REPORT

Review of Implementation of Constitutional Court Decisions on Socio-Economic Rights

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1. Introduction

This report analyses and reviews the Constitutional Court (Court) jurisprudence since the coming into force of the 1996 South African Constitution (Constitution) on 4th February 1997. The various socio-economic rights in the Bill of Rights have presented South African courts with an opportunity to develop South Africa’s legal system to be responsive to poverty in society. This report focuses on the Court’s jurisprudence emanating from the socio-economic rights entrenched in the Constitution.

The Constitution is one of the few national constitutions that are expressly committed towards the judicial enforcement of socio-economic rights. The Constitution not only explicitly incorporates a broad range of socio-economic rights - it also provides for these rights to be subjected to the same forms of judicial adjudication, protection and remedies available in respect of civil and political rights enshrined in the Bill of Rights. The report will consider the role the Court has forged for itself in interpreting and enforcing these rights through a discussion and analysis of the relevant case law. These includes the rights to housing, health care, food, water and social security, children’s socio-economic rights, education, and the socio-economic rights of persons deprived of their liberty. Additionally, the report will highlight key issues emerging from the Court’s decisions as well as identify the relevant organs of State, whether in the national, provincial or local sphere of government, that were, or are, responsible for giving effect to these decisions.

Although poverty has slightly decreased in South Africa between 1994 and 2013, the socio-economic indicators for the same period indicate that inequality has increased, and the racialised nature of poverty has not shifted considerably since 1994. The poor still lack access to adequate healthcare, education, housing and basic municipal services. Such vast inequalities and deep poverty pose an existential threat to South Africa’s constitutional project if not addressed. The Court itself has acknowledged that:

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1 See section 26 of the Constitution.
2 Section 27.
3 Section 28(1)(c).
4 Section 29.
5 Section 35(2)(e).
6 This is mainly through social grants and the extension of basic services to poor households.
7 See J Dugard “Courts and Structural Poverty in South Africa: To What Extent has the Constitutional Court Expanded Access and Remedies to the Poor? (2012) 4.
We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.\textsuperscript{8}

2. The Constitutional Court-background issues

The Court was established in 1994 as a key institution under the 1993 interim Constitution to oversee the new post-apartheid democratic dispensation.\textsuperscript{9} The Constitution provides for the Court as the judicial organ of final instance for all constitutional matters, including appeals on constitutional matters from the High Courts and Supreme Court of Appeal, as well as deciding on which issues are constitutional matters. In turn, the Supreme Court of Appeal is the final court of appeal in all matters other than constitutional matters.\textsuperscript{10} The Constitution explicitly states that it seeks to “heal the divisions of the past”, “establish a society based on democratic values, social justice and fundamental human rights” and “improve the quality of life for all citizens and free the potential of each person”.\textsuperscript{11}

Adjudication in the area of socio-economic rights was still a conceptually novel undertaking at the time the Court was established. There was very little experience in other comparable common law jurisdictions on which the Court could draw inspiration in interpreting and enforcing socio-economic rights guarantees entrenched in the Bill of Rights. The only reasonably well developed framework was the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), and the General Comments from the Committee on Economic, Social and Cultural Rights (CESCR). However, South Africa has not ratified the ICESCR, hence the later has no direct domestic application within South Africa. The Constitution provides that international agreements are only binding once ratified by a resolution of the National Assembly.\textsuperscript{12}

\textsuperscript{8} Soobramoney v. Minister of Health, KwaZulu Natal 1998 (1) SA 765 (CC) (Soobramoney), para. 8.
\textsuperscript{10} Section 167(3) of the Constitution.
\textsuperscript{11} See preamble to the Constitution.
\textsuperscript{12} See 231 (2) of the Constitution. It is noteworthy that the ICESCR and the General Comments of the CESCR can still be used by the Court as an aid in interpreting socio-economic rights.
Section 39(1)(b) of the Constitution, however, enjoins the Court to consider international law when interpreting the Bill of Rights. In that context the Court made it clear in the case of *S v Makwanyane* that such reference to international law as an interpretive guide in the interpretation of the rights in the Bill of Rights includes both binding and non-binding international law.  

South Africa’s conservative legal culture, steeped in legal liberalism, has a number of features which also constrained the development of jurisprudence on socio-economic rights. Mired in traditions of judicial deference to legislative choices and legal positivism, South Africa’s dominant strains of legal thought were ill-suited to the new Constitution which required purposive, value-laden interpretation. It is worthy-noting that the system of parliamentary sovereignty under the apartheid-era Constitutions did not give judges the necessary latitude to allow for judicial review of legislation for consistency with human rights norms. In its earlier jurisprudence on socio-economic rights, the Court was faced with the dual task of finding an interpretive paradigm within which to enforce socio-economic rights while at the same time maintaining its institutional stability. The American legal theorist Karl Klare, in a seminal article published in 1998, described the Constitution as entailing a project of ‘transformative constitutionalism’. Klare described this project as:

> [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 relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.

The notion of ‘transformative constitutionalism’ has been well accepted in the jurisprudence of the Court. Liebenberg has noted that like other constitutions adopted during periods of political transition, the Constitution is ‘simultaneously backward - and forward-looking’ in that it provides a legal framework within which to redress the injustices of the past as well as to facilitate the creation of a more just

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13 *S v Makwanyane* 1995 (3) SA 391 (CC).
16 See *S v Makwanyane* 1995 (3) SA 391 (CC)
society in the future.\textsuperscript{17} This new constitutional dispensation envisages improving the quality of life and freeing the potential of each person.\textsuperscript{18}

\section*{3. Socio-economic rights as justiciable rights}

The historic focus and privileging of civil and political rights at the expense of socio-economic rights within the human rights framework has resulted in the interests and values protected by socio-economic rights being relegated to the margins at both the international human rights law and domestic constitutional frameworks. The Constitution responds appropriately to this historical anomaly by creating various mechanisms for holding State organs and non-State actors accountable for any infringement of socio-economic rights.\textsuperscript{19}

Apart from the Court, other State institutions such as the South African Human Rights Commission, the Commission for Gender Equality and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities have a constitutional mandate in relation to promoting, monitoring, investigating and reporting on human rights.\textsuperscript{20} The justiciability of socio-economic rights under the Constitution vests in the Court an important role in interpreting and giving content to these rights. It is now beyond contestation that the judiciary is, within the parameters provided for in the Constitution, obliged to adjudicate on petitions predicated on these rights as well as to develop new and grant innovative remedies if infringement of these rights is established.\textsuperscript{21} It is through their interpretation of socio-economic rights that courts have an important role to play in facilitating and aiding the democratic transformation project. Additionally, the Court serves as an apposite forum where the various dimensions of poverty and the political and social responses to it can be evaluated in the light of constitutional rights entrenched in the Constitution. In that regard, the judicial adjudication of socio-

\begin{enumerate}[\textsuperscript{17} Liebenberg \textit{Socio-Economic Rights} 25.\textsuperscript{18} See Preamble to the Constitution.\textsuperscript{19} Section 7(2) enjoins the State to respect, protect, promote and fulfil the rights in the Bill of Rights. Section 8(2) provides that “a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.” Additionally, section 39(2) enjoins every court, tribunal or forum to “promote the spirit, purport and objects of the Bill of Rights” when developing the common law or customary law.\textsuperscript{20} These institutions are created in chapter 9 of the Constitution and are regulated by specific statutes such as the Human Rights Commission Act 54 of 1994, the Commission on Gender Equality Act 39 of 1996, and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002.\textsuperscript{21} see s 172(1)(b) of the Constitution vests in competent courts a broad discretion to grant ‘just and equitable’ remedies for breaches of the Constitution.

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economic rights has the capacity to enrich South Africa’s democracy.\textsuperscript{22} This report is divided into three parts. The first part discusses and analyses the Court’s socio-economic rights jurisprudence since the coming into force of the Constitution. The second part identifies and highlights the key issues emerging from the Court’s socio-economic rights jurisprudence. The third part highlights the State organs responsible for implementation of the decisions discussed in the first part of the report, followed by the conclusion and recommendations.

4. The case law

The High Courts, Supreme Court of Appeal and the Court have developed a substantial body of jurisprudence on socio-economic rights since the adoption of the Constitution in 1996. The landmark cases adjudicated by the Court that laid the basis of the socio-economic jurisprudence are Soobramoney \textit{v} Minister of Health, KwaZulu-Natal\textsuperscript{23} (‘Soobramoney’), Government of the Republic of South Africa \textit{v} Grootboom\textsuperscript{24} (‘Grootboom’), Minister of Public Works \textit{v} Kyalami Ridge Environmental Association\textsuperscript{25} (‘Kyalami Ridge’), Minister of Health \textit{v} Treatment Action Campaign\textsuperscript{26} (‘TAC’), Khosa \textit{v} Minister of Social Development; Mahlaule \textit{v} Minister of Social Development\textsuperscript{27} (‘Khosa’), Port Elizabeth Municipality \textit{v} Various Occupiers\textsuperscript{28} (‘Port Elizabeth’), Jaftha \textit{v} Schoeman; Van Rooyen \textit{v} Stoltz\textsuperscript{29} (‘Jaftha’), President of the Republic of South Africa \textit{v} Modderklip Boerdery (Pty) Ltd\textsuperscript{30} (‘Modderklip’), Occupiers of 51 Olivia Road \textit{v} City of Johannesburg\textsuperscript{31} (‘Olivia Road’), Residents of Joe Slovo Community, Western Cape \textit{v} Thubelisha Homes\textsuperscript{32} (Joe Slovo), Mazibuko and others \textit{v} City of Johannesburg and others\textsuperscript{33} (Mazibuko), Joseph and Others \textit{v} City of

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\item Minister of Public Works \textit{v} Kyalami Ridge Environmental Association (Mukhwevho Intervening) 2001 (3) SA 1151 (CC)
\item Minister of Health \textit{v} Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC)
\item Khosa \textit{v} Minister of Social Development; Mahlaule \textit{v} Minister of Social Development 2004 (6) SA 505 (CC)
\item Port Elizabeth Municipality \textit{v} Various Occupiers 2005 (1) SA 217 (CC)
\item Jaftha \textit{v} Schoeman; Van Rooyen \textit{v} Stoltz 2005 (2) SA 140 (CC)
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\item Residents of Joe Slovo Community, Western Cape \textit{v} Thubelisha Homes [2009] ZACC 16.
\item Mazibuko and others \textit{v} City of Johannesburg and others 2010 (4) SA 1 (CC).
\end{thebibliography}
The Court’s decisions have dealt with healthcare rights, housing rights, social assistance rights, water rights, electricity rights, sanitation rights, and education. Some socio-economic rights such as the right of access to sufficient food provided in section 27(1)(b) of the Constitution are still to be adjudicated at the Court level. The Court’s jurisprudence, as will be noted below, has involved two kinds of scenarios. The first is where the State has failed to formulate or implement a programme to give effect to the socio-economic rights of a section of the population. The second situation encompasses an allegation of unreasonable exclusion from an existing legislative or other programme giving effect to the socio-economic rights guaranteed in the Constitution. The following section discusses the Court’s jurisprudence on socio-economic rights, highlighting the key issues under adjudication, the Court’s adjudicative approach and the orders (or lack thereof) made by the Court.

4.1. Soobramoney v Minister of Health, KwaZulu-Natal

Soobramoney was the first major case in which the Court adjudicated over the socio-economic rights enshrined in the Constitution. In that case, the Court had to consider healthcare rationing. The case began in the Natal High Court where the applicant sought an order directing the State to provide him with continuing dialysis treatment. The discussion in this section focuses on the judgement of the Court. On appeal to the Court, the applicant based his claim on sections 11 (the right to life)
and 27(3) of the Constitution. The major question which the Court was called upon to decide was whether the health rights in section 27 of the Constitution entitled a chronically ill man in the final stages of renal failure to an order enjoining a public hospital to admit him to the renal dialysis programme of the hospital.

The applicant was denied access to dialysis because he suffered from chronic renal failure and was not a candidate for a kidney transplant as he would need kidney dialysis for the rest of his life as his condition was incurable. The KwaZulu Natal Department of Health’s policy was to limit access to dialysis to persons suffering from acute renal failure or chronic renal failure patients awaiting a kidney transplant. The policy was predicated on ensuring that those whose kidneys could be completely cured were given the best chance of eventually living without the need for dialysis.

The applicant claimed that the Department’s decision amounted to a breach of his constitutionally protected right under section 27 (3) of the Constitution not to be refused emergency medical treatment. The applicant further argued in the alternative that the policy breached his right of access to healthcare services guaranteed in section 27 (1) (a) of the Constitution. The Court rejected the challenge based on section 27 (3) because the applicant sought access to treatment of an ongoing, chronic condition. The Court held that section 27 (3) was intended primarily to ensure that “a person who suffers a sudden catastrophe which calls for immediate medical attention” is not denied ambulance services or access to hospitals which are, in principle, able to provide the necessary treatment.44

It is important to note that what the applicant claimed was, in essence, the lifting of the exclusion from State renal dialysis facilities of persons with chronic renal failure who do not qualify for a transplant in terms of the Department’s policy. The Court ruled that the decision to limit access to dialysis in these circumstances was rational and that “a court will be disinclined 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”.45 The Court ruled that the applicant had no cause of action in terms of either section 11 or section 27(3) of the Constitution. The Court, instead, held that the applicant’s claim fell to be adjudicated in terms of sections 27(1) and (2) of the Constitution. Those provisions entrench the qualified right of access to health care services.46

44 Para 20.
45 Para 29.
46 Para 22.
The Court had to address two critical issues in determining whether the refusal to admit the applicant to the dialysis treatment programme constituted an infringement of these provisions. The first issue to be determined was whether it was necessary to ration access to kidney dialysis treatment to patients such as the applicant. Secondly, if such rationing was necessary, whether the policy adopted by the Department complied with the constitutional injunctions in sections 27(1) and (2) and, if so, whether they were applied fairly and rationally to the applicant’s case.

The first issue concerns whether and under what conditions limited resources constitute a valid basis for limiting access to medical treatment for patients in the situation of the applicant. The Court alluded to the budgetary constraints facing provincial health departments. The Court noted that the scarcity of resources meant that the need for access to kidney dialysis treatment greatly exceeded the number of available dialysis machines. The Court further noted that this was a national problem extending to all renal clinics.\(^ {47}\) According to the Court, the diversion of additional resources to the renal dialysis programme and related tertiary health care interventions from within the health budget would negatively impact on other important health programmes.\(^ {48}\) Additionally, the Court pointed out that if the overall health budget was to be substantially increased to fund all health care programmes, this would diminish the resources available to the State to meet other socio-economic needs such as housing, food, water, employment opportunities, and social security.\(^ {49}\)

The Court was not persuaded that it was reasonable to require the State to divert additional resources to the renal dialysis programme in order to cater for all patients in his situation. This inevitably implied that it was necessary for health authorities to ration access to certain forms of medical treatments. It is significant to note that the applicant had not suggested that the relevant guidelines established by the hospital were unreasonable. Neither did he argue that the guidelines were not applied fairly and rationally when the decision was taken that he did not qualify for dialysis treatment.\(^ {50}\) Accordingly, the Court held that there was no breach of section 27(1)(a) read with (2).

\(^{47}\) Para 24.
\(^{48}\) Paras 27-28.
\(^{49}\) Para 28.
\(^{50}\) Para 25.
4.2. Government of the Republic of South Africa v Grootboom

The *Grootboom* decision, handed down almost three years after the *Soobramoney* judgment was the next major case on socio-economic rights to be adjudicated by the Court. The Court was more expansive in its approach as compared to the *Soobramoney* case. This was partly because in *Grootboom* the Court was faced not with a resource allocation decision taken in the context of an existing State programme, but with a failure by the State to have a programme at all. In *Grootboom*, the Court was faced with a failure by the State to take any steps to assist those in desperate and immediate housing need. The Court analysed the State’s failure to take steps by reference to the reasonableness approach as a model of review. The Court rejected the contention that the right to housing provided for in section 26 (1) of the Constitution had any interpretive content independently of the duty to take reasonable measures under section 26(2). Notably, the Court rejected an interpretive approach urged by the *amicus curiae*, based on the idea that socio-economic rights had a minimum core content to which all rights bearers are entitled. This approach was based on the CESC R’s General Comment 3 (1990) on the nature of states parties’ obligations, under the ICESCR. The Court rejected the minimum core approach on the basis that it had inadequate information before it to determine the minimum core of the right to adequate housing.

The *Grootboom* case concerned a group of adults and children who had moved onto private land from an informal settlement owing to the horrendous conditions in which they were living. Following the eviction from the private land, the claimants camped on a sports field in the area. The claimants found themselves in a precarious position where they had neither security of tenure, nor adequate shelter from the elements. The group launched an application to the Western Cape High Court on an urgent basis for an order against all three spheres of government, requiring them to provide temporary shelter or housing until they obtained permanent accommodation. The High Court held that there was no violation of section 26 (the right of everyone to have access to housing), but found a violation of section 28(1) (c) which protects the right of children to shelter. On appeal, the Court declared that the

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51 See paras 34 - 46.
53 See *Grootboom* para 3.
54 Paras 9 -11.
State’s housing programme fell short of compliance with section 26(1) and (2) (the qualified right of everyone to have access to adequate housing). However, the Court found no violation of the right of children to shelter protected under section 28(1)(c) of the Constitution.

The Court ruled in *Grootboom* that the State’s positive obligation under section 26 of the Constitution was primarily to adopt and implement a reasonable policy, within its available resources, which would ensure access to adequate housing over time. The bulk of the *Grootboom* judgment is devoted to defining the concept of reasonableness. The Court held that, to qualify as “reasonable”, State housing policy must:

- be comprehensive, coherent and effective;\(^{55}\)
- have sufficient regard for the social economic and historical context of widespread deprivation;\(^{56}\)
- have sufficient regard for the availability of the State’s resources;\(^{57}\)
- make short, medium and long term provision for housing needs;\(^{58}\)
- give special attention to the needs of the poorest and most vulnerable;\(^{59}\)
- be aimed at lowering administrative, operational and financial barriers over time;\(^{60}\)
- allocate responsibilities and tasks clearly to all three spheres of government;\(^{61}\)
- be implemented reasonably, adequately resourced and free of bureaucratic inefficiency or onerous regulations;\(^{62}\)
- respond with care and concern to the needs of the most desperate;\(^{63}\)
- achieve more than a mere statistical advance in the numbers of people

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55 Para 40.  
56 Para 43.  
57 Para 46.  
58 Para 43.  
59 Para 42.  
60 Para 45.  
61 Para 39.  
62 Para 42.  
63 Para 44
accessing housing, by demonstrating that the needs of the most vulnerable are catered for.\textsuperscript{64}

The \textit{Grootboom} judgment obliged the State, within its available resources, to provide temporary shelter for those who have been evicted or face imminent eviction and cannot find alternative shelter with their own resources. Although the Court had shied away from the idea that section 26 could give rise to a right to housing on demand, its focus on the need for the State to alleviate the plight of those in a desperate situation, according to Liebenberg, suggests that, in certain situations, section 26 of the Constitution could ground a fairly immediate claim for shelter. Liebenberg goes on to note that \textit{Grootboom} is arguably the most far reaching of the Court’s socio-economic rights jurisprudence. This is because the decision resulted in the adoption of a national emergency housing policy.\textsuperscript{65} \textit{Grootboom} has also led to a line of decisions in which poor people have successfully resisted evictions potentially leading to their homelessness and consequently claimed alternative shelter from State organs.\textsuperscript{66}

\subsection*{4.3. \textit{Treatment Action Campaign} (\textit{TAC})}

The decision in the \textit{TAC} case was handed down almost two years after the \textit{Grootboom} judgement. The case involved a challenge to the limited nature of the measures introduced by the State to prevent mother-to-child transmission of HIV. The Court was asked to consider the reasonableness of government policy in facilitating access to antiretroviral treatment to prevent mother to child transmission of HIV. The applicants argued that the State unreasonably prohibited the administration of the antiretroviral drug, Nevirapine, at public hospitals and clinics outside a limited number of research and training sites.\textsuperscript{67} This drug was of proven efficacy in reducing mother-to-child transmission of HIV. The applicants further argued that the State had failed to produce and implement a comprehensive national programme for the prevention of mother-to-child transmission of HIV. According to the applicants, the aforementioned conduct and omissions of the State constituted violations of the right of everyone to have access to health care services protected

\begin{itemize}
  \item \textsuperscript{64} Para 44.
  \item \textsuperscript{65} See Volume 4, part 2 of the South African National Housing Code (2009).
  \item \textsuperscript{66} See discussion below on evictions jurisprudence.
  \item \textsuperscript{67} See \textit{TAC} paras 10–11.
\end{itemize}
under section 27 of the Constitution as well as children’s right to have access to basic health care services protected under section 28(1)(c).

The Court held that the State’s programme to prevent mother-to-child transmission of HIV did not comply with its obligations in terms of sections 27(1) and (2) of the Constitution. The Court ruled that the decision to limit access to antiretroviral treatment to a few test sites was irrational because there was no compelling reason to not provide treatment where it was medically indicated outside a limited number of research and testing sites. The Court made both declaratory and mandatory orders against the Government.

4.4. Khosa v Minister of Social Development; Mahlaule v Minister of Social Development (Khosa)

*Khosa* involved an application for an order confirming the constitutional invalidity of certain provisions of the social assistance legislation which limited eligibility for non-contributory social assistance grants to South African citizens. The applicants were a group of destitute South African permanent residents of Mozambican origin. This group was ineligible to access the various social assistance grants due to the citizenship requirement. The applicants argued that the relevant provisions in the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act 106 of 1997 infringed both the right of everyone to have access to social assistance provided for in 27(1)(c) read with (2)) and the right against unfair discrimination provided in section 9(3).

The Court considered the reasonableness of the exclusion of permanent residents from the Social Assistance Act in terms of the right of access to social security entrenched under section 27(1)(c) read with (2) of the Constitution. The Court noted that the Constitution confers the right of access to social security on everyone. The Court identified the following factors as being relevant to the assessment of the reasonableness of the exclusion:

i. the purpose served by social security;

ii. the impact of the exclusion on permanent residents; and

iii. the relevance of the citizenship requirement to that purpose.

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68 The qualified right of every one to have access to health care services.
69 Section 27(1). See *Khosa* paras 53–57.
70 Para 49.
iv. the impact that this has on other intersecting rights, for example, the equality rights protected in section 9 of the Constitution.\textsuperscript{71}

The Court, after examining the claim through the lens of equality rights, inquired whether the exclusion of permanent residents from social grants amounted to unfair discrimination in terms of section 9(3) of the constitutionally protected equality clause. The test for unfair discrimination involves the consideration of a number of factors, particularly its impact on the group discriminated against. The Court ruled the exclusion of South African permanent residents from state social assistance programmes as irrational.\textsuperscript{72} The Court in that case was guided by the impact of the exclusion on the applicants’ right to equality. The right to social security, the Court held, vests in everyone. According to the Court, the exclusion of permanent residents from the State’s social security programme affected the applicant’s rights to dignity and equality. The Court held that without sufficient reason being established to justify such an impairment of the applicants’ equality rights, the exclusion was irrational and unconstitutional. According to the Court, the purpose of the right of access to social assistance for those unable to support themselves and their dependants is to ensure that the basic necessities of life are accessible to all.\textsuperscript{73} Given these purposes and the \textit{prima facie} entitlement of “everyone” to have access to social security, the Court held that differentiating on the basis of citizenship in relation to social grants “must not be arbitrary or irrational nor must it manifest a naked preference”.\textsuperscript{74} The Court held that a differentiating law which did not meet the basic requirement of rationality constituted a violation of both sections 9(1) and sections 27(2) of the Constitution.\textsuperscript{75} It relegated the applicants “to the margins of society” and deprived them “of what may be essential to enable them to enjoy other rights vested in them under the Constitution”.\textsuperscript{76}

The Court’s assessment of the reasonableness of the exclusion of permanent residents in \textit{Khosa} incorporates a proportionality analysis. There were other less drastic methods for reducing the risk of permanent residents becoming a burden to the fiscus than excluding them from gaining access to social assistance. Ultimately, the impact of the exclusion from social assistance on the life and dignity of

\textsuperscript{71} Para 45.
\textsuperscript{72} Paras 53 and 85.
\textsuperscript{73} \textit{Khosa} (note 6 above) para 52.
\textsuperscript{74} Ibid para 53.
\textsuperscript{75} Para 53.
\textsuperscript{76} Paras 77, 81.
permanent residents outweighed the financial and immigration considerations on which the State relied. The stringent standard of review applied in this case should be understood in the context of the denial of a basic social benefit to a vulnerable group, and the intersecting breaches of a socio-economic right and the right against unfair discrimination.

4.5. Mashavha v President of the Republic of South Africa

In the Mashavha case, the Court considered the validity of a presidential proclamation assigning administration of the Social Security Act from the national government to the provincial government. The Court declared the assignment of the administration of the Social Assistance Act to the provinces in terms of Proclamation R7 to be unconstitutional in that it fell within the ambit of s 126(3) of the Interim Constitution. The latter provision excludes from assignment to provincial level matters requiring uniform national norms and standards for their effective performance and minimum standards across the nation. The Court held that the delivery of social assistance grants was such a matter. In doing so, the Court emphasised the importance of the right and value of equality in the delivery of social assistance rights. According to the Court:

> The history of our country and the need for equality cannot be ignored in the interpretation and application of s 126(3). Equality is not only recognised as a fundamental right in both the interim and 1996 Constitutions, but is also a foundational value. To pay, for example, higher old age pensions in Johannesburg in Gauteng than in Bochum in Limpopo, or lower child benefits in Butterworth than in Cape Town, would offend the dignity of people, create different classes of citizenship and divide South Africa into favoured and disfavoured areas.

4.6 Jaftha v Schoeman; Van Rooyen v Stoltz

It is important to observe the Court’s interpretive approach in cases dealing with a negative infringement of a socio-economic right. The significance of the Jaftha case

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77 Para 82.
78 Para 44.
79 Mashavha v President of the Republic of South Africa 2004 12 BCLR 1243 (CC).
80 Para 51.
is that it is the first case in which the Court elaborated on the meaning of negative duties in the context of section 26 (and, by implication, section 27) of the Constitution. It is noteworthy that the Court adopted a distinctive model of review to these negative violations.

The *Jaftha* case involved a challenge to the constitutionality of provisions of the Magistrates’ Court Act 32 of 1944 that permitted the sale in execution of people’s homes in order to satisfy sometimes very small debts. Such sales-in-execution would result in the eviction of the applicants from their State-subsidised homes. The applicants would have no suitable alternative accommodation should they be evicted, and would not be eligible again for a housing subsidy from the State.\(^{81}\)

The Court interpreted the apposite provisions of the Magistrates’ Court Act as constituting a negative violation of section 26(1) of the Constitution as they permitted a person to be deprived of existing access to adequate housing.\(^{82}\) This negative duty is not subject to the qualifications in subsection (2) relating to reasonableness, resource constraints and progressive realisation. According to the Court, such deprivation of existing access to housing (and by implication, other socio-economic rights) constitutes a limitation of their rights which can only be justified in terms of the stringent requirements of the general limitations clause encapsulated in section 36 of the Constitution. Such a limitation includes the requirement of a law of general application. Accordingly, the deprivation of people’s existing access to housing by the relevant provisions of the Magistrates’ Court Act was held to constitute a limitation of section 26(1) of the Constitution.

The Court, in carrying out the limitations analysis in terms of section 36 of the Constitution, closely scrutinised the purposes that the relevant provisions of the Act were designed to serve, and found them to be overbroad. The relevant provisions of the Act permitted execution against the homes of debtors in circumstances “where execution will be unjustifiable because the advantage that attaches to a creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor”.\(^{83}\) The Court thus held that the relevant provisions were not justifiable in terms of the general limitations clause provided for under section 36 of the Constitution. As a remedy, the Court “read in” provisions to the Act requiring

\(^{81}\) Ibid para 12  
\(^{82}\) Ibid paras 31–34.  
\(^{83}\) Ibid para 43.
judicial oversight of executions against the immovable property of debtors taking into consideration “all relevant circumstances”.84

The Jaftha case illustrates that the interest of poor people in the protection of their homes is an important consideration in a judicial process which was previously solely concerned with protecting the interests of creditors. Prior to this decision, a judgment creditor was entitled to a writ of execution against immovable property once the debtor had insufficient movables to satisfy the debt. The clerk of the court had no discretion to refuse the writ of execution.

4.6.1 Negative and positive duties

The Court’s decision in Jaftha shows the Court’s preparedness to apply a different model of review to conduct or legislation which deprives people of their existing access to socio-economic rights. Such conduct or legislation is regarded as a prima facie breach of the rights in sections 26 and 27 of the Constitution. In such a case, the burden is on the State to justify them according to the stringent purpose and proportionality requirements of the general limitations clause. This can be contrasted with the internal limitations of sections 26(2) and 27(2) which allow the State a greater margin to rely on resource constraints and the latitude of progressive realisation with regard to an omission to fulfil the positive duties imposed by socio-economic rights. It would appear that the stronger model of review applied to negative as opposed to positive duties suggests that in circumstances where people lack access to socio-economic resources and services, the State will be subjected to less robust forms of constitutional accountability.

4.7 Minister of Public Works v Kyalami Ridge Environmental Association (Kyalami)85

In the Kyalami case, the Ministry of Public Works relied on its constitutional obligation to assist people in crisis situations to defend its decision to establish a transit camp on State-owned land which had previously been used as a prison to temporarily house destitute flood victims from Alexandra Township who had been displaced by severe floods. This decision was challenged by a neighbouring residents’ association on the grounds that there was no legislation authorising the government to establish

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84 Ibid paras 52–67
85 2001 (3) SA 1151 (CC).
the transit camp and that the decision was unlawful in that it contravened the town planning scheme and environmental legislation.

In a unanimous judgement, the Court first addressed the issue as to whether the government had power to establish a transit camp on a prison farm for the accommodation of flood victims. The Court held that none of the laws relied on by the applicant excluded or limited the government’s common law power to make its land available to flood victims pursuant to its constitutional duty to provide them with access to housing. The Court further ruled that procedural fairness did not require government to do more in the circumstances than it had undertaken to do, namely to consult with the Kyalami residents in an endeavour to meet any legitimate concerns they might have as to the manner in which the development will take place. According to the Court:

To require more would in effect inhibit the government from taking a decision that had to be taken urgently. It would also impede the government from using its own land for a constitutionally mandated purpose, in circumstances where legislation designed to regulate land use places no such restriction on it.86

4.8 Port Elizabeth Municipality v Various Occupiers

The Port Elizabeth case was primarily concerned with the lack of adequate consultation with unlawful occupiers before an eviction order was made against them. The case concerned an eviction application brought in terms of section 6 of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) by the Port Elizabeth Municipality against about 68 people who were occupying informal dwellings erected on privately owned land within the jurisdiction of the Municipality. The Municipality was responding to a neighbourhood petition in pursuing with the eviction application.

The Court, after detailed historical and contextual analysis of the nature and role of forced evictions during the apartheid era, highlighted the transformative purposes section 26(3) of the Constitution was intended to promote.87 The Court further held that PIE had to be interpreted and applied within a “defined and carefully

87 Ibid paras 8–23.
calibrated constitutional matrix." The Court held that property rights are not absolute, but incorporate the important social dimension of promoting the public interest, particularly given South Africa’s history of colonial and racist dispossession. Significantly, under the Constitution, “the normal ownership rights of possession, use and occupation” have to be balanced with “a new and equally relevant right not to be arbitrarily deprived of a home”. The Court pointed out that PIE should not merely be seen as an expression of “judicial philanthropy in favour of the poor”, but must be interpreted in the light of the fact that even unlawful occupiers are now the bearers of constitutionally enshrined housing rights. The Court further elaborated on the substantive interests people have in their homes and which are threatened in an eviction context, pointing that:

Section 26(3) evinces special constitutional regard for a person’s place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat.

The Court further explained that the fact that people have housing rights which may conflict with property rights in an eviction application fundamentally changes the traditional approach of courts in eviction applications. The Court further elaborated on the need for the availability to the unlawful occupier of suitable alternative accommodation as a factor in determining whether it is just and equitable to grant an order for eviction in terms of s 6(3) of PIE. The Court further noted though that there is “no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available”. Having said that, the Court stipulated that a court should be reluctant to grant an eviction against relatively settled occupiers unless it is

88 Ibid para 14
89 Para 16.
90 Para 23.
91 Para 14.
92 Para 17.
93 Para 28.
satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.\textsuperscript{94}

According to the Court, eviction orders should generally require organs of State to take reasonable measures to ensure alternative accommodation for occupiers who will be left homeless, even if it is only on a temporary basis pending their integration in a long-term housing programme. State organs are thus obliged to make serious efforts to ensure alternative accommodation to those facing homelessness pursuant to an eviction and such an obligation is not satisfied by a generalised programme that “works in theory”.\textsuperscript{95} It is important that there be an individualised assessment by organs of State of the actual needs and situation of the occupiers in any particular case.\textsuperscript{96} Furthermore, another important factor to be considered in determining the justice and equity of an eviction is whether “proper discussions, and where appropriate, mediation” has been attempted.\textsuperscript{97} People facing eviction have constitutionally protected housing rights which entitle them to participate in the process of finding a just solution to the conflict between their rights and the landowner’s property rights.

The significance of the \textit{Port Elizabeth Municipality} decision lies in its insistence that unlawful occupiers, who enjoyed minimal rights under the previous legislative and common-law regime, are now the bearers of constitutionally protected rights, specifically the housing rights in section 26 of the Constitution. This confers on them interrelated procedural and substantive protections in the context of legal steps to evict them from their homes.\textsuperscript{98} It is also significant to note that the Court provided a pro-poor interpretation of the duties of local authorities in eviction cases. It held that it would not be just and equitable to evict a community without prior consultation with them and without at least considering the possibility that they could be provided with tenure security on any relocation site.\textsuperscript{99} The Court’s concern for the need to provide the occupiers with some measure of tenure security is clear throughout the judgment.\textsuperscript{100} \textit{Port Elizabeth Municipality} accordingly reinforces the view that security of tenure is a constituent of the right of access to adequate housing protected under section 26 of the Constitution.

\textsuperscript{94} Para 28.  
\textsuperscript{95} Para 29.  
\textsuperscript{96} Para 29.  
\textsuperscript{97} Para 43.  
\textsuperscript{98} Liebenberg Socio-Economic Rights 277.  
\textsuperscript{99} See Port Elizabeth para 55.  
\textsuperscript{100} See especially paras 17 and 18.
It is noteworthy that the Port Elizabeth Municipality case considered an application for eviction at the instance of an organ of State. The following case considers the obligations of organs of State, particularly local authorities, when applications are brought for the eviction of impoverished occupiers from privately-owned land.

4.9 President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA, Amici Curiae) 14 ("Modderklip")

The Modderklip case dealt with the State’s duties in the context of a private landowner’s unsuccessful efforts to execute an eviction order granted in terms of PIE against a community occupying his land. At the time of the landowner’s attempted execution of the order the community numbered approximately 40 000 residents. The Court held that the State’s failure to take steps to assist the landowner to recover his property and, at the same time, avoid the large-scale social disruption caused by the eviction of a large community with nowhere to go was unreasonable. The Court further held that it was unreasonable for the State “to stand by and do nothing in circumstances where it was impossible for Modderklip to evict the occupiers because of the sheer magnitude of the invasion and the particular circumstances of the occupiers”. The Court ordered the State to compensate the landowner for the occupation of its property. Significantly, the Court order expressly declared that the residents were entitled to occupy the land until alternative land had been made available to them by the State or the provincial or local authority.

The significance of the Modderklip case is that it confirmed the position that the State may not abdicate its responsibilities in a dispute between private parties where important constitutional rights are threatened and State intervention is required for their protection. Notably, the Court affirmed the principle that where an eviction will place persons in a situation of desperate housing need they should generally have access to some form of accommodation (albeit on a temporary basis) pending their integration in long-term housing programmes. The Court’s position signifies a reiteration of the principle it earlier laid down in Grootboom that the State should put in place and implement a reasonable programme which provides immediate relief “for

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101 2005 (5) SA 3 (CC)
102 Para 48.
103 Ibid para 68 Order 3 (c).
people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations”.\textsuperscript{104}

4.10 Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg (Olivia Road)\textsuperscript{105}

\textit{Olivia Road} is a significant case which provided the courts with an opportunity to consider the implications of section 26, particularly s 26(3) of the Constitution. The case arose out of the Johannesburg City Council’s applications to evict a substantial number of poor residents of alleged unsafe buildings in the Johannesburg inner city in terms of the National Building Regulations and Building Standards Act 103 of 1977 (the NBRSA’).

The applicants approached the Court to set aside an order that they be evicted from buildings in the inner city of Johannesburg that the City of Johannesburg alleged were unfit for habitation. The occupiers conceded that the conditions in the buildings were far from safe, but that the buildings presented their only alternative to homelessness. The City had refused to offer the occupiers any alternative accommodation. In those circumstances, the occupiers said that an order for their eviction should not have been granted by the Supreme Court of Appeal.\textsuperscript{106} The occupiers also pointed out that the municipality’s eviction proceedings against them were part of a broader strategy to evict an estimated 67 000 people from 235 allegedly unsafe properties in the inner city of Johannesburg. The City had no plan in place to find alternative accommodation for these people. The occupiers claimed that the absence of such a plan was a violation of section 26 (2) of the Constitution and that the Court should declare this to be so. The occupiers further asked the Court to supervise the formulation of a reasonable housing policy by means of a structural interdict.

In its judgement, the Court dealt with three major issues. The first concerned its reasons for making the engagement order, and the purposes and nature of such engagement. The Court affirmed the basic principle that in situations where people face homelessness due to an eviction, public authorities should generally engage seriously and in good faith with the affected occupiers with a view to finding humane and pragmatic solutions to their dilemma. The Court derived the legal basis for the

\textsuperscript{104} Grootboom para 99.
\textsuperscript{105} 2008 (3) SA 208 (CC)
requirement of “meaningful engagement” directly from a range of constitutional provisions.

The duty, according to the Court, is primarily derived from the various subsections of section 26 of the Constitution. Every level of government is obliged to act consistently with the constitutional obligation on the State to take reasonable measures to extend access to adequate housing. The Court explained that this includes the obligation to respect the inherent dignity of every person and to treat human beings as human beings. Whether there has been meaningful engagement is furthermore one of the “relevant circumstances” to be taken into account in terms of section 26(3) of the Constitution. The failure of a municipality to engage meaningfully, or an unreasonable response in the engagement process, “would ordinarily be a weighty consideration against the grant of an ejectment order”. As the Court held:

Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably managed by careful and sensitive people on its side.

The Court further observed that “a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of the constitutional obligations … taken together”. The Court explained that the objectives of such engagement are to ascertain what the consequences of an eviction might be, whether the city could help in alleviating those dire consequences, whether it is possible to render the buildings concerned relatively safe and conducive to health for an interim period, whether the City had any obligations to the occupiers in the prevailing circumstances, and when and how the

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107 Occupiers of Olivia Road para 10
108 Ibid paras 18, 22.
109 Para 21.
110 See Para 15.
111 Para 16.
City could or would fulfil these obligations. The Court explicitly links the objectives of meaningful engagement with the duty of municipalities to act reasonably in relation to people’s housing needs in terms of s 26(2). According to the Court in *Olivia Road*, “meaningful engagement” would accordingly apply whenever public authorities seek to evict people from their homes in circumstances that expose them to potential homelessness, regardless of the common law or legislative power to evict.

The second major issue dealt with in the Court’s judgment concerned the proper interpretation of s 12(4)(b) of the NBRSA in light of section 26 of the Constitution. The Court held that availability of suitable alternative accommodation or land was not a relevant consideration when making a decision to issue a notice to vacate in terms of s 12(4)(b). The Court, however, explained that the possibility of people being rendered homeless consequent upon a decision to evict was a highly relevant consideration which a municipality should take into account in exercising its discretion to issue a notice to vacate.

The third aspect which the Court considered in *Olivia Road* is the constitutionality of section 12(6) of the NBRSA which imposes criminal liability for a failure to comply with a notice to vacate without provision for judicial oversight of the eviction. The Court held that this provision falls foul of section 26(3) which prohibits the eviction of people from their home in the absence of a court order made after considering all the relevant circumstances. The Court’s approach is a welcome affirmation of the principle of participatory, deliberative democracy in resolving conflicts involving constitutional rights such as housing. A failure to engage meaningfully is to be treated by courts as a weighty consideration against the grant of an eviction order.

In this regard, important guidance on the normative framework can be obtained from the aspects of the *Olivia Road* judgment which engage with the substantive implications of section 26(3). First, no eviction of persons from their home may take place without judicial oversight. The right to insist that a court authorise any attempt to evict them from their homes is an important safeguard for communities when they believe their rights are not being respected by public authorities in the engagement process. Second, the Court iterated that when exercising its discretion to grant an eviction order, relevant legislation must be read in the light of section 26 of the Constitution. Section 26(2) provides that organs of State

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112 Para 16.
113 Ibid para 43.
must take reasonable measures to realise progressively the right of access to adequate housing. In the context where people face homelessness as a result of an eviction, the availability of suitable alternative accommodation or land is a highly relevant factor in terms as emphasised under section 26(3) of the Constitution. Ultimately, the most significant implication of the Olivia Road judgment is the Court’s confirmation that the phrase, “relevant circumstances” in section 26(3) of the Constitution is not simply a redundant injunction. Section 26(3) is intended to transform the existing legal framework pertaining to evictions by requiring courts to take into account a range of considerations which are relevant to the purposes and values underlying the right of access to housing guaranteed in the Constitution. This includes the personal circumstances of the occupiers, whether meaningful engagement has taken place, and the provision of alternative accommodation to those facing homelessness.

4.11 Residents of Joe Slovo Community, Western Cape v Thubelisha Homes

The Court’s decision in Joe Slovo dealt with the implications of section 26 of the Constitution in circumstances where the State seeks to evict and relocate a large, settled community from their homes in order to facilitate a major housing development. In that case, the claimants numbering 20,000 people appealed to the Court to set aside an order for their eviction granted by the Cape High Court. The eviction was sought by Thubelisha Homes, the Minister of Housing and the Member of Executive Committee (MEC) for Housing in the Western Cape, all of whom argued that the eviction was necessary to implement the N2 Gateway housing project. The project involved the development of formal housing for low-income families on the site of the Joe Slovo informal settlement in which the occupiers resided. Thubelisha Homes, the housing company engaged by the State to implement the project, applied for the occupiers’ eviction in order to implement the project. It tendered to provide temporary accommodation at a new housing development near Delft, some 15 kilometres away from the settlement, where the occupiers could live until they were provided with permanent housing. Crucially, Thubelisha Homes did not undertake to ensure that the relocated occupiers would be provided with permanent housing within the N2 Gateway project. Thubelisha Homes was unable to say where or when permanent accommodation would be provided to the occupiers, after they had been relocated.
The occupiers argued their case on three broad grounds. The first was that they were not unlawful occupiers and could not therefore be lawfully evicted. The second was that the eviction was being sought to avoid giving effect to their legitimate expectation that 70% of the houses to be provided in the upgraded settlement at the N2 Gateway project would be allocated to them. The third was that the eviction order would not be just and equitable for two reasons. First, the eviction was sought without meaningful engagement, particularly on the option of upgrading the Joe Slovo settlement in situ without the need for relocation. Second, the eviction would, in any event, cause considerable hardship because the site to which they were to be relocated lacked social amenities such as hospitals and clinics. The claimants further argued that the proposed relocation site took them far away from their existing access to jobs and livelihoods. In most cases, the cost of commuting back to the occupiers’ jobs every month would likely double. Given the meagre incomes already earned by the occupiers, these costs could add up to half or more of their monthly incomes.

The Court was unanimous that there were no grounds for reviewing the reasonableness of the N2 Gateway Project, that an in situ upgrade of the land on which the Joe Slovo community was situated was not possible. The Court therefore endorsed the decision to relocate the community to a temporary resettlement area. The Court held that it was appropriate to afford State authorities a generous margin of discretion in relation to the relevant policy choices. There are five key features of the order handed down by the Court.114

First, the Court agreed with the High Court that an eviction order was just and equitable in the circumstances. A schedule for the eviction of the community over a ten-month period, commencing on 17 August 2009 and ending on 21 June 2010 was annexed to the Court’s order.116 Second, the eviction order was made on condition that the applicants be relocated to temporary residential units situated in Delft “or another appropriate location”. Significantly, the Court order contains a detailed specification of the nature and quality of the alternative accommodation which must be provided.117 Notably, the Court order imposes an obligation on the respondents to ensure that 70% of the new homes to be built on the site of the Joe Slovo informal settlement are allocated to those people who are currently resident there or who

114 See, for example, paras 115–116.
115 See para 7 of the judgement.
were resident there but voluntarily relocated to the TRUs in Delft after the N2 Gateway Housing Project had been launched.\(^{118}\) The order also required an ongoing process of meaningful engagement between the residents and respondents concerning various aspects of the eviction and relocation process.\(^{119}\)

It must be noted that to date, the eviction order has not been executed, and looks likely to be discharged. In the period between the hearing of the case and the handing down of the judgment, political control of the Western Cape Provincial Government passed from the African National Congress (ANC) to the Democratic Alliance (DA). The DA had always been critical of the implementation of the N2 Gateway project and soon agreed to revisit the relocation to Delft.

Liebenberg has argued that the transformative implications of *Joe Slovo* are undermined by the readiness of the Court to find that the inadequacies in the engagement process with the community facing eviction did not vitiate the ultimate decisions taken concerning the *Joe Slovo* community. The flawed nature of the engagement between the officials and community is described by the Court as follows:

> There can be no doubt that there were major failures of communication on the part of the authorities. The evidence suggests the frequent employment of a top-down approach where the purpose of reporting back to the community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision-making itself.\(^{120}\)

Such a top-down form of engagement represents the very opposite of “the need for structured, consistent and careful engagement” by “competent sensitive council workers skilled in engagement” which was endorsed by the Court in *Olivia Road*.\(^{121}\) Despite the above anomalies, the Court was prepared to conclude that the greater good which the N2 Gateway project sought to achieve outweighed the defects in the engagement process. Liebenberg has noted that such an approach fails to take into account the Court’s own insight that procedure and substance are inextricably connected. It must be noted that meaningful participation is indispensable to ensuring

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\(^{118}\) Para 7.Order para 17.  
\(^{119}\) Ibid.Order paras 5 & 11.  
\(^{120}\) Ibid para 378.  
\(^{121}\) *Occupiers of 51 Olivia Road* (note 15 above) para 19.
that both the design and implementation of programmes to realise socio-economic rights are effective and sustainable.\textsuperscript{122}

Nevertheless, the \textit{Joe Slovo} judgment signifies a very strong endorsement of the need for alternative accommodation as a critical factor in evaluating the justice and equity of evicting a large settled community. The Court’s approach though raises concerns regarding the ease with which organs of State may be able to justify not complying with the principles of procedural fairness and the constitutional tenets of meaningful engagement judicially endorsed in \textit{Olivia Road} and related cases.

\textbf{4.12. Mazibuko and others v City of Johannesburg and others (Mazibuko)}

\textit{Mazibuko} illustrates how the flexibility of the reasonableness test has allowed the Court to excessively defer the State’s socio-economic policy choices. In that case, the applicants, residents of Phiri, a poor township in Soweto brought a case against the City of Johannesburg, Johannesburg Water and the national minister responsible for water and forestry.\textsuperscript{123} The first issue that the Court was asked to determine was whether the City of Johannesburg’s policy with regard to the supply of free basic water of 6 kilolitres per household per month (Free Basic Water policy) was in conflict with the Water Services Act and the right of access to sufficient water in section 27 of the Constitution. Another key issue the Court was called upon to determine was whether the installation of prepaid water metres in Phiri which charged consumers for use of water in excess of the free basic water allowance was lawful.

The applicants argued that the City’s Free Basic Water (FBW) policy was unreasonable because it was insufficient to meet the basic needs of poor households. The applicants argued that the FBW was based on a per person per day calculation of 25 litres, whereas the international standard in the CESCR’s General Comment 15 on the right to water suggests that 50 litres per person per day is the minimum amount of water to meet basic human health and dignity needs.\textsuperscript{124} The applicants further argued that the 6 kl FBW policy was based on a calculation of 8

\textsuperscript{122} See Liebenberg \textit{Socio-Economic Rights} 309.

\textsuperscript{123} The matter was filed in the South Gauteng High Court in Johannesburg, in July 2006. The applicants identified two key issues: whether the city of Johannesburg’s policy of supplying 6 kilolitres of water free to every household in the city was in compliance with section 27 of the Constitution; and whether the installation of prepaid meters was lawful. For the South Gauteng High Court judgement see Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as amicus curiae) 2008 4 All SA 471 (W).

persons per household (defined as the number of persons living on a stand), whereas in Phiri there were commonly 15 or more people per household as most stands had backyard shacks that also had to share the one monthly FBW allocation. The FBW policy was not a reasonable policy capable of giving effect to the applicants’ right of access to sufficient water.

The applicants further argued that the decision by Johannesburg Water (Pty) Ltd (Johannesburg Water) to install prepayment water meters in Phiri amounted to administrative action and, because it was taken without consultation, violated section 4 (1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The applicants further argued that the automatic disconnection of prepayment water meters violated section 4 (3) (b) of the Water Services Act which requires reasonable notice and an opportunity to make representations prior to the limitation or discontinuation of water services.

The Court rejected these claims. Its judgment was remarkable for its apparent retreat from the contextual reasonableness standard adopted in Grootboom. The Court attached little significance to the facts that the applicants were desperately poor who had inadequate access to water. The Court did not enquire whether the City had a reasonable programme that was “capable of facilitating the realisation of the right” in the context of its implementation. The Court focused instead on a plethora of bureaucratic data on the difficulties the City allegedly faced in supplying water to Soweto. Liebenberg has noted that, whereas the Grootboom reasonableness standard required state conduct to be assessed in the light of the rights entrenched in the first subsections of section 27, in Mazibuko the Court was only prepared to use reasonableness as an “over-flexible, abstract and decontextualised standard of governance.” In Mazibuko, this rendered the reasonableness standard – upon which the applicants had based much of their claim not helpful as a standard of review.

The Court held that the right of access to sufficient water does not require the State to provide upon demand to every person with sufficient water. The right, according to the Court, only requires the State to take reasonable legislative and other measures progressively to realise the achievement of the right within available resources. The Court rejected the applicants' argument that the court should adopt a

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125 See for example Grootboom para 41.
126 Liebenberg Socio-Economic Rights 470.
quantified standard determining the content of the right not merely its minimum content.127

The Court further stated that the positive obligations imposed upon government by socio-economic rights will be enforced by courts where government fails to take steps to realise the rights. Courts will also intervene where measures adopted by the government are unreasonable or fail to give effect to the latter’s duty under the obligation of progressive realisation to continually review its policies.128

The Court therefore ruled that the City’s FBW policy fell within the bounds of reasonableness and therefore did not contravene either section 27 of the Constitution or national legislation regulating water services. The Court noted that the City of Johannesburg continually reconsidered and reviewed its policy and investigated ways and undertook research to ensure that the poorest inhabitants of the City gained access to water.129 The Court therefore found the City of Johannesburg’s free basic water policy not unreasonable.130

On the question of the constitutionality of the prepaid water meters, the Court held (contrary to the High Court and the Supreme Court of Appeal’s findings) that national legislation and the city’s own by-laws authorised the latter to introduce prepaid water meters.131 According to the Court, the cessation in water supply caused by a prepaid meter stopping is better understood as a temporary suspension in supply, not a discontinuation in water supply. In the Court’s view, the installation of pre-paid meters was therefore not in violation of the constitutional provision.132

Furthermore, the Court ruled that even if the pre-paid meter water system was discriminatory in its impact, it would not be unconstitutional “if it can be shown that the purpose for which the policy was introduced was not unfair for the purposes of section 9(3).”133 The Court further pointed out that the purpose of the measure was to eradicate severe water losses in Soweto hence it was a laudable objective.134 The Court also pointed out that credit meter users were also not afforded a choice to have a pre-payment meter system with its reduced tariffs unless certain strict conditions were satisfied. The Court therefore justified restricting consumer choice in altering the water delivery system on the basis of the substantial cost of the installation of

127 Para 50.
128 Paras 66-72.
129 Para 94.
130 Para 97.
131 Paras 157-158.
132 Paras 106-111 and 157-158.
133 Para 150.
134 Paras 150 and 154.
either system.\textsuperscript{135} The Court thus concluded that the installation of the pre-payment meter system did not constitute unfair discrimination in respect of the \textit{Phiri} residents.\textsuperscript{136}

Liebenberg has argued that the Court “adopted a particularly narrow frame of reference to its approach” in ascertaining the deleterious impact of the pre-payment meter system on impoverished communities.\textsuperscript{137} This is particularly the case with poor households who are only limited to the free basic provision of 6 kilolitres per household per month should they be unable to pay for additional water supplies. This has negative implications for the life, health and dignity of such communities. Additionally, the absence of procedural safeguards prior to the discontinuation of water supply services from a household should they fail to pay for additional water puts them at a further disadvantage.\textsuperscript{138} The Court should have done better by adopting a substantive and contextual conception of equality. The Court’s failure to do so resulted in its inability to appreciate the impacts of a prepaid system in comparison to a credit metered water supply system taking into account the socio-economic background of the community in question.\textsuperscript{139} This is because those households from the former white suburbs experiencing financial challenges in paying for their water consumption are afforded statutory procedural safeguards of notice. They are also entitled to make representations and, if need be, enter into an arrangement with the water services supplier for a staggered payment of any arrears on their water bills. Such safeguards are not available to poor households such as those in \textit{Phiri}. This has led Liebenberg to argue that:

“...The benefits afforded by the statutory procedural safeguards are not merely formal. In the context of a basic need and a fundamental constitutional right, they allow for an individualised consideration of the actual circumstances of the consumer. This is a critical safeguard against the impersonal disconnection of water services, particularly in circumstances that pose a threat to people’s lives, health and human dignity. The values of human dignity and equality are implicated when an impoverished community is denied the opportunity afforded to affluent communities of making

\textsuperscript{135} Para 155.
\textsuperscript{136} Paras 154 & 157.
\textsuperscript{137} Liebenberg \textit{Socio-Economic Rights} 478.
\textsuperscript{138} 478.
\textsuperscript{139} 478.
representations on their particular circumstances prior to the disconnection of their water supply."\textsuperscript{140}

Liebenberg has persuasively argued that the Court’s dismissal of the challenge to the sufficiency of the free basic water supply shows the limitations of a reasonableness review disconnected from a “substantive analysis of the normative purposes and values underpinning the relevant socio-economic rights.”\textsuperscript{141} Such an approach, according to Liebenberg, resulted in the Court failing to give any significance to the right of access to sufficient water enshrined in the South African Constitution. This was despite the applicants having argued for the Court to assess the reasonableness of the measures adopted by the City of Johannesburg in respect of the \textit{Phiri} community in light of the normative standards and values imposed by the right to water provided in the Constitution.\textsuperscript{142}

What is particularly noteworthy is that the Court failed to emphasise the City’s obligation to progressively improve the quality of access to water for the \textit{Phiri} community. Rather, the Court interpreted progressive realisation to imply the obligation of the State to continuously review its policies and to be flexible and adaptable to changing circumstances.\textsuperscript{143} Although such can be useful tools of accountability, they avoid the substantive dimension of progressive realisation.\textsuperscript{144} It is pertinent to refer to General Comment No 3 in which the CESCR defined the concept of progressive realisation as placing a substantive, positive obligation on the State to move expeditiously towards achieving the full realisation of socio-economic rights.\textsuperscript{145}

Although the Supreme Court of Appeal had upheld the argument that the installation of prepaid water meters had not been authorised by any law, the Court dismissed the various grounds on which the applicants challenged the legality of the prepaid water meters installed in the \textit{Phiri} community. The Court interpreted the City of Johannesburg’s by-laws to permit the installation of pre-paid meters.\textsuperscript{146}

\begin{footnotes}
\textsuperscript{140} 479.
\textsuperscript{141} 467.
\textsuperscript{142} Liebenberg argues that the relevant considerations which the City should have taken into account in exercising its discretion to provide more than the prescribed minimum amount of water include the basic water needs of the affected households, the impact on their life, health and dignity of restricting their free basic water supply to 25 liters per person per day and the available resources to the City. Liebenberg \textit{Socio-Economic Rights} 467-468.
\textsuperscript{143} Liebenberg \textit{Socio-Economic Rights} 470.
\textsuperscript{144} 470.
\textsuperscript{145} CESCR \textit{General Comment 3} (1990) para 9.
\textsuperscript{146} See Mazibuko paras 106-109.
\end{footnotes}
Geo Quinot has pointed out the absence of any detailed reference by the Court to the perilous personal circumstances of many of the residents of Phiri and the effect of the limitation of water introduced by Operation Gcin’amanzi on their lives.\textsuperscript{147} This is despite the detailed submissions made in that regard by the appellants in their papers to the Court. Quinot further points out that in its summary of the case’s background, the Court approached the facts from the perspective of the City of Johannesburg. For instance, the Court points out to “significant water losses in Soweto and the problem of non-payment,” “ostensible success” and “customer satisfaction” of the project.\textsuperscript{148}

The safeguards provided in section 4(3) of the Water Services Act are intended to apply to any interference in people’s access to water. Any exclusions from the procedural safeguards in section 4(3) need to be in express terms had this been the legislative intention.\textsuperscript{149} The Mazibuko decision shows that formalism pervaded the Court’s analysis of equality and procedural fairness rights raised by the applicants.\textsuperscript{150} Ultimately, the Court ended up engaging in a superficial analysis of the impact of the City of Johannesburg’s policies on the Phiri community.\textsuperscript{151}

\textbf{4.13. Abahlali Basemjondolo Movement SA v Premier of the Province of KwaZulu-Natal (Abahlali)}\textsuperscript{152}

In Abahlali the Court declared section 16 of the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 inconsistent with section 26(2) of the Constitution. Section 16 compelled owners of properties or municipalities to institute eviction proceedings against unlawful occupiers within a period determined by the responsible MEC by notice in the Gazette. The applicants argued that section 16 of the Slums Act, read together with various other provisions of the Act, constituted a regressive measure which retarded access to adequate housing, contrary to section 26 (2) of the Constitution. The Act allowed the MEC to set a deadline for the eviction of every single unlawful occupier in the province in one notice.

\textsuperscript{147} G Quinot “Substantive Reasoning in administrative-law Adjudication” (2010) 3 Constitutional Court Review 111 126.
\textsuperscript{148} 126.
\textsuperscript{149} Liebenberg Socio-Economic Rights 474.
\textsuperscript{150} 480.
\textsuperscript{151} 480.
\textsuperscript{152} Abahlali Basemjondolo Movement SA v Premier of the Province of KwaZulu-Natal [2009] ZACC 31
The applicants argued that section 16 was incompatible with section 26 of the Constitution. They argued that section 16 of the Act would merely encourage more State officials to abuse the law. The applicants further argued that section 16 was incapable of being implemented in consonance with the applicants’ constitutional rights protected under section 26 of the Constitution.

The Court agreed that section 16 of the Act was unconstitutional and held that section 26 of the Constitution, the PIE Act and the cases decided under these provisions had constructed a “dignified framework for the eviction of unlawful occupiers” and that section 16 was, on its face, incapable of an interpretation consistent with the framework. In reaching this conclusion, the Court suggested that eviction must normally be a measure of last resort; after all reasonable alternatives have been explored through engagement. The Court also suggested that where it is possible to upgrade an informal settlement in situ this must be done. Yacoob J’s dissenting judgement also affirmed that the obligation to meaningfully engage fell on private parties seeking eviction, and not just on the State, as had previously been thought.

While these principles might have been considered implicit in the jurisprudence on evictions before the Abahlali decision, their articulation by the Court confirmed the entitlements for poor people seeking to affirm their housing rights. After Abahlali, the failure to consider an upgrade of an informal settlement (as opposed to an eviction or relocation) probably renders the decision to evict or relocate reviewable. Claimants will also be able to propose alternatives to their eviction if these exist. These alternatives must now be explored prior to the institution of eviction proceedings.

4.14 Joseph and Others v City of Johannesburg (Joseph)

The Court emphasised the duty of public service providers to comply with procedural fairness requirements under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) before taking a decision to disconnect basic services.

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153Para 122.
154 Paras 113-115.
155 Para 114.
156 See para 69 of Yacoob J’s dissenting judgement.
In the *Joseph*,[^157] the applicants were lessees of a building who had paid the amounts owing for their monthly electricity bills to their landlord. The contract for purposes of providing electricity to residents was between landlord and City Power (a public entity formed by the City of Johannesburg). The landlord had responsibility for making payments for electricity consumption on the property. The property accumulated substantial arrears for unpaid electricity bills to City Power which resulted in the disconnection of the electricity supply by City Power. The applicants were left without power supply despite being up to date with their payments to the landlord for electricity supply.

The tenants argued that their electricity supply was unlawfully disconnected because the right of access to adequate housing implied a right to electricity in appropriate circumstances. Whatever those circumstances were, a disconnection of an existing electricity supply to a residential property affected their constitutional right of access to adequate housing. At the very least, they argued, they were entitled to procedural fairness before the decision to disconnect them was taken. This should include notice and a reasonable opportunity to make representations. City Power argued that the tenants had no right to electricity which was enforceable against it. While the owner of the property had a right to receive electricity in terms of his contract with City Power (and accordingly the right to notice prior to the disconnection of their supply) tenants had no such right in the absence of a direct contractual nexus between them and City Power.

The Court had to determine whether City Power was entitled to disconnect power supply to the property without notifying the applicants nor affording them with a hearing. According to the Court, the key issue was whether any “legal relationship exists between the applicants and City Power outside the bounds of contractual privity that entitles the applicants to procedural fairness before their household electricity supply is terminated.” Ultimately, the legal issues rested on a determination of whether the procedural fairness requirements under PAJA were applicable. According to the Court, “[t]he real issue is whether the broader constitutional relationship that exists between a public service provider and the members of the local community gives rise to rights that require the application of section 3 of PAJA.” The Court held that the local government is constitutionally obliged has an obligation to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider. In

[^157]: See *Joseph v City of Johannesburg* 2010 4 SA 55 (CC).
the Court’s view, power supply services are part of the services that local
government is expected to provide in fulfilling such basic needs. The applicants
(alongside all citizens) have a public law right to receive such basic services. The
Court held that City Power had a duty to comply with the requirements of procedural
fairness provided for under PAJA before taking a decision to disconnect the
applicants with their electricity supply. The Court did not decide whether the right to
housing implied a right to electricity.

The significance of the Joseph decision is that it opens up a range of new
possibilities for holding electricity providers accountable. At the very least, the steps
taken by electricity utilities which might affect existing supply will now have to be
taken in a procedurally fair manner as prescribed by PAJA. It is also possible that
utilities will also in future attract the obligations to act reasonably in deciding whether
or not to disconnect an electricity supply, by at least considering the consequences of
doing so.

4.15 Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others
(Nokotyana)

In Nokotyana case, occupiers of the Harry Gwala informal settlement near
Johannesburg approached the Court to compel the provision of toilets and high mast
street lighting pending a decision on whether the settlement was to be upgraded *in situ* or relocated to formal housing. The High Court had, by agreement between the
parties, ordered the municipality to expand provision of potable water in the
settlement and then dismissed the occupiers’ claims to toilets and street lighting.
Before the matter reached the Court, the municipality adopted a new policy in terms
of which every informal settlement within its jurisdiction would be provided with 1
chemical toilet per 10 households.

The occupiers criticised this policy as unreasonable in two respects. First, the
claimants argued that expecting 10 households to share 1 toilet compromised the
occupiers’ dignity. Second, the claimants argued that the occupiers should be given
Ventilated Improved Pit Latrines (VIPs), which was their preferred choice of toilet. By
the time the case reached the Court, the National Minister of Housing, the Director
General of Housing and the MEC for Housing in Gauteng province had been joined
to the proceedings. In light of the adoption of municipality’s new policy on the
provision of chemical toilets to informal settlements, the respondents offered to
provide additional funding to ensure that 1 chemical toilet could be provided to every four households in the Harry Gwala settlement. The occupiers and the municipality both rejected this offer on the basis that this would be unfair to other informal settlements within the municipality’s jurisdiction.\(^{158}\)

The occupiers also persisted in their demand for VIP toilets, provided at a frequency of 1 or 2 toilets per household. The occupiers relied on Chapters 12 and 13 of the National Housing Code.\(^{159}\) Chapter 12, adopted in response to the Court’s decision in *Grootboom*, regulates the provision of funds to municipalities to deal with emergency housing situations by providing temporary shelter and access to services. Chapter 13 deals with the upgrading of informal settlements.

The Court did not decide the issues placed before it by the occupiers. It noted that reliance on Chapter 12 of the National Housing Code was misplaced because the occupiers did not find themselves in a state of emergency, but rather an ongoing state of need. According to the Court, reliance on Chapter 13 of the Code was misplaced because that instrument only provided for the installation of interim services once a decision to upgrade an informal settlement had been taken. Having found that neither Chapter 12 nor Chapter 13 created the rights relied upon by the occupiers, the Court found that they could not rely directly on the Constitution either, because they had not challenged the failure of Chapter 12 or 13 to provide for interim services to an informal settlement pending a decision on whether to upgrade it.\(^{160}\) Although the occupiers challenged the new policy introduced on appeal, the Court did not entertain this.

The Court did, though, identify what it considered to be one of the “root causes of the applicants’ plight”.\(^{161}\) According to the Court, this was the failure of the MEC to take a decision on whether to upgrade the settlement in terms of Chapter 13. The Court directed that a decision be taken within 14 months of the date of its order.\(^{162}\) The Court also noted the municipality’s new policy and the municipality’s intention to implement it speedily.

*Nokotyana* is another example of the Court giving effect to socio-economic rights by identifying pre-existing government policy and requiring its prompt

\(^{158}\) Paras 53 and 54.

\(^{159}\) The National Housing Code has since been repackaged. For the “new” Emergency Housing Policy and Informal Settlement Upgrading Policy (which are substantially the same) see Volume 4 of the South African National Housing Code, 2009.

\(^{160}\) See paras 37-44.

\(^{161}\) Para 61.

\(^{162}\) Para 62.
implementation. The case also illustrates the Court’s reluctance to exercise its power to evaluate policy by reference to a *Grootboom*-type standard of substantive reasonableness.

It is however noteworthy that the Court, despite making an explicit observation that the community of the Harry Gwala Settlement was living in desperate circumstances, that their conditions would remain the same until the provincial Government makes a decision in accordance with Chapter 13 of the National Housing Code, and that their patience had been tested to the limit, still refused to make a finding that the policy in this regard was unreasonable for failing to cater for the immediate and short-term interests of those in desperate circumstances. It is submitted that failure to address the immediate needs of those in desperate circumstances constitute failure to comply with the reasonableness test as elaborated in the *Grootboom* and *Treatment Action Campaign* cases.

4.16 **Head of Department: Mpumalanga Department of Education v Hoerskool Ermelo**

In the *Ermelo* case, the Court handed down its judgment in an appeal against a decision of the Supreme Court of Appeal’s interpretation of section 22 of the South African Schools Act 84 of 1996. The Court ruled that the head of a provincial education department is entitled, on reasonable grounds, to withdraw the function of a governing body of a school to determine the language policy of the school.

The Court ruled that the reasonableness of the relevant grounds must be determined on a case-by-case basis, taking into account the impact of such a withdrawal on the well-being of the school, as well as the broad contextual framework of the Constitution, particularly the rights of access to education and the considerations pertaining to equity and historical redress in section 29.

The Court further held that in exercising its duties, including the power to determine a school’s language policy, a governing body should refrain from adopting an insular approach, focusing only on its existing learners and parents. In addition to promoting the best interests of its immediate constituencies, a school governing body must recognise “that it is entrusted with a public resource which must be managed … in the interests of the broader community in which the school is located and in the light of the values of our Constitution.”

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163 Head of Department: Mpumalanga Department of Education v Hoerskool Ermelo, para 80.
The Court, with a view to resolving the underlying dispute between the parties in a manner consistent with constitutional requirements, ordered the school governing body of Hoërskool Ermelo to review and determine a language policy in terms of s 6(2) of the Schools Act and in the light of the constitutional matrix outlined in the judgment. The Court further ordered the governing body to lodge a report on the process followed to determine such a language policy and a copy of the relevant policy with the Court by no later than 16 November 2009.

The Court’s approach is an endorsement of the principle that the Schools Act must be interpreted so as to promote the purposes and values underlying the right to education protected in section 29 of the Constitution. In particular, the responsibility of school governing bodies to determine the language policies of a school incorporates a broader social responsibility to ensure that the relevant policy promotes equitable access to education and ensures the redress of the results of past racially discriminatory laws and practices. As observed by the Court:

Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender...Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly deep social disparities and resultant social inequity are still with us.164

4.17 City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties39 (Pty) Ltd and Another (Blue Moonlight")165

In Blue Moonlight Properties case, the Court elaborated on the obligations of local government in the provision of emergency temporary accommodation under section 26 of the Constitution, the Housing Act and Chapter 12 of the Housing Code. Significantly, the Court locates these obligations in a system of cooperative governance and the broader framework of Chapter 7 of the Constitution and the Municipal Systems Act. Blue Moonlight is instructive on the duties imposed by the Constitution on municipalities in the exercise of their functions as local government authorities, although only in the context of emergency temporary accommodation.

164 Ibid para 45.
165 2012 (2) SA 104 (CC).
Blue Moonlight concerned 86 vulnerable and poor people in unlawful occupation of a property called Saratoga Avenue in Berea in the City of Johannesburg. The Court was called to pronounce on the ownership rights of Blue Moonlight, the owner of the building, under section 25 of the Constitution and the rights of the occupiers to have access to adequate housing in terms of section 26 of the Constitution. The Court also ruled on the obligations of the City in relation to these rights. The judgment in Blue Moonlight is instructive on the relationship between sections 25 and 26 of the Constitution. The Court’s judgement is also important in its iteration of the principle that evictions which result in homelessness are unlawful and the State that bears the constitutional obligation to facilitate access to housing and to provide it on an emergency basis where occupiers face homelessness on eviction. This the Court establishes by limiting section 25 rights, and by linking the eviction of the occupiers to the ability of the City to alternatively house them. Most of the occupiers did not have formal employment. Some were employed in the informal sector. Several resided on the property for many years and all submitted that on their eviction from Saratoga Avenue they would be homeless.

The claimants lived at the property with the permission of the owner until 1999 and paid rent to at least two different letting firms until 2004, when the property was purchased by Blue Moonlight with the intention to redevelop it. Blue Moonlight sought their eviction as early as June 2005 and in 2006 commenced eviction proceedings in the High Court under the PIE.

The High Court ordered the complainants’ eviction and held the City’s housing policy unconstitutional to the extent that it could not accommodate the occupiers since they were being evicted by a private landlord. The City was ordered to remedy the defect by providing the occupiers with temporary emergency alternate accommodation. The City was further ordered to report to the High Court on the steps it was taking to house the occupiers. The High Court also ordered the City to pay rental to Blue Moonlight for the continued occupation of its building, since Blue Moonlight had no obligation in law to continue housing the occupiers rent free. The City appealed to the Supreme Court of Appeal that part of the High Court order declaring its housing policy unconstitutional and the ruling that it pay rent to Blue Moonlight. The Supreme Court of Appeal upheld the eviction, set aside the rent order but in similar vein as the High Court found the City's housing policy unconstitutional for excluding the occupiers from consideration for temporary housing.
On appeal to the Court, the City argued against the finding that its housing policy was unconstitutional and that it provide alternate accommodation to the occupiers. The occupiers in turn cross-appealed seeking that any order for their eviction be linked to the provision of suitable alternate accommodation by the City. The Court held that the questions raised by the submissions are whether the occupiers must be evicted to allow the owner to fully exercise its rights regarding its property, and, if so, whether their eviction must be linked to an order that the City provide them with accommodation. The City's position was that it is neither obliged nor able to provide accommodation to the occupiers, and Blue Moonlight submitted that it simply wished to exercise its right to develop its property and wanted no part in the dispute about the City's responsibilities or the plight of the occupiers. The occupiers simply did not want to be homeless.

Since the eviction took place at the instance of a private landlord, the Court observed that the dispute raised the questions of "the rights of the owner in a constitutional and PIE era". The Court ruled that an owner's constitutional right not to be deprived of property, must be interpreted in a social and historical context and be balanced against the right of access to adequate housing and not to be evicted arbitrarily from one's home. The Court held that although unlawful occupation results in a deprivation of property under section 25(1) of the Constitution, the violation is constitutional since section 25(1) is limited by a law of general application (PIE), which was not arbitrary. Thus, even though housing unlawful occupiers indefinitely suspends an owner's right to use and enjoy property, evictions can only be carried out in terms of PIE, and are only permissible where just and equitable.

The Court held that the legal framework demonstrated that the City had an important role to play in the provision of housing and it could not be said that this role was secondary, limited and dependent on funding received from provincial government. According to the Court, it was common cause that on eviction from Saratoga Avenue the occupiers would be homeless, unless the City provided them with accommodation and that their situation constituted an emergency. The City for its part contended that its ability to do so was dependent on receiving funding from the province. This was based on its view that local government was not primarily responsible for the achievement of access to housing, which was incorrect.

The other significance of Blue Moonlight is that it propounded the position that where tenants are indigent and face the prospect of homelessness on eviction, the relevant local municipality must be joined as a necessary party to the proceedings.
The principle now seems to be that where an eviction has the potential to render occupiers homeless, local government is a necessary party to the proceedings. The municipality is further required to actively participate in proceedings by submitting a report on the steps that it will take to house occupiers who face homelessness. *Blue Moonlight* expressly provides that PIE as a law of general application, limits the right not be unlawfully deprived of property under section 25(1) of the Constitution. Although it acknowledges that since PIE does not make provision for expropriation and that an owner is not obliged in law to provide free lodging for indigent occupiers, PIE does sanction the limitation of an owner's right to use and enjoy property until a court of law has pronounced on whether it is just and equitable for the occupiers to be evicted. In the case of indigent occupiers, the case law is unanimous and *Blue Moonlight* confirms the position that courts will be reluctant to order the eviction of occupiers that face homelessness. *Blue Moonlight* applies this principle by linking the eviction of the occupiers to an order that the City provide them with alternate accommodation.

*Blue Moonlight* is also significant in that it imposes on local government the obligation to alternatively house vulnerable occupiers on an emergency basis, where on eviction they will be rendered homeless. The Court's order in *Blue Moonlight* is mindful of the landlord's ownership rights, hence the Court ruled that *Blue Moonlight* was entitled to its eviction order. However, in an effort to create some form of legal security of tenure for the occupiers, the eviction order is linked to a ruling compelling the City to house the occupiers and to make such accommodation available well before their scheduled date of eviction. *Blue Moonlight* could also serve as authority to stay pending eviction applications until such time that local government engages meaningfully with unlawful occupiers on their eviction, its consequences and future temporary housing solutions. The State's failure to carry out its constitutional obligations may well serve the basis of an application to compel either the furnishing of a report or alternative accommodation.

4.18 Occupiers of Portion R25 of the Farm Mooiplaats 355JR v Golden Thread Limited and Another

In *Occupiers of Portion R25 of the Farm Mooiplaats 355JR v Golden Thread Limited and Another ("Mooiplaats")* the Court handed down judgement in a case involving
170 families who unlawfully occupied certain land within the City of Tshwane Municipality owned by a private entity, Golden Thread Limited. The applicants appealed against an order of the Pretoria High Court evicting them from the land on the basis that their eviction was just and equitable. The City had been joined in the proceedings in the High Court but took no part in them. The High Court did not order the City to provide any information about the steps that could be taken against the possible homelessness of the occupiers as a result of the eviction.

In a unanimous judgement, the Court ruled that in the circumstances of the case, where a large number of families would be rendered homeless, the High Court should have closely investigated the question of whether their eviction was just and equitable. Furthermore, it should have enjoined the City to furnish certain information about the occupiers and, in particular, the steps the City could take to provide emergency housing. The Court ruled that in order to make this determination whether the eviction is just and equitable, the Court will have to consider the circumstances of the occupiers and, critically, the issue of whether the City is able to provide alternative accommodation. For this purpose, the City must place the relevant information before the court before it can make a determination on whether or not there should be an eviction. The Blue Moonlight case discussed above is clear that the City has the obligation to provide alternative accommodation within its available resources and this in itself will require the City to place relevant information before the court. Therefore in Mooiplaats the Court held that it was impossible for the High Court to determine whether an eviction of the occupiers would be just and equitable without investigating the aspect of whether the City was reasonably capable of providing alternative accommodation. The Court therefore set aside the order of eviction and remitted the matter back to the High Court and ordered the City to file a report in the High Court, confirmed by affidavit, covering various issues including the steps it has taken, is able to take and intends to take to provide alternative land or housing as emergency accommodation for the occupiers if they are evicted.

4.19 Elsie Gundwana v Steko Development CC and Others

In the Gundwana case, the applicant woman living in Thembalethu township outside George, appealed to the Court against an order evicting her from her home. The case challenged the constitutionality of granting orders authorising sales in execution of residential property without judicial oversight. The Court declared that Rule 31 (5)
of the Uniform Rules of Court constitutionally invalid to the extent that they permitted a High Court registrar to authorise the sale of a person’s home. The judgment means that banks that wish to execute on mortgage bonds must approach a Judge and show why the sale of a person’s home would be justifiable in the circumstances of a particular case.

The applicant petitioned the Court to set aside the sale of her home (and a subsequent eviction order) after Nedcor bank sold the house. Nedcor did so in order to recover a sum of R5268 in arrears owed to it for a bond over her home. The applicant argued that the process by which the bank had sold the property in execution was unconstitutional because the Registrar of the High Court should not be empowered to take away ownership of a home. That function, she argued, should be reserved for a Judge, who must carefully weigh the circumstances of a case before deciding whether a sale in execution can be justified. One of the most important factors will always be the amount a bond holder is in arrears at the time the bank seeks to execute. It may not be justifiable to order a sale where the amount of the debt outstanding is very small and there are other ways to collect a debt.

The applicant further argued that it was for a Judge, not a Registrar, to consider that question. In its discussion of Jaftha, the Court pointed out the difference in rules for declaring property specially executable in the Magistrates Courts (as discussed in Jafta) and the High Courts. Section 66 (1)(a) of the Magistrates Courts Act, 1944 is more stringent than its High Court counterpart and the banks have exploited this inconsistency by seeking these orders in the High Court even in instances that fall within the jurisdiction of the Magistrates Court. In terms of section 27A of the Supreme Court Act, 1959, default judgment may be granted in the High Courts by the Registrar in accordance with Rule 31(5) of the High Court Rules. This Rule makes no explicit reference to orders declaring mortgaged property specially executable. Declaring mortgaged property specially executable thus became an “executive matter which is dealt with by the Registrar”.

The Court unanimously agreed. The Court held that “where execution against the homes of indigent debtors who run the risk of losing their security of tenure is sought after a judgment on a money debt, further judicial oversight by a court of law…is a must”. The Court went on to hold that while execution against mortgaged property is an ordinary part of economic life, an agreement to put one’s property at risk as security in a mortgage does not equate to a license for banks to sell a property in bad faith, or where it would otherwise be a disproportionate way to
recover a debt. The Court accordingly declared Rule 31 (5) unconstitutional, set aside the eviction order made against the applicant, and referred the case back to the High Court for her to challenge the sale of her home on the particular facts of her case.

4.20 Kabelo Betlane v Shelly Court CC ('Betlane')167

In Betlane the applicant appealed to the Court against five orders of the South Gauteng High Court. The orders were granted against him whilst he was litigating without legal representation. The first order evicted the applicant from his home; the second order dismissed his application to reverse the execution of the eviction order, which was carried out unlawfully, while his application for leave to appeal it was pending; the third, fourth and fifth orders dismissed his attempts to appeal or rescind the first two orders, and restrained him from approaching the High Court again before he had satisfied various costs orders granted against him.

In a unanimous judgement, the Court dismissed the application for direct access to set aside a series of orders restraining the applicant from approaching the High Court and the Supreme Court of Appeal to challenge an eviction order, because the orders had been abandoned by the respondent (Shelly Court) shortly before the hearing. It also dismissed the application for leave to appeal against the eviction order itself. The Court, however, did set aside a writ of execution on which the applicant was evicted from his home. This was because an earlier appeal against the eviction order was still pending at the time the writ was issued and because the writ was issued by the registrar in the absence of a court order authorising interim execution of the eviction. Such an order is required by Rule 49 (12) of the Uniform Rules of Court.

4.21 Maphango and Others v Aengus Lifestyle Properties168

The Maphango case concerned an eviction that arose from a rental dispute between tenants of a Johannesburg apartment building and their landlord. The applicant and fourteen other residents (tenants) of the Lowliebenhof apartment block in Braamfontein challenged the cancellation of their leases by their landlord, Aengus

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167 2011 (1) SA 388 (CC).
168 2012 (3) SA 531 (CC).
Lifestyle Properties, a property investment company. Each of the tenants had a lease that ran for a specified period and continued automatically unless either the landlord or the tenant terminated it with written notice.

After purchasing and upgrading the building, the landlord exercised its power to cancel the tenants’ leases, by giving the required written notice. However, the landlord offered each of the tenants an opportunity to enter into a new lease on the same terms, but at much higher rentals. The tenants, in response, lodged a complaint with the Gauteng Rental Housing Tribunal (Tribunal), a body established under the Rental Housing Act. Following an unsuccessful mediation, the matter was referred to arbitration, but the tenants withdrew their complaint after the landlord brought eviction proceedings against them in the South Gauteng High Court.

Both the High Court and the Supreme Court of Appeal found that the Act did not apply and that, under the common law, the landlord was entitled to terminate the lease agreements by relying on the power to cancel them on written notice. The landlord’s conduct in doing so could not be seen as oppressive or unfair. The order of eviction granted by the High Court was thus upheld by the Supreme Court of Appeal.

On appeal, the Court held that the critical question was whether the landlord was entitled to exercise the bare power of termination in the leases for the sole purpose of securing higher rentals. The Court found that the High Court and Supreme Court of Appeal failed to give adequate weight to the Act and that the landlord’s conduct may have amounted to an “unfair practice”. According to the Court, the Tribunal is empowered to determine whether a landlord committed an “unfair practice”, and it might accordingly have ruled in the tenants’ favour.

The Court held that the Act takes account of market forces as well as the need to protect landlords and tenants. Its most potent provisions are those at the centre of the dispute in this case, namely termination of a lease and rental determinations that are just and equitable. The Court further held that the tenants, while withdrawing their complaint from the Tribunal, never abandoned their claim that the landlord engaged in an “unfair practice”, and persisted in asserting it before all courts. That complaint, and any the landlord might choose to lodge about the rental rate, should therefore be considered by the Tribunal. The Court therefore postponed the appeal, and gave both parties until 2 May 2012 to lodge a complaint with the Tribunal. It also allowed the parties to seek leave to apply to the Court following the Tribunal’s decision.
4.22. Pheko and 777 Others v Ekurhuleni Metropolitan Municipality (Pheko)

In the *Pheko* case, the Court had to decide the lawfulness of the sudden relocation of hundreds of families that resided in the Baspfontein Informal Settlement and the Demolition of their homes. The applicants are several hundred former occupiers of the Baspfontein informal settlement who were evicted and relocated over a distance of approximately 30 kms from their homes. There was no court order authorising their eviction. The Ekurhuleni Metropolitan Municipality claimed the authority to do so in terms of a directive issued section under 55 (2) of the Disaster Management Act 57 of 2002, mandating the applicants’ evacuation to temporary shelter. The applicants argued that the directive did not provide a lawful basis for the relocation of the occupiers because:

i. The occupiers did not consent to the relocation;

ii. There was no court order authorising the relocation, contrary to section 26 (3) of the Constitution;

iii. The Disaster Management Act does not purport to limit the right not to be evicted without a court order and would not, if it did, meet the requirements for a limitation of rights set out in section 36 of the Constitution.

The Court held that the actions of the municipality - in forcibly removing the residents of Baspfontein and demolishing their homes without a court order, allegedly as a result of the imminent danger created by sinkholes in the area - was unauthorised in law and contrary to section 26(3) of the Constitution. The Court declared the municipality’s removal of thousands of people from Baspfontein unlawful, and ordered the municipality to provide land to the evictees “within the immediate vicinity of Baspfontein”.

4.23 Sebola and Another v Standard Bank of South Africa Limited and 4 Others

In *Sebola* v *Standard Bank*, the applicants entered into a home loan agreement with Standard Bank. The agreement allowed for notices to be sent to an address chosen by the applicants. When the applicants defaulted on their home loan, Standard Bank

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169 2012 (2) SA 598 (CC).
170 2012 (5) SA 142 (CC).
sent a section 129 letter by registered post to the selected address. The letter was, however, delivered to the wrong post office and the applicants never received the letter. Standard Bank proceeded by taking judgement against the applicants and obtained a warrant of execution against the property.

During a High Court application for rescission of the judgement (where it was established that the applicants did not receive the notice), the court rejected the argument which stated that the National Credit Act does not require actual delivery of the section 129 letter. The High Court held that it was sufficient for the credit provider to show that it had sent the notice to the consumer’s chosen address – the credit provider need not show that the consumer actually received the notice. The applicants took the matter to the Court and argued that the National Credit Act must be constitutionally interpreted to give effect to the protections envisioned therein.

The Court ruled that the credit provider must be able to prove that the notice has been delivered to the consumer. This can be done by proving that the letter was sent by registered mail to the consumer’s address and that the notice reached the appropriate post office for delivery to the consumer. If the credit provider cannot prove the above, the credit provider cannot execute against the property until it has met the requirements of the act. According to the Court, this means that in future credit providers must be able to show that they have sent the letter by registered mail as well as that it has obtained a track and trace printout from the post office to show that the letter was indeed delivered to the correct post office.

4.24. Schubart Park Residents’ Association and Others v City of Tshwane Metropolitan Municipality and Another 2013 (1) SA 323 (CC)

The Schubart Park case involving the residents of the Schubart Park residential complex, situated in the City of Tshwane, Metropolitan Municipality. On 21 September 2011, following a two week discontinuation of electricity and water supply to the buildings, a number of residents embarked on protest action that rapidly turned violent. The law enforcement authorities attempted to control the situation by removing the residents from one of the blocks and restricting access to the complex. By the end of September more than 700 families were either on the streets or in temporary shelter.

171 2013 (1) SA 323 (CC).
The residents unsuccessfully sought an urgent court order against the City for re-occupation of their homes. The North Gauteng High Court (High Court) held the buildings to be unsafe and ordered the parties to engage and reach an amicable agreement on temporary shelter and alternative housing pending the outcome of the enquiry into the possible refurbishment of the complex. The parties were unable to reach a settlement. The High Court made a final order which required the City to provide temporary housing until the complex had been refurbished and to relocate the residents into the complex subsequent to the refurbishment. However, if renovation was not possible and the complex had to be demolished, residents were entitled to alternative accommodation.

In a unanimous judgment, the Court held that the dismissal of the application for immediate restoration of the residents’ occupation of their homes could not serve the purpose of an eviction court order required under section 26(3) of the Constitution. According to the Court, the High Court order should have made it clear that its order operated merely temporarily and that the residents were entitled to return to their homes once it was safe to do so. The Court set aside the High Court orders and declared that the High Court orders did not constitute an order for the residents’ eviction as required by section 26(3) of the Constitution and that the residents were entitled to occupation of their homes as soon as reasonably possible. To give effect to the declaratory order, the Court directed the residents and the City to engage meaningfully with one another on what plans have been agreed upon to provide alternative accommodation to residents and to report to the High Court by 30 November 2012 on the progress. The Court further ordered that the applicants and the City of Tshwane Metropolitan Municipality must, through their representatives, engage meaningfully with each other in order to give effect to this declaratory order.

4.25. Governing Body of Juma Musjid Primary School and Others v Essay NO and Others (‘Juma Musjid’)172

The Juma Musjid case concerned the right to a basic education where a private property owner sought to evict a public school conducted on its property. The applicants, the School Governing Body (SGB) of the Juma Musjid Primary School

(school) and the parents and guardians of the learners enrolled at the school, appealed against an order granted by the KwaZulu-Natal High Court which upheld the Juma Masjid Trust’s (Trust) application to evict the MEC for Education, KwaZulu-Natal (MEC) and, effectively, the learners and educators of the school, from the private premises owned by the Trust.

The High Court held that: (a) the Trust was not performing a public function that required it to observe fair process towards the school; (b) the Trust owed no constitutional obligations to the MEC or to the learners at the school; and (c) the Trust’s right to property in terms of section 25 of the Constitution must be respected. The High Court further held that the obligation to respect the learners’ right to a basic education lies with the MEC, and not with the Trust.

On appeal to the Court, the SGB challenged the conduct of, firstly, the Trust in enforcing its rights under section 25 of the Constitution as a private owner of land; secondly, the High Court in its failure to exercise its constitutional obligation to develop the common law to protect the learners and thirdly, the High Court’s failure to craft an appropriate order. Finally, the SGB contended that, in making its decision, the High Court failed to take into account the importance of the best interests of the children.

The Court provisionally set aside the eviction order made by the High Court. It held that the order had an impact on the learners’ right to a basic education under section 29(1) of the Constitution and on the learners’ best interests under section 28 of the Constitution. The Court further ruled that the Trustee had a constitutional duty to respect the learners’ right to a basic education under section 29 of the Constitution. The Court, however, held that Trustees had acted reasonably in approaching the High Court for an eviction order but that was not sufficient reason for the High Court to grant the eviction order. The Court further held that in considering the eviction application, the High Court failed to consider properly the best interests of the learners and their right to a basic education. The Court held that the MEC had a primary positive obligation to provide access to schools in respecting the learners’ right to a basic education, but the Trustees had a negative obligation in terms of Section 8 of the Constitution not to infringe that right.

Since it was towards the end of the 2010 school-year, the Court issued a provisional order which directed the MEC to engage meaningfully with the Trustees and the SGB in an effort to resolve the dispute to allow for the continued operation of the school. If this failed, the Court ordered the MEC to take steps to secure
alternative placements for the learners. The Court further ordered the MEC to file a report setting out, among other things, the steps she had taken to ensure that the learners’ right to a basic education was respected. The Trustees were granted leave to apply directly to the Court for an order that would be just and equitable, including an eviction order.

The parties were heard for a second time on the 25 November 2010 and the Court received the first report submitted by the MEC. The Court took note that the closure of the school had become inevitable. The parties had not reached an agreement and the dispute remained unresolved. As a result, the Court ordered the MEC to submit a further report to indicate that the MEC complied with the obligation to provide alternative schooling.

A second report was then filed by the MEC setting out sufficient information regarding the schools where the learners would continue their schooling. The Court was satisfied that alternative arrangements for the placement of the children for the 2011 school-year had been made and that the learners’ right to a basic education would be protected. The Court then considered the eviction application by the Trust and was satisfied that a case for eviction had been established and the learners’ rights had been given effect to. The final eviction order was granted on 11 December 2010.

4.26. **Motswagae and Others v Rustenburg Local Municipality and Another (Motswagae)**\(^{173}\)

The *Motswagae* case, handed down by the Court on 7 February 2013, concerned the constraints placed upon municipalities when entering land on which people’s homes are situated. The applicants’ dilapidated homes are situated on land owned by the Rustenburg Local Municipality (Municipality). The Municipality engaged a contractor to carry out work on the land as part of a housing development project. The contractor entered the property and excavated the outer wall of the home of one of the applicants with a bulldozer, exposing its foundations. The applicants applied to the North West High Court, Mafikeng for an interdict restraining the Municipality and the contractor from performing this construction work. The High Court refused the application because the applicants were not being ejected from their homes and their

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\(^{173}\) CCT 42/12.
privacy was not disturbed. The applicants challenged the High Court judgment and order.

In a unanimous judgment, the Court held that the applicants’ constitutional right not to be evicted from their homes without a court order guarantees their peaceful and undisturbed occupation of their homes. Having found that the work of the Municipality interfered substantially with the applicants’ peaceful and undisturbed enjoyment of their homes, the Court interdicted the Municipality from performing any work where the applicants’ homes are situated without their written consent or a court order. The following section identifies and discusses the key issues emerging from the Court’s socio-economic rights jurisprudence.

5 Main themes and issues arising from the Court’s jurisprudence

5.1 Textual formulation of the socio-economic rights in the Constitution

The core set of socio-economic rights from which much of the Court’s jurisprudence has emanated are those protected under sections 26, 27, 28(1)(c), 29(1) and (2) and 35(2)(e) of the Constitution. Section 26(1) entrenches the right of everyone “to have access to adequate housing”, and section 27(1) protects the right of everyone “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”. It is significant to note that the first sections are qualified by a second subsection, which reads that the “State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”. Section 26(3) provides that:

   No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

   Additionally, section 27(3) provides that “[n]o one may be refused emergency medical treatment.” In addition, the Constitution entrenches a set of basic socio-economic rights for children within the context of section 28, a special clause devoted to children’s rights. Section 28(1)(c) confers upon every child the right “to basic
nutrition, shelter, basic health care services and social services”. Section 29(1) of the Constitution protects educational rights by conferring on everyone the right (a) “to a basic education, including adult basic education; and (b) to a further education, which the State, through reasonable measures, must make progressively available and accessible”. Section 29(2) gives everyone the “right to receive education in the official languages of their choice in public educational institutions where that education is reasonably practicable”.

Section 29(3) gives everyone a qualified right to establish and maintain, at their own expense, independent educational institutions that (a) do not discriminate on the basis of race among others. Persons deprived of their liberty are also guaranteed a special set of socio-economic rights. Section 35(2)(e) of the Constitution provides that everyone “who is detained, including every sentenced prisoner” has the right “to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment”.

It can therefore be observed that there are three basic formulations used in the socio-economic rights provisions entrenched in the Constitution. The rights in the first two subsections of sections 26 and 27 are defined in terms of a right of “access to” the relevant socio-economic goods and services rather than a “right to”. Also noteworthy is the fact that the duty on the State to realise these rights is explicitly qualified by the phrases, “reasonable legislative and other measures”, “available resources”, and “progressive realisation”. The right to “further education” is not phrased as an “access” right, but is qualified in terms similar to the latter rights. The right to receive education in the official language of one’s choice is qualified according to the criterion of reasonable practicability.

Second, certain socio-economic rights are formulated as direct entitlements without the internal qualifying phrases contained in sections 26 and 27. These provisions relate to the right to basic education, and the socio-economic rights of children and persons deprived of their liberty.\(^{174}\)

The third type of formulation takes the form of prohibitions on arbitrary evictions and demolitions and the refusal of emergency medical treatment respectively. The way in which these rights have been interpreted in the jurisprudence is reflected in the Soobramoney case discussed above. Section 7(2)

\(^{174}\) See sections 28 & 35 of the Constitution.
places a duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights.

5.2 Legal standing

The expansive and generous provisions on legal standing (*locus standi*) contained in the Bill of Rights are of particular importance for the practical justiciability of socio-economic rights.

Section 38 confers standing on a broad category of persons who allege that a right in the Bill of Rights has been infringed or threatened to approach a competent court for appropriate relief. This includes anyone acting in their own interest or on behalf of persons who cannot act in their own name, class actions, actions in the public interest, and associations acting in the interest of their members.\(^\text{175}\) The Court has given a broad interpretation to the standing provisions in section 38 requiring only an allegation that, objectively speaking, a right entrenched in the Bill of Rights has been infringed or threatened, and that the parties seeking relief have a sufficient interest in obtaining the remedy they seek.\(^\text{176}\)

A broad and generous approach to legal standing is essential to facilitate the ability of communities and groups living in poverty to vindicate their socio-economic rights.\(^\text{177}\) Permitting legal standing on this basis enables any breaches of socio-economic rights to be redressed which could not otherwise be brought because of the financial and practical difficulties associated with the joinder of a large and disparate affected group or the complexity of class action proceedings. Significantly, public interest actions are also well suited, not only to the redress of past wrongs, but also to deter and prevent future rights violations.\(^\text{178}\)

5.3 Reasonableness approach

The reasonableness of the State’s conduct or omissions should be assessed in the light of the values and interests which the rights protect, the impact of the deprivation on the claimant group, and the state’s resource and other justifications for failing to extend access to the relevant rights.

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175 Section 38(a)–(e) of the Constitution.
176 *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) paras 165–167.
177 See Liebenberg *Socio-Economic Rights* 88.
178 See Liebenberg *Socio-Economic Rights* 89.
As noted above, the Court dismissed arguments submitted by *amici* in favour of a minimum core obligation in cases such as *Grootboom*, *TAC* and *Mazibuko*. In the *Grootboom case*, the Court proceeded to develop a model of reasonableness review for adjudicating the positive duties imposed by sections 26 and 27. The Court pointed out that in reviewing these positive duties, the key question that the Court asks is whether the means chosen are reasonably capable of facilitating the realisation of the socio-economic rights in question.\(^{179}\) The Court’s approach is designed to allow government a margin of discretion relating to the specific policy choices adopted to give effect to socio-economic rights. According to the Court, “a court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.”\(^{180}\)

In the *Soobramoney*, the Court adopted of a standard of rationality scrutiny for socio-economic rights claims. In *Grootboom* and *Treatment Action Campaign* proceeded to develop a more substantive set of criteria for assessing the reasonableness of the State’s acts or omissions. The Court explained that a reasonable government programme in the context of socio-economic rights will have the following features:

i. It must be capable of facilitating the realisation of the right;\(^{181}\)

ii. It must be comprehensive, coherent, co-ordinated;\(^{182}\)

iii. Appropriate financial and human resources must be made available for the programme;\(^{183}\)

iv. It must be balanced and flexible\(^{184}\) and make appropriate provision for short-, medium- and long-term needs;\(^{185}\)

v. It must be reasonably conceived and implemented;\(^{186}\)

\(^{179}\) See *Grootboom* para 41.

\(^{180}\) Para 41.

\(^{181}\) *Grootboom* para 41.

\(^{182}\) paras 39 and 40.

\(^{183}\) para 39.

\(^{184}\) paras 68, 78, 95.

\(^{185}\) para 43.
vi. It must be transparent, and its contents must be made known effectively to the public.\textsuperscript{187}

vii. It must make short-term provision for those whose needs are urgent and who are living in intolerable conditions.\textsuperscript{188}

The Court further elaborated on the last element and its role in the assessment of the reasonableness of the government’s measures in the following terms:

To be reasonable, measures cannot leave out of account, the degree and extent of the denial of the right they endeavour to realise. Those whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.\textsuperscript{189}

It must be noted that the assessment of the reasonableness of government programmes is influenced by two further criteria derived from sections 26(2) and 27(2) of the Constitution. These are the concepts of “progressive realisation” and “availability of resources”. These are discussed below.

### 5.4 Criticism of the reasonableness approach jurisprudence

The model of reasonableness review adopted by the Court for adjudicating the positive duties imposed by socio-economic rights has been criticised for amounting to an administrative law model which does not engage in a sufficiently substantive analysis of the content of socio-economic rights and the obligations they impose. It has been argued that the vagueness and openness of the reasonableness inquiry allow courts to avoid giving clear normative content to socio-economic rights. In part, the notion of minimum core obligations constitutes an attempt to respond to this critique of reasonableness review by carving out a clear normative content for socio-

\begin{footnotesize}
\begin{enumerate}
\itemparas 40–43.
\item \textit{Treatment Action Campaign} (note 5 above) para 123.
\item \textit{Grootboom} (note 3 above) paras 44, 64, 68, 99; \textit{Treatment Action Campaign} (note 5 above) para 78.
\item \textit{Grootboom} (note 3 above) para 44.
\end{enumerate}
\end{footnotesize}
economic rights. It has been questioned whether the Court’s reasonableness review jurisprudence sufficiently defines the content of the relevant socio-economic rights, and protects those who are experiencing severe deprivation of minimum essential levels of basic socio-economic goods and services. This category of claimants is in danger of suffering irreparable harm to their lives, health and human dignity if they do not receive urgent assistance.

Woolman and Botha elucidate the differing nature of the inquiry which takes place during the first and second stages of constitutional analysis.\(^{190}\) The first stage is concerned with developing the content of the relevant right and evaluating whether the respondent’s conduct or omissions infringes the right. The second stage entails an inquiry into the respondent’s purposes for limiting the right and an inquiry into the proportionality of the means chosen to achieve this purpose, including a consideration of less restrictive means.\(^{191}\)

Liebenberg has pointed out that the reasonableness model of review offers no clear distinction between determining the scope of the right, whether it has been breached, and justifications for possible infringements. In Grootboom, the Court held that the overarching obligation of the State in terms of section 26 was the adoption of a comprehensive, co-ordinated programme which must be capable of facilitating the realisation of the right.\(^{192}\) In the TAC case, there is even less engagement with the scope and content of the right of access to “health care services, including reproductive health care” protected in section 27(1). Similarly, in the Khosa case, while the Court emphasises the significance of the values of human dignity and equality in evaluating the reasonableness of the exclusion of permanent residents from the social assistance legislation, it engages only very superficially with the content or scope of the social security and assistance rights in s 27(1)(c).\(^{193}\) In other words, the Court has failed to develop an independent interpretation of the rights in the first sub-sections of sections 26 and 27.\(^{194}\) Bilchitz points out that until some understanding is developed of the content of the right in question, the assessment of whether the measures adopted by the State are reasonably capable of facilitating its realisation takes place in a normative vacuum.

\(^{191}\) Section 36(1)(e).
\(^{192}\) Grootboom (note 3 above) para 41
\(^{193}\) See the very brief treatment of the ambit of the right of access to social security in terms of s 27(1)(c) in Khosa ibid paras 46–47.
\(^{194}\) Liebenberg 176.
The reasonableness approach as a model of review has also been criticised for allegedly creating only an indirect entitlement to the formulation and implementation of a reasonable government programme. Such jurisprudence does not confer any direct entitlements on individuals and groups to claim concrete resources and services from the State. For instance, in *Grootboom*, the Court asserted that “[n]either s 26 nor s 28 entitles the respondents to claim shelter or housing immediately upon demand”, and therefore the High Court order ought not to have been made. According to the Court, the State’s obligation imposed by section 26 was to devise and implement a coherent, co-ordinated program designed to meet its section 26 obligations. The Court proceeded in the case to grant a declaratory order concerning the State’s obligation to devise and implement a reasonable housing programme, incorporating reasonable measures to provide relief for those in urgent housing need, and living in “intolerable conditions or crisis situations”.

5.5 *Progressive Realisation*

The Court interprets “progressive realisation” to mean the dismantling of a range of legal, administrative, operational and financial obstacles which impede access to the rights, and the expansion over time of such access, to a larger number and broader range of people. The concept of progressive realisation is a reflection of the resource-dependant nature of State obligations in relation to socio-economic rights such as the right to water. It also reflects the complexity of access to socio-economic rights given entrenched structural patterns of the economy and systematic disadvantage. South Africa is a case in point where, as a result of apartheid policies, the black majority was subjected to systemic deprivation and discrimination in accessing basic services such as water, healthcare, housing, food, education and social security. Article 2(1) of the ICESCR enjoins States to take the necessary steps towards “achieving progressively the full realisation of the rights recognised in [the ICESCR].” The CESCR has pointed out that progressive realisation constitutes acknowledgement that the full enjoyment of socio-economic rights will generally not be able to be achieved in a short period of time.

The term “progressive realisation” shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the

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195 *Grootboom* (note 3 above) para 45.
196 See Liebenberg *Socio-Economic Rights* xxvi.
197 CESCR *General Comment 3* (1990) para 9.
basic needs of all in our society be effectively met and the requirement of progressive
realisation means that the State must take steps to achieve this goal. It means that
accessibility should be progressively facilitated: legal, administrative, operational and
financial hurdles should be examined and, where possible, lowered over time. Housing
must be made more accessible not only to a larger number of people but to a wider
range of people as time progresses.198 Full realisation of all human rights requires States
to develop policies which progressively ensure the realisation of the relevant rights.199
This does not imply that States have unfettered discretion to do as they please when it
comes to the fulfillment of socio-economic rights under the ICESCR.200 In the Grootboom
case, for instance, the Court interpreted progressive realisation to mean the dismantling of a range of legal, administrative, operational and financial obstacles which impede access to the rights. Bilchitz has explained this
approach in the context of the right to adequate housing in the South African Constitution, arguing that:

“Progressive realisation involves an improvement in the adequacy of housing for the
meeting of human interests. It does not mean some receive housing now, and others
receive it later; rather, it means that each is entitled as a matter of priority to basic
housing provision, which the government is required to improve gradually over
time.”201

Liebenberg further points out that in the case of pressing resource constraints in the
provision of basic services such as water, it is important that the needs of marginalised and disadvantaged groups should receive particular attention.202 Progressive realisation, according to Liebenberg, must be understood to entail the State’s obligation to improve the nature and quality of the services to which people have access.203 This means that the standard of socio-economic goods and services provided should be adequate, sufficient and acceptable.

Progressive realisation, it must be noted, can also assist a claimant to establish the unreasonableness of a State’s acts or omission where a State has not

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198 Grootboom (note 3 above) para 45.
199 129.
200 E Riedel “Economic, Social and Cultural Rights” in C Krause & M Scheinin International Protection
201 D Bilchitz Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic
202 188.
203 Liebenberg Socio-Economic Rights 188.
taken timely or effective steps in realising the right to water.\textsuperscript{204} The concept of progressive realisation must therefore be read in light of the objective of the ICESCR, which is to establish clear obligations for States to take steps towards full realisation of socio-economic rights such as the right to water.\textsuperscript{205} In this context, the Court also specifically endorsed the views of the UN Committee on Economic, Social and Cultural Rights in the \textit{Grootboom} case that “any deliberately 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.”\textsuperscript{206}

\textbf{5.6. Availability of resources}

It must be noted that in contrast to the provisions entrenching civil and political rights or even the general limitations clause in section 36, sections 26 and 27 expressly refer to the availability of the State’s resources. However, the Court itself acknowledged, the enforcement of all rights has resource implications.

It is notable that, in contrast to civil and political rights, the distributive and resource implications of socio-economic rights are often given much more prominence in the debates concerning their justiciability. Placing an obligation on the State to ensure that everyone has access to socio-economic rights will therefore require a degree of intervention which has significant implications for pre-existing policy and resource distributions. The Court has expressly pointed out that the availability of resources will be a factor in the assessment of the reasonableness of the State’s conduct.\textsuperscript{207} The State is afforded the latitude to demonstrate that the measures it has adopted are reasonable, taking into account its resource and capacity constraints and the overall claims on its resources. The Court has said that although its orders in enforcing socio-economic rights claims may have budgetary implications, they are not “in themselves directed at rearranging budgets.”\textsuperscript{208}

This raises the question as to whether a court is confined to scrutinising existing budgetary allocations for the relevant socio-economic right or whether it can

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{204} 189.
\item \textsuperscript{205} General Comment 3 (1990) para 9.
\item \textsuperscript{206} \textit{Grootboom} para 45 citing CESC\textit{R General Comment No 3 (1990) para 9.}
\item \textsuperscript{207} In \textit{Grootboom} (note 3 above) para 46 the Court held: There is a balance between goals and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.
\item \textsuperscript{208} \textit{Grootboom} para 38.
\end{itemize}
\end{footnotesize}
scrutinise the State’s budgetary or macro-economic policies more broadly. In a domestic constitutional context, this gives rise to considerations regarding courts’ institutional capacity and capability to make such determinations.\footnote{192} The cases which will present particular challenges are those where the resource implications of the claim are extensive and provision has not been made for such expenditure within existing budgetary frameworks. The question then becomes, how should the courts fulfil their constitutional mandate to enforce these rights without usurping the role of the other branches and spheres of government to distribute resources equitably among various legitimate priorities. Undoubtedly, claims involving significant budgetary implications warrant a measure of respect by the judiciary for the resource allocation decisions of the other branches of government. The courts may not have the evidence before them to assess the impact of such a decision on other needs and priorities. The burden of adducing evidence regarding the availability of resources, distributive decisions, and the overall onus of proof in respect of the defence of resource constraints should rest on the State as this information is squarely within its own sphere of knowledge and expertise.

The Court acknowledged the significance of availability of resources in the \textit{Grootboom} case, explaining that “both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources”.\footnote{210} This is a result of the Court’s interpretation that the positive duties imposed by the socio-economic rights provisions entrenched in the Constitution are limited by the second subsection of sections 26 and 27.\footnote{211}

In the \textit{TAC} case, the Court scrutinised and ultimately rejected the State’s arguments that it did not have sufficient resources to provide Nevirapine throughout the public health sector. In the \textit{Grootboom} case, the Court held that the government’s housing programme, though in other respects rational and comprehensive,\footnote{212} was inconsistent with section 26 of the Constitution. This is because such a programme failed “to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations”.\footnote{213}

\footnotetext[192]{192}{209}
\footnotetext[210]{Grootboom para 46.}
\footnotetext[211]{Soobramoney (note 2 above) paras 11, 28; Grootboom (note 3 above) para 38; Treatment Action Campaign (note 5 above) para 39.}
\footnotetext[212]{Grootboom (note 3 above) paras 53–55 and 64.}
\footnotetext[213]{Grootboom para 99.}
In the TAC case, the Government had defended its restrictive policy on mother-to-child transmission, raising concerns ranging from the efficacy and safety of Nevirapine to a lack of resources and capacity to roll out a comprehensive programme to prevent mother-to-child transmission of HIV throughout the public health sector. The Court closely examined and ultimately rejected all of these justifications.

It is noteworthy that the State’s resource constraints arguments were evaluated in relation to the two legs of the challenge mounted by the TAC to the programme. The first leg of the challenge concerned the restriction placed on doctors from prescribing Nevirapine in facilities where testing and counselling facilities already existed. The Court noted that the administration of the drug is a relatively simple procedure, and the manufacturers had made a free offer of the drug to the government for a period of five years. The Court held that such orders may or may not be accompanied by a reporting order or structural interdict through which judicial supervision over the engagement process is maintained.

The second leg of the challenge concerned the extension of testing, counselling and treatment facilities to clinics that currently lack these facilities. After a close analysis, the Court concluded that the capacity and costs arguments did not have sufficient factual cogency to outweigh the impact on a particularly vulnerable group of the denial of a basic life-saving medical intervention. The Court’s jurisprudence, for instance, shows that orders with clear budgetary and resource implications will be made in situations where the State does not place sufficient evidence before the court demonstrating that it lacks available resources or has other competing urgent claims on its available resources.

5.7 Minimum Core

The idea of a minimum core obligation suggests that there are degrees of fulfillment of a right and that a certain minimum level of fulfillment takes priority over a more extensive realisation of the right. Bilchitz conceives of minimum core as the very

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214 para 95.
215 paras 90–92, 115–120.
basic interest people have in survival and the socio-economic goods required to survive. Bilchitz further points out that:

“The recognition of a minimum core of social and economic rights that must be realised without delay attempts to take account of the fact that certain interests are of greater relative importance and require a higher degree of protection than other interests.”

Within the South African context, David Bilchitz has persuasively argued for the adoption of the minimum core concept. Bilchitz has argued that an analysis of obligations imposed by socio-economic rights on the State should entail a minimum core obligation to realise, without delay, the most urgent survival interests. Bilchitz’s position is that the recognition that the State has a minimum core obligation to realise essential levels of each right represents a viable and principled method of approaching the justiciability of socio-economic rights. Therefore, each substantive right imposes upon a State a variety of core obligations that the State is obliged to satisfy.

In the Grootboom, TAC and Mazibuko cases, the Court declined to adopt the concept of the minimum core as a model of review in assessing State compliance with the positive obligations imposed by sections 26 and 27 of the Constitution. In Grootboom, for instance, the Court pointed out that the determination of a minimum core in the context of the right to have access to adequate housing presents difficulties because there are people who need land, others need both land and houses yet others need financial assistance. The Court further declined to adopt the minimum core obligation approach on the basis of its alleged lack of adequate information in order to determine the content of the minimum core obligations. This, according to the Court, should be contrasted with the CECSR which developed

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218 11.
220 In Treatment Action Campaign, Grootboom and Mazibuko cases the Court rejected the minimum core concept in assessing the State’s compliance with the positive obligations imposed by the economic, social and cultural rights in sections 26 & 27 of the Constitution. For a comprehensive analysis of the minimum core debate in South Africa’s socio-economic rights jurisprudence, see Liebenberg Socio-Economic Rights 148-151 & 163-173.
223 Para 33.
224 Para 31.
the content of the minimum core obligations on the basis of its extensive experience reviewing State reports under the ICESCR.\textsuperscript{225}

The Court pointed out that the formulations of sections 26 and 27 of the Constitution did not provide for an unqualified obligation on the State to provide access to the rights enshrined in those provisions immediately and on demand.\textsuperscript{226} Rather, the Court developed a model of reasonableness review for assessing State compliance with the positive duties imposed by socio-economic rights as indicated above. The Court further pointed to the unrealistic demands imposed by the minimum core obligations on the State. The Court cited the impossibility to give everyone access even to a core service immediately.\textsuperscript{227}

Following the Court’s rejection of this approach in \textit{Grootboom}, the \textit{amici} in \textit{TAC} located the minimum core in the first subsection of s 27(1) (and by implication also s 26(1)) of the Constitution. They argued that every individual is entitled to a basic core of health care services comprising the minimum necessary for a dignified human existence. They further argued that this basic core of the right is not subject to the qualifications of resource constraints and progressive realisation provided for in section 27(2) of the Constitution. It was further argued that over and above this minimum core entitlement, the State is obliged, in terms of section 27(2), to take reasonable measures within its available resources to achieve progressively the full realisation of the relevant duties.\textsuperscript{228}

### 5.8 Remedies

In the context of lack of access, or inadequate access, to socio-economic rights, such situations can often not be remedied by a once-and-for-all court order sounding in money. The Court has emphasised the broader importance of developing effective and innovative remedies to vindicate against any infringement of constitutional rights. This is particularly relevant in socio economic rights cases, where impoverished communities often lack access to legal services, and cannot afford to engage in ongoing litigation to secure an effective remedy.

\textsuperscript{225} Para 31.
\textsuperscript{226} \textit{Grootboom} para 95; \textit{TAC} para 32 & 35 and \textit{Mazibuko} para 57.
\textsuperscript{227} \textit{TAC} para 32; \textit{Grootboom} para 95 and \textit{Mazibuko} paras 58 and 59.
\textsuperscript{228} Paras 32-33.
5.9 Prohibitory and Mandatory orders and Interdicts

The purpose of interdicts is to prevent or to compel certain conduct. In the context of socio-economic rights cases, a prohibitory interdict may be considered in situations where there is a threatened interference with people’s existing access to socio-economic rights. Where the violation of a socio-economic right consists of a failure to take particular steps or adopt measures in order to give effect to a positive duty, a mandatory order may constitute appropriate relief. Such an order requires the respondent to act in the manner specified in the particular order.

5.10 Mandatory orders

Mandatory orders play a crucial role in providing effective remedial relief for violations of socio-economic rights. Orders to provide benefits or services to the applicants or a defined class of people are appropriate in circumstances where urgent and concrete forms of relief are urgently needed, and the nature of the benefits to be provided can be defined clearly and provided relatively expeditiously. The TAC judgment placed it beyond doubt that the courts are not confined to making general declaratory orders relating to the State’s non-compliance with the constitutional duties imposed by socio-economic rights. Neither are courts limited to issuing general mandatory orders requiring the State to adopt a “reasonable programme” to give effect to particular socio-economic rights. In appropriate circumstances, a mandatory order may be issued requiring the State to provide or extend the provision of socio-economic goods and services to defined groups or classes of persons. The primary underlying concern with orders requiring concrete benefits to be provided to particular groups relates to the institutional capacity and legitimacy of the courts to make decisions which have direct policy, budgetary and distributional implications.

In TAC, the orders imposed by the Court enjoined the government to act “without delay” to “remove the restrictions” to the provision of Nevirapine in public hospital and clinics; “permit and facilitate” its use when medically indicated; “make provision” for counsellors based at public hospitals and clinics to be trained for the counselling necessary for the use of Nevirapine to reduce the risk of mother-to-child transmission of HIV; and “[t]ake reasonable measures to extend the testing and counselling facilities” at all public hospitals and clinics “to facilitate and expedite the
use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.  

In the *Joe Slovo* case, the Court upheld the order of the Western Cape High Court requiring the residents to vacate the *Joe Slovo* informal settlement in order to facilitate the development and upgrading of the settlement as part of the N2 Gateway Project. It is however noteworthy that the Court affirmed their right to adequate alternative accommodation during the upgrading process and set detailed substantive standards for the provision of the temporary residential accommodation at Delft, including the provision of services and facilities. The respondents were furthermore directed to allocate 70% of the low-cost housing to be built at the site of *Joe Slovo* to the residents. The parties were further directed to “engage meaningfully” with each other concerning certain aspects of the order.

### 5.11 Orders of ‘meaningful engagement’ and mediation

In the context of eviction applications, the courts have frequently made mandatory orders requiring the parties to engage with each other with a view to exploring mutually acceptable solutions to the dispute, including the possibility of securing suitable alternative accommodation for the occupiers facing eviction. Such orders may or may not be accompanied by a reporting order or structural interdict through which judicial supervision over the engagement process is maintained. Such meaningful engagement orders are an example of an innovative type of mandatory order which may be given by a court in socio-economic rights litigation.

*Olivia Road* is the leading case in which an order was made for the parties to “engage meaningfully” with each other. The Court issued an interim order requiring the City of Johannesburg and the applicants “to engage with each other meaningfully” in an effort to resolve the disputes between them “in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned”. The parties were further enjoined to file affidavits before the Court within two months which reported on the results of this engagement between them. Such an approach illustrates how a mandatory order by a court for the parties to engage meaningfully with each other

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229 Ibid para 135. Orders 3(a)-(d).
230 Ibid para 7. See particularly the Order para 10.
231 Ibid. Order para 17.
232 See para 3 of judgment.
can stimulate a dialogic process of engagement leading to the provision of concrete benefits to a particular group. The orders of meaningful engagement made by the Court in cases such as *Olivia Road*, and to a lesser degree, in *Joe Slovo* and various other cases discussed above suggest that the Court may be becoming bolder in experimenting with innovative remedies of this nature.

### 5.12 Reporting Orders and Structural interdicts

A court may, in addition to granting mandatory relief, require the respondent to report back to it and the other parties to the litigation on the implementation of the order - a “reporting order”. In the alternative, the court may require the parties to negotiate a plan which will give effect to the relevant rights and report back to it on a regular basis. Significantly, at each stage the court issues a set of directions regulating further engagement between the parties and the implementation of the plan. Such a process is continued until the court is satisfied that the constitutional infringement has been satisfactorily remedied. Notably, at both stages of the implementation of the plan, the applicants (and possibly other independent institutions and experts) are given an opportunity to comment through filing affidavits on the reports filed.

### 5.13 Constitutional damages

In the *Modderklip* case, the Court recognised that compensation would constitute appropriate relief for the infringement of the relevant constitutionally guaranteed rights. The Court held that the remedy of constitutional damages constituted the most effective and expeditious way of vindicating the rights of both the landowner and the occupiers in the circumstances of the case. The landowner was compensated by the State for having to bear the ongoing burden of the unlawful occupation of his property. The order entitling the residents to remain on the land until alternative land was made available to them ensured that their housing rights were protected.

### 5.14 New evictions paradigm-joinder of State organs

The evictions jurisprudence has shown that by virtue of its constitutional obligations, the State has a fundamental interest in all eviction applications which result in homelessness, regardless of whether the eviction is instituted by an organ of state or private entity. According to the Court, the State has a duty to protect the
constitutional rights at stake in eviction applications and to facilitate dialogic, mediated solutions. The public dimensions of eviction applications have been developed further in cases such as *Blue Moonlight Properties* in which courts have ordered the joinder of the State as a party to eviction proceedings brought by private landowners. The purpose of such joinder is to permit an order to be made against the relevant local authorities to facilitate mediation between the parties and to provide information to the court relating to alternative accommodation for those facing eviction. Cases such as *Port Elizabeth Municipality* and *Olivia Road* have emphasised the importance of procedural fairness and the need for parties to seek dialogic solutions to eviction conflicts through mediation or meaningful engagement.
6. Identity of relevant organs of State at the national, provincial or local sphere of government responsible for giving effect to these decisions

Identity of organs of State responsible for giving effect to the decisions

<table>
<thead>
<tr>
<th>Case</th>
<th>State organ(s) responsible for implementation of Court decision</th>
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</table>
Conclusion

Although the Constitution entrenches socio-economic rights as justiciable rights, their adjudication and enforcement by the Court has to date been a mixed bag. This is evident from the way the Court has defined the nature of the obligations these rights engender, and in finding and implementing relief to remedy their violation. Economic injustice and other forms of social injustice mutually reinforce each other. This is particularly evident in the case of South Africa, where race, class and gender divisions are deeply embedded in the fabric of society. Social and economic deprivation and discrimination have a direct effect on the key values of human rights law – human dignity, equality and freedom.

The transformative ethos of the Constitution will not be realised if the vast inequalities and deep poverty are not addressed. The Court acknowledged thus:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services.233

It is worth noting that not much progress has been made in economic transformation since these words were uttered fifteen years ago as South Africa is more unequal now than it was then. Although a black middle class is emerging, the country’s poor remain unemployed, and without access to basic goods and services such as adequate healthcare, water, education and housing.

This report pointed out that one of the key weaknesses in the Court’s adjudication of socio-economic rights protected in the Constitution is the model of reasonableness review developed by the Court for adjudicating the positive duties imposed by socio-economic rights.234 The reasonableness approach focuses on the appropriateness of State action to give effect to socio-economic rights. It leaves out of consideration the objective norms promoted, or the specific goods and services protected by the rights themselves. In its application of the reasonableness approach as a model of review, the Court has failed to develop the substantive purposes and values which these rights seek to protect by defining the scope and content of such

233 Soobramoney para 8.
234 The Court first adopted the reasonableness approach as a model of review in Grootboom.
rights. Consequently State organs responsible for the implementation of such rights and litigants lack normative guidance on the kind of processes and outcomes which are consistent with these rights. The Court’s jurisprudence to date demonstrates a failure to engage substantively with these questions. This is illustrated in Mazibuko where the Court’s assessment of the reasonableness of the City of Johannesburg’s water policies takes place in the absence of an attempt to define the normative content of the right of access to sufficient water entrenched s 27(1)(b) of the Constitution and the interests that it seeks to protect. The Mazibuko case further illustrates how the flexibility of the reasonableness approach has allowed the Court to defer to the executive’s socio-economic policy choices to a degree that appears to be inappropriate. The Mazibuko decision contains overt statements of deference to the executive.235 The concept of reasonableness has, moreover, become too flexible and has enabled the Court to defer too easily to the executive. The Court appears to characterise socio-economic rights litigation on positive obligations as doing little more than presenting the State with an opportunity to reformulate its plans in a manner which the Court will find reasonable. This approach has also been extended to those socio-economic rights of children and prisoners which are formulated as direct basic entitlements without the internal qualifications contained in sections 26 and 27. The Nokotyana case, as explained above, also illustrates the Court’s reluctance to exercise its power to evaluate State policies by reference to a Grootboom-type standard of substantive reasonableness.

Through its adoption of a reasonableness approach as a model of review, the Court opted for a flexible approach which would allow it to interpret positive obligations imposed on the State by the constitutionally-protected socio-economic rights cautiously and incrementally. The Court’s cautious approach is illustrated in TAC, where it explained that a socio-economic right does not “give rise to a self-standing and independent positive right” enforceable independently.236 The result is that the prospects for an individual litigant approaching the court claiming specific benefits are particularly bleak and the incentive to litigate is relatively low as the reasonableness standard has often been applied to justify the Court’s deference to the executive’s socio-economic policy choices.

Recent socio-economic rights judgments of the Court have sought to encourage and enforce deliberative engagement between the parties in finding

235 Para 61.
236 See TAC para 39.
mutually satisfactory solutions to their disputes. This is a potentially significant development for encouraging participatory, context-specific solutions to rights conflicts. The evictions jurisprudence discussed in this report point to some features of a transformative approach to the Court’s adjudication of socio-economic rights. The Court has interpreted s 26 (3) of the Constitution to impose, not only procedural guarantees but also a number of substantive rights on those facing the ignominy of eviction from their homes.\textsuperscript{237} The Court has opined that meaningful engagement is a constituent of reasonableness and accordingly a procedural requirement imposed by section 26 (2) of the Constitution. In \textit{Olivia Road} discussed above, the Court held that, prior to seeking an eviction, an organ of State will normally be required to show that it has engaged “individually and collectively” with the occupiers who may be rendered homeless by an eviction and to “respond reasonably” to the needs and concerns articulated in the process. The Court was reluctant to define what a reasonable response to potential homelessness is, but stated that the range of reasonable responses stretched from providing permanent alternative housing to the occupiers to providing no alternative accommodation at all.\textsuperscript{238}

The problem with the “meaningful engagement approach” is that without a sense of what the community engaged with can reasonably expect to receive from the State, engagement may often degenerate into the enforcement of a predetermined State policy which may be inappropriate to the needs of the community engaged with. In the absence of substantive guidance on the nature and purposes of socio-economic rights, such engagement occurs in a normative vacuum. However, orders of meaningful engagement can be particularly useful in the context of the structural, participatory remedies discussed above.

The Court has created new entitlements in the context of adjudicating alleged negative infringements of socio-economic rights provided in the Constitution as earlier demonstrated in \textit{Khosa}. The Court’s creation of a constitutional right to electricity in \textit{Joseph} was a transformative approach in the interpretation and enforcement of socio-economic rights. Furthermore, the principles articulated by the Court in \textit{Abahlali} confirmed relatively novel entitlements for poor people seeking to enforce their housing rights. \textit{Abahlali} clearly demonstrated that marginalised and poor people will also be able to propose alternatives to their eviction if these exist and such alternatives must be explored prior to the institution of proceedings. The

\begin{itemize}
\item \textsuperscript{237} Liebenberg \textit{Socio-Economic Rights} 311.
\item \textsuperscript{238} See \textit{Olivia Road} para 18.
\end{itemize}
Court thus developed, albeit incrementally, the scope and content of the right to housing.

Establishing appropriate and effective remedies for the breach of socio-economic rights protected in the Constitution is a big challenge in rights adjudication. The Court has, accordingly, been given wide remedial powers to grant appropriate and effective remedies in socio-economic rights cases. The Court may grant “appropriate relief, including a declaration of rights” and when deciding a constitutional matter, “must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency” and “may make any order that is just and equitable”.

The transformative potential of the Court’s remedial jurisprudence has been constrained by the Court reticence to endorse structural mandatory relief in the context of socio-economic rights cases. Structural orders are the most effective remedial option for redressing violations of socio-economic rights which require a series of structural reforms to be adopted over a period of time. Although structural remedies will not constitute appropriate or effective relief in all socio-economic rights cases, they nevertheless constitute a valuable remedy for particular types of socio-economic rights violations and their use should not be discouraged on the basis of restrictive conceptions of the separation of powers doctrine and judicial competence.

There are certain contexts in which it is particularly appropriate to impose positive duties on private actors to protect or facilitate communities and individuals’ access to socio-economic rights. The express provision made in the Bill of Rights for the application of human rights norms in private relations challenges the public/private dichotomy in South Africa’s legal culture and tradition. The classic liberalism is often premised on the need to preserve maximum freedom from interference in the private spheres of the family and marketplace. Thus, any potentially redistributive measures in favour of the poor are to emanate from State-provided benefits and services.

The idea that some of the negative or positive duties imposed by socio-economic rights may bind private parties poses a direct challenge to the myth of a private sphere free of State influence and a public sphere in which the role of a Bill of Rights is to restrain an over-zealous State. However, South African courts have

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239 Liebenberg 330.
240 Liebenberg 61.
241 Liebenberg 61.
not constructed a clear methodology to guide the application of the rights in the Bill of Rights to extend to private law. Civil society organisations and litigants thus have a role to play to ensure that the powerful hold which the liberal legal culture has in private relationships is loosened so as to ensure the application of the normative value system underpinning socio-economic rights in that realm. Civil society organisations and litigants should assist courts to develop strategies to ensure that in certain appropriate contexts positive duties are imposed on private actors to protect or facilitate people’s access to socio-economic rights.

The adjudication of socio-economic rights facilitates participation by civil society organisations, individuals and communities in the formulation and implementation of social programmes bearing on socio-economic rights protected in the Constitution. However, there are myriad factors, institutional and political which determine whether courts can play a transformative role in the realisation of socio-economic rights. Civil society organisations and other actors in socio-economic rights litigation should be conscious of the institutional and capacity limits of courts in delivering socio-economic goods and consider that particular claims may be appropriately considered through advocacy and other allied strategies. This also avoids the danger of inappropriate resort to litigation resulting in judgements such as Mazibuko that impede rather than aid realisation of socio-economic rights.

The Constitution provides for broad remedial powers for the courts to enforce socio-economic rights. Despite this broad remit, this is another area of its socio-economic rights jurisprudence where the Court has been more deferent and cautious. Civil society organisations and other actors should ensure that the remedies that they seek from the courts in respect of socio-economic rights are tailored to the circumstances of the cases in question. As noted by Liebenberg, compliance with constitutional rights will not necessarily be achieved “through a once-off, final judicial decree but will require an ongoing of engagement between relevant organs of State, affected communities and civil society organisations.”242 It is in that respect that structural interdicts discussed in this report are particularly well suited to the progressive realisation of socio-economic rights as guidance and regular supervision by courts will ensure that any engagement process is underpinned by the norms and values entrenched in the Bill of Rights.

242 Liebenberg Socio-Economic Rights 462.
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