutional Court,<sup>336</sup> there was no precedent that the court could rely on to determine the "scope and extent" of these rights.<sup>337</sup> This left the Constitutional Court with the pioneering task of developing its own enforcement framework from the scratch. In the *Soobramoney* case, the court used a rational review test.<sup>338</sup> In the subsequent *Grootboom* and *TAC* judgment, the Constitutional Court applied a standard of reasonableness to adjudicate claims on socio-economic rights.

In short, in adjudicating socio-economic rights in the South Africa, the courts have to start with a clean slate. Firstly, this was due the fact that there was no any precedent on which the courts could rely on. Secondly, even though the Constitution allows the courts to take a cue from international law and foreign law,<sup>339</sup> the Constitutional Court had already rejected the minimum core of obligation in *Grootboom* judgment. There was not enough that could be learnt from international law as socio-economic rights were largely regarded as non-justiciable. Foreign law too was of little use. Only a few countries have socio-economic rights as part of the constitution. Even from a few countries that have constitutionally protected socio-economic rights, they applied a variant standard of adjudication.<sup>340</sup> For example, India recognised the importance of socio-economic rights by incorporating them in their Constitution. But such rights were not made justiciable. They were contained in Part IV of the Constitution as "Directive Principles of State Policy".<sup>341</sup> As a result, South Africa had to develop its jurisprudence on socio-economic rights. The Constitutional Court tried different standards and tests to adjudicate socio-economic rights; inter alia:

## 5.5 Standards of adjudicating socio-economic rights

### 5.5.1 Rationality review standard

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<sup>336</sup> *Grootboom* para. 20.

<sup>337</sup> De Vos (n 235 above), p. 85.

<sup>338</sup> *Soobramoney*, para. 29.

<sup>339</sup> Section 39(1) and (c) of the Constitution provides as follows: When interpreting the Bill of Rights, a court, tribunal or forum (b) must consider international law; and (c) may consider foreign law.

<sup>340</sup> Wilson and Dugard, 2012, p. 230.

<sup>341</sup> Yacoob, Zak, *The entrenchment and enforcement of socio-economic rights*, Conference Document prepared to mark the inauguration of the new building for the Constitutional Court of South Africa, 18-20 March 2004.

In the *Soobramoney*, the Court used a novel standard of rationality to adjudicate socio-economic rights.<sup>342</sup> The Court rejected the appellant's claim for emergency treatment under section 27 of the Constitution. It considered the appellant's claim under section 27(1)(a), read with section(2). Considering the limited resources available for the provision of dialysis treatment, the Constitutional Court deferred to the responsible organ of the State. It held that a wide margin of discretion would be assigned to the provincial government to set budgetary priorities. In coming to this ruling, the Constitutional Court's focus was on whether the government's policy and programme were rational or not. The court found the provincial government's policy on the provision of dialysis treatment to be rational. The Court held:

A court will be slow to interfere with *rational decision* taken in good faith by the political organs and medical authorities whose responsibilities it is to deal with such matters.<sup>343</sup>

The court did not take this standard of review further. However, the rationality test served as a prelude to the development of the standard of reasonableness, which crystallised in the *Grootboom* judgment. Besides the fact that the rationality standard has been a precursor for the test of reasonableness, not much can be said about this tentative framework for enforcing socio-economic rights.<sup>344</sup> The Constitutional Court abandoned this standard of adjudication immediately after the *Soobramoney* judgement. In the later judgments, the Constitutional Court applied different standards of adjudication.

### 5.5.2 The standard of reasonableness

The standard of reasonableness was adopted in the *Grootboom* case. It focuses on the appropriateness of the measures taken by the government to give effect to the realisation of socio-economic rights. It gives no consideration to the specific goods and services guaranteed in the Constitution. Nor does it consider the content of the rights.<sup>345</sup> The court held that the reasonableness of the state measures is contingent upon the context within which they are taken. By embracing "a contextualised account of reasonableness" the court was able to evade the task of determining concrete entitlements of universal application while at the same time developing a standard by which to evaluate them.<sup>346</sup>

#### 5.5.2.1 Requirements for a reasonableness test

<sup>342</sup> See Liebenberg, 2013, 32.

<sup>343</sup> *Soobramoney*, para. 29.

<sup>344</sup> See *supra* n.342.

<sup>345</sup> Wilson and Dugard (n 282 above), p. 38.

<sup>346</sup> *ibidem*, p. 41.

The definition of reasonableness was made in the *Grootboom* judgment. For the state (housing) policy or programme to qualify as 'reasonable' it should entail the following requirements:<sup>347</sup>

- Be comprehensive, coherent and effective
- Have sufficient regard for the social economic and historical context of widespread deprivation
- Have sufficient regard for the availability of the state's resources
- Make short-, medium-, and long-term provision for housing needs
- Give special attention to the need of the poorest and the most vulnerable
- Be aimed at lowering administrative, operational, and financial barriers over time
- Be implemented reasonably, adequately resourced and free of bureaucratic inefficiency or onerous regulations
- Allocate responsibilities and tasks clearly to all three spheres of government
- Respond with care and concern to the needs of the most desperate
- Achieve more than a mere statistical advance in numbers of people accessing housing, by demonstrating that the needs of the most vulnerable are catered for

#### 5.5.2.2 Critique of reasonableness test

Wilson and Dugard<sup>348</sup> criticise the standard of reasonableness, for its impotence and weakening the potential of litigation as an effective tool to bring about transformation. They see the standard as a weak link incapable of producing results which are beneficial to poor people. They identify three characteristics of the reasonableness standard that lessen the impact of socio-economic rights litigation:<sup>349</sup> it is a-contextual, and therefore oblivious/unmindful of the lived experience of poverty, it has displaced other, more determinate constitutional and statutory rights, and it has denuded the conception of the role of socio-economic rights litigation in developing the state's socio-economic rights obligations.

<sup>347</sup> *Grootboom* paras 39-46. See also Wilson and Dugard (n. 282 above), p. 40.

<sup>348</sup> Wilson and Dugard (n. 282 above), p. 37.

<sup>349</sup> *Ibidem*.



The reasonableness standard fails to vindicate the rights of the poor. As Wilson and Dugard point out, the litigants resort to legal action is to vindicate certain rights “not because they feel that the state’s overall approach in the area of socio-economic policy is flawed”.<sup>350</sup> They approach the courts because they would like to “make a difference in their own lives”.<sup>351</sup> Instead of focusing on the content of the rights claimed by the applicants, the courts look at whether the programme or policy taken by the state is reasonable or not.

For an example; in *Mazibuko* case,<sup>352</sup> a challenge was made against the City of Johannesburg’s Free Basic Water policy and the installation of pre-paid water meters in the Phiri, Soweto Johannesburg. The challenge was made by poor residents. They challenged the city policy, which provided 6 kilolitres of free water per month to every accountholder in the city. They also challenged the installation of pre-paid water meters in their yards. The result of the City’s water policy was that most of poor and large families were left without water for the better part of the month. Once the 6 kilolitres is exhausted, most families were unable to pay for more supply of water, that is, beyond the free water supplied by the city.

The court found the measures taken by the city in the provision of water to be reasonable. In making such a ruling, the court did not give due consideration to the hardships and extreme poverty faced by the applicants. Its focus was eschewed in favour of considering/ evaluating government policy and its reasonableness. The court did not take into cognisance the abject poverty in which the applicants lived. As pointed out by Wilson and Dugard, the court “attached no significance to the facts that the applicants were desperately poor”.<sup>353</sup> As a result the court failed to situate its analysis within the recognition of poverty and disadvantage. The city’s policies were therefore evaluated in the abstract, and devoid of historical context.<sup>354</sup>

In short, Wilson and Dugard argue that standard used to enforce socio-economic rights is inappropriate and undermines the court’s potential to eliminate “structural inequality and disadvantage”.<sup>355</sup> The Court’s ignorance of the lived experiences of the poor results led to the

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<sup>350</sup> Wilson and Dugard (n. 340 above), p. 230.

<sup>351</sup> Ibidem, pp. 230-231.

<sup>352</sup> *Mazibuko and Others v City of Johannesburg and Others* (Constitutional Court of South Africa, 2009).

Hereinafter referred to as *Mazibuko*.

<sup>353</sup> Wilson and Dugard (n. 340 above) p. 233.

<sup>354</sup> Ibidem, p. 235.

<sup>355</sup> Ibidem, p. 223.

amelioration of their plight instead of tackling socio-economic challenges decisively.<sup>356</sup> They argue that the standard of reasonableness is too limiting, and is biased against the poor. It does not take into cognisance the lived experiences of the poor.

According to Wilson and Dugard, since the *Grootboom* judgment, the court has been reluctant to "exercise the power the Constitution assigns it explicitly to determine the interests socio-economic rights themselves exist to protect and advance".<sup>357</sup>

Wilson and Dugard also criticise reasonableness test for its flexibility, which makes socio-economic rights claim unpredictable.<sup>358</sup> This in turn has a discouraging effect on the litigants as they are not so certain of the likely outcome of litigation.

### 5.5.3 Meaningful engagement

#### 5.5.3.1 Defining meaningful engagement

Meaningful engagement is defined as a constituent of reasonableness and accordingly a procedural requirement imposed by s 26(2).<sup>359</sup> It is a strong form of administrative common law principle of *audi-altaremparterm*. Basically, meaningful engagement requires the organ of state seeking eviction, to show that it has engaged "individually and collectively" with the occupiers who may be rendered homeless by an eviction and to have "responded reasonably" to the needs and concerns articulated in the process.<sup>360</sup>

#### 5.5.3.2 Critique of meaningful engagement

According to Wilson and Dugard, meaningful engagement amounts to the proceduralization of socio-economic rights through adoption of administrative law norms.<sup>361</sup> In other words, meaningful engagement is not concerned with the content of socio-economic rights. Its focus is on whether the state has followed the right procedures in depriving people of their socio-economic rights. Wilson and Dugard further argue that rather than ground the right to housing in substantive norms, the court chose instead to create a space in which concrete entitlements could possibly be negotiated and implemented by agreement.<sup>362</sup> They conclude

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<sup>356</sup> *Ibidem*, p. 223.

<sup>357</sup> Wilson and Dugard (n. 340 above), p. 227.

<sup>358</sup> Wilson and Dugard (n. 282 above), p. 37.

<sup>359</sup> *Ibidem*, p. 46.

<sup>360</sup> *Ibidem*.

<sup>361</sup> *Ibidem*.

<sup>362</sup> *Ibidem*.

that even though meaningful engagement constitutes a useful resource around which communities could mobilise, it is not "sufficient enough to ensure that housing appropriate to the community's needs is provided",<sup>363</sup>

Notwithstanding the above criticism, meaningful engagement offers a number of advantages. As argued by Chenwi, using meaningful engagement offers several advantages: it promotes social transformation; enhances participatory democracy and transparency and accountability in the delivery of socio-economic goods.<sup>364</sup> This is so because meaningful engagement encourages a dialogue or interaction between the state and the communities so that they can reach a settlement to their dispute.

## 5.6 The Administrative law model

In adjudicating socio-economic rights claims, the Constitutional Court has followed different approaches from the one it applies in the enforcement of civil and political rights, namely: rationality review, reasonableness and meaningful engagement. All these approaches of adjudicating socio-economic rights fall within the same ambit of the 'administrative law model'.<sup>365</sup> Section 33 of the Constitution provides as follows:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons
- (3) National legislation must be enacted to give effect to these rights, and must-
  - (a) Provide for the review of administrative action by a court or where appropriate, an independent and impartial tribunal
  - (b) Impose a duty on the state to give effect to the rights in subsections (1) and (2)
  - (c) Promote an efficient administration

As it could be seen from the above definition of administrative action, the three approaches adopted by the Constitutional Court to enforce socio-economic rights are an expatiation of some elements of an administrative action. An administrative action is required to be "lawful, reasonable and procedurally fair".<sup>366</sup> As for the rationality review and reasonableness standard, they are both covered by the requirement that administrative action should be "reasonable". The meaningful engagement requirement is more orientated

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<sup>363</sup> *Ibidem*, p. 47.

<sup>364</sup> Chenwi, 2011, p. 373.

<sup>365</sup> Wilson and Dugard, p. 42.

<sup>366</sup> Section 33 of the Constitution..

towards procedural fairness. It encourages ‘‘the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solution’’.<sup>367</sup>

## 5.7 Concluding remarks

This chapter has evaluated the performance of the Constitutional Court in adjudicating claims on socio-economic rights. The focus was primarily on the rights of access to health, housing and social security services. In evaluating the Constitutional court's performance, a critique was made on the standards used to adjudicate socio-economic rights claims.

The chapter has also shown that the Constitutional Court applies different standards to enforce socio-economic rights: the rationality test (adopted in *Soobramoney* judgment), the reasonableness standard (*Grootboom* judgement), and the meaningful engagement test (*Olivia Road* judgment). All these approaches of adjudicating socio-economic rights are subsumed within the ambit of administrative law. Even though these approaches have different names, each of them amounts to a further elaboration on the elements of just administrative action, which requires the state action to be lawful, reasonable and procedurally fair.

This chapter has also pointed out the weaknesses and strengths of the approaches adopted to enforce socio-economic rights. Despite bearing different names, all these tests for adjudicating socio-economic rights claims revolve around the same centre of a just administrative action.<sup>368</sup>

In conclusion the chapter has shown that the standard and approaches used by the court to adjudicate socio-economic rights have a potential to advance socio-economic needs of the poor. The next chapter will look at the impact of court decisions in the socio-economic transformation of South Africa. It will also serve as an evaluation of the appropriateness and efficiency of the standards adopted by the court to enforce socio-economic rights. Do these standards of enforcing socio-economic rights really work?

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<sup>367</sup> *Port Elisabeth Municipality v Various Occupiers* 2004 (12) BCLR 12 (CC) para 39.

<sup>368</sup> Section 33 of the Constitution.

## CHAPTER 6

### 6 EVALUATION OF THE IMPACT OF COURT DECISIONS ON SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA

#### 6.1 Introduction

In this chapter, the effects of court judgments and orders in bringing about social justice in South Africa are considered. The chapter starts by tackling challenges concerning how to draw a correlation between court orders and their impacts in socio-economic transformation of the South African society. It then classifies impacts of social litigation into different categories. The last part of the chapter evaluates the effects of litigation in the provision of access to housing, health and social security.

#### 6.2 Challenges in assessing impact of socio-economic rights litigation

Assessing the impact of the court judgments in transforming the South African society is an exercise fraught with numerous challenges. Using the *Grootboom* judgment as a basis for assessing the impacts of social litigation, Langford identifies four challenges.<sup>369</sup>

The first challenge is to determine the formula or approach to be used to gauge the impact of litigation. The two approaches are used to assess the impact of social litigation: a 'before and after' approach or an 'idealistic expectations' approach.<sup>370</sup> The difference between the two approaches lies in the fact that the former entails comparing the conditions of the litigants before and after litigation. The focus is on whether the conditions of the litigants become better or worse as a result of social litigation. In other words, it looks at whether social litigation has resulted in an observable change in the socio-economic conditions of the applicant communities.

The latter approach measures impacts of social litigation against a future expectation of the effect.<sup>371</sup> This entails contrasting the promise of a particular rights strategy with its eventual outcome. According to Langford, the weakness of the latter method of assessing impact of litigation lies in "nailing down an acceptable expectation."<sup>372</sup> While the former entails an identification of positive impact, the latter will include a "more pessimistic reading,

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<sup>369</sup> Langford, 2014, p. 194.

<sup>370</sup> *Ibidem*.

<sup>371</sup> Langford, 2014, p. 24.

<sup>372</sup> *Ibidem*.

particularly if emphasis is placed on the community's short-term anticipation immediately after the judgment''.<sup>373</sup>

In retrospect, the "before and after" approach is concerned with the socio-economic position of the applicants after the litigation. It considers whether social litigation has led to improvements or detriment of the socio-economic position of the applicants. On the other hand, the idealist expectations approach looks at whether social litigation has led to the ideal socio-economic position that is envisioned in the Constitution.

The second challenge lies in determining the beneficiaries of the court order. This includes determining whether the focus should be on the impact the socio-economic rights litigation had; for an example, on the Grootboom community or the broader changes in housing and eviction policy''.<sup>374</sup> In other words, the challenge will be in determining whether the benefits of social litigation should be for the litigants who had brought an application before the courts or also for those who are in a similar position.

The third challenge is how to determine the amount of weight to be given to the different impacts: respective material (rights realisation and policy and institutional change), political (power relations) and symbolic (perceptive/ attitudinal) impacts.<sup>375</sup>

Lastly, the challenge in assessing the impact of social litigation is on determining what time is reasonable for the assessment<sup>376</sup>. In other words, it is not so clear if the impact of Court judgments on socio-economic rights is made on a short, medium or long term basis.

In retrospect, there is no unanimity yet on the standard for measuring improvements and regressions triggered by court judgments. While some authors use a before and after approach,<sup>377</sup> others embrace idealistic expectations as standard to gauge the impact of court judgments. To compound the problems, it is also difficult to determine the basis of measurement.

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<sup>373</sup> Langford (n. 369 above), p. 194.

<sup>374</sup> Ibidem.

<sup>375</sup> Ibidem.

<sup>376</sup> Ibidem.

<sup>377</sup> Langford (n. 371 above), p. 23.

### 6.3 Categorisation of the impact social litigation

Impacts of social litigation are many and varied. According to Langford, they include direct, indirect, material, systemic, political and symbolic. Most of the impacts are represented in the table below.

Table 1: Impacts of Grootboom community's strategy.<sup>378</sup>

|                                  | <u>Direct</u>                                                              | <u>indirect</u>                                                                                |
|----------------------------------|----------------------------------------------------------------------------|------------------------------------------------------------------------------------------------|
| <u>Material</u>                  | new public policy as addressed<br>By the decision                          | decision creates jurisprudence<br>that is useful in other cases                                |
| <u>Political</u>                 | legal mobilisation places<br>pressure on authorities to<br>change policies | judgment triggers organisation of<br>activities to support litigation<br>or implement decision |
| <u>symbolic/<br/>recognition</u> | defining and perceiving the<br>the problem as a rights<br>violation        | public opinion transformed<br>about the problem's urgency<br>and gravity                       |

As shown in the above table, there are multiple ways of assessing the impact of social litigation. These include assessing direct and indirect, negative and positive effects. Another way to assess the impact of socio-economic litigation is to differentiate immediate impact from the ultimate desired effects. Immediate effects can be divided into material, political and symbolic impacts. On the other hand, long-term desired effects are reflected in the actual attainment of the rights themselves, "as either outcome or process entitlements".<sup>379</sup>

<sup>378</sup> Adapted from Malcolm, Langford (2014), 'Housing Rights Litigation *Grootboom* and beyond', in Malcom Langford et al(eds.), *Socio-Economic Rights in South Africa: Symbols or Substance* ( United states of America: Cambridge University Press)187,195

<sup>379</sup> Langford (n. 371 above), p. 23.

Gauri and Brinks<sup>380</sup> distinguish the following kinds of socio-economic effects: direct impacts on the litigants themselves, direct effects on the non-litigants; direct effects of early decision on subsequent decisions and the indirect legislative or regulatory impact of a decision beyond its immediate beneficiaries.

From the foregoing, it is apparent that there are multiple ways of assessing impact of social litigation. In the next section of this chapter, some of the impacts of social litigation will be assessed.

#### **6.4 The impact of social litigation on right of access to adequate housing:**

##### ***Grootboom* case**

The *Grootboom* case was the first case in which the Constitutional Court adjudicated on the right of access to adequate housing. In assessing the impact of the *Grootboom* decision, Langford uses the community's original demands before the High Court as the baseline.<sup>381</sup> He divides the impact of *Grootboom* judgment into two, namely: community and systemic impacts<sup>382</sup>.

##### **6.4.1 Community impacts**

Basically, community impacts entail the benefits which accrue to the applicant community as a result of embarking on social litigation to vindicate their socio-economic rights.

###### **6.4.1.1 Material**

The *Grootboom* community's original demand was for temporary shelter. This demand was met a day before the Constitutional Court hearing. The Constitutional court issued an order pursuant to the agreement between the parties for the provision of temporary shelter. However, this impact did not last long, as the municipality failed to take steps to provide the promised materials, water and sanitation.<sup>383</sup> A follow-up application had to be made to ensure that the agreement between the parties was made the order of the court.<sup>384</sup> According to

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<sup>380</sup> Gauri and Brinks, 2008, p. 21.

<sup>381</sup> In the High Court, the community's demands were for adequate temporary shelter pending permanent accommodation and basic nutrition and shelter for children. See also Langford (n. 369 above), p. 194.

<sup>382</sup> Ibidem, p. 195.

<sup>383</sup> Ibidem.

<sup>384</sup> *Grootboom v Government of the Republic of South Africa* (unreported order in case no. CC/000), 21 September 2001



Langford, the community continued to complain against the quality of water, sanitation facilities and maintenance problems.<sup>385</sup>

Even though the provision of temporary shelter to the *Grootboom* community did not take very long, the provision of permanent housing took very long to be effectuated.<sup>386</sup> The major hurdle to the implementation of the court order was the lack of coordination and cooperation amongst different government authorities. It took the City of Cape Town and the Western Cape provincial government one year to decide on the 'locus of responsibility' for the implementation of the judgement.<sup>387</sup>

#### 6.4.1.2 The benefits for the *Grootboom* community

The agreement between the parties facilitated security of tenure for the *Grootboom* community. Because of the litigation, the threat of eviction was removed.<sup>388</sup> The *Grootboom* decision prompted the government to develop a plan which ensured permanent resettlement of all Wallacedene residents. According to this plan, the residents could choose between contractor-built housing (RDP) or the People's Housing Process. According to Langford, 130 hectare Blue Ridge Farm was purchased for the construction of low-cost housing for 6,800 households while another 2,000 would be developed in existing Wallacedene.<sup>389</sup> By 2008, the goal had been achieved for those who had chosen the People's Housing Process. But for those who had chosen contractor-built housing, there were numerous delays. According to Langford, 3000 of the RDP houses were built in Wallacedene, but construction of the remainder was delayed because of the cancellation of the contractor's tender due to allegations of corruption.<sup>390</sup> Unfortunately, Mrs Grootboom, the principal applicant in this case, died on the 8 of May 2008 while she was still waiting for her RDP house.<sup>391</sup> Despite this unfortunate incident, the process of providing *Grootboom* community with permanent housing continues unhindered. It is worth mentioning that this process was triggered by litigation.

By 2012, 90 per cent of the *Grootboom* community had become beneficiaries of permanent housing provided by the state. According to Langford, it was due to disagreements with the

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<sup>385</sup> Langford (n. 369 above), p. 196.

<sup>386</sup> Langford (n. 369), p. 197.

<sup>387</sup> *Ibidem*.

<sup>388</sup> *Ibidem*.

<sup>389</sup> *Ibidem*.

<sup>390</sup> *Ibidem*.

<sup>391</sup> *Ibidem*, p. 198.

contractors over the quality of the houses that those remaining decided not to take the permanent housing offers.<sup>392</sup>

Langford takes the view that the community managed to achieve permanent housing because of litigation. Social litigation prompted the government to accelerate the process of providing permanent housing by developing the Wallacedene housing plan''.<sup>393</sup> Langford concludes that 'there is a clear causal connection between the judgment and the creation of the plan, and potentially its implementation''.<sup>394</sup>

#### **6.4.2 Practical impact**

The *Grootboom* decision had a practical impact on the housing policy at national, provincial and local levels of government. The standard of reasonableness has ensured that protection is extended to those who find themselves in intolerable or crisis conditions.<sup>395</sup>

##### **6.4.2.1 Immediate benefits and relief**

Prompted by the legal action, the Western Cape provincial administration and the Oostenberg local administration made an offer to the *Grootboom* community to ameliorate their immediate crisis.<sup>396</sup> The offer entailed providing the community with certain rudimentary services. According to the provincial government, the offer was made out of humanitarian and pragmatic concerns.

Despite the government's hesitancy to act on its humanitarian offer to the *Grootboom* community,<sup>397</sup> social litigation has at least galvanised the state into taking considerate measures to cater for those in desperate need. According to Pillay<sup>398</sup>, the provincial government did not provide the rudimentary services immediately. They were only prompted to do so after the *Grootboom* was granted an interdict which put the municipality on terms to provide certain rudimentary services. As a result of this legal action (interlocutory order), a

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<sup>392</sup> *Ibidem*.

<sup>393</sup> *Ibidem*..

<sup>394</sup> *Ibidem*..

<sup>395</sup> Pillay (n. 257 above), p. 256.

<sup>396</sup> *Grootboom*, para. 5.

<sup>397</sup> Pillay, (n. 257), p. 257.

<sup>398</sup> *Ibidem*.

sum of R200 000 was made available to the Grootboom community to purchase zink sheets, windows and doors. 20 toilets were also erected. Water taps were also installed.<sup>399</sup>

At least the *Grootboom* community demand for temporary shelter had been met. Had they not brought their plight to the Court's attention, the state could have remained oblivious to their intolerable situation. The intolerable conditions in which they lived could have gone unnoticed and their cries unheard by the powers that be.

#### **6.4.2.2 Indirect consequences of the *Grootboom* judgment**

The *Grootboom* judgment had impact which reverberated far beyond the Grootboom community. As indicated by Richard Goldstone, the *Grootboom* judgment had unintended or indirect consequences of litigation.<sup>400</sup> Emboldened by the *Grootboom* judgment, the government responded proactively to the plight of a group of Alexandra residents who were left homeless because of flash floods. Without having to wait for any legal proceedings to be initiated, the government established a Cabinet committee which made R300 million available for the relief of those who had been rendered homeless.<sup>401</sup> When challenged by the local community for erecting a transit camp adjacent to their expensive residential area, the state was able to raise the defence which it borrowed from *Grootboom* case. The state defended itself successfully by indicating that it was bound to take step to rescue those who find themselves in the conditions of crises.

Goldstone observed that too much focus is often on the reaction of state officials to the court judgments/ orders. He argues that rights are equally realised when the state officials take appropriate action in order to pre-empt litigation.<sup>402</sup> This is what happened in the *Kyalamini* case.

#### **6.4.2.3 Influence of the *Grootboom* judgment**

The court order in the *Grootboom* is not only addressed to the parties before the court. Instead, it has sent ripples of hope to the whole nation, thereby reviving hope in all "persons other than the Grootboom community, who are now able to scrutinise and challenge national, provincial and/or local housing policy on the basis that it does not cater for people in

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<sup>399</sup> Pillay (n. 257), p. 264.

<sup>400</sup> Goldstone (n. 319 above), p. x.

<sup>401</sup> See *Minister of public Works and others v Kyalami Ridge Environmental Association and others* 2001 (7) BCLR 652(CC).

<sup>402</sup> See *supra* n. 400.

desperate and crisis situations.”<sup>403</sup> In brief, the court went beyond the narrow confines of the locality of Grootboom community. It encompassed all those who find themselves in conditions of dire need. The court order reads thus:

2 (b) [I]t is declared that: The Programme must include reasonable measures such as, but not necessarily limited to, those in the Accelerated Managed land Settlement programme, *to provide relief for people who have no access to and, no roof over their heads, and who are living in intolerable conditions or crisis situations*<sup>404</sup> (emphasis added).

It is apparent from the above order that no geographical distinction is made regarding those people who live in intolerable conditions. Even though the Grootboom community was party to the proceedings, the Constitutional Court did not confine itself to the plight of the applicants. The Court's focus was on everyone who is facing conditions similar to the ones which precipitated the Grootboom community to institute legal action. The state was ordered to take reasonable measures to *provide relief to people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations* (own emphasis).<sup>405</sup>

It is apparent, from the above order that no geographical distinction is made on those in intolerable conditions. In Pillay's words: “[T]he judgment handed down by the Constitutional Court is not specific to any community or area. It is directed at policy generally and requires the state to devise and implement a policy or programme for all persons who find themselves in desperate and crisis situation”.<sup>406</sup>

As it was held in the *Grootboom* judgment, the state was obliged to devise, fund and implement a nationwide housing programme that would fulfil the needs of those in intolerable conditions:

Effective implementation requires at least budgetary support by national government. This, in turn, requires recognition of the obligation to meet immediate needs in the nation-wide housing programme. Recognition of such needs in the nationwide housing programme requires it to plan, budget and monitor the fulfilment of immediate needs and the management crises. This must ensure that a

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<sup>403</sup> Pillay (n. 257 above), p.257.

<sup>404</sup> *Grootboom*, para. 99.

<sup>405</sup> *Ibidem*.

<sup>406</sup> Pillay (n. 257 above), p. 273.

significant number of desperate people in need are afforded relief, though not all of them receive it immediately.<sup>407</sup>

The court order to the state to develop a nationwide housing programme to cater for those in desperate conditions is well consistent with the goals for which the Constitution was adopted. The preamble to the Constitution provides as follows:

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to improve the quality of life of all citizens.

### 6.4.3 Gaining political leverage

It could well be argued that socio-economic rights litigation has led to political empowerment of the poor. As indicated by Langford,<sup>408</sup> social litigation has led to the shift in the power relations between the community evictees and the municipality. The power of the disadvantaged community has been enhanced. Once powerless and easy victims to evictions, the communities are now able to resist evictions or negotiate with the government for eviction to be made under certain conditions only. The enhancement in the community's power is apparent from the *Grootboom*, *Olivia* cases, where the community was able to forestall the municipality's threat of forced eviction.<sup>409</sup>

Furthermore, the judgment had facilitated the creation of new community organisation.<sup>410</sup> Langford points out that litigation has resulted in the political empowerment of the impoverished and marginalised community: [I]t (litigation) clearly helped unite a heavily marginalised community living in a highly precarious conditions and give birth to a new representative entity that negotiated with municipality.<sup>411</sup>

### 6.4.4 Systemic impact

The *Grootboom* judgment had far-reaching consequences. Although the *Grootboom* community approached the court with the intention to have the court address their plight, the court's judgment went far beyond the locality of Wallecedence. It dealt with the housing problem faced by all similarly-situated South Africans. As it was rightly pointed out by

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<sup>407</sup> *Grootboom*, para. 68.

<sup>408</sup> Langford (n. 369 above), p. 198.

<sup>409</sup> *Ibidem*.

<sup>410</sup> *Ibidem*.

<sup>411</sup> *Ibidem*, p. 199.

Langford<sup>412</sup>, although the community's claim addressed its own situation, the judgment was focused on the broader obligations of the state, particularly towards all those in desperate need'. Therefore, the *Grootboom* decision had a great potential for a 'wider systemic impact'.<sup>413</sup>

#### 6.4.5 Impact on the housing policy

The *Grootboom* decision had an impact on the housing policy of the government. In 2003, the national and provincial government approved a new programme called Housing Assistance in Emergency Situations. The programme was adopted as a result of the *Grootboom* decision and severe floods in Limpopo in 2000.<sup>414</sup> Chapter 12 of the National Housing code provides housing assistance in emergency situations to those who, for reasons beyond their control –find themselves in an emergency situation. These include those whose shelters are being destroyed or damaged; their prevailing situation posing an immediate threat to their lives, health and safety or eviction or threat of imminent eviction.

#### 6.4.6 Monetary benefits

Pursuant to the *Grootboom* decision, the National Treasury Department undertook to allocate a fixed 0.8per cent of the national housing budget to the implementation of the Housing Assistance in Emergency Situations policy<sup>415</sup>.

In 2009, the different sums of monies were provided by the programme for different purposes: R22,416 for the repair of existing services; R4,230 for municipal engineering services and R47,659 for the construction of temporary shelters.<sup>416</sup>

Unfortunately the implementation of this policy has been hindered by various reasons<sup>417</sup>: only municipalities could apply for the funds, and only when they could demonstrate an emergency situation, the use of the programme has been minimal and on an ad hoc basis, only six out of nine provinces have applied for the funds and most grants were disbursed for disaster and floods in rural areas, although this does not reflect a state-initiated use of the

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<sup>412</sup> Langford (n. 369 above), p. 199.

<sup>413</sup> Ibidem.

<sup>414</sup> Ibidem.

<sup>415</sup> Langford (n. 369 above), p. 200.

<sup>416</sup> Department of Human Settlement, 'Subsidy quantum-Incremental Interventions', Pt. 3, Vol. 4, National Housing Code (2009)4.

<sup>417</sup> See supra n. 415.

funds. The other problems regarding the implementation of the emergency policy were the narrow definition of emergency and burdensome procedures.<sup>418</sup>

#### 6.4.7 Tackling informal settlement challenges

Around 2002 to 2003 the government realised that the housing policy needed a comprehensive overhaul.<sup>419</sup> A number of problems were identified during the government's review process:<sup>420</sup> huge housing backlog, continued growth of informal settlement. In response to these challenges, a new Informal Settlements Programme was adopted and included in Chapter 13 of the Housing Code.<sup>421</sup> Informal settlements could be upgraded in situ, or relocations could only occur in exceptional cases.

Langford regards the *Grootboom* decision to have played a part in influencing this development of the policy. This is apparent from the timing of the policy which came right after the *Grootboom* judgment.<sup>422</sup> What is remarkable about the *Grootboom* judgment was the fact that it "contributed to legitimising the existence of informal settlements and their residents as constitutional rights holders."<sup>423</sup> They are no longer viewed, through the lenses of criminal law, as illegals that deserved to be evicted. They are now considered to be bearers of human rights, and who are entitled to an administrative action which is lawful, reasonable and procedurally fair.<sup>424</sup> In essence, the *Grootboom* resulted in the restoration of dignity of informal settlement residents. As state above, they are no longer viewed as objects of eviction. They are now treated by the state with dignity and as rights bearers.

#### 6.4.8 Development of socio-economic jurisprudence

The *Grootboom* judgment serves as an inspiration as well as precedent for "all of the key socio-economic rights cases in the South African jurisprudence".<sup>425</sup> According to Pillay, the *Grootboom* decision constituted "a milestone victory for homeless and landless people in South Africa".<sup>426</sup> In short, if there had been any lingering doubt over the justiciability of socio-economic rights, such doubt was finally settled by the (*Grootboom*) judgment. The

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<sup>418</sup> Ibidem..

<sup>419</sup> Langford (n. 369 above), p. 201.

<sup>420</sup> Ibidem.

<sup>421</sup> Ibidem.

<sup>422</sup> Langford (n. 369 above), p. 202.

<sup>423</sup> Ibidem.

<sup>424</sup> Section 33 of the Constitution.

<sup>425</sup> Langford (n. 369 above) p. 203.

<sup>426</sup> Pillay (n. 257 above), p. 256.

judgment itself had a very positive impact on the development of jurisprudence on the enforcement of socio-economic rights in South Africa.<sup>427</sup>

## **6.5 Impact of social litigation after the *Grootboom* case**

The *Grootboom* decision was a precedent-setting judgment. It had an impact on the subsequent cases dealing with the right of access to adequate housing. Most of them deal with eviction.

### **6.5.1 *President of the Republic of South Africa and Another v Modderklip*<sup>428</sup>**

#### **6.5.1.1 Background**

This case involves the Gabon community's struggle against forced evictions. Following their eviction from an overly-crowded settlement by the state, a group of about four hundred people decided to settle on a privately-owned farm, called Modderklip farm. The farm Modderklip is located next to Daveyton Township, in Benoni, on the East Rand. They settled on the farm in 2002. By October 2003, the number of people living on the Modderklip farm had risen to approximately forty thousand. The landowner's, Mr Duvenage Modderklip's, attempts to either evict illegal occupiers or to persuade the City Council to expropriate the farm were to no avail.

Modderklip obtained an eviction order from the High Court. The sheriff required him to pay a deposit of R1.8 million corresponding to the costs for evicting the residents.<sup>429</sup> He could not afford such an amount. He brought an action against the state for failing to respect property rights.

#### **6.5.1.2 *Modderklip* judgment**

The Constitutional Court held that the state's obligation to satisfy property rights goes beyond establishing formal mechanisms and institutions. It found that Duvenage's right to rule of law was infringed. It also found the state's inaction and failure to assist Modderklip to have the eviction of illegal occupiers effected was unreasonable. The Court held:

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<sup>427</sup>KameshniPillay, 'Implementation of *Grootboom*: Implementation for the enforcement of socio-economic rights, 6 *Law Democracy and Development* (2002)p256

<sup>428</sup>*President of the Republic of South Africa and Another v ModderklipBoerdery (Pty) Ltd* (Constitutional Court of South Africa, 2005)., hereinafter referred to as *Modderklip*.

<sup>429</sup>*Modderklip*, para. 9.



The state is also obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders thus undermining the rule of law.<sup>430</sup>

The court ordered the state to pay compensation to Mr. Modderklip for unlawful occupation and pay rent for the occupiers until such time an alternative land has been made available to them by the state.

### **6.5.1.3 Effects of the *Modderklip* order**

#### **6.5.1.4 Immediate effects**

The *Modderklip* had the following immediate effects on the Gabon community: litigation stopped the eviction order. Ordering the state to pay continuous rent for the occupiers served as an incentive for the state to address the community needs for permanent housing expeditiously.<sup>431</sup> Because of this court judgment, the Department of Housing developed a housing plan which catered for the Gabon community. In 2006, the construction of houses began a new township, called Chief Albert Luthuli Extension 6. It would provide 7,278 housing opportunities in a mixed-housing environment to Gabon residents. Basic services were secured.<sup>432</sup>

#### **6.5.1.5 Long term effects**

Even though the *Modderklip* case revolved around the Gabon community's resistance against eviction, it culminated in the fulfilment of the right of access to adequate housing. Owing to the ongoing rent that the state was required to pay, the state responded very speedily to the housing needs of the community. By 2009, the first phase of relocations to the new township was already taking place.<sup>433</sup>

### **6.5.2 *Olivia Road case*<sup>434</sup>**

#### **6.5.2.1 Background**

In this case, the City Council sought to evict residents from the two buildings they occupied illegally in Berea, Johannesburg: Olivia Road and Joel Street. The state wanted to evict the

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<sup>430</sup> Ibidem para. 43.

<sup>431</sup> Langford, (n. 369 above), p. 214.

<sup>432</sup> Ibidem.

<sup>433</sup> Langford, (n. 369 above), p. 215.

<sup>434</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC) ; 2008 (5) BCLR 475 (CC)

occupiers from those two uninhabitable buildings because it was implementing the Inner-City Regeneration Strategy. The objective of this Strategy was to revamp the old city buildings so as to encourage private sector investment in the inner city of Johannesburg.<sup>435</sup> The occupiers sought the legal help from the Centre of Applied Legal Studies (CALS) lawyers. In addition to opposing the state application for eviction, they also instituted a counterclaim, on behalf of all persons living in the same buildings as Olivia Road and Joel Street, that the state's policy is unconstitutional.<sup>436</sup>

### **6.5.2.2 High Court judgment**

The High court found in favour of the respondents (occupiers). It ordered the state to discontinue the eviction process until such time an alternative accommodation is provided to the occupiers.<sup>437</sup> The state appealed to the Supreme Court of Appeal (SCA) against the decision of the High Court. The SCA upheld the appeal of the state, but ordered the state to provide alternative shelter to the would-be victims of eviction. Following the occupants' appeal to the Constitutional court against the SCA decision, the Constitutional Court ordered the parties to engage in a meaningful dialogue so that they could find a mutually acceptable and satisfactory solution to their predicament.<sup>438</sup> The court found that the municipality should engage in a meaningful dialogue with the occupants to avoid the occupants from being rendered homeless as a result of eviction.

### **6.5.2.3 Effects of *Olivia Road* judgment**

The court judgment resulted in a temporary relocation of about 450 residents within City-owned 'communal' housing in one year; refurbishment of empty buildings, one room was allocated for each family; they shared cooking and sanitation facilities, rental subsidy and provision of basic services.<sup>439</sup>

### **6.5.2.4 Overall effects of litigation on housing rights**

In most housing cases, litigation has had the following effects: prevented evictions, improved provision of basic services, strengthened community organisation, compelled government to come up with new policies, developed the jurisdictional foundation for socio-economic

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<sup>435</sup> Langford (n. 369 above), p. 217.

<sup>436</sup> *Ibidem*.

<sup>437</sup> *Ibidem*.

<sup>438</sup> *Ibidem*.

<sup>439</sup> *Ibidem*.

litigation and accelerated provision of permanent housing and political empowerment of the poor communities.<sup>440</sup>

As it could be seen from *Grootboom*, social litigation has removed the plight of the Grootboom community from obscurity and brought it to the attention of the government. The *Grootboom* case also managed to evoke some empathy from the government, which was all along oblivious to the needs of the Grootboom community. As a result of the application brought by the Grootboom case, the state was prompted to act humanely and offer the community some temporary relief before the case was even finalised. Besides securing the temporary relief they sought in their application, the Grootboom community was eventually provided with permanent housing.

In *Modderklip*, the trend was almost the same. The initial cause of action was the illegal occupiers' resistance against eviction from Modderklip farm. Even though they managed to secure the relief they sought in their application, the impact of their court action went beyond mere enjoying security of tenure. It culminated in the provision of permanent housing for them as well.

## 6.6 Impact of litigation on the provision of health services

### 6.6.1 The *Van Biljon v Minister of Correctional Services* judgment<sup>441</sup>

This was the first reported court decision on the right to access adequate health care under the new dispensation.<sup>442</sup> This case deals with the rights of sentenced prisoners under section 35(2) (e) of the Constitution. The said section provides every detained person, including every sentenced prisoner with the right to "conditions of detention that are consistent with human dignity, including at least exercise and the provision, at the state expense, of adequate accommodation, nutrition, reading material and medical treatment".

The applicants were four inmates at the Pollsmore prison in Cape Town. They were suffering from HIV infection. They applied to the High Court of a declaratory order entitling them to receive appropriate anti-viral medication at the state expense.<sup>443</sup>

<sup>440</sup> Langford (n. 369 above), p. 218.

<sup>441</sup> *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C).

<sup>442</sup> Berger, Jonathan, 'Litigating for Social Justice in post-Apartheid South Africa: A focus on Health and Education' in VarunGauri and Daniel, M. Brinks (eds.) *Courting Social Justice: Judicial Enforcement of Social and economic Rights in the Developing World* (New York: Cambridge University Press), 2008 p. 38-53.

<sup>443</sup> *Van Biljon*, para. 4.

The issue which fell to be decided by the High Court was whether the applicants and other similarly situated prisoners who “have reached the symptomatic stage of the disease and whose CD4 counts are less than 500/ml- are entitled to receive the anti-viral treatment at the state expense”.<sup>444</sup>

The court held that the said prisoners are entitled to all basic rights not temporarily taken away or necessarily inconsistent with being prisoners.<sup>445</sup> It declared that the anti-viral treatment should be extended to the applicants.

The major shortcoming of this court order was that it did not include similarly situated prisoners.

### 6.6.2 Benefits of the *TAC* judgment

This was a watershed judgment for mothers and their new born babies in South Africa. The court ordered the government to remove all restrictions that impede the acceleration of the provision of NVP to all public hospitals and clinics. The *TAC* decision has played a vital role in realigning the state's policy towards HIV-AIDS.

First, the government showed reluctance to tackle the HIV-AIDS pandemic head-on as it was in a denial mode.<sup>446</sup> Nonetheless, the impact of the decision is apparent from the huge strides that South Africa has made in reducing new HIV infections since the *TAC* judgment. Between 2001 and 2011, there had been a 41% reduction in HIV infections.<sup>447</sup> South Africa has also made huge investments in its fight against the HIV pandemic. In the past two years, the country's expenditure on HIV treatment has increased by 75%.<sup>448</sup> Currently, more than 1.7 million people have access to the lifesaving drug.<sup>449</sup> Given the government's first initial reluctance to response to the outbreak of HIV pandemic speedily, it is apparent that the Court order has had a major impact in the redirection of the state policy and expediting the roll out of the HIV drug to all state hospitals and clinics. In the process many lives have been saved.

### 6.6.3 Evaluating effects of litigation on the right to access health care

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<sup>444</sup> *VilBiljon*, para.8.

<sup>445</sup> *VilBiljon*, para. 42.

<sup>446</sup> Verify Murphy, “ Mbeki stirs AIDS controversy”, 26 September 2003, available <http://news.bbc.co.uk/2/hi/africa/3143850.stm>, visited on 16 December 2013.

<sup>447</sup> UNAIDS Report 2012. Available at <http://www.unaids.org/en/resources/presscentre/pressrelease>, accessed on 23 May 2013.

<sup>448</sup> *Ibidem*.

<sup>449</sup> *Ibidem*.

From the above cases, the effects of litigation on the provision of health services are evident. In *TAC* court order led to the provision of the anti-retroviral drug in all state hospitals and clinics. In short, the *TAC* order played a very pivotal role in South Africa's fight against HIV-AIDS pandemic. As indicated above, South Africa has since made a huge success in the fight against HIV-AIDS pandemic, thus, reducing new HIV infections by 41 per cent within a very short space of time.<sup>450</sup> However, in *van Biljon*, the court order was not as comprehensive as the one given in *TAC* by the Constitutional Court. In the latter, the court failed to extend its order beyond the four applicants.

### 6.7 Impact of litigation on the provision of social security services

"A Nation should not be judged by how it treats its highest citizens, but its lowest ones"

Nelson Mandela- Long Walk to freedom

The apartheid regime paid scant attention to the plight of black people who were in vulnerable positions. Its focus was solely directed to benefit white people. For that reason, the apartheid regime created social security system for the exclusive benefit of this group. Through different social welfare legislations, white people were guaranteed protection against poverty and risk.<sup>451</sup> Blacks were left out of the state's social security insurance. As depicted by Goldblatt and Rosa,<sup>452</sup> discriminatory legislations were passed to provide social security to white South Africans, before and during the apartheid era: The Child Protection Act of 1913 provided maintenance grant to white children only. None was extended to black children. From the introduction of the Old Age Pension Act of 1928, only whites and coloureds were made beneficiaries. Indians and blacks were only included in 1944.<sup>453</sup> When Disability grant was introduced in 1937, it was meant to benefit white and coloured people. The Disability grant was only extended to blacks after 10 years of its introduction.<sup>454</sup>

The above background information shows how discriminatory the South Africa welfare system was, even before the apartheid era. It favoured white people to the detriment and neglected black South Africans. This resulted in inequalities amongst the most vulnerable members of the South African society. The South African Constitution was adopted to address imbalances and inequities such as the ones in the social security area. It was adopted

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<sup>450</sup> *Ibidem*.

<sup>451</sup> Goldblatt and Rosa, 2014, p. 255.

<sup>452</sup> *Ibidem*.

<sup>453</sup> *Ibidem*.

<sup>454</sup> *Ibidem*.

to establish a society based on social justice, and to improve the quality of life of all citizens.<sup>455</sup> Social security rights are today enshrined in the Constitution:

Section 27

(1) Everyone has the right to have access to

.....

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights

The impact of these state measures in offering a safety net to vulnerable groups is apparent. Most South Africans have become beneficiaries of social security grants. According to Goldblatt and Rosa,<sup>456</sup> 16 million out of 50 million South Africans benefitted from social security grants by September 2012. This figure represented one third of the South African population who were protected from facing abject poverty. As it will be explained below, such a success in the provision of social assistance could be attributable to progressive government policies, campaigns by civil society and litigation. The focus in the next heading will be primarily on the impact of litigation in ensuring that social assistance is extended to cover more people who are incapable of supporting themselves and their dependents.

### **6.7.1 Effects of litigation or threat of litigation on the expansion of social security services**

#### **6.7.1.1. *Mahlangu* case<sup>457</sup>**

Mrs Florance Mhlangu, the applicant, was a mother of three children who were deemed to be too old to qualify for Child Support Grant. In 2005 child support grant was extended to cover children younger than fourteen years. Before that, only children under the age of seven could benefit from child grant. Mrs Mhlangu was a sole breadwinner, who worked as a domestic worker, earning a monthly salary of paltry 1000.00 South African rands (about 68 Euros). This was too little to cover for her family's basic needs, which comprised of her unemployed husband and two children.

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<sup>455</sup> See the Preamble to the Constitution.

<sup>456</sup> Goldblatt and Rosa, (n.451 above) p.253.

<sup>457</sup> This is an unreported case. See also Goldblatt and Rosa (n. 451 above), pp. 259-260.

Mrs Mahlangu launched a High Court challenge on the basis that the Department of Social Development's policy denied children aged between fourteen and eighteen their constitutional right to social security. Her lawyers argued that the limitation of Child Support Grant to the above age constitute an infringements of children's Constitutional Rights: the rights to social assistance, food and nutrition, social services, basic education, equality, dignity and life.<sup>458</sup>

Despite the initial opposition to this application from the departments of Social Development and Finance, the government finally revised its policy on social assistance grants before the judgment was handed down. On 31 December 2009 and in March 2010, the impact of litigation became evident when the Minister of Social Development gazetted amendments to the Social Assistance Act 2004. Today, child support grant is extended to all poor children younger than 18.<sup>459</sup>

Given the fact that there was no social grant for care givers for almost 2.4 million children between the age of fifteen and eighteen, the effects of Mrs Mahlangu's efforts on the realisation of children's socio-economic rights are immense and laudable.

#### **6.7.1.2 Impact of litigation on the expansion of Old Age pension**

The apartheid era welfare system treated old men and women unequally. Pensions were provided to women who had reached the age of sixty and men who had reached sixty-five.<sup>460</sup> This discriminatory treatment between elderly men and women was due to a "legacy from the 1930s" which was made "in recognition of earlier marrying age and shorter working lives".<sup>461</sup>

This discriminatory treatment against old men of pensionable age led to a court case which became known as the *Roberts* case.<sup>462</sup> Briefly, the background to this case is as follows: In 2005, a group of men between the ages of sixty and sixty-five made a High Court application in which they challenged the constitutionality of the government's Old Age Pension policy.

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<sup>458</sup> Goldblatt and Rosa' (n. 451 above), p. 260. See also sections 9, 10, 11, 27, 28 and 29 of the Constitution.

<sup>459</sup> *Ibidem*.

<sup>460</sup> *Ibidem*, p.262.

<sup>461</sup> *Ibidem*

<sup>462</sup> *Roberts and Others v Minister of Social Development and Others* (unreported decision of the Transvaal Division, Case Number 3283/05).

Their challenge was based on two grounds, namely: that the old age pension policy infringed their rights to equality and social security.<sup>463</sup>

In opposing the application, the state argued that the age differentiation on which the Old Age Pension was based, was reasonable and justifiable because it was a positive measure calculated at advancing “the rights of women as an economically, socially and politically vulnerable group in society”.<sup>464</sup> The state grounded its defence on section 9(2) of the Constitution, which allows legislative measures to be taken to advance people who were disadvantaged by discrimination. Section 9(2) of the Constitution provides as follows:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.

However, when it dawned on the government that the impugned Old Age Pension policy was inconsistent with the Constitutional provisions to equality and social security, it was amended with much ado. President Thabo Mbeki announced during the 2008 State of the Nation speech that old age pension would be equalised at the age of sixty.<sup>465</sup> The president's announcement was prompted by the court application and the pending court judgment. Had the applicants not challenged the old age policy, the state could have remained oblivious of the inconsistency between the policy and the Constitution. The government acted speedily to pre-empt the court from declaring that the old age policy was inconsistent with section 9 of the Constitution, and therefore invalid. Section 172(1) of the Constitution provides the courts with powers to make such declaration. It provides thus:

(a) When deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.

The impact of the changing government's policy on old age pension was huge. It led to ‘the inclusion of thousands of men into the grants system and longer term inclusion of millions more’,<sup>466</sup>

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<sup>463</sup> See *supra* n. 460.

<sup>464</sup> *Ibidem*.

<sup>465</sup> *Ibidem*.

<sup>466</sup> *Ibidem*, p. 263



### 6.7.1.3 *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development*<sup>467</sup>

In this instance, the Constitutional Court had to deal with two cases referred to it by the Transvaal Provincial Division of High Court. The two cases were *Khosa and others v the Minister of Social Development and others* and *Mahlaule and Another v the Minister of Social Development and others*. Both of the applicants were from Mozambique, but have become permanent residents in South Africa.

Their challenge was on the Social Assistance Act<sup>468</sup> and Welfare Laws Amendment Act.<sup>469</sup> In the *Khosa* case, the challenge was to section 3(c) of the Social Assistance Act, which reserved social grants for the aged South African citizens. In the *Mahlaule* case, the challenge was to sections 4(b)(ii) and 4B(ii) of the Welfare Laws Amendment Act. The applicants challenged the said sections for reserving child-support grants and care dependency grants for South African citizens only.<sup>470</sup>

The court found the impugned sections to be inconsistent with the Constitution. In both cases the court held that the omission of the word "or permanent resident" after the word "citizen" was inconsistent with the Constitution.<sup>471</sup> To remedy the defects in both sections, the court ordered that the words "or permanent resident/s" should be read in after the words "citizen/s" in both sections.<sup>472</sup>

### 6.7.1.4 Culture of non-compliance with court orders

Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. If the government becomes a law breaker, it breeds contempt for law.

Justice Brandeis in *Olmstead et al v United States*

Despite the outstanding achievement made in the provision of social security services since the dawn of democracy in South Africa, the record of the Eastern Cape provincial government in honouring court orders on the provision of social grants has not been

<sup>467</sup> *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (Constitutional Court of South Africa, 2004).

<sup>468</sup> Social Assistance Act 59 of 1992.

<sup>469</sup> Welfare Laws Amendment Act 106 of 1997.

<sup>470</sup> *Khosa* para 1.

<sup>471</sup> *Khosa* para 98.

<sup>472</sup> *Khosa* para 98.

impressive.<sup>473</sup> As detailed by Mbazira and De Beer and Vetorri, the Eastern Cape provincial government has gained notoriety for disrespecting court orders on the provision of social security and assistance service.<sup>474</sup>

In *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another*<sup>475</sup>, the applicant who had been a beneficiary of the disability for a period of five years, was informed of the termination of her disability grant verbally by the Eastern Cape Department of Welfare. The court ruled against the Department as its conduct amounted to the violation of the Social Assistance Act.

Mbazira laments that the failure by the Eastern Cape provincial government to view the *Bushula* judgment and order as a precedent and guidance for it not to repeat the same conduct.<sup>476</sup> Instead of learning from *Bushula* judgment and apply it to similar cases, the Eastern Cape provincial government went on to commit similar offences of failing to reinstate social grants.

In *Njongi v MEC, Department of Welfare Eastern Cape*,<sup>477</sup> the provincial government failed to reinstate the applicant's grant. The application for the reinstatement of the grant was determined 18 months after its admission. The issue which fell to be decided was whether Ms Njongi was entitled to arrears. The Court found the provincial government's conduct to be unlawful and ordered the grant to be reinstated retrospectively.

This kind of disrespect for court orders has also find resonance among some of the prominent members of the ruling party, ANC. For an example: Amos Masondo, the former Mayor of Johannesburg was reported to have attacked the High Court and judge Tsoka for finding against the City of Johannesburg Metropolitan municipality in the *Mazibuko* judgement.

Judges are not above the law ... We cannot have a situation where a judge wants to take over the role of government. Judges must limit their role to what they are supposed to do. If they want to run the country they must join political parties and contest elections. In that way they can assume responsibilities beyond their powers. We don't want judges to take the role of Parliament, the role of

<sup>473</sup> Mbazira, Christopher, 2008 (a) 'Non-implementation of court orders in socio-economic rights litigation in South Africa: Is the cancer to stay?', ESR vol 9 no 4.

<sup>474</sup> Ibidem.

<sup>475</sup> *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* [2000] (2) SA 849 (E).

<sup>476</sup> Mbazira, (n. 473 above), p. 8.

<sup>477</sup> *Njongi v MEC, Department of Welfare Eastern Cape* 9 [2008] ZACC.

the national council of provinces, the role of the legislature and the role of this council. Judges must limit their role.<sup>478</sup>

Disregard for court judgments as it was a trend in the Eastern Cape, and disrespect for the courts have very deleterious repercussions for both the government and the state. As indicated by Justice Brandeis in *Olmstead et al v United States*:<sup>479</sup>

In a government of laws, existence of the government will be imperilled if it fails to observe law scrupulously..... Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. If the government becomes a law breaker, it breeds contempt for law. It invites every man to become a law unto himself, it invites anarchy.

### 6.8 Evaluating effects of litigation on the provision of social security services

Litigation has played an important role in ensuring that social security is extended and enjoyed by most South Africans as well as those who are permanent residents in South Africa. The above cases have demonstrated that litigation is a powerful tool for bringing about legislative and policy change<sup>480</sup> and protecting vulnerable South Africans from abject poverty.

In conclusion, litigation or threat thereof has played an important role in the extension of the social benefits to groups of people who were denied access to social security''.<sup>481</sup> Therefore, one can conclude that success in the provision of social security services is attributable not only to litigation, but also to advocacy, lobbying and campaigns. As shown in the *Roberts*, *Mahlangu* and *Khosa* cases, the government has yielded to the pressure from courts which were accompanied by sustained advocacy, campaigns, advocacy and lobbying.<sup>482</sup>

### 6.9 The record of the Constitutional Court in enforcing socio-economic rights

The record of the Constitutional Court as a vehicle for the advancement of socio-economic rights in South Africa is a mixed one.<sup>483</sup> As a result of the Constitutional Court judgments in the *TAC* case, the state was ordered to provide Nevirapine to all state hospitals without delay. The impact of the court order in the fight against the HIV-AIDS pandemic in South Africa was considerable. South Africa used to have the highest rate of HIV-AIDS infections, but

<sup>478</sup> <http://constitutionallyspeaking.co.za/attacking-the-judiciary-ii/> visited on 13 November 2013.

<sup>479</sup> *Olmstead et al v United States* 277US 438 (1928)

<sup>480</sup> Goldblatt and Rosa' (n. 451 above), p. 261.

<sup>481</sup> Ibidem, p. 271.

<sup>482</sup> Ibidem, p. 269.

<sup>483</sup> Bilchitz, David, "What is reasonable to court is unfair to the poor" Business Day, 06 August 2012.

between 2001 and 2011, new HIV infections had been reduced by 41%.<sup>484</sup> Given the fact that the government was dragging its feet regarding the expedition of provision of the Neverapine in government hospitals and clinics, the impact of *TAC* order in galvanizing the state to act speedily cannot be underestimated.

However, in the *Mazibuko* case, the court has decided to turn a deaf ear or blind eye to the plight of the applicants. Despite the fact that the applicants lived in difficult conditions and could not afford to pay for more water once the free water from the Municipality was exhausted, the court found the municipality's program to be reasonable. In reaching this decision, the court had chosen to be oblivious to the plight of those in intolerable conditions.

Also in the *Nokotyana* case,<sup>485</sup> the Constitutional Court confirmed the High Court decision that the municipality did not act unreasonably by failing to provide the applicants and their poor community of Harry Gwala informal settlement with basic services pending the court decision on the upgrading of their settlement.

Briefly, the *Nokotyana* case was about the right to health (sanitation) and electric lighting. The residents of the Harry Gwala Informal Settlement, in the Ekurhuleni Metropolitan Municipality, brought an application against the municipality for the provision of the above services pending the ruling on the application for their settlement to be upgraded. The Harry Gwala community sought the municipality to provide them with a ventilated pit latrine per household instead of 1 chemical toilet per 10 families.

The High Court had already found that the municipality had acted reasonably and in accordance with the National Housing Code. Chapters 12 and 13 of the Code make the provision of basic services contingent upon the decision to be made first on whether the informal settlement would be upgraded or not. Since the decision on the upgrading of the Harry Gwala Informal Settlement was still pending, both the High Court and the Constitutional Court arrived at the same finding that the state did not act unreasonably and that the residents' conditions did not qualify as an emergency situation.

Given the plight of the Harry Gwala community, one would expect the Constitutional Court not to leave the poor community susceptible to such health hazards by failing to order an interim provision of services.

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<sup>484</sup>UNAIDS report 2012. Available at <http://www.unaids.org/en/resources/presscentre/pressrelease>, accessed on 23 May 2013.

<sup>485</sup>*Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* (CCT 31/09) [2009] ZACC 33.

### 6.10 Concluding remarks

In this chapter the impact of Constitutional Court decisions on socio-economic rights has been considered. The chapter has shown that socio-economic rights litigation has a potential of becoming “a potent weapon in the hands of the poor”.<sup>486</sup> As a result of utilising social litigation, poor communities have so far achieved a number of victories. *TAC*, *Grootboom*, *Khosa*, *Modderklip* and other Constitutional Court judgments bear testimony to the usefulness of social litigation. Notwithstanding the above achievements, it is apparent that the potential of social litigation is limited by several factors. Some of them are inherent to the legal system. Others are extraneous. The purpose of the next chapter is to look at the barriers to social litigation, and make recommendations on what could be done to improve the efficiency of social litigation.

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<sup>486</sup> David, Bilchitz, “What is reasonable to court is unfair to the poor” *Business Day*, 06 August 2012

## CHAPTER 7

### 7 ASSESSMENT OF LITIGATION AS AN EFFECTIVE TOOL TO REALISE SOCIO-ECONOMIC RIGHTS

By 2030, we seek to eliminate poverty and reduce inequality. We seek a country wherein all citizens have the capabilities to grasp the ever-broadening opportunities available. Our plan is to change the life chances of millions of our people, especially the youth, life chances that remain stunted by our apartheid history.

Trevor Manuel, chairperson of National Development Commission, and the former Minister in the Presidency Office, Republic of South Africa.

#### 7.1 Introduction

Twenty years of democracy have come and gone in South Africa. It was a time period in which socio-economic rights have enjoyed a special status. Not only have they been entrenched in the Constitution, but they have also enjoyed the same protection as all other kinds of rights, should there be a violation of or any threat to them. The state bears equal obligations to ensure that socio-economic rights are also realised.<sup>487</sup> From the forgoing chapter, it is evident that social litigation has played an important role in ensuring that socio-economic hardships faced by many South Africans are ameliorated. As pronounced in the National Development Plan, the ultimate goal in South Africa's post-apartheid journey is the elimination of poverty and inequalities. The target date for the elimination of poverty in South Africa is 2030.<sup>488</sup>

Basically this chapter sets out to assess social litigation as a vehicle through which social justice could be attained in South Africa. In retrospect, this chapter examines the barriers as well as the enabling factors of social litigation. It then makes suggestions and recommendations on what could be done to turn social litigation into an effective tool for social transformation in South Africa.

#### 7.2 What are the barriers to successful social litigation?

##### 7.2.1 Shortfalls within the legal system

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<sup>487</sup> Section 7(2) of the Constitution.

<sup>488</sup> National Development Plan Vision for 2030.

Most of the factors which make social litigation not yield the desired results are inherent in the South African legal system. They include the following factors:

### 7.2.1.1 Inaccessibility- language, fees, technical aspects

The first major hurdle to be faced by the poor using the legal system as a tool through which their socio-economic rights could be realised is gaining access to justice. As indicated by Dugard and Roux<sup>489</sup>, most of the potential social rights litigants fail at this stage because they cannot afford legal fees.<sup>490</sup> As noted Constitutional Court noted in *Grootboom* judgment, "hundreds of thousands (possibly millions) of South Africans live in appalling conditions throughout the country".<sup>491</sup> The living conditions of most communities are such that they cannot afford legal fees. For example, in *Grootboom*, the Constitutional Court described the conditions under which the residents of Wallecedene as lamentable:<sup>492</sup>

A quarter of the households of Wallacedene had no income at all, and more than thirds earned less than R500 per month. About half the population were children; all lived in shacks.

Dugard argues that the absence of legal aid for constitutional matters exacerbate matters for the poor, who would like to use litigation as a tool to help them escape intolerable conditions of need.<sup>493</sup> He further argues that direct access lies at the heart of the questions whether the Court is functioning as an institutional voice of the poor.<sup>494</sup> Despite the Constitution's guarantee to everyone to have a direct access to the Constitution Court, provided certain conditions are met,<sup>495</sup> the vast majority of applications for direct access have been refused for non-compliance with the set criteria.<sup>496</sup>

### 7.2.1.2 Stringent requirements for direct access

Over the past decade the conditions set for direct access have become more stringent, thereby putting the Court out of the reach of the poor who would not have the resources and the patience to pursue the matter to the highest court in the land. Under Rule 17 (1), it was

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<sup>489</sup> Dugard and Roux, 2006, p. 109.

<sup>490</sup> Dugard, 2006, p. 266.

<sup>491</sup> *Grootboom*, para. 80.

<sup>492</sup> *Grootboom*, para. 7.

<sup>493</sup> See *supra* n. 490

<sup>494</sup> *Ibidem*, p. 271.

<sup>495</sup> Section 167(6) of the Constitution provides that national legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with the leave of the Constitution to bring a matter directly to the Constitutional Court; or to appeal directly to the Constitutional Court

<sup>496</sup> Dugard and Roux (n. 489 above), p. 112.

possible to access the Constitutional Court directly, provided the following simple cumulative requirements have been met: 'exceptional circumstances', 'urgency' and 'public importance'. With Rule 18,<sup>497</sup> a successor to Rule 17, the criteria set to access Constitutional Court directly is more complex and stringent: the applicants have to show that they have exhausted all other remedies or procedures; and that they have reasonable prospects of success based on the substantive merits of their case.<sup>498</sup>

Dugard criticises the Constitutional Court for the restrictive interpretation it gives to the rules on direct access, which are supposed to be based on "an inclusive public interest ideal".<sup>499</sup> As a result of these stringent criteria, Dugard and Roux conclude that "only the most persistent and well-supported litigants are able to access the courts".<sup>500</sup> One could then further submit the poor will have neither patience nor the resources to go to such extremities.

Legal fees are also a disincentive for the poor communities to use courts to vindicate their socio-economic rights. S'bu Zikode, president of Abahlalibase Mjondolo<sup>501</sup> stated this fact well: Lawyers are expensive and are only a last resort so we are trying to strengthen the political strategies.<sup>502</sup> The inference to be drawn from this statement is that the poor communities will use litigation only after everything else has failed. It is possible that by the time they resort to using legal route to vindicate their socio-economic rights, all their means and resources needed would be exhausted.

### 7.2.1.3 Barriers for the indigent

The litigation system creates impediments for the poor and the illiterate. Besides the exorbitant fees, the courts are inaccessible to the poor because of the court language used in the litigation. The South African courts use English and Afrikaans as the language of the court. In most instances such languages are foreign to the poor and illiterate litigants who bring socio-economic rights claims before the court. Their story has to be told through court

<sup>497</sup> Rules of the Constitutional Court, available at [http://www.justice.gov.za/legislation/rules/UniformRulesCourt\[26jun2009\].pdf](http://www.justice.gov.za/legislation/rules/UniformRulesCourt[26jun2009].pdf), visited on 12 December 2013.

<sup>498</sup> See *supra* n. 496.

<sup>499</sup> Dugard (n.490 above), p. 272.

<sup>500</sup> Dugard and Roux (n. 489 above), p. 113.

<sup>501</sup> AbahlalibaseMojondolo movement is a militant movement for poor, shack dwellers in South Africa. It was established in 2005 in Durban. It has established itself as voice for the shack dwellers. Available at <http://abahlali.org/a-short-history-of-abahlali-basemjondolo-the-durban-shack-dwellers-movement/>, visited on 25 December 2013.

<sup>502</sup> See footnote 66 in Malcolm, Langford, 'Housing Rights Litigation *Grootboom* and beyond', in Malcom Langford et al(eds.), *Socio-Economic Rights in South Africa: Symbols or Substance* ( United states of America: Cambridge University Press)2014 ,p. 221.



interpreters.<sup>503</sup> One could also argue that the unequal treatment of languages in the courts is inconsistent with the Constitution. Section 6 of the Constitution provides that there are eleven official languages in South Africa. It also obliges the state to take steps to recognise the historically diminished use and elevate the status of the indigenous languages.<sup>504</sup>

Dugard<sup>505</sup> criticises the Constitutional Court for failing to position itself as "an institutional voice of the poor". This happens irrespective of the fact the Constitution makes provision for direct access. In other words, the Constitutional Court fails to utilise the mechanism which is already at its disposal. Dugard views the direct access to legal system as the "only hope" for the poor to vindicate their rights through courts.<sup>506</sup> He argues that failure by the Constitutional Court to "develop its exclusive direct access jurisdiction has most disappointingly robbed it of a unique, pro-poor, jurisdiction and role".<sup>507</sup>

As a consequence of this anomaly, only the 'empowered individuals and groups' are able to access the legal system and use courts to enforce socio-economic rights.<sup>508</sup> This makes the constitutional court to be the tool for those who have the means. This is contrary to Section 167 of the Constitution, which provides the Constitution Court with the competence to grant direct access: provided the application made for direct is in the interests of justice and with the leave of the Constitutional Court. Whereas the Constitution sets an easy standard for direct access, the Rules of the Constitutional Court are very stringent. They literally remove the Constitutional court out of the reach of common people.

According to Dugard the Constitutional Court's failure to develop a pro-poor jurisdiction has damaging effects: on the ability of the poor to raise constitutional complaints and the court's own function and role in the society.<sup>509</sup> This erodes the faith and trust that the poor once had on the supremacy of the Constitution and rule of law across socio-economic divides.<sup>510</sup>

#### 7.2.1.4 Discouraging individual claimants

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<sup>503</sup> Pierre de Vos, "All languages equal but English (Afrikaans?) more" available at <http://constitutionallyspeaking.co.za/all-languages-equal-but-english-and-afrikaans-more-equal/> visited on 20 December 2013.

<sup>504</sup> See subsections 6(1) and (2) of the Constitution.

<sup>505</sup> Dugard (n. 490 above), p. 262.

<sup>506</sup> Dugard (n. 490 above), p. 266.

<sup>507</sup> *Ibidem*.

<sup>508</sup> *Ibidem*. See footnote 26 where Jackie Dugard describes 'empowered and individuals and groups' as those applicants who have access to considerable socio-economic resources and capacity required to litigate all the way through the judicial system to the Constitutional Court.

<sup>509</sup> Dugard (n. 490 above), p. 282.

<sup>510</sup> *Ibidem*.

The Constitutional Court discourages individuals from bringing socio-economic claims. In the *TAC* judgment, the Court held that a socio-economic right does not give rise to a self-standing, independent and enforceable positive right independently of whether the state's policies to give effect to the right in question are reasonable.<sup>511</sup> Dugard and Roux mentioned lack of direct substantive relief to the applicants as one of the reasons why only a few poor litigants would resort to constitutional litigation as a way to seek relief.<sup>512</sup> This constitutes a disincentive for individuals to approach the court to claim specific socio-economic benefits. It also appears to be contrary to the Constitution which provides for the Constitutional rights to be enjoyed by both individuals and group of persons. As it is evidenced by the provisions of the Bill of Rights, the Constitution include both collective and individual rights. For example, most rights in the Bill of Rights begin with the phrase "everyone one has the right to....".<sup>513</sup> This indicates that the Constitution provides for individual rights. As such, individuals should be entitled to make claims for socio-economic rights as individuals.

### **7.2.1.5 Weak standard of enforcement**

Dugard and Roux identified the reasonableness standard of review, as the second disincentive for poor litigants to use litigation to vindicate their socio-economic rights.<sup>514</sup> This is so because determining the reasonableness of the programme, policy, legislation and practices of the government demands a high level of sophistication from the poor litigants which would enable to understand government's complex policy and budgetary matters.<sup>515</sup> Furthermore, reasonableness standard does not ensure that the applicants become immediate beneficiaries of the relief they sought. No poor litigant will deem it necessary to bring a case against the state so that the Courts could make a ruling on the reasonableness of the state policy or lack thereof. They bring applications against the state because of the dire socio-economic conditions in which they live. All they expect is to get relief from their socio-economic predicament.

Furthermore, Wilson and Dugard pointed out three weaknesses in the reasonableness standard- as it has been applied in the second wave of socio-economic rights:<sup>516</sup> Firstly, the court has been reluctant to consider "contextual evidence of the difficulties the poor face in

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<sup>511</sup> *TAC*, para. 39.

<sup>512</sup> Dugard and Roux ( n. 489 above), p. 113.

<sup>513</sup> For example: sections 11, 12,14, 15,16,17,18,23, 2426, 27 etc.

<sup>514</sup> See *supra* n. 512.

<sup>515</sup> *Ibidem*.

<sup>516</sup> Wilson and Dugard ( n. 282 above) p. 58.

accessing socio-economic goods''.<sup>517</sup> The court has disregarded such evidence in the *Mazibuko, Abahlali and Nokotyana* cases. Secondly, the court has displaced some of the more substantially developed administrative law rights. In *Mazibuko*, the court ignored the right to a hearing before disconnection because it found the City's policy to fall "within the bound of reasonableness".<sup>518</sup> Finally, the court appears to characterise socio-economic rights litigation on positive obligations as presenting the State with an opportunity to reformulate its plans in a manner which the court finds reasonable.<sup>519</sup> In considering reasonableness, the court has failed "to give the poor the opportunity to expand and give meaning to the idea of reasonableness by their reference to their own needs, purposes, and lived reality".<sup>520</sup>

### 7.2.1.6 An unpopular method

As a consequence, the second wave of socio-economic rights claims were brought by a small number of organisations. As indicated above, to litigate successfully applicants are required to have a thorough and comprehensive knowledge of policy and "frame a case by reference to the reasonableness standard".<sup>521</sup> Even though the Constitutional Court has so far used different standards to adjudicate socio-economic rights, all the standards used so far revolve around the administrative law model. The major question, which the Court seeks to answer, still remains whether measures taken by the state to achieve socio-economic rights are reasonable or not. This makes litigation to be a tool far beyond the reach of the poor, who are, in most instances, uneducated, unemployed and stay in slums or informal settlement. As it was made evident in the above cases, most socio-economic rights applicants (communities) live in the most lamentable conditions.

If the constitutional court were to become a potent instrument in the hands of the ordinary South Africans, and to improve their lot, it will have to be accessible and use-friendly. For the ordinary person to depend on the help of others so as to exercise their right is disempowering and it perpetuates dependency syndrome. Of course, this is also against the values of the constitution, which calls for freedom, and the improvement of quality of life of all citizens<sup>522</sup>.

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<sup>517</sup> *Ibidem*.

<sup>518</sup> *Ibidem*.

<sup>519</sup> *Mazibuko* paras. 159-69.

<sup>520</sup> See *supra* n. 516.

<sup>521</sup> Wilson and Dugard (n.282 above), p. 45.

<sup>522</sup> See Preamble to the Constitution.

As if to exacerbate the matters, the court has given a new meaning to socio-economic rights litigation. Instead of seeing it as “a process through which claimants enforce entitlements”, socio-economic rights litigation has been reduced into “an elaborate form of participation in policy making”.<sup>523</sup> This is what the Constitutional Court did in *Olivia Road*, where it ordered the applicants and the municipality to embark on a meaningful engagement that would enable them to find a mutually acceptable solution to their impasse.

### 7.2.1.7 Legal culture

As a country that has just transited from an era where parliamentary supremacy run supreme to an era of Constitutional supremacy,<sup>524</sup> South Africa's legal system is still conservative, and it “is still influenced by the common-law tradition with deference to political authority as a central democratic virtue”.<sup>525</sup> Wilson and Dugard<sup>526</sup> describe the South African legal culture as still steeped in the tradition of judicial deference. The Constitutional Court's predisposition to deference has been evident in *TAC*, *Soobramoney* and other judgments. The conservative legal culture makes the courts to be ill-suited for the task demanded of them by the new Constitution, which calls for purposive and value-based interpretation.<sup>527</sup> Section 39(2) of the constitution provides for purposive interpretation:

When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

### 7.2.1.8 Complicated process

Social litigation is not a simple straightforward path available to the litigants whose socio-economic rights are violated or threatened. It is a complicated process, whose success is contingent upon multiple factors. As indicated by Gloppen,<sup>528</sup> success or failure in social litigation is dependent upon confluence of several factors: ability of the groups to articulate their claims and bring them into a legal system; the responsiveness of the courts towards the

<sup>523</sup> *Mazibuko* case paras.159-69. See also Wilson and Dugard (n. 282 above), p. 57.

<sup>524</sup> Currie and De Waal (n. 242 above), p. 2.

<sup>525</sup> Gloppen (n. 166 above), pp. 170-171.

<sup>526</sup> Wilson and Dugard (n. 282 above), p. 38. In *Soobramoney* para. 29, the Constitutional court held: These choices involve difficult decisions to be taken at the political level in fixing the budget, and at the functional level in deciding upon the priorities to be met. 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. In *TAC* para.129, the Court held: we do not consider, however, that orders should be made in those terms unless this is necessary. The government has always respected and executed orders of this Court. There is a reason to believe that it will not do so in the present case.

<sup>527</sup> *Ibidem*.

<sup>528</sup> Gloppen (n. 166 above), p. 157.

claims that are voiced; the capacity of the judges to give legal effect to social rights and the implementation of court orders by the state.

In short, social litigation is a very complicated process. As indicated above, success in social litigation is not only dependent on the articulation made by poor litigants, but also on some external factors over which they do not exercise control. To compound the matters, poor litigants will have to depend on the charity of others to ensure that their grievances become court matters.

### **7.3 Further barriers**

Even if the court were intent on giving orders which would yield tangible effects for the poor litigants, it is constrained by several other factors.

#### **7.3.1 Separation of powers**

The Court's respect for the principle of separation of powers constitutes stumbling blocks to the fulfilment of the Constitutional project. McLean<sup>529</sup> described separation of powers doctrine as primarily a functional division of powers between the three branches of the government to ensure that different functions of the government are assigned to different organs of the state and that there is no encroachment by one state organ into the domain of another. In most socio-economic rights cases that were brought before the Constitutional Court, the court deferred to the state to devise the programme because of the reasonableness standard.

The Constitutional Court had indicated its reverence for the doctrine of separation of powers from *Soobramoney* case, that is, the first case to be adjudicated by the constitutional court. The Court held: 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>530</sup> However, Pillay warns against excessive restraint by the Courts, as it may result in orders which are ineffective.<sup>531</sup> Inherent to the excessive restraint is the danger of the Court failing to fulfil its Constitutional obligations to respect, protect, promote and fulfil the rights entrenched in the Constitution.<sup>532</sup>

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<sup>529</sup> McLean, 2009, p.105.

<sup>530</sup> *Soobramoney*, para. 29.

<sup>531</sup> Pillay (n. 257 above), p. 276.

<sup>532</sup> Section 7(2) of the Constitution.

### 7.3.2 Failure to implement court decisions

Mabzira<sup>533</sup> attributes the failure of socio-economic rights court decisions to transform socio-economic conditions in South Africa to the state's failure to comply with the courts' progressive orders. He describes the failure to implement court orders as the "weakest link" in ensuring that socio-economic rights are realised. He concludes that this non-compliance with the court order has a damaging effect on the potential of litigation as a tool to bring about socio-economic transformation.<sup>534</sup>

As highlighted by *Mbazira*,<sup>535</sup> the Eastern Cape provincial gained notoriety for dishonouring court orders regarding the provision of social security and assistance services. In *Bulusha* and *Njongi*, the said government showed reluctance to honour court orders and reinstate the cancelled grants. It was only after the appeal to the Constitutional Court was made, that the provincial government was prompted to take the court orders serious.

De Beer and Vetorri<sup>536</sup> indicate that the trend for disregard for court orders has been the same in other socio-economic rights cases. In *TAC*, the Constitutional Court was mistaken in including a structural interdict its order. The Court showed respect for the government that it has "always respected and executed orders of this Court. There is no reason that it will not do so in the present case".<sup>537</sup> The government did not carry out the court order until such time a further application was made.

The disregard for the court orders which are conducive for the advancement of socio-economic conditions constitutes a major hurdle to South Africa's goal to attain social justice. As noted by Mbazira, state's failure to implement court constitutes the weakest link in the realisation of socio-economic rights.<sup>538</sup>

### 7.3.3 Skirting around core rights

The court is further criticised for its failure to consider "a rights-based analysis of social rights and the nature of state obligations vis-à-vis each right".<sup>539</sup> The standard of reasonableness, which the court uses to enforce socio-economic rights, has helped the court

<sup>533</sup> Christopher Mbazira, 2008 (b), p. 2.

<sup>534</sup> Mbazira (n. 533 above), p. 2.

<sup>535</sup> *Ibidem*, p.5.

<sup>536</sup> De Beer and Vetorri, 2007, p.9.

<sup>537</sup> *TAC*, para. 129.

<sup>538</sup> See *supra* n. 534.

<sup>539</sup> Dugard and Roux (n. 489 above), p116.

to evade facing the real issues. The court had skirted around the content of the central issue, namely considering the content of socio-economic rights. Unfortunately, the approach or standard adopted by the court had led to the detriment of socio-economic jurisprudence in South Africa. The poor and marginalised do not see any virtue in bringing the cases before the court where the court's focus is not primarily on what should be their entitlements..

## **7.4 Dangers of relying on social litigation**

### **7.4.1 Narrowing social justice scope**

There is a potential danger in relying heavily on socio-economic litigation as a vehicle to achieve social justice. It can impact very negatively on the political power of the communities. Heavy reliance on social litigation "might narrow the frame of political struggle and leave communities and individuals bereft of remedies of any substance".<sup>540</sup> It might also lead to undermining the political power of the poor and marginalised groups or reduce the framework of social justice".<sup>541</sup>

As demonstrated by the few cases that came before the constitutional court, the poor depend on other means to attain social justice. In most instances, social litigation, which is the least popular because of the barriers mentioned above, only comes into the picture after all other means have not yielded the desired results. Even in that case, it does not constitute the last resort. The outbreak of service delivery protests in South Africa has shown that social litigation is not the most popular method of ensuring that the state provides socio-economic goods to the needy communities. According to South African police reports, there are at least 32 service delivery protests that happen in South Africa every day.<sup>542</sup> These are instances in which people resort to the right to assemble, to demonstrate, and to picket and to present petitions<sup>543</sup> to vindicate their socio-economic rights instead of relying on the judicial system. Unfortunately, in most such demonstrations and service delivery protests, demonstrators did not abide by the constitutional requirements that they should demonstrate "peacefully and unarmed".<sup>544</sup>

### **7.4.2 Nurturing the dependency syndrome**

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<sup>540</sup> Langford, 2014, p. xiii.

<sup>541</sup> *Ibidem*, p. 23.

<sup>542</sup> Riots: 32 daily protests in South Africa: Eye Witness News Reports, available at <http://www.censorbugbear.org/farmitracker/reports/view/2138> visited on 20 April 2014

<sup>543</sup> Section 17 of the Constitution.

<sup>544</sup> *Ibidem*.

Social litigation might also lead to the inculcation of a dependency syndrome and entitlement mentality among the populace. Mamphela Ramphele argues:

The whole approach of post-apartheid government was to deliver free housing, free this, free the other. This has created expectations on the part of the citizens, a passive expectation that government will solve problems. It has led to a disengaged citizenry... when people's expectations are not met, they revert to the anti-apartheid mode of protest which is destroy, don't pay, trash.<sup>545</sup>

The same view is reiterated by Andrew Mlangeni,<sup>546</sup> of the African National Congress (ANC), and liberation struggle veteran. According to Mlangeni,<sup>547</sup> there is a serious danger in the South Africa's ambitious social project. Despite of it being viewed to have a model character, it has produced some unintended consequences. It has created a society that needs to be 'spoon-fed all the time'.<sup>548</sup> Bernard Ngoepe, the retired Gauteng judge president, also lamented the fact that the Constitution is viewed by some people as encouraging a culture of entitlement:

People think it (the Constitution) gives them rights without limitations. They think the Constitution means that you get everything for nothing. You do not pay for electricity. It cannot mean that.<sup>549</sup>

This stands in stark contrast with the real objective behind South Africa adopting the constitution: to establish a new South Africa based on dignity, social justice, equality and, to enable every citizen to realise their potential.

## 7.5 Consequences of failing to address socio-economic problems

The failure to address poverty or socio-economic problems may have a corrosive effect on the Constitution, which is the anchor on which South Africa's democracy is founded. As it was pointed out by Langa,<sup>550</sup> poverty constitutes a serious challenge to the rule of law, which in turn is a foundation to constitutional existence. The failure to tackle poverty and bridge the wide gap between the poor and the rich will mean that the reconciliation process, which should underline the development of the South Africa, will 'remain a pipe dream.'<sup>551</sup> That

<sup>545</sup> Cited in Green, 2009:1.

<sup>546</sup> Roane Brendan, 'ANC stalwart Mlangeni wastes no time to vote', *The Star*, 8 May 2014, p 1

<sup>547</sup> Andrew Mlangeni is an ANC stalwart. He expressed his views and fears about the development of dependency syndrome after voting in the fourth South African democratic elections in May 2014.

<sup>548</sup> Ibidem.

<sup>549</sup> Sibongakonke Shoba, 'SA losing its way, top jurist warns', *Sunday Times*, July 20 2014, p. 12.

<sup>550</sup> Pius N. Langa, 'The role of the Constitution in the struggle against poverty' in Sandra Liebenberg and Geo Quinot (eds) *Law and poverty: Perspectives from South Africa and beyond* 1ed(2012) 1-10, p. 5.

<sup>551</sup> Pius N. Langa, 'The role of the Constitution in the struggle against poverty' in Sandra Liebenberg and Geo Quinot (eds) *Law and poverty: Perspectives from South Africa and beyond* 1ed(2012) 1-10, p. 7.



poverty can lead to disrespect for law was evident when South Africa was inundated with services delivery protests.<sup>552</sup>

## 7.6 What should be the way forward?

Given the fact that social litigation has a number of inherent weaknesses and loopholes, what could be the solution for the poor, the marginalised and the helpless communities? How could, inter alia, the capacity of the courts be enhanced? This section suggests different solutions and alternatives.

### 7.6.1 Minimum core obligation

For the adjudication of socio-economic rights to have the desired tangible results, Van Bueren argues in favour of the minimum core obligation: this kind of approach 'provides economic and social rights with determinacy and certainty'.<sup>553</sup> As argued earlier, the standard of reasonableness adopted to enforce socio-economic rights is still shrouded in uncertainty and vagueness. It is also rightly contended, for a right to be justiciable there needs to be certainty on the minimum core of the rights, otherwise it is of no use to include socio-economic rights in the Constitution as justiciable. It would serve well to have an identifiable, measurable minimum core on which the government policies and programmes could be judged.<sup>554</sup> Van Bueren argues that the traditional test of reasonableness is both irrelevant and insufficient for the enforcement of socio-economic rights: it is developed from civil and political rights and it only asks if government action was within the scope of legality, jurisdiction and rationality. She further cautions that the minimum core approach should not be used as a reason for inertia. It should be viewed as a springboard for further action.<sup>555</sup>

Since only a few cases have been heard by the Constitutional Court, Dugard makes a suggestion that the barriers to entry into legal system must be lowered.<sup>556</sup>

### 7.6.2 Committing resources to poverty reduction

Hausermann<sup>557</sup> acknowledges that courts may have some impact on ensuring that certain rights are realised, but for others the state needs to allocate more budget. She states as

<sup>552</sup> <http://www.censorbugbear.org/farmitracker/reports/view/2138>, visited on 23 March 2014.

<sup>553</sup> Van Bueren (n. 277 above), p. 57.

<sup>554</sup> *ibidem*.

<sup>555</sup> *ibidem*, p. 59.

<sup>556</sup> Dugard, (n. 490 above) pp. 277-8.

<sup>557</sup> Hausermann, 1992, p. 61.

follows: “ [W]hilst access to courts and tribunals might be an effective way of implementing some rights, others are less a question of law than of social policy. The allocation of a sufficient proportion of state budget to social needs is essential”.<sup>558</sup> In essence Hauserman, links the realisation of socio-economic rights to political will. As she pointed, “where there is a political will to give services priority in national expenditure, considerable advances can be made”.<sup>559</sup> The implementation of court decisions is also dependent on the availability of resources.

### 7.6.3 Empowerment of communities.

Poverty eradication should not be viewed as a purely technical problem confined to the exclusive domain of legal experts. As rightly stated by Klare, the poor need to be involved in addressing socio-economic challenges: [T]he poor must be actively engaged in design and implementation of measures to eliminate poverty”.<sup>560</sup> Education is indispensable and a prerequisite for people to exercise their rights. As very few people are aware of their rights, and what the Constitution can uphold, it will not be possible for them to make use of the courts and claim their socio-economic rights unless they are empowered and enlightened about their rights.

### 7.6.4 The use of structural interdicts

A structural interdict is a remedy in terms of which the violator or an organ of state is ordered to rectify violation of fundamental rights under court supervision.<sup>561</sup> According to Currie and De Waal<sup>562</sup>, the structural interdict comprises five elements, namely: declaration in respect of which the state's conduct is inconsistent with the constitutional obligations; court order to the state to comply with the constitutional obligations; the court orders the state to produce a report showing compliance; the applicant is afforded an opportunity to reply to the state's report and the report is made the order of the court. Failure to comply with the order of the court is tantamount to contempt of the court.<sup>563</sup>

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<sup>558</sup> *Ibidem*.

<sup>559</sup> *Ibidem*. See also sections 26 (2) and 27 (2). They make realisation of socio-economic rights contingent upon the availability of resources.

<sup>560</sup> Klare, 2012, p. 424. See also Raising awareness about the South African Constitution, available at <http://www.ensafrica.com/Uploads/Images/news/20%20June%202012%20Polity.org%20Raising%20Awareness%20about%20the%20SA%20Constitution.pdf>, visited on 20 June 2014.

<sup>561</sup> Currie and De Waal (n.242), p. 217.

<sup>562</sup> *Ibidem*.

<sup>563</sup> *Ibidem*.

As indicated by Currie and De Waal, the constitutional court has so far granted a limited structural interdicts.<sup>564</sup> By failing to grant structural interdicts, the courts have deprived themselves of an assurance from the government that the state will at least respond to the court order or account for its failure to comply through filing reports. According to Pillay,<sup>565</sup> the weakness of the *Grootboom* judgment was in the Court's failure to give an explicit order to the South African Human Rights Commission (SAHRC) to monitor and report steps taken by the state to comply with section 26 of the Constitution. The need to monitor state compliance was only mentioned in the body of the judgment. As it did not constitute the order, there was no certainty as to whether the SAHRC was supposed to report back to the court or whether it would be part of its annual report to the National Assembly.<sup>566</sup>

As noted by De Beer and Vettori, 'structural interdict is particularly suitable for the enforcement of duties which are ongoing, such as socio-economic rights'.<sup>567</sup>

#### 7.6.5 Direct access and legal aid

To enhance accessibility to the Constitutional Court, section 167 of the Constitution and rule 18 of the Rules of the Constitutional Court provide for direct access. However, the Rules put difficult conditions that should be satisfied before gaining access to the Constitutional Court. This makes the Constitutional promise of direct access impossible for many poor litigants.

Even where access to courts is secured, there are still other hurdles to be overcome by the poor, namely; to secure legal representative; and mastery of the language of the court. To overcome all these impediments, the courts should either give free access to socio-economic rights litigants or provide legal aid services. Free access could take the form of the Small Claims Courts which prohibits representation by an attorney or an advocate in the court proceedings.<sup>568</sup> An alternative to granting free access to courts would be to make the poor communities rely on the legal services provided by the Legal Aid South Africa. According to the mandate and mission of the Legal Aid South Africa, its 'role is to provide legal aid to those who cannot afford their own legal representation. This includes poor people and

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<sup>564</sup> *Ibidem*.

<sup>565</sup> Pillay (n. 257 above), p. 272.

<sup>566</sup> *Ibidem*. See also section 184 of the Constitution and sections 7(1)(d) of the South African Human Rights Commission Act 54 of 1994

<sup>567</sup> De Beer and Vettori (n. 536 above), p. 10.

<sup>568</sup> <http://www.justice.gov.za/scc/scc.htm> visited on 23 September 2013.

vulnerable groups such as women, children and the rural poor''.<sup>569</sup> Surely there is no reason why the services of the Legal Aid South Africa should not cover the indigent communities, which would like to advance their socio-economic needs through legal channels.

The importance of attaining free access to courts or utilising legal aid was hinted to in the *Ngxuza* case.<sup>570</sup> The court held that many people in South Africa 'are unable to individually pursue their claims because they are poor, do not have access to lawyers and will have difficulty in obtaining legal aid. Effectively, they are unable to act in their own name'.<sup>571</sup> One can therefore submit that giving the poor free access to the courts or providing them with free legal aid, at the state expense could go a long way into ensuring that the poor vindicate their socio-economic rights.

#### **7.6.6 Court-supervised settlements**

To avoid an unnecessary contestation between the courts and other organs of the state, it would be appropriate for the courts to encourage negotiated settlement. This will help allay the fears from other state organs that the judiciary is usurping exclusive terrains. In addition to allaying the fears of the courts trampling on the principle of separation of powers, the chances of the government implementing court orders will be enhanced as the government will be part of the negotiated settlement. To counterbalance powers between the government and the poor communities and to ensure that there is fairness and equity in the negotiations, the courts could act as a mediator in such negotiations.

#### **7.6.7 Contempt of court and delictual damages**

As indicated above, failure by the Eastern Cape provincial government to implement court orders denied successful applicants their rights. To ensure that the responsible government officials honour court orders timeously, it would be appropriate for the courts to use other means of deterrence. One way of doing this will be to hold such officials in contempt of court and/ or imprison them for contempt of court.<sup>572</sup> Another way to ensure that court orders are complied with, would be 'to create individual and personal liability for state officials

<sup>569</sup> <http://www.legal-aid.co.za/?p=16> visited on 20 January 2014

<sup>570</sup> *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 (12) BCLR 1322 (E)

<sup>571</sup> Ibidem

<sup>572</sup> See De Beer and Vettori (n. 536 above), p. 14.

responsible for the implementation of court orders''.<sup>573</sup> Where people suffer damages as a result of either negligence or *mala fides* on part of government officials, delictual claims could be made against them. Through piercing the corporate veil, the responsible government officials could be made more accountable for their conduct regarding the implementation of court orders.

### 7.8.8 Concluding remarks

This chapter has assessed litigation as a tool to be employed in pursuance of social and economic justice in South Africa. The chapter has revealed that there are inherent shortcomings which impede social litigation from contributing fully and efficiently to socio-economic justice. Despite all these defects, social litigation remains a potent weapon in the hands of the poor. The chapter has also given some suggestions on what could be done to enhance the capacity of the courts and ensure that social justice is realised in South Africa.

Notwithstanding all the above weaknesses, social litigation still has a role to play, and can lead to huge benefits for the poor. As demonstrated by the court judgments in *TAC*, *Grootboom*, *Roberts*, *Olivia Road Khosa*, *Modderklip* etc, socio-economic rights litigation has a great potential of ensuring that the state takes measures that can lead to the enjoyment of socio-economic rights by the poor.

In proving that Courts still have significant role to play in the realisation of socio-economic rights Wilson and Dugard list instances in which social litigation is bound to yield tangible benefits for the poor: when dealing with negative infringements of socio-economic rights, or requiring the State to take steps provided for in, or consistent with, its own policy, or when expanding on the content given to the right by applicable legislation.<sup>574</sup> They argue that, in the above instances the court has shown preparedness to give content to socio-economic rights.<sup>575</sup>

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<sup>573</sup> *ibidem*, p. 17.

<sup>574</sup> Wilson and Dugard (n. 282 above), p. 59.

<sup>575</sup> *Ibidem*.

## CHAPTER 8

### 8.1 CONCLUSIONS

Since the justiciability of socio-economic rights is no longer a controversial question in South Africa, the focus of this thesis was to evaluate the impact of court decisions on socio-economic rights claims.

As shown in chapter six, the record of the South African Constitutional Court in helping the poor achieve social justice is of qualified success. In some cases, the Constitutional Court orders have led to positive impact on the lives of ordinary South Africans. For an example, the *TAC* judgment prompted the state to act expeditiously and rolled out Neversapine in all state's hospitals and clinics, thereby preventing transmission of HIV from mother to child. The *Grootboom* judgment resulted in the state being ordered to provide rudimentary services to those in the crisis situation. The judgment in *Khosa* and *Mahlaule* led to the extension of social grant and assistance to permanent residents in South Africa.

However, in other socio-economic rights cases, the Constitutional Court did not go that far. For an example in *Mazibuko* and *Nokotyana*, court judgments were not with the same enthusiasm. In the said cases, the Constitutional Court chose to evaluate the measures and programme taken by the municipality to realise socio-economic rights in abstract, thereby turning a blind eye and deaf ear to the plight of the needy communities. Those judgments were also in contrast with the *Grootboom* ruling, in which the Court found that the state measures did not meet the standard of reasonableness because they did not take into account those people who were in crisis conditions.

With regard to the earlier cases, such as *Grootboom* case, the results of social litigation were not immediately visible. However, with the progression of time, the state has managed to provide (Grootboom) community with more than mere rudimentary services they had originally applied for. This goes on to show that the wheel of justice does turn in favour of the poor communities which resort to legal system to vindicate their socio-economic rights.

As shown above, the potency of social litigation in addressing socio-economic conditions was very evident in most cases. The mere threat of social litigation spurred the government to

act expeditiously and realigned its policy. For an example in *Roberts*<sup>576</sup> a threat of litigation had prompted the government to change its policy on the provision of old age pension which unfairly discriminated against old men.

## 8.2 Concluding remarks

In retrospect, this thesis has evaluated the impact of courts decisions in bringing about socio-economic changes in South Africa. From the above assessment of socio-economic jurisprudence, it is apparent that the courts have a role to play in South Africa's pursuit of social justice, human dignity, freedom, equality and realisation of potential of every citizen. The thesis has also shown that social litigation is impeded from reaching its full potential by several barriers. As it was shown in chapter seven, these barriers are surmountable.

As noted by Liebenberg the primary responsibility of addressing social issues lies with the executive and legislative.<sup>577</sup> She stated: [T]he legislative and executive branches of the government have the primary mandate under the constitution to give effect to socio-economic rights through comprehensive social legislation and programmes''.<sup>578</sup> However this does not mean that the judiciary has no role to play in the country's constitutional project of ensuring social justice, dignity, equality and freedom to all South Africans. It does have a major role to play. It normally comes into picture after the executives and legislative have either failed or neglected their responsibility, thus: where the political system has failed to respond through political channels, legal mobilisation has achieved significant results.<sup>579</sup> The primary focus of social litigation is to "commit and direct the people's elected representatives to carry out their political mandate''.<sup>580</sup>

In fact, all organs of the state have an equally important role to play in making South Africa a better place. In essence, these organs are continuously engaged in a collaborative dialogue through which they collectively deal with the socio-economic challenges facing South Africa. In highlighting the need for all organs of the state to act in unison for the realisation of South Africa's constitutional project, Mbazira made the following observation:

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<sup>576</sup> *Roberts and Others v Minister of Social Development and Others* (unreported decision of the Transvaal Division, Case Number 3283/05).

<sup>577</sup> Liebenberg, (n. 113 above), p. 328.

<sup>578</sup> *ibidem*.

<sup>579</sup> Gloppen, (n. 166 above), p. 155.

<sup>580</sup> Gloppen, (n. 166), p. 176.

When courts adjudicate socio-economic rights, they are not doing so in competition with other organs of state. Rather, they are engaging in a dialogue which requires that all the institutions of the state play a role in the constitutional enterprise of actualising the rights. In such a dialogue, it is important that all institutions put to use, in a collaborative manner, their skills and capabilities as regards the enforcement of the rights<sup>581</sup>

As pointed out by Wilson and Dugard, the judicial enforcement of socio-economic rights is one limited means of addressing inequalities and transforming apartheid-ravaged South Africa.<sup>582</sup> Indeed, challenges such as poverty can only be partially addressed through the legal system alone.<sup>583</sup> As argued by Van Bueren,<sup>584</sup> social litigation still has the potential to help eradicate poverty. However, she emphasises the fact that litigation can only play a role “within a broader strategy of poverty eradication”. Such a wider strategy should, among others, include grassroots mobilisation and empowerment, knowledge of cultural identities, parliamentary procedures etc.

Considering the victories achieved through social litigation so far, one can conclude that social litigation has played a paramount role in the realisation of the social justice in South Africa. If it were not for social litigation the state could have remained oblivious of the deplorable conditions under which the poor *Grootboom* community lived. If it were not for the litigation, the poor could have continued to be treated as if they were people without rights. But the existence of social litigation has inspired hope in the poor communities, and enabled the poor to see themselves as rights bearers. If it were not for *TAC*, the state could have continued to drag its feet in rolling out the HIV preventing drug in all government hospitals and clinics, thereby putting millions of lives in jeopardy. If it were not for *Khosa Mahlaule* judgments, permanent residents could have continued to be denied social grants.

In conclusion, to address socio-economic challenges requires a “holistic solutions”.<sup>585</sup> [L]aw alone cannot make poverty disappear.<sup>586</sup> But working in conjunction with other organs of the state, the courts can play a vital role in the eradication of socio-economic changes in South Africa. In *Nokotyana* judgment, the Constitutional Court remarked about the role of the Courts in the achievement of socio-economic goals “as an important but limited one and that bureaucratic efficiency and close co-operation between different spheres of government and

<sup>581</sup> Mbazira (n. 217 above), p. 41.

<sup>582</sup> Wilson and Dugard (n. 282 above), p. 35.

<sup>583</sup> Langa, (n. 121), p. 7.

<sup>584</sup> Van Bueren (n.277), p. 53.

<sup>585</sup> *ibidem*, p. 54.

<sup>586</sup> *ibidem*, p. 65.



communities are essential''.<sup>587</sup> Together with other organs of the state, the judiciary can make a significant contribution in the eradication of socio-economic challenges facing South Africa.

Looking at the impact that the court orders have in South Africa, one can safely conclude that social litigation is playing an instrumental role as either an alternative or complementary strategy where political blockages have impeded the voice of those deprived of their rights from getting through to; and being heeded by the politicians.<sup>588</sup>

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<sup>587</sup> *Nokotyana*, para. 4.

<sup>588</sup> Gloppen, Seri (2005) p. 176.

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## ABSTRACT

South Africa adopted a new Constitution (the Constitution of the Republic of South Africa) in 1996. It was meant to be the blueprint for the country to chart the way from an apartheid era to a new era of constitutional democracy. Through the new Constitution, the country aims to redress the imbalances of the past, and establish a new South Africa anchored on democratic values, social justice, human dignity, freedom and equality. To achieve this transformational goal, it is indispensable that each organ of the state contributes its special skills and expertise. This includes the judiciary, which shoulders the responsibility of ensuring that an appropriate relief is granted for any infringement of or threat to any of the rights enshrined in the Bill of Rights.

To date, the Constitution has been in operation for a period of 17 years. Over this time period, the Constitutional Court has adjudicated on different socio-economic rights claims. It has passed judgments and made orders to remedy the infringements of or threat to the rights in the Bill of Rights. These remedies have impacts on the South African society.

At the centre of this thesis lies an attempt to evaluate the impact of the Constitutional Court judgments and orders in the realisation of socio-economic rights and social transformation of South Africa.

In making this assessment, the thesis starts by evaluating the competence and the powers conferred on the Constitutional Court to adjudicate socio-economic rights claims. It then examines different cases and court remedies for the violations of socio-economic rights. The approaches or standards applied by the courts to enforce socio-economic rights are also considered. The focus of the thesis is primarily on the impacts of socio-economic jurisprudence, in particular on the right of access to adequate housing, the right to health and social security.

While some of the socio-economic rights cases have impacted the entire South Africa in positive way, in other cases the poor communities were left disappointed by court judgments. For an example, the *TAC* judgment made South Africa a trend-setter in the fight against HIV-AIDS pandemic. As a result of the court order made to the South African government to immediately roll out the HIV-AIDS prevention drug, and provide it to patients in all government hospitals and clinics, the country has made unprecedented strides in the fight against AIDS. On the other hand, the threats of litigation in the *Roberts* case had galvanised the government to change its discriminatory policy on the provision of old age pension. Today, both old men and women qualify for old age pension at the age of sixty.

The effects of social litigation have not been comprehensively positive for all the poor litigants and communities. In other cases, the Constitutional Court has shown indifference to the plight of the poor. For example, in the *Mazibuko* and *Nokotyana* cases, the Constitutional court considered the measures taken by the municipality to realise socio-economic rights in abstract, thereby ignoring the glaring evidence of the most deplorable conditions in which those communities lived.

In the *Mazibuko* case, the Constitutional court found that the steps taken by the municipality were reasonable. In making such a finding, the Constitutional Court disregarded the fact that the applicants were so poor that they could not afford to pay for more water, that is, once they have exhausted the free water provided by the municipality. This would imply that they will spend the better part of the month without water supply as they were too poor to augment on the little supply they got from municipality's free basic water.

In the *Nokotyana* case, the Constitutional Court upheld the decision of the high court regarding the suspension of the provision of basic services to illegal occupiers, thus pending the decision on the upgrading of the informal settlement. In other words the Constitutional Court confirmed to the suspension of basic services to the needy community, pending the decision on whether the informal settlement would be upgraded. In both decisions ( *Mazibuko* and *Nokotyana*), the Constitutional Court has chosen to be oblivious of the standard it set in the *Grootboom* case, that is, for the state measures to be judged reasonable, they should not leave out those in the crisis conditions.

Despite the courts' qualified results in enforcing socio-economic rights, this thesis indicates that the courts have a complementary role to play in the realisation of social justice. Along with other organs of the state (executive and legislative), the judiciary contributes its unique skills to the country's search for social justice. The courts often steps in when all else has not worked, thus, ensuring that the executives do play their part in the realisation of socio-economic rights.

**Keywords:** Constitution, Constitutional Court, judgement, justiciability, impact, remedy, social justice, Constitutional Court, transformation

**ABSTRACT (Deutsch)**

Südafrika verabschiedete im Jahr 1996 eine neue Verfassung (die Verfassung der Republik Südafrika). Sie sollte der Plan sein, der dem Land den Weg von der Apartheid-Ära hin zu einem demokratischen Rechtsstaat weist. Durch die neue Verfassung will das Land die Missverhältnisse der Vergangenheit beseitigen und ein neues Südafrika gründen, fest verankert auf demokratischen Werten, sozialer Gerechtigkeit, Menschenwürde, Freiheit und Gleichberechtigung. Um diesen angestrebten Wandel verwirklichen zu können, ist es unverzichtbar, dass jede staatliche Funktionseinheit ihre jeweiligen Kompetenzen und Fähigkeiten einbringt. Dies bezieht die Judikative, mit ihrer Verantwortung für die Garantie eines angemessenen Rechtsmittels bei jeder Verletzung oder Bedrohung eines in der Verfassung verankerten Rechtes, mit ein.

Bis dato ist die Verfassung über einen Zeitraum von 17 Jahren in Kraft. In dieser Zeitspanne hat das Verfassungsgericht in unterschiedlichen Anträgen aus dem Bereich wirtschaftlicher und sozialer Rechte geurteilt. Um Verstöße oder Bedrohungen gegen die Rechte der Verfassung zu beheben, hat es Urteile gefällt und Beschlüsse gefasst. Diese Rechtsmittel haben Auswirkungen auf die südafrikanische Gesellschaft.

Der Kern dieser Diplomarbeit versucht die Auswirkungen der Entscheidungen und Beschlüsse des Verfassungsgerichts auf die Verwirklichung wirtschaftlicher und sozialer Rechte und den sozialen Wandel in Südafrika zu bewerten.

Im Zuge dieser Bewertung beginnt die Diplomarbeit mit der Einschätzung der Kompetenzen und Befugnisse die dem Verfassungsgericht zur Entscheidung von Anträgen aus dem Bereich sozialer und wirtschaftlicher Rechte übertragen sind. Danach werden unterschiedliche Fälle und gerichtliche Rechtsmittel bei Verstößen gegen wirtschaftliche und soziale Rechte untersucht. Hierbei werden auch die Herangehensweisen sowie von den Gerichten zugrunde gelegte Standards zur Durchsetzung wirtschaftlicher und sozialer Rechte in Betracht gezogen. Das Hauptaugenmerk dieser Diplomarbeit liegt auf den Auswirkungen der Jurisprudenz im Bereich wirtschaftlicher und sozialer Rechte, insbesondere auf das Recht zum Zugang zu angemessenem Wohnen, das Recht auf Gesundheit und soziale Sicherheit.

Während einige der Fälle aus dem Bereich wirtschaftlicher und sozialer Rechte ganz Südafrika positiv beeinflusst haben, wurden in anderen Fällen die in Armut lebenden Teile der Gesellschaft durch die Urteile enttäuscht. Zum Beispiel wurde Südafrika durch das *TAC* Urteil zum Trendsetter im Kampf gegen HIV-AIDS. In Folge des Gerichtsbeschlusses, der besagt, dass das Medikament zur HIV-AIDS Prävention durch Südafrika unverzüglich einzuführen und den Patienten in allen öffentlichen Spitälern und Kliniken zur Verfügung zu stellen ist, sind dem Land neuartige Schritte im Kampf gegen HIV-AIDS gelungen. Zum anderen hat die Androhung eines Prozesses im *Roberts* Fall die Regierung wachgerüttelt die diskriminierenden Bestimmungen betreffend Alterspension abzuändern. Heute haben Frauen und Männer ab 60 Jahren Pensionsanspruch.

Die Auswirkungen der Gerichtsverfahren aus dem Bereich sozialer Rechte waren nicht allesamt positiv für die in Armut lebenden Teile der Gesellschaft und prozessführende

Parteien aus diesem Bereich. In anderen Fällen hat sich das Verfassungsgericht gegenüber der Notlage der Hilfsbedürftigen gleichgültig gezeigt. Zum Beispiel in den *Mazibuko* und *Nokotyana* Fällen hat das Verfassungsgericht die durch die Kommunalverwaltung getroffenen Maßnahmen abstrakt betrachtet, und dabei den offenkundige Beweis von den unter erbärmlichsten Umständen lebenden Bevölkerungsteilen außer Acht gelassen.

Im *Mazibuko* Fall befand das Verfassungsgericht die von der Kommunalverwaltung eingeleiteten Schritte für angemessen. Mit dieser Feststellung ließ das Verfassungsgericht den Umstand außer Acht, dass die Antragssteller so arm waren und es sich nicht leisten konnten für mehr Wasser zu bezahlen, wenn das Kontingent an kostenlosem Wasser erschöpft war. Das würde bedeuten, dass sie den Großteil des Monats ohne Wasserversorgung verbringen, da sie zu arm waren um das durch die Kommunalverwaltung zur Verfügung gestellte geringe kostenlose Kontingent aufzubessern.

Im *Nokotyana* Fall hat das Verfassungsgericht an der Entscheidung des Obersten Gerichtshofes hinsichtlich der Aussetzung der Bereitstellung von Basisdienstleistungen an illegale Bewohner festgehalten und hierdurch die Entscheidung hinsichtlich der Aufwertung der informellen Siedlung in Schwebe gelassen. In anderen Worten hat das Verfassungsgericht die Aussetzung der Basisdienstleistungen für bedürftige Teile der Bevölkerung bestätigt und die Entscheidung ob die informelle Siedlung aufgewertet wird ausstehend gelassen. In beiden Entscheidungen (*Mazibuko* und *Nokotyana*) war sich das Verfassungsgericht der Maßstäbe die es im *Grootboom* Fall gesetzt hat anscheinend nicht bewusst. Sprich, Maßnahmen des Staates sind dann als angemessen zu beurteilen, wenn sie die Bedürfnisse derjenigen Menschen, die in Not leben, berücksichtigen.

Trotz gemischter Ergebnisse hinsichtlich der Auswirkungen von Gerichtsurteilen aus dem Bereich der sozialen und wirtschaftlichen Rechte zeigt diese Studie dass das Gerichtswesen bei der Verwirklichung sozialer und wirtschaftlicher Rechte eine komplementäre Rolle einzunehmen hat. Zusammen mit anderen staatlichen Funktionseinheiten (Exekutive und Legislative) leistet das Gerichtswesen mit seinen einzigartigen Kompetenzen seinen Beitrag bei der Suche nach sozialer Gerechtigkeit in Südafrika. Die Gerichte greifen vielfach dann ein, wenn alles andere keine Wirkung gezeigt hat und stellen somit sicher, dass der Bereich der Exekutive seinen Beitrag zur Verwirklichung sozialer und wirtschaftlicher Rechte erbringt.

**Stichwörter:** Verfassung, Verfassungsgericht, Urteil, Justiziabilität, Auswirkung, Rechtsmittel, soziale Gerechtigkeit, Wandel.