

**RESEARCH PAPER**

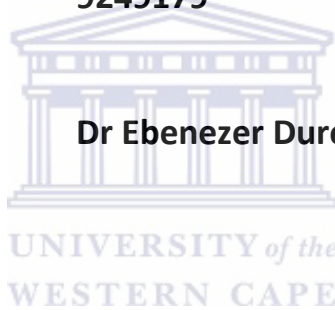
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**Title : The impact of supervisory orders and structural interdicts in  
socio economic rights cases in South Africa**

A research paper submitted in partial fulfilment of the requirement for the LLM Degree.

10 May 2013

## **The impact of supervisory orders and structural interdicts in socio-economic rights cases in South Africa**

### **ABSTRACT**

The sentiment of Justice Ackerman that courts have a particular responsibility and obligation to “forge new tools” and shape innovative remedies to achieve a goal, is profound and based on a constitution with a transformative nature. The injustice of apartheid brought about unequal resource distribution in South Africa and this is well documented. The need for innovative remedies to address these injustices has been in demand. The Constitution of the Republic of South Africa has made available, sufficient remedies for the courts to deal with these concerns. However, the courts need to find a creative way of using and applying these remedies. One such remedy, being promoted by this paper is, structural interdicts with a supervisory jurisdiction. This remedy has a process of meaningful engagement attached to it, to ensure all parties reach practical solutions to ongoing socio-economic rights violations. The ancillary effect of these types of orders will promote future policies to take into consideration socio-economic rights needs of other people in the same position as the applicants. The ongoing supervision of the court will further ensure that government comply with its obligation within reasonable time, and to address ongoing concerns of socio-economic rights violation as and when they arise during the process of engagement.



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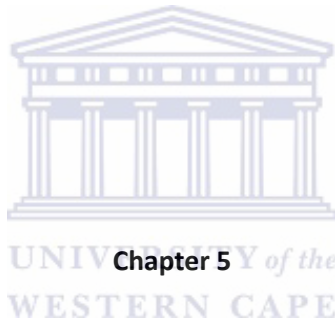
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## PART 1

### CHAPTER 1

#### CONSTITUTIONAL CATEGORIES OF SOCIO-ECONOMIC RIGHTS AND INTERNATIONAL INSTRUMENTS

##### 1.1 Introduction

Addressing effective remedies in socio-economic rights cases is considered by many, to be an important mechanism in helping the most vulnerable people in society. The South African Constitution provides the Constitutional Court of South Africa (CCSA) with wide remedial powers, which will be fully discussed later in this paper.

Socio-economic rights are explicitly included in chapter two of the Bill of Rights, of the South African Constitution, with the view of addressing the injustices of the past<sup>1</sup>. This was evident during the negotiation process of the Constitution. A feature that stood out was the fact that a strong institutionalised opposition was the key to a sustainable democracy. Understandably, many negotiators were not alone in warning that the gravest danger to South African democracy would be the lack of a strong opposition to the African National Congress (ANC). The drafters were aware that, with no strong opposition in sight in the near future, for the ANC, the Constitution had to be designed in such a way, to provide safeguard mechanisms, to promote a transformative constitution, in order to protect its citizens and to ensure fair resource distribution<sup>2</sup>.

These mechanisms must ensure that rights are not being violated, without reasonable justifiable limitation, to promote the values of an open and democratic

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<sup>1</sup> See Christiansen E “*Adjudicating Non-Justifiable Rights: Socio-Economic Rights and the South African Constitutional Court*” 38 (2007) Columbia Human Rights L. Rev 321, for a full discussion of the history and negotiating process that lead to the incorporation of socio-economic rights in the South African Constitution

<sup>2</sup> Klare K “*Legal culture and transformative constitutionalism*” 1998 SAJHR 146

society<sup>3</sup>. The Constitution was rightfully perceived as an instrument to transform South African society from a society based on socio-economic deficiency, to one based on the equal distribution of available resources.

The duties and responsibilities placed on the Constitutional Court of South Africa in socio-economic rights cases are enormous and there are very few guidelines to realise this duty. This could possibly seem like one reason why the first few socio-economic rights cases, failed to provide remedies that enhanced socio-economic rights, to its full potential. This study seeks to address a way forward for the court to use a more creative way of using already-existing remedies for these rights, by merely performing a more practical function.

The main focus of this paper is to present an understanding of how useful and practical structural interdicts, with a supervisory jurisdiction, can act as one effective remedy to ensure the fulfilment of compliance of the state's obligation to socio-economic rights. This paper will further present a broader achievement context; it will demonstrate that proper meaningful engagement can result in better institutional policy infrastructures being put in place for socio-economics rights. The breach of these rights will then be dealt with by government directly via using the Promotion of Administrative Justice Act (PAJA) first<sup>4</sup>. PAJA is a law, which gives effect to rights by setting out people's rights within administrative procedures. This process is to make sure that fair administrative procedure is adhered to and will result in citizens having an easier and quicker response to the infringed right being adhere to, ideally.

However, this broader achievement can only be accomplished effectively if the CCSA provides proper benchmarks for these rights, whereby the state will be able to use the benchmarks as a foundation in their policy-drafting, in collaboration with their meaningful engagement process with the parties.

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<sup>3</sup> Section 36 of the Constitution of the Republic of South Africa

<sup>4</sup> See [www.justice.gov.za/paja/new.htm](http://www.justice.gov.za/paja/new.htm) (accessed on 2 May 2013) for a full discussion on PAJA



However, in order to set benchmarks, the CCSA must define the normative value (pertaining to giving directives) to these rights first. Consequently, without an agreed methodology for setting benchmarks, states are left with wide discretion in setting their own benchmark standards. Fukuda-Parr, Lawson-Remer and Randolph have developed a theoretical model of an evidence-based methodology for estimating state performance where benchmarks are set, by using an innovative 'achievement possibilities frontier' (APF)<sup>5</sup>. They developed the Social and Economic Rights Fulfilment Index (SERF Index) benchmark frontier, which uses data from up to 2008, on socio-economic achievements of countries, for over the past 25 years, to identify the best performance standards in key aspects of economic and social rights. The focus of the index is on structural and process dimensions, such as making strong constitutional provisions or adopting appropriate legislative measures. South Africa's performance shows not only that many citizens do not enjoy socio-economic rights, but that state performance is well below what is potentially feasible with the level of overall development. They concluded by saying that, South Africa may be a country that leads the world in constitutional commitments to economic and social rights, but South Africa is still faced with widespread poverty.

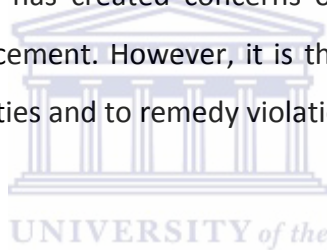
From this discussion it seems clear that it has become important that serious consideration should be provided for effective remedies by the court. This being said, the starting point is to find an appropriate interpretation for socio-economic rights, it is submitted that meaningful engagement will provide the much-needed understanding of the socio-economic rights' normative value. This process of participatory decision-making is arguably more capable of achieving just and sustainable solutions to particular problems because the participants are more

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<sup>5</sup> ESR review Community Law Centre (University of the Western Cape) 2012 13 no 2  
[www.communitylawcentre.org.za/clc-projects/socioeconomic-rights/esr-review-1](http://www.communitylawcentre.org.za/clc-projects/socioeconomic-rights/esr-review-1)

familiar to the local needs and uniqueness of their circumstances<sup>6</sup>. This process of meaningful engagement will be discussed fully in chapter 3 of this paper.

Firstly, chapter 1 will illustrate the important nature and function of socio-economic rights in a transformative constitution and its international protection. It will further discuss the ICESCR and its ratification, which is submitted, to be a step in the right direction. The ICESCR provides the court with guidelines how to interpret certain provisions such as “minimum core” and “within its full available resources” to mention only a few, however the courts willingness to incorporate the interpretation of these various concepts into a South African context is yet to be seen. A brief discussion in this chapter will focus on the Doctrine of Separation of Power, it will be submitted that this doctrine has created concerns of institutional legitimacy and competency in judicial enforcement. However, it is the duty of the court to use its flexible powers to enforce duties and to remedy violations.



## **1.2 The characteristics of socio-economic rights and its International Instruments**

Socio-economic rights encompass the material aspects of people’s basic needs, for survival and growth. The notion is that human beings cannot survive unless their basic needs of adequate shelter, sufficient food, water, education, health care, and social security are being satisfied. For decades, socio-economic rights have been treated differently from civil and political rights. Civil and political rights refer to the right to vote, the right to a fair trial and freedom of speech, movement and assembly, these rights are also recognised as first class rights. Civil and political rights receive more legal protection than socio-economic rights, as most of the civil and political rights have been codified in domestic statutes. Unlike socio-economic rights, or second class rights, they are regarded as having a much lower status than first

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<sup>6</sup> Liebenberg S “*Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of ‘meaningful engagement’*” (2012) 12 AHRJ 5

class rights<sup>7</sup>. However, the United Nations has confirmed that socio-economic and civil and political rights are equally important, indivisible and interdependent<sup>8</sup>. It is submitted that this view is correctly expressed as one cannot hope to participate in civil and political rights while there is a struggle to provide for food, healthcare and basic shelter.

Countries such as Namibia, Ireland and India, made civil and political rights justiciable, but not socio-economic rights. In fact most common law countries adopt similar approaches. These rights are merely used as a directive principle for government<sup>9</sup>. It is gratefully accepted that International laws, norms and principles have had a profound effect in shaping the development of domestic human rights norms, and principles around the world<sup>10</sup>. Fortunately, socio-economic rights are protected by a number of international instruments. The founding document of the protection of human rights is the 1948 Universal Declaration of Human Rights (Universal Declaration), under the umbrella of the United Nations (UN)<sup>11</sup>. The Universal Declaration of Human Rights (UDHR) consists of a comprehensive catalogue of civil, political, economic, social and cultural rights<sup>12</sup>. The UDHR is universal in its content and application; however it is not part of binding international law, but it is still a potent instrument, used to apply moral and diplomatic pressure on states that violate the Declaration's principles<sup>13</sup>. The UDHR states that all "human beings are born free and equal in dignity and rights" and it serves as the driving force behind many human rights-based legislation. The UDHR sets a standard of achievement for all nations to strive for. Even though the

<sup>7</sup> See Kapindu R *"From the Global to the local. The role of international law in the enforcement of socio-economic rights in South Africa"* Socio-Economic rights project 6 (2009) Community Law Centre (University of the Western Cape).

<sup>8</sup> Kapindu R (2009) 15

<sup>9</sup> Khoza S *"Socio-economic Rights In South Africa"* A resource Book 2ed Community Law Centre (University of the Western Cape) 2007

<sup>10</sup> Kapindu R (2009) 3

<sup>11</sup> Liebenberg S *"Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'"* (2012) 12 AHRJ 2

<sup>12</sup> Kapindu R (2009) 10

<sup>13</sup> [www.unac.org/rights/question.html](http://www.unac.org/rights/question.html) (access on 5 May 2013)

Declaration is not legally binding technically, there are no signatories to the Declaration. Instead, the Declaration was ratified through a proclamation by the General Assembly on 10 December 1948, with a count of 48 votes to none with only 8 abstentions. This was considered a triumph as the vote unified very diverse, even conflicting political regimes. In addition, the Declaration has inspired the creation of subsequent international documents such as the Canadian Charter of Rights and Freedoms and has inspired the creation of subsequent international documents such as the International Bill of Rights, and the Convention on the Elimination of All Forms of Racial Discrimination.

The commission involved in drafting the UDHR also drafted two legally-binding covenants on human rights. The two Covenants are the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights. Both were adopted by the General Assembly and were opened for signature in December 1966 and both came into effect in 1976. These primary covenants provide guidelines for domestic laws in South Africa. The International Covenants on Human Rights are treaties, and state parties undertook to respect, ensure and take steps for the full achievement of a wide range of rights<sup>14</sup>.

The African Charter on Human and Peoples' Rights (African Charter) is another instrument that identifies the universal desires of fundamental human rights. These instruments have created supervisory committees to monitor state compliances. The United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR), monitors the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the UN Committee on the Rights of the Child (CRC Committee), monitors the implementation of the Convention on the Rights of the Child (CRC) these are all international human rights instrument<sup>15</sup>. The CRC though,

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<sup>14</sup> [www.unac.org/rights/question.html](http://www.unac.org/rights/question.html) (access on 5 May 2013)

<sup>15</sup> Chirwa N M "Child poverty and children's rights of access to food and basic nutrition in South Africa A contextual, jurisprudential and policy analysis" Community Law Centre (University of the Western Cape) 2009 2

protects civil, political rights and socio-economic rights in one treaty. The ICESCR, together with the UDHR and the ICCPR, are usually referred to as the International Bill of Rights. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) also deals directly with socio-economic rights of women. The ICESCR and the ICESCR has been regarded as the International Bill of Rights because of their binding status.

The ICESCR has received approval on 10 October 2012 by the South African cabinet for ratification; it has been eighteen years since Nelson Mandela signed the ICESCR. Finally the provisions of the covenant will be legally binding on the state. However despite the approval, ratification has not yet taken place.

Jackie Dugard, the executive director at the Socio-Economic Rights Institute of SA (SERI), welcomed the long-awaited decision but she observed that South Africa has already, for many years, adhered to the norms and standards contained in the ICESCR. South Africa, has ratified the African Charter on Human and People's Rights of 1981, which echoes many of the socio-economic rights contained in the ICESCR<sup>16</sup>.

The ICESCR indeed had a profound influence in shaping South Africa's constitutional architecture insofar as socio-economic rights were concerned. The Committee on Economic Social and Cultural rights (CESCR) has come up with an impressive catalogue of general comments on various socio-economic rights. With regard to individual complaints, on 10 December 2008, the General Assembly unanimously adopted an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights which provides the Committee competence to receive and consider communications<sup>17</sup>.

These international instruments are indeed the starting point of interpretation of socio-economic rights and the Constitution of South Africa gave these rights its

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<sup>16</sup> Socio-Economic Rights Institute available at <http://www.seri-sa.org> (access on 7 September 2012)

<sup>17</sup> Kapindu R (2009) 14

function and character in the legal system, its justiciability makes socio-economic rights a demand for fulfilment.

### 1.3 Socio-economic rights are justiciable

The scope and interpretation of these full range of rights has been set out by many cases in the CCSA, and these rights are justiciable rights and legally enforceable, under the Constitution<sup>18</sup>. Certain states in the United States of America, have refused to acknowledge socio-economic rights as legally enforceable<sup>19</sup>. Kirsty Mclean describes the notion of justiciable and enforceability as distinct, and she provides the following characteristics; enforceability she states, deals with the ability of the courts to develop a remedy to protect or enforce the interest or rights it wishes to protect and enforce, while justiciability concerns the question of whether a matter is suitable for judicial resolution<sup>20</sup>.

The CCSA has received the Constitutional mandate to act as guardian and administer these rights to its full potential. It further places a duty on the state to respect, protect, promote and fulfil these rights in the Bill of Rights<sup>21</sup>. It is submitted that these rights and duties create a relationship of check and balances between the two institutions, which should frequently be strengthened. Later in this study, an overview of the court jurisprudence of the last seventeen years will provide a clearer understanding, of how the courts have interpreted this mandate and the effective implementation of court orders by the state will present whether the state's duty has progressed.

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<sup>18</sup> *Government of the republic of South Africa v Grootboom & Others 2001 (1) SA 46 (CC)(South Africa)* para 94

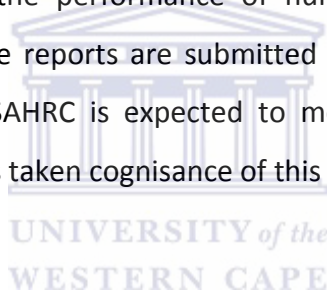
<sup>19</sup> Wiles E "Aspirational Principle or Enforceable Rights? The future for socio-economic rights in National Law" (2006) 22 American University Law Review 35-64

<sup>20</sup> Mclean K "Objections to socio-economic rights " Challenges posed by socio-economic rights for judicial review" 2009 PULP 109

<sup>21</sup> Section 7(2) The Constitution of the Republic of South Africa 1996 (The Constitution)

There is an on-going debate between scholars, legal experts, academics and litigants as to what extent the state should be held accountable for the enforcement of these rights. Mia Swart observes that if the government fails to adhere to court orders in relation to socio-economic rights, it should be held in contempt for not executing orders<sup>22</sup>. However, a rule nisi will have to be issued first, to allow the target of the order to show cause as to why he or she should not be held in contempt<sup>23</sup>. This is a clear time-consuming process and one which some litigants find themselves out of resources, to continue forward.

How then does one measure state performance to socio-economic rights? It is the role of the South African Human Rights Commission (SAHRC) to monitor, assess and investigate, and report on the performance of human rights, according to the Constitution<sup>24</sup>. In turn, these reports are submitted to Parliament for assessment and recommendation. The SAHRC is expected to monitor state compliance with judgements and the CCSA has taken cognisance of this role<sup>25</sup>.



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<sup>22</sup> Swart M *"Left out in the cold? Crafting Constitutional Remedies for the poorest of the poor"* (2005) 21 SAJHR 240

<sup>23</sup> Currie I and De Waal J *"The Bill of Rights handbook"* 5 ed (2005) 225

<sup>24</sup> Section 184(3) The Constitution of the Republic of South Africa

<sup>25</sup> South African Human Rights Commission available at [http:// www.sahrc.org.za](http://www.sahrc.org.za) (access 7 September 2012)

#### 1.4 The three categories of Constitutional socio-economic rights

Liebenberg describes the first set of rights as qualified socio-economic rights<sup>26</sup>. They are; access to adequate housing, health care services, sufficient food and water, and social security<sup>27</sup>. The reason, she emphasises for describing it as “qualified”, relates to subsection (2) of section 26 and 27 of the rights. The description of the rights are limited to a qualification she explains; that the state explicitly take reasonable legislative, and other measures within its available resources, to achieve the progressive realisation of each of these rights. The second category consists of the socio-economic rights of children, detained people, and basic education. The final category deals with the right not to be evicted from one’s home, or have one’s home demolished without an order of court, and a further right; that no one may be refused emergency medical treatment.

These categories of rights, stipulated in section 26 and section 27, place a negative and positive duty on the state. Positive rights usually request an action, whereas negative rights usually require inaction<sup>28</sup>. Liebenberg emphasises that International Human rights law recognises that the effective guarantee of human rights depends on the combination of positive and negative duties<sup>29</sup>.

An illustration of positive duties, which were imposed on the state, was found in *Minister of Health & Others v Treatment Action Campaign & Others (TAC)*<sup>30</sup>, where the court request the state to take reasonable steps to realise the rights violated. The court referred to section 26(2). However, the court explicitly held that section 26(1) must be read together with section 26(2), in order to understand the real

<sup>26</sup> Woolman S, Bishop M and Brickhall J “*Constitutional law of South Africa*” 2 ed (2008) 2 et al ch 33 Liebenberg S “*The Interpretation of Socio-economic Rights*” paras 33-5

<sup>27</sup> Section 26(1) and 27(1) The Constitution of the Republic of South Africa

<sup>28</sup> The United Nations Universal Declaration of Human Rights lists both positive and negative rights (but does not identify them as such)

<sup>29</sup> Liebenberg S *Socio, Economic rights: Adjudication under a transformative Constitution* (2010) 83

Also see Fredman S *Human Rights transformed: Positive Rights and positive duties* (2008)

<sup>30</sup> 2002 (5) SA 721 (CC)



duties the section places on the state. The court held that the two sections cannot be read in isolation.

The third categories of rights are contained section 26(3) and section 27(3). These rights were discussed in the case of *Soobramoney v Minister of Health, Kwazulu – Natal*<sup>31</sup>, the court made it clear that the scope of section 27(3) is restricted to existing services, not new services which still need to be established. In this case, the applicant requested on-going dialysis treatment and the court denied his claim. The court held that the right in section 27(3) had been formed in a negative term, and its scope was thus restricted to receive immediate remedial medical treatment that is “necessary” and “available” and to avert harm in a case of sudden emergency<sup>32</sup>.

It is clear that the formulation of these sections presented its own unique set of interpretations, as illustrated in the *Soobramoney* case. This case was the first socio-economic rights case and as much as the case had negative consequences for the applicant, it remained the case which allowed the court to interpret socio-economic right, while taking into account resource constraints. This case will be further discussed in chapter 3 of this paper. In essence, the court in the *Soobramoney* case accepted that the enforcement of these rights raised much difficulty but it is submitted that the duty belonged to the CCSA to give contents to these rights. The Constitution created the CCSA and the initial idea was that the court’s institutional competencies, to adjudicate socio-economic rights cases, were adequate to fulfil its mandate. It is understandable that the CCSA will be faced with some challenges. One of the main challenges being the doctrine of separation of powers, but it is argued that the way the CCSA defines this challenge will eventually strengthen or weaken the CCSA’s existence. The jurisprudence of the CCSA has shown that it is

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<sup>31</sup> 1998 (1) SA 765 (CC)

<sup>32</sup> See judgement of Chaskalson P paras 28-36 in the *Soobramoney* case

this very doctrine, and its margin of appreciation, that has resulted in the CCSA failing to provide remedies which can be executed efficiently<sup>33</sup>.

### **1.5 The court's approach to the doctrine of separation of powers**

This doctrine was traditionally viewed as a functional division of power between the three branches of government<sup>34</sup>. Commentators have argued that there is a clear boundary between these branches which should result in each one understanding its powers and functions. Mclean, in her analysis of various writers on this topic, has come to the conclusion that the doctrine of separation of powers is important for the judicial review of socio-economic rights issues, and that these reviews strain the conventional role of the courts<sup>35</sup>. She further argues that a pure theory of the doctrine of separation of powers is not possible, as this would imply a complete separation of powers between the three branches, a situation that is almost impossible. She explains this theory by referring to the so-called "partial" doctrine of separation of powers that was developed over the years. This theory, she continues, recognised the overlap of powers in government. The idea is to allow for checks and balances to operate, and this in turn, will ensure that public power is being exercised consistently with the Constitution. It is this overlap that is causing the tension between the branches. The shift in interpreting the doctrine of separation of powers as "partial", in exercising judicial review, is vital as an accountability mechanism, for the other two branches. This can only enhance a transformative Constitution, resulting in a sustainable democracy<sup>36</sup>. This theory of Mclean may also be understood as creating a participatory democracy.

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<sup>33</sup> Rautenbach I M "Policy and judicial review –political questions, margin of appreciation and the South African constitution" (2012) 1 20-34

<sup>34</sup> Mclean K (2009)105

<sup>35</sup> Mclean K (2009) 107

<sup>36</sup> Klare K "Legal culture and transformative constitutionalism" 1998 SAJHR 146.

In the *TAC* case, the Constitutional Court emphasised that:

*“This Court has made it clear, on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation”.*

Chaskalson P, observed in *Ferreira v Levin NO and others*<sup>37</sup>, that at times, these functions may overlap, but warns that terrains are in the main, separate; and should be kept separate. Bilchitz agree with the views of Chaskalson and further submitted that there is a need for a critical understanding amongst these organs that they are organs of one body and that they need to work in tandem, and within a spirit of complementarities, to achieve the common good of society as a whole<sup>38</sup>. Even though the debate surrounding the doctrine of separation of powers continues, there is no doubt that the courts have shown deference to the state in its first ten years of the existence of the CCSA. It is argued, that as much as Chaskalson admitted there would be overlapping, he is not willing to extend under which circumstances these overlapping will be considered acceptable. In essence, it is understandable that no judicial officer would want to define a line of acceptability in this type of matter, and as he points out that these terrains should be kept separate. It is this evasiveness; it has been submitted that has caused the courts to fail to provide a positive jurisprudence for effective socio-economic rights remedies.

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<sup>37</sup> 1996 (1) SA 984 (CC)

<sup>38</sup> Kapindu R *“Pulling back the frontiers of Constitutional Deference: Mazibuko & Others v City of Johannesburg & others and its implications”* 2009 Conference paper available at <http://isthisseattaken.co.za/pdf/papers/Kapindu.pdf> (access on 8 September 2012)

## 1.6 Conclusion

This chapter has demonstrated the importance, international human rights instruments had on the formulation of socio-economic provisions in the South African Constitution. It has further provided insight into the State's lack of realising the rights progressively, mainly due to the court's inability to set benchmarks and providing a normative interpretation of socio-economic rights. The chapter has acknowledged that socio-economic rights is justiciable but due to the doctrine of separation of powers, it does not receive the full extent of the CCSA's remedial powers, and due to the court's overreaching deference it has shown to the state.

Chapter 2 will analyse the CCSA powers on judicial review, as one remedial source for the enforcement of socio-economic rights. It will further focus on various case law studies on how judicial discretion and the judges' manner of interpretation has shaped the outcome of these cases.

Chapter 3 will assess the CCSA jurisprudence and various tests that have been developed by the court, in understanding the court's interpretation of the rights and enforcement of socio-economic rights. This chapter will provide a clear understanding on how the court has failed to provide normative interpretation of the right and the overreaching deference the court has shown the state. The study will explore the debates in favour of, and against, the minimum core approach, and from this discussion it will become clear that this study does not support the minimum core approach. The introduction of meaningful engagement in this chapter is considered a step in the right direction. The chapter will end with an in-depth discussion on the courts development of this approach focusing on a sustainable long-term solution.

Chapter 4 will demonstrate a detailed analysis of the effectiveness of a structural interdicts. It will demonstrate the defects of the interdict, as well as solutions. Lastly it will provide certain elements that a court may identify in cases, when

considering this remedy. Chapter five will set out the recommendation of this paper, which will encourage courts to use, as regularly as possible, supervisory orders and structural interdicts as one method to ensure an effective remedy to socio-economics rights infringement. Taken into account that those who seek fulfilment of these rights are people who have been marginalised due to apartheid and where the resources of the country have been unequally distributed for centuries. This chapter will emphasise the conclusion that will be reached in chapter 3 regarding minimum core, as a short solution which will create more frustration amongst the most vulnerable of people. Consequently this imposes a duty on someone to choose between two poor marginalised groups of people to received assistance first. This paper will argue for a remedy that will be sustainable for generations to come. In this regard then it is submitted, that courts grant supervisory orders with structural interdicts and to allow for meaningful engagement, with its citizens who has first-hand knowledge of the issues at hand.



## CHAPTER 2

### THE EFFECTIVE USE OF JUDICIAL REVIEW IN A DEMOCRACY AS A REMEDIAL TOOL

#### 2.1 Introduction

The CCSA does not receive many socio-economic rights cases to adjudicate. When it does, it should make full use of its capacity to lay down a clear interpretation of the rights. It is expected of the court to make use of the protective remedies available in the Constitution and to give meaning to it by way of effective interpretation. Justice Ackermann emphasises in a judgment that:

*“.....Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal<sup>39</sup>.*

The judicial review powers are a mechanism available to the CCSA to measure the legislatures and executives laws and policies to the effect that it conforms to a Constitutional standard. The Constitution has a value-based interpretation and judicial review has been explicitly incorporated in the Constitution to protect those values. Karl Klare correctly pointed out, that the Constitution invites a new imagination and self-reflection about legal methods, analysis and reasoning consistent with its transformative goal<sup>40</sup>. The Constitution, he states, is not self-executing but an evolving text that must be interpreted and applied. It is submitted that this is not an easy task and the CCSA must perform these interpretations keeping in mind a regions social context.

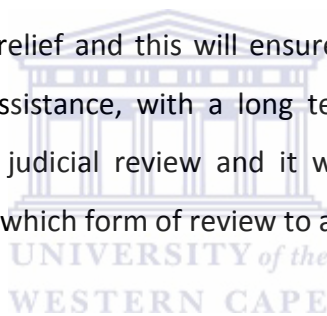
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<sup>39</sup> *The Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (S.Afr) paras 101-102

<sup>40</sup> Klare K (1998)156

In countries such as the United States of America and Canada, judicial review was founded on a simple idea; namely the duty of the court was to apply the law and where two laws were in conflict, the more fundamental constitutional law was selected as the governing rule. In the United States of America, judicial review has not explicitly been established but has been inferred from the structure, provisions and history of the Constitution<sup>41</sup>.

The CCSA should be more creative when applying judicial review. It is argued that the CCSA should promote a strong form of review, and encourage consistency amongst the judges. This chapter, promotes a strong form of judicial review in socio-economic rights cases, as some of the remedies available under a strong form of review, provides immediate relief and this will ensure that the most vulnerable of society receive immediate assistance, with a long term effect. This chapter will assess the various forms of judicial review and it will further illustrate how the judges' interpretation affects which form of review to apply.



## **2.2 The scope of judicial review**

Judicial review of legislation is defined as the duty of the CCSA to declare any law or conduct that is inconsistent with the Constitution invalid, to the extent of its discrepancies. The two forms of reviews that the Constitution provides have been incorporated by design not by mistake. It should not create confusion but should be applied for its purpose. It might come across from certain cases that a judicial discretion is being used when judicial review is applied. The cases that will be discussed later in this chapter, will provide a clearer understanding of how judges

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<sup>41</sup> The Supreme Court decision in the landmark case of *Marbury v Madison* (1803), Judge Marshall defended judicial review and believed that the function of the courts are to decide cases according to law, and that the courts are ruling on the constitutionality of legislation not because it has a general commission to oversee Congress legislation behaviour but because the Constitution was higher law, available at [http://www.encyclopedia.com/topic/Osborne\\_reynolds.aspx](http://www.encyclopedia.com/topic/Osborne_reynolds.aspx) (access on 8 September 2012)

have used strong or weak form of review. It is however clear that judicial review is an effective remedy when used while taking into consideration the countries' past history. Section 172, has been interpreted as promoting a strong form of review and section 39(2) promotes weak form of review. The interpretation of these sections must be done in the prism of the Bill of Rights as specified in the preamble<sup>42</sup>.

### 2.2.1 Strong form of judicial review (section 172)

Section 172(1)(a) refers to constitutional review that is rigorous and robust (strong) by any standard<sup>43</sup>. Once the court declares the legislation unconstitutional, it has two options on how it wants to deal with the legislation.

Firstly, it may use its power in severance, reading-in, or cutting words. These are constitutional remedies that correspond with section 172(1)(b) of the Constitution which allow for "any order that is just and equitable" as an outcome of constitutional adjudication, undoubtedly a strong form of judicial review. Secondly, it may refer the legislation back to parliament for redrafting, over a specific period of time. The court is flexible and may grant various types of orders, which includes; declaratory orders; mandatory orders; damages; structural interdicts; reading in words and contempt of court orders. In the case of *Fose v Minister of Safety and Security*<sup>44</sup>, the court held that:

*"[t]he courts have a particular responsibility . . . and are obliged to 'forge new tools' and shape innovative remedies, if needs be . . . ." The Court stressed that "an appropriate remedy must mean an effective remedy"*<sup>45</sup>.

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<sup>42</sup> Du Plessis L "Interpretation" in Woolman (et al) Constitutional Law of South Africa Volume 2 (2 ed) 2006 32-136 to 32-158

<sup>43</sup> *Ferreira v Levin NO* 1996 (5) BCLR 658 (CC)

<sup>44</sup> 1997 (7) BCLR 851 (CC) (S. Afr.)

<sup>45</sup> *Fose* par 888-89



To illustrate the use of strong review, reference is made to the case of *Daniels v Campbell NO & Others*<sup>46</sup>. The court was dealing with the interpretation of two Legislations; the Maintenance of Surviving Spouses Act of 1990 and the Marriage Act of 1961. The court had to interpret the word “spouse”. The court understood the word “spouse”, in the first legislation, to include partners in Muslim marriages, which was not the same in the second piece of legislation. The majority judgment in this case thought that such an extensive reading was necessary to guarantee the constitutionality of a provision that would otherwise have been struck down or declared unconstitutional; this is also referred to as reading up. The idea is where one of two conflicting interpretations of a statutory provision better promotes the spirit, purpose and object of the Bill of Rights than the other one, the former is to be preferred.

Lourens Du Plessis, warned against a misunderstanding that this “reading in” and “reading up” and emphasises, it is not the same as the use in section 39(2) as this section requires that existing law must be “developed” in light of the spirit, purport and objects of the Bill of Rights<sup>47</sup>.

### **2.2.2 Weak form of review (section 39(2))**

Section 39(2) does not declare legislation unconstitutional. The court merely reinterpreted the existing legislation and tried to bring it into conformity with the Constitutional requirements. Section 39(2) is crucial in the application of the Constitution. It also deals more with the principle of subsidiary, and promotes the indirect application of the Bill of Rights. Both sections 39(2) and section 8(3) promote the development of existing laws and they are encouraged to be read together.

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<sup>46</sup> 2004 (5) SA 331 (CC)

<sup>47</sup> Du Plessis L (2006) 32-136 and 32-158

Woolman<sup>48</sup> warns against the lack of understanding the application of this section. He states that before one considers the indirect application of the Bill of Rights and the development of new rules of law, one must first ascertain what the ambit is of the alleged applicable constitutional provisions. Only when one determines the ambit and finds that it does not speak to the issue raised by an ordinary rule of law, one can turn to the more open-ended invitation of section 39(2).

Currie<sup>49</sup> believes that the power of interpretation should be left for politics. The idea, he says, is to leave room for the legislature to reform the law in accordance with its own interpretation of the Constitution. He states that it would be much better for the legislature to decide on an issue, before a court decides on it. This paper rejects this argument. However the Minister of Justice, Mr Jeff Radebe, would welcome such an approach from the courts, for the legislature to decide on the issue. This idea of the minister is further supported by Du Plessis and Ngcobo CJ, where they propose an approach whereby the principle of subsidiary should be applied. This operates as follows; when a piece of legislation comes under constitutional scrutiny, the legislation should first be considered under section 39(2) and only if no meaningful alternative interpretation can be found, then as a second leg should section 172 be applied. However, the Constitution does not promote a single approach as the correct one, and it is merely a different manner of interpretation that has been illustrated by the judges.

In contrast, Mark Tushnet promotes weak form of review very prominently<sup>50</sup>. He finds that weak form of review suggests solutions to practical and theoretical problems<sup>51</sup>. He states that it is crucial to attempt to create joint responsibility and genuine dialogue between the courts and the legislator, with respect to fundamental rights. He finds that the weak form of review creates a model promise to ensure

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<sup>48</sup> Woolman S *"The amazing vanishing Bill of Rights"* (2007) 124 SALJ 784

<sup>49</sup> Currie I *"Judicious avoidance"* (1999) 15 SAJHR 142

<sup>50</sup> Tushnet M *"The rise of weak-form constitutional review"* in Ginsburg T and Dixon R (eds) *Comparative Constitutional Law* (2011)333

<sup>51</sup> Tushnet (2011) 321-331

important matters of principle back into legislative and popular debate. Tushnet believes that weak form of review would provide a fundamentally direct resolution of the democratic difficulties associated with traditional judicial review. He acknowledges that weak form of review could degenerate into the return of preliminary supremacy, but he concedes that it will reduce the tension between the branches of government. This view of Tushnet, it is submitted, is too high a risk in a new democracy as he rightfully pointed out it could promote parliamentary sovereignty; it would most certainly work in a much older, well-established democracy<sup>52</sup>.

There is already rife tension, since 2011, in debates in South Africa on this issue. The issue of interfering with the doctrine of separation of powers was in high debate, turning the relationship between the judiciary and government into furious hostility with terrifying implications<sup>53</sup>. The tension became worse when the president of South Africa, President Jacob Zuma, announced in 2011 that he wished to “review the powers<sup>54</sup> of the Constitutional Court”<sup>55</sup>.

The South African legislature prefers weak form of review as this allow for a dialogue where the court informs the legislature of the court’s understanding of the constitutional provision, whilst allowing the legislature to respond, and take conclusive action, based on its own understanding. However, the CCSA has reached no conformity between its judges on judicial review, and interpretations are based

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<sup>52</sup> See Dixon R “*Creating dialogue about socio economic rights: strong v weak from judicial review revisited*”(2006) Centre for Human Rights and Global Justice Working Paper. Economic, Social and Cultural Rights Series number 3

<sup>53</sup> In Legal brief report issue number 3019, on 20 April 2012 it was reported that “*Though there are differing views about exactly when the relationship between government and the judiciary began to unravel, most agree that by the time Judge Mogoeng Mogoeng was nominated for Chief Justice and then appointed by President Jacob Zuma, things were already seriously askew*”

<sup>54</sup> Section 165(4) allows for constitutional amendments “The assessment is aimed at enhancing the measures the legislative measures and programmes designed and developed by government to realize the objectives of this section

<sup>55</sup> The government wishes to do an assessment on the transformation of the judicial system and the role of the judiciary in a developmental state, the assessment must be completed in 18 months. See the *Soobramoney v Minister of Health* document on the transformation of the judicial system and the role of the judiciary in the developmental South African state February 2012

on the judge's discretion. It is this very discretion of the majority and minority judgments that has created the hostility between the judiciary and parliament.

### 2.2.3 Judge's discretion in applying judicial review

In demonstrating the use of the discretion, reference is made to three cases briefly. The first case is, *Government of the republic of South Africa v Grootboom & Others*<sup>56</sup>, whereby the Court applied a weak form of review. The case deals with the right to access of housing, section 26 of the Constitution. The court refused to involve itself with government policies and held that their only duty is to make sure that those government policies are reasonable. The court did however, hold further, that the housing system in place did not meet the standard of reasonableness as it unreasonably failed to consider and address those in most terrible need of housing<sup>57</sup>. The Court issued a declaratory order only. In the case of *The Minister of health v Treatment Action Campaign*<sup>58</sup>, the court applied strong form of review. The case deals with the supply of Nevirapine drugs to HIV positive mothers, thereby preventing mother to child transmission of HIV to a limited number of 'pilot sites'. The Court ruled that the government programme, in this case, failed the reasonableness test and ordered the government to remove, without delay, the restrictions that prevented Nevirapine from being made available outside the pilot sites, and for it to be distributed where medically indicated. Even though the court in the *TAC* case only provided a mandatory order it also made it clear what is expected of government. The difference between the mandatory and declaratory order lies in their enforceability. Once a declaratory order is ignored there is no real recourse, unlike a mandatory order which is an interdict, and is enforceable by way of contempt proceedings<sup>59</sup>.

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<sup>56</sup> 2001 (1)SA 46 (CC)(S.Afr)

<sup>57</sup> *Grootboom* paras 35 -38

<sup>58</sup> 2002 (5) SA 721 (CC) (S.Afr)

<sup>59</sup> *TAC* paras 96-97

The above cases are, but a few examples, of how a judgment can differ depending on the Court's interpretation on which rights, values, text and context the court gives preference to and how the limitations on certain rights are interpreted is in the discretion of the judges<sup>60</sup>.

The judiciary's inconsistency is further demonstrated by Roux in the case of *Minister of Home Affairs v Fourie*<sup>61</sup>, which relates to the common law definition of marriage, to illustrate how judges can reach the same conclusion based on two different opinions on an outcome. Justice Sachs opted for a weak form of review, as he believed it was important to enlist the help of the legislature in the enforcement of a legal change that was likely to be highly disruptive and ran the risk of future weakening public support for the Court. However, for Justice O'Regan, the constitutional text was sufficiently clear and a strong form of review was suggested and relief should be granted immediately by the court, as justice delayed, is justice denied<sup>62</sup>, she emphasises.

O'Regan noted that should the CCSA, in its first decade of existence, have provided a stronger, theoretically more secure foundation for its Bill of Rights jurisprudence than the current CCSA's jurisprudence would have been on a more solid footing now<sup>63</sup>. Woolman criticises the judges for relying too much on weak form of review in section 39(2) and for overusing it in challenging cases<sup>64</sup>.

It is submitted that the remedy of judicial review could be considered effective when dealing with legislation and policies. Tushnet's reasoning, for promoting weak form

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<sup>60</sup> See *Glenister v President of the Republic of South Africa* CCT 48/10 dated 17 March 2011.

<sup>61</sup> 2006 (1) SALR 524 (CC)

<sup>62</sup> Roux T (2009) 9

<sup>63</sup> O'Regan K November 2011 "*The role of the Constitutional Court in our Democracy*" at a Helen Suzman Memorial Lecture, Johannesburg, states "...in a Constitutional democracy the relationship between these arms of government is structured in a way to ensure that the power of each is checked or restrained by the other" Justice Yacoob, 2012, in a paper presented at a constitutional week at the University of Cape Town, stated "The constitution in my view has its own check and balances in relation to the power of the judiciary and its possible political impact"

<sup>64</sup> Woolman S (2007) 786

of review is practical and well-founded, but not in a country such as South Africa where there is no strong opposition party. Using strong form of review by the courts, will obliged government to re-evaluate its Constitutional obligation in socio-economics rights cases, in future litigation.

### **2.3 Conclusion**

This chapter assessed the effectiveness of strong and weak form of review by discussing the judicial discretion the court applied in various cases. There was presented in this chapter views for, and against, both judicial reviews were illustrated and this chapter concluded with the paper promoting strong form of review.



**PART 11****CHAPTER 3****THE COURT REMEDIES, REJECTION OF MINIMUM CORE AND MEANINGFUL  
ENGAGEMENT IMPLEMENTATION****3.1 Introduction**

Liebenberg believes, and this paper supports this view, that courts should start using their remedial powers in socio-economic rights cases more effectively<sup>65</sup>. The court can instruct the state to develop programmes which can bring about the changes needed. Her advice to the court is to overcome its reluctance to grant supervisory remedies, in order to facilitate the long-term structural reforms required to realise socio-economic rights. These types of orders, will allow the court to monitor compliance with its orders, and it will enhance participation with all parties concerned. This will further, allow the courts, the opportunity to give forms of tangible relief to those experiencing immediate deprivations, to avoid irreparable threats to life, health and future development. The nature and extent of this relief will depend on the context of the right, keeping close attention to the democratic values which calls for the basic necessities of life to be provided to all; if it is to be a society based on human dignity, freedom and equality<sup>66</sup>.

The jurisprudence of the court, as will be discussed in this chapter, will illustrate that the remedies provided, have brought the citizens no closer in realising their socio-economic rights. This can also be attributed to the method of interpretation of the rights in question before the court. By critically analysing the court's interpretation of these rights which resulted in declaratory and mandatory orders being issued, together with academic views of certain scholars, it will become clear that there is

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<sup>65</sup> Liebenberg S "Needs, Rights and Transformation: Adjudicating Social Rights" Centre for Human rights and Global justice working paper, Economic and Social rights Series (2005) 30

<sup>66</sup> Liebenberg S (2005) 30

no straightforward understanding to these rights. The lack of substantive reasoning of these rights remains a challenge.

This chapter will focus further, in more detail, on the court's reluctance to apply a minimum core to socio-economic rights and its criticisms will follow. The main critical question that this chapter wants to address is whether the minimum core can provide a remedy to ensure full enjoyment of socio-economic rights which is sustainable for generations to come. The answer is simply no, however not for the reasons provided by the court. The discussion will consist of the court's reasoning and various academics that promote and reject the minimum core approach.

This chapter will further discuss the relevance of the application of meaningful engagement as a positive direction allowing participation between the parties, with a view to encouraging contributions to policy development. The idea, as Brian Ray explains and fully discusses later in this chapter, is that meaningful engagement should be incorporated into policies from its inception. He refers to it as political engagement<sup>67</sup>. It is argued that Ray understands the importance and practicality implication of engagement.

### **3.2. The Constitutional Court's interpretation of the reasonable review approach and the notion of progressive realisation within available resources**

The concept of the "reasonable review approach", in the jurisprudence of socio-economic rights cases in South Africa, imposes a duty on the state. However it is submitted that the CCSA has failed to adopt a consistent methodology in applying this reasonable review approach as a result the state use this confusion to delay its socio-economics rights obligations.

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<sup>67</sup> Ray B "*Proceduralisation's Triumph and Engagement's Promise in Socio-Economic Rights Litigation SAJHR*", Symposium Issue on Public Interest Litigation in South Africa 2011



In highlighting the manner of the courts approach, four major South African socio-economic rights cases will be discussed and analysed namely; *Soobramoney*<sup>68</sup>, *Grootboom*<sup>69</sup>, *Treatment Action Campaign*<sup>70</sup> and *Mazibuko*<sup>71</sup>. Throughout these cases, it can be observed that socio-economic rights have not yet established a rightful place in society due to the lack of the court inconsistencies in defining the normative value of the rights. No framework of socio-economic right has been developed by the CCSA to introduce benchmarks for the state's policies.

The critical question is therefore: how progressive are socio-economic rights in reality to the court?, and why has the Court continuously failed to protect these rights?. Biltchitz provides a possible answer; he states that the judiciary's deference to the government in socio-economic rights cases seems to have been pushed too far out by the socio-economic rights cases and there is a need to pull them back<sup>72</sup>. This paper is in agreement with this observation but clearly this is not enough.

Mitra Abedolahi also, criticises the Constitution for failing to provide a clear meaning of socio-economic rights. She asked; how can the judiciary evaluate whether or not the State is fulfilling its duties to "respect, protect, promote and fulfil" these rights, with so much uncertainty? How can vague rights be meaningfully adjudicated or enforced and violations remedied<sup>73</sup>? Klare explains and correctly points out that the constitution invites a new imagination and self-reflection about legal methods, analysis and reasoning consistent with its transformative goal<sup>74</sup>. All these writers seems to agree that the judiciary must become more actively involved with interpreting socio-economic rights openly, clearly, and effectively with special

<sup>68</sup> *Soobramoney v Minister of Health, Kwazulu – Natal* 1998 (1) SA 765

<sup>69</sup> *Government of the republic of South Africa v Grootboom & Others* 2001 (1)SA 46 (CC)(S.Afr.)

<sup>70</sup> *Minster of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC) (S.Afri.)

<sup>71</sup> *Lindiwe Mazibuko and Others v City of Johannesburg & Others* 2010(3) BCLR 239 (CC)

<sup>72</sup> Bilchitz D "Towards a reasonable approach to the minimum core: Laying the foundation for future socio-economic rights jurisprudence" (2003) 19 SAJHR 4

<sup>73</sup> Ebadolahi M "Using structural interdicts and the South African Human Rights Commission to achieve judicial enforcement of economic and social rights in South Africa" 2008 NYU School of Law 1567

<sup>74</sup> Klare K "Legal culture and transformative constitutionalism" 1998 SAJHR 156

attention to the needs of the recipients of these rights. How the courts have interpreted socio-economic rights will receive further scrutiny in the next paragraphs.

### **3.2.1 The Constitutional Court's interpretation of these rights**

#### **3.2.2.1 The rational test in *Soobramoney v Minister of Health,***

##### ***Kwazulu–Natal***

The first case that considered the scope of socio-economic rights was the case of *S v Soobramoney*. Mr Soobramoney suffered from a terminal illness, which required him to receive dialysis treatment. The hospital policy only allowed treatment for people who are eligible for a kidney transplant. He relied on section 27(3) of the Constitution, which states that “no one may be refused emergency medical treatment.” The court, in this matter, adopted the rational test and held that the word “emergency” in this section does not refer to people in situations such as the applicant<sup>75</sup>. The court further held that should terminally ill people receive treatment, such as what the applicant needed first, it would result in depleting the available resource for preventative health care and other illnesses which are not life-threatening.

Furthermore, the court stated that Mr Soobramoney's case would have failed even in respect of section 27(1) as the court found that the eligibility criteria adopted by the hospital were reasonable given the resource constraints. The court held further that section 27 must be read in the context of the state's limited resources expressly contained in section 27(2), which provides that; “The state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of these”.

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<sup>75</sup> *Soobramoney* para 25

In this regard, the provincial government offered evidence that it had to balance a great number of health priorities with a woefully inadequate budget<sup>76</sup>. The court concluded on this basis, that “a court will be slow to interfere with rational decisions taken in good faith by political organs and medical authorities whose responsibilities it is to deal with such matters”<sup>77</sup>. Lehman state that most scholars accepted that Mr Soobramoney’s interest in prolonging his life had to be sacrificed in the interest of the general welfare of others<sup>78</sup>.

The court made it clear in the manner its judgment is articulated, that it shall not over-step its separation of powers and that each branch has a duty that the other should not interfere with. The court has drawn a distinction between extending one life on the one hand, and treating a number of ill people on the other, in respect of budgetary issues. It is submitted that this type of concession expressed in the *Soobramoney* case can never be justified in a democratic state. It is argued that the court should have requested the state to present other options of where resources could be obtained from, for example, the court never explored the possibility of requesting the state to obtain funds from other departments or even borrow money from other countries to assist. These types of socio-economic rights should be considered primary where it comes to budget allocation. It is further argued that the concept “within available resources” should change to “within all available resources” as this will include all the departments’ resources<sup>79</sup>.

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<sup>76</sup> *Soobramoney* para 33

<sup>77</sup> *Soobramoney* para 29

<sup>78</sup> Lehmann K “*In Defense of Constitutional Court: Litigating Socio-economic rights and the Myth of the minimum Core*” American University International Law review 1, (2006) 22

<sup>79</sup> See further General comment 3 para 13 “ The Committee notes that the phrase “to the maximum of its available resources” was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance.

### 3.2.2.2 *Government of the Republic of South Africa v Grootboom &*

#### ***Others: declaring the duties of the state***

This case has been the source of many debates and analysis in academic writings. *Grootboom*, established the states duty towards socio-economic rights, even though the court recognised that housing was "a constitutional issue of fundamental importance to the development of South Africa's new Constitutional order", failed to define the extent of the states' duty.

The rubber stamping of the agreement resulted in many of the people's rights not being fully identified and analysed. The state in this matter, agreed to provide urgent relief to the applicants before court only. Liebenberg does not agree with the state's offer to only assist the applicants as there were other people in the same situations who also needed the court's intervention. She argues that it is inappropriate to distinguish between different disadvantaged groups in the absence of compelling justification such as a severe shortage of resources<sup>80</sup>.

The judge in the *Grootboom* case continued to develop a "standard of reasonableness" as a guide in deciding whether government's policies conformed to the Constitutional requirements. The end result of the interpretation of this case resulted in signifying that the court had shown deference for the legislature and executive, in their policy development. The Court acknowledged that "a wide range of possible measures could be adopted by the State to meet the requirement of reasonableness." It can be argued that this approach is too flexible and open-ended, and what should have been established is a context in which reasonableness should be measured and proper benchmarks should have been developed to assist the state. The courts jurisprudence would have been firmly established and advanced if only the court adhered to these types of suggestions.

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<sup>80</sup> Liebenberg S "Socio- economic Rights: Adjudicating Social rights under a transformative Constitution" (2010) 412

In effect, the declaratory order that was granted was a general order with a mere function of interpreting the policies of government with the one aim to establish if the policies were reasonable; not the result that was initially aimed at when the application was brought to court.

Seen in this light, the contention made by Sunstein is not unusual when he said that the *Grootboom* case is a typical administrative law case<sup>81</sup>. It can be argued that the manner in which the model of reasonableness review has been developed, by the CCSA, does not represent the best approach to the judicial enforcement of these rights.

### **3.2.2.3 The assessment of reasonable review and progressive realisation via a declaratory order and its effect**

The assessment of the reasonableness of the state's programmes and policies are influenced by two further factors; the internal limitations of section 26(2) which requires that the rights be "progressively realised", and that the availability of resources is an important factor in determining what is reasonable<sup>82</sup>.

Bilchitz disagrees with the Court's interpretation of the reasonable standard approach, and emphasises that an enquiry into the reasonableness of the measures, adopted by the state, must also involve an enquiry into the content of the rights contained in sections 26(1) and 27(1)<sup>83</sup>. Liebenberg supports this analysis and states that there was a need for the government to place evidence before the Court concerning the alleged floodgate implications of granting direct relief<sup>84</sup>.

Mclean captured the essence of the Court's approach correctly, when she stated that the Court's analysis of these sections are a limited interpretation of section 26,

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<sup>81</sup> Sunstein C R "Designing Democracy: What Constitutions Do" 2002 224-37

<sup>82</sup> Liebenberg S "Adjudicating Social rights under a transformative Constitution" (2010) 83

<sup>83</sup> Bilchitz D "Towards a reasonable approach to the minimum core: Laying the foundation for future socio-economic rights jurisprudence" (2003) 19 SAJHR 11 6

<sup>84</sup> Liebenberg S "Socio-economic Rights: Adjudicating Social rights under a transformative Constitution" (2010) 412

which resulted in ignoring the more practical and progressive understanding of the state's duty in national legislation and international law.<sup>85</sup> She believes that the court has adopted a highly deferential approach in interpreting the scope and meaning of section 26. This is further illustrated by Yacoob's failure to consider the jurisprudence of the ESCR committee, that requested the state "to take steps" which should be deliberate, concrete and targeted as clearly as possible towards fulfilling that right<sup>86</sup>.

Liebenberg has suggested a more substantive judicial approach to the reasonableness review. She states that it should build on, or at least incorporate, a further principled and systematic interpretation of the content of the various socio-economic rights. She suggests that consideration should be given to the value of the rights and the impact of the denial of the rights, on each group<sup>87</sup>. This approach coincides with Ebedolahi's request for more clarity on these fundamental rights.

The court in the *Grootboom* case issued a declaratory order requiring the state to implement progressively, within its available resources, a comprehensive programme to realise the right of access to adequate housing. The programme should contain, the court held, provisions which undertake to provide shelter for those in desperate need of housing either due to intolerable living conditions or crisis situations. The order further required that the programme must be balanced and flexible and appropriate, providing for short, medium, and long-term needs. Additionally, it must also allocate responsibilities and tasks to the different spheres of government, to ensure that financial and human resources are available. The programme must be reasonably formulated and implemented<sup>88</sup>. It is submitted that the order in the *Grootboom* case was vague and did not provide details to the state.

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<sup>85</sup> Mclean K "Constitutional deference, courts and Socio-economic Rights in South Africa" 2009 PULP 143

<sup>86</sup> Mclean K (2009) 141

<sup>87</sup> Woolman S and Bishop M (eds) "Constitutional Conversations" (et al), Liebenberg S "Socio-economic rights: revisiting the reasonableness review/minimum core debate" (2008) ch 18 325.

<sup>88</sup> *Grootboom* paras 39 - 44

What is expected of the state now, is to fill the gaps, which in fact is the duty of the court. Pillay argues, that the declaratory nature of the order meant that it did not compel the state to take steps to ensure that its programme complied with the Constitutional requirements<sup>89</sup>. Furthermore, the CCSA's order did not contain any time frames, within which the state had to act, and unfortunately the Court also refrained from exercising a supervisory role, which it could have easily ordered<sup>90</sup>. It cannot be denied that the *Grootboom* case did set out the duties of the state very prominently. These duties merely needed structure and formulation, which will be further discussed in chapter 4 of this paper.

The main difference between this case and the case of *Soobramoney*, is that the government policy in *Grootboom* focuses on medium to long-term needs and providing emergency relief for the most vulnerable in need of urgent housing. In *Soobramoney*, the court weighed up the interest of survival between two groups first, before justifying its decision. This interpretation of *Grootboom*, is a step that is in line with the spirit of a democratic state. However, the court in the *Grootboom* case, made it clear that socio-economic rights do not give rise to a direct individual entitlement to the provision of socio-economic resources and service.

Various academic writers expressed different view on the outcome of the *Grootboom* case. Wesson agrees with the basic structure of the case and believes that the *Grootboom* judgment could develop into a framework for the adjudication of socio-economic rights that is not only coherent but which also strikes an appropriate balance between the competing roles of the state and the judiciary<sup>91</sup>. Liebenberg characterised the *Grootboom* case as a positive precedent for the judicial enforcement of economic and social rights<sup>92</sup>. Roux again states that the flaw in the

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<sup>89</sup> Pillay K "Implementing *Grootboom*" (2002) 3(1) ESR Review

<sup>90</sup> Pillay K (2002)

<sup>91</sup> Wesson M "Grootboom and beyond: Reassessing the Socio-economic jurisprudence of the South African Constitutional Court" (2004) 20 SAJHR

<sup>92</sup> Liebenberg S "The Right to Social Assistance: The Implications of *Grootboom* for Policy

<sup>92</sup> Reform in South Africa" (2001) 17 SAJHR 232

decision is not found in the Court's substantive reasoning, but rather in the form of the order made<sup>93</sup>. He argues that the Court failed to back up its declaration of constitutional invalidity with a proper enforcement mechanism. He criticises the Court for failing to do justice to the remedies available, under the South African Constitution<sup>94</sup>.

On the positive side to the *Grootboom* case, Jung and Paremoer argue that the courts started to function not only as mechanisms of accountability, but also as a location where embattled communities could take the government to task for the poor quality of public debate, and their unconcern for the adverse effects of public policies<sup>95</sup>.

Lehmann in contrast to Liebenberg believes, that the decision to prioritise certain interests is very rational and reasonable, and that an executive cannot be faulted for doing so; provided its choices are rational and reasonable<sup>96</sup>. Lehmann further argues that policies should never be set aside due to a ranking of interest. Moreover, she cautions the judiciary's use of power and argues that their function is to scrutinise the rationality and reasonableness of government policies. This concept is the same as in the *Grootboom* case.

Lehman further attempts to justify the above-mentioned restriction on the judiciary, by emphasising that it is an impossible task for the Court to evaluate the reasonableness of budgetary allocation, without extensive evidence<sup>97</sup>. It would appear that Lehman supports the view of the *Grootboom* judgment.

From the above discussion it is clear that the declaratory order presented a mix view but all the writers are in agreement that more clarity in the order is needed. It is

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<sup>93</sup> Roux T "Understanding *Grootboom*-a response to Cass R Sunstein "12 Const. F. 41 2001-2003 3

<sup>94</sup> Roux T (2001-2003) 3

<sup>95</sup> Jung C and Paremoer L "The Role of Social and Economic Rights in Supporting

<sup>95</sup> *Opposition and Accountability in Post-Apartheid South Africa* 2007 28

<sup>96</sup> Lehmann K (2006) 93

<sup>97</sup> Lehmann K (2006) 94



argued that reasonableness review is but one step in the courts questioning to state's policies but more is needed to ensure fulfilment of socio-economic rights.

#### **3.2.2.4 *Minister of Health v Treatment Action Campaign: A positive step to resource allocation where a mandatory order is granted***

The court in the *Minister of Health v Treatment Action Campaign (TAC case)* granted a mandatory order to the state but rejected a request for on-going judicial supervision of the government's HIV programmes, in the form of a supervisory order. The court did display in this case, a greater eagerness to impose extensive financial obligations upon the state where it failed to meet the standard of reasonableness and in a way allowed some flexibility of application of the reasonableness test.

The Constitutional challenge was brought by the TAC against the government's policy for limiting the provisions of Nevirapine, a drug useful in preventing mother to child transmission of HIV, to a limited number of 'pilot sites'. This was a public interest case and the Court granted a mandatory order against the state which would benefit the entire class of HIV positive women giving birth in public hospitals<sup>98</sup>. The government argued that extending Nevaripine to other public sites will be too costly and expensive to maintain. It is submitted that this was the same argument used in the *Soobramoney* case. Fortunately the court used a different approach.

The court held that the government programme, in this case, failed the reasonableness test and ordered the government to remove, without delay, the restrictions that prevented Nevirapine from being made available outside the pilot sites and for it to be distributed where medically indicated. The government was also required, to extend testing and counselling facilities related to mother-to-child transmission (MTCT), throughout the public health sector. In essence, the court

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<sup>98</sup> TAC para 135

declared the existing government policy available to all. The court wanted government to amend or revise its policies if it wished to do so.

The case accepted that the interests of the individual HIV positive pregnant women, and their children, were equal with the general public welfare.

### **3.2.2.5 *Lindiwe Mazibuko and Others v City of Johannesburg & Other: A lost opportunity***

Keeping in mind the above, jurisprudence followed by a rich academic scrutiny of six years, one would expect that the next socio-economic rights case would draw on these interpretations and opinions. The case of *Mazibuko* found its way to the CCSA, with disappointing results. Many objections were indeed raised in the Court's approach by legal writers and socio-economic rights activists. The judgement was received by many as a perfectly missed opportunity to give more substance to socio-economic rights, with acceptable benchmarks for state duties.

The case considered the lawfulness of Operation Gcin'amanzi, a project the City of Johannesburg piloted in Phiri in Soweto in early 2004, to address the problem of water loss and the non-payment for water services in Soweto. The Applicants succeeded in the South Gauteng High Court. This court found that the pre-paid water meters was unlawful and unfair, and held further that the City's free basic water policy was unreasonable and therefore unfair. The High Court stated that 50 litres of free basic water daily must be provided to the Applicants and similarly placed residents of Phiri.

However, on Appeal to the Supreme Court of Appeal, the court varied the order. The court granted 42 litres of water per day as "sufficient water" and it also declared the pre-paid meters unlawful. The court did not consider whether the manner in which the meters were installed was fair. The Applicants applied to the CCSA for

leave to appeal against the judgment of the Supreme Court of Appeal and in fact sought reinstatement of the High Court order. The Applicants accepted that the old water supply system in Soweto was unsustainable and had to be changed. When the matter received attention in the High Court, eighteen months had passed and the vast majority of residents had accepted, under strain, the pre-paid water system.

The CCSA held that the obligation placed on government by section 27 is an obligation to take reasonable legislative and other measures to seek the progressive realisation of the right. This is the same criteria laid down in the *Grootboom* case. The court considered the question, whether the water policy was reasonable. The court held, in this regard, that it is not appropriate for a court to give a quantified content as to what constitutes “sufficient water” because this is a matter best addressed in the first place by government<sup>99</sup>.

The court held that ordinarily, it is institutionally inappropriate for a court to determine precisely what the achievement of any social and economic right entails, and what steps government should take to ensure the progressive realisation of the right. The court went further and argued that to investigate social conditions in the light of available resources, the legislature and executive are the best places to investigate social conditions, to discuss available budgets, and to determine what targets are achievable in relation to these rights.

According to Liebenberg, it is regrettable that in the *Mazibuko* case, the court chose to place the narrowest possible construction on these criteria and then engage in a superficial analysis of the impact of the City’s water policies<sup>100</sup>.

In considering other Constitutional Courts such as Columbia, the court recognises the difficulties associated with the enforcement of social rights and further

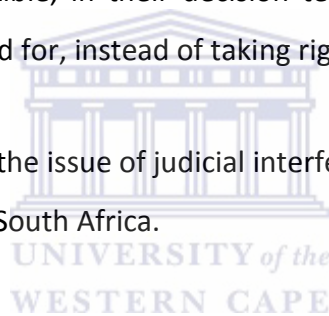
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<sup>99</sup> *Mazibuko and Others v City of Johannesburg & Others*, 2010(3) BCLR 239 (CC) para 61 further states that; “ It is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right”

<sup>100</sup> Liebenberg S “*Adjudicating Social rights under a transformative Constitution*” (2010) 480

acknowledges that these difficulties cannot be ignored<sup>101</sup>. The Columbian judges recognised the progressive characteristic of the state's duty to fulfil rights and they have to take into consideration, in their interpretive task, not only the limited resources but the progressiveness principle as well. The Columbian court takes into consideration the social right that entails public expenditure and they accept that it is the duty of the state to determine the ways in which they plan to render service and provide subsidies. Due to this duty, the Constitutional court of Columbia does not ignore the vital role that the law plays in the definition of social content and protection mechanisms. It means that the court does allow congress ample freedom to develop strategies for the satisfaction of these rights. The willingness by Columbia's judges to be flexible, in their decision techniques to allow for further democratic discussion is called for, instead of taking rights away.

In this analysis it is clear that the issue of judicial interference in state duties, in other countries, are as visible as in South Africa.



The *Mazibuko* case, it is submitted failed to address the most crucial issue of socio-economic rights, which is a long awaited interpretation of the rights normative value in a South African context. It is argued that the starting point of the *Mazibuko* judgment was a repeat of the *Grootboom* standard, nothing new could be drawn from it to add to the CCSA's courts jurisprudence.

The amicus curiae in all of the above cases in this chapter, requested the court to implement the minimum core approach as laid down in General Comment 3 of the ICESCR. The court rejected the request. An in-depth discussion will follow from various scholars, providing their support or disagreement with this approach. As noted above, this study does not support a minimum core approach.

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<sup>101</sup> Gorgorella R, Domingo P and Roux T "Courts and Social Transformation in new democracies: An institutional voice for the poor" 2006 et al Yepes R "Enforcement of Social Rights by Columbia Constitutional Courts: Cases and debates" ch 6 141

### 3.3 The minimum core debate: Does it have a place in South Africa?

Liebenberg sets out the correct starting point to the minimum core debate in South Africa. She illustrates the importance of the value of socio-economic rights against a background that cannot be ignored, which is the purpose socio-economic rights holds in the Constitution<sup>102</sup>. She believes that the socio-economic rights jurisprudence should be seen within the transformative commitments of the Constitution. She holds that in this manner, this might lead to an understanding of the purposes of socio-economic rights, in the South African context, that goes beyond enabling people to survive and fulfil a diversity of purposes. She argues further that, socio-economic rights can also be regarded as integral to advancing the constitutional vision of a society based on social justice. According to her, a society that values this; is committed to the redress of all forms of systemic inequality and disadvantages. It aims to ensure that people have access to social services and economic resources necessary to realise their full potential and to participate as equals in all spheres of the South African democratic society<sup>103</sup>. The question that needs to be asked is, whether the minimum core can be considered as a remedy to address the infringement of socio-economic rights. Various views will be analysed and criticised in respect of this concept, as some writers do believe that implementing a minimum core approach does provide a remedy to the problem.

According to Bilchitz, survival can be addressed by a minimum core allowance from the state<sup>104</sup>. Bilchitz's theory is based on a survival threshold. Liebenberg rejects his views. Bilchitz argues that the concept of minimum core obligation is a method of protecting citizens, and considering their basic necessities to survive, and if these

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<sup>102</sup> Liebenberg S "Socio-economic rights: Revisiting the reasonable review/minimum core debate" Woolman S and Bishop M et al (eds) in *Constitutional Conversations 2008* ch 18 303

<sup>103</sup> Liebenberg S Book review of Bilchitz D, "Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights" (2007) 888

<sup>104</sup> Bilchitz D 'Towards a reasonable approach to the minimum core: Laying the foundation for future socio-economic rights jurisprudence' (2003) 19 SAJHR 11

needs are not met, then the citizens' ultimate survival will cease to exist<sup>105</sup>. He argues further, that the obligation is on the state, to protect the citizen's survival. He concedes that an individual can only flourish if his or her socio-economic rights are met. He accepts that in order for the state to meet its minimum core obligations in socio-economic rights as a matter of urgency, other rights will receive less priority, weighing of rights are thus required. He justifies this notion by stating that the obligation of progressive realisation of the right will not meet a satisfactory standard unless the minimum essential needs for survival are met<sup>106</sup>. It can be argued that this idea was facilitated by the *Grootboom* case, when the court held that the standard of reasonableness review requires that government programmes must make some reasonable short-term provision, for those whose socio-economic circumstances are urgent or intolerable.

Wesson seems to agree with Bilchitz and he has identified three reasons why the minimum core should be adopted<sup>107</sup>. Firstly it would allow for resources to be first allocated where needed urgently. Secondly, it would allow for an understandable formulation of the concept of progressive realisation, and this would be the starting point for the state. Finally, it has an advantage that would guarantee individual entitlements. He concludes that with all these benefits in mind, the minimum core will allow for substantive achievement of a transformative society<sup>108</sup>.

Wesson's main criticism against the minimum core, is the fact that the Court overlooked the complex relationship between core (those that implicate survival) and non-core (those that relate to fulfilling a range of purposes and flourishing as a human being) allocations, and the difficulty of balancing these against one another. Lehman disagree with Bilchitz and criticise those who promote the application of

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<sup>105</sup> Liebenberg S (2008) 310

<sup>106</sup> Liebenberg S (2007) 885

<sup>107</sup> Wesson M "Grootboom and beyond: Reassessing the Socio-economic jurisprudence of the South African Constitutional Court" (2004) 20 SAHRJ 299

<sup>108</sup> Wesson M (2004) 299

the minimum core and she argues that people who promote this core approach, fail to provide specification of the core and especially where the minimum core requires a ranking of interests. She argues that no principled basis exists on which the court can rank the interests of claimants when their interests are incomparable<sup>109</sup>.

Liebenberg, taking a different critical approach from Bilchitz, accepts that people can survive on very little; and to introduce a minimalism for survival purposes is not correct where a state has the resources to provide more than the bare minimum<sup>110</sup>. The critical question now asked is; why should a heightened justification be required from the state, only in respect of survival interests. Liebenberg warns against the danger of adopting a fixed, overarching standard such as survival, as it will result in either over- or under-inclusivity in the specification of core obligations. She further states, that if survival is the standard to apply socio-economic rights; which standard would then be needed for other goods and services such as the public provision of child care, which may not be essential for survival, but is critical in fostering substantive gender equality; one of the foundational constitutional values<sup>111</sup>.

Liebenberg further disagrees with Bilchitz's approach, noting that the survival standard does not provide clear guidance as to which socio-economic interventions should be adopted or enjoyed. Liebenberg suggests an assessment of the impact on the seriousness on the complainant group of the deprivation in question<sup>112</sup>.

Young agrees with Liebenberg's method of interpretation of the minimum core. Young concedes that the focus on survival can set the interpretations of economic and social rights on the wrong path<sup>113</sup>. Young criticises the CCSA for its reluctance to

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<sup>109</sup> Lehmann K "In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core " American University International Law Review 22, no. 1 (2006)188

<sup>110</sup> Liebenberg S "Socio-economic rights: Revisiting the reasonable review/minimum core debate" Woolman S and Bishop M et al (eds) in Constitutional Conversations (2008) 313

<sup>111</sup> Liebenberg S (2008) 315

<sup>112</sup> Liebenberg S (2007 ) 888

<sup>113</sup> Young K " The minimum core of Economic and Social Rights: A concept in search of content" The Yale Journal of International law (2008) 33 128

give meaning to the minimum core, through a simple expression of values, by merely highlighting normative values of dignity, equality, and liberty in guiding its interpretation.

Young clarifies her position by acknowledging that there is a connection between the “minimum core” and the “basic needs” required for life and survival. According to her, this does focus on urgent steps that need to be taken for the satisfaction of those rights. She believes that some competing values that are alongside human dignity may also bring about the interpretation of the minimum core; and it is this interpretation of the values that should be measured in context with the right the Constitution strives to promote<sup>114</sup>.

It should be understood, that to value the inherent dignity of human beings as a society, is to ensure that the material conditions exist in which people can develop their capabilities and participate in shaping their society<sup>115</sup>.

Lehman admits that no matter what form of interpretation is used for the “minimum core”, it remains both theoretically and pragmatically ill-conceived. She applauds the rejection of the Court’s jurisprudence, in respect of the minimum core in socio-economic rights cases, and urges that it is inappropriate as a tool of judicial decision-making. She accepts that the reasonable approach is the better approach than the minimum core, but criticises the Court for not getting involved in the manner in which the budget is spent. She holds firm that the minimum core is inappropriate in the context of litigation that relates to the enforcement of an individual’s rights<sup>116</sup>.

The onus would be on the state to prove what it can provide, which means that the boundary of the minimum core would have a shifting target; its boundaries determined by what the state could afford to deliver.

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<sup>114</sup> Young K (2008) 130

<sup>115</sup> Liebenberg S (2007) 889

<sup>116</sup> Lehman K (2006) 183



Lehman accepts that there is a distinct lack of specificity, in both academics' and the CESCR's comments, on how competing interests should be ranked when the minimum core is applied. Further analysis by Lehman into the CESCR response and that of other supporters of the approach, resulted in an acceptance that the minimum core requires a ranking of interests. Urgent interests need to be prioritised. But on what basis, she asked, are interests to be ranked? How should "urgent" interests be distinguished from less-urgent interests? She makes various examples and only one is mentioned here to illustrate her point. She asks between a family of three in a two-bedroomed house that lacks running water and sanitation, and a family of ten squeezed into a two-bedroom house with running water and sanitation. How she asks, does one find the answer to these questions within the right itself<sup>117</sup>? These questions go back to the *Soobramoney* case, where rights were limited due to practical issues relating to the scarcity of resources.

The minimum core debate in other countries, such as Colombia, the Constitutional Court openly embraced the minimum core approach in socio-economic rights adjudication<sup>118</sup>. The Court accepted, into its law, the interpretations of the right, as laid down by the UN Committee on Economic and Social Rights. The Constitutional Court of Colombia applies the provisions of the International Covenant of Economic, Social and Cultural Rights, to interpret its sections. A number of cases have identified the minimum core of socio-economic rights, such as the right to health and the right to housing, in view of the CESCR observations.

In 2008, the Columbia Constitutional court demonstrated its commitment to their minimum core obligation by ordering that certain rights in health care should be made immediately available<sup>119</sup>. The court made it clear that if the treatment needed

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<sup>117</sup> Lehmann K (2006) 191

<sup>118</sup> Chowdhury J "Judicial Adherence to a minimum core approach to socio economic rights – a comparative perspective" Columbia law School Cornell Law School Inter-University Graduate Student Conference Papers 2009 paper 27 8 available at [http://scholarship.law.cornell.edu/lps\\_clacp/27](http://scholarship.law.cornell.edu/lps_clacp/27) (access on 15 September 2012)

<sup>119</sup> Chowdhury J (2009)

is not available in Columbia, then provision will be made for abroad treatment. The court adopted a framework for healthcare as specified by the United Nations Committee on Economic, Social and Cultural Rights (UN ESC Rights Committee). The Court categorised essential minimum core of the right to health in a mandatory plan and a subsidised mandatory plan. These were immediately enforceable. The other health care plans were made subject to progressive realisation. Here the court considered resource constraints. However, the immediate enforceable minimum core section is already considerably resource-intensive.

Lehman is correct in concluding that the minimum core idea is inherently inconsistent and its adoption could lead to an outcome that exacerbates socio-economic rights' needs<sup>120</sup>. A minimum core strategy may help some poor, but it may well be at the expense of other poor people, and this paper cannot support such a strategy as a remedy.

The following discussion, which relates to meaningful engagement, is the Court's latest and perhaps most promising, improvement in ensuring participation in socio-economic rights.

### **3.4 Meaningful engagement, providing much needed participation**

#### **3.4.1 The process of engagement**

Liebenberg<sup>121</sup> promotes meaningful participation and states that it is not only an expression of the dignity of the citizen, but is indispensable in ensuring that the design and implementation of programmes, to realise socio-economic rights, are effective and sustainable. It is submitted that meaningful engagement is one part to the fulfilment of a sustainable remedy to socio-economic rights infringement.

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<sup>120</sup> Lehmann K (2006) 192

<sup>121</sup> Liebenberg S "Joe Slovo eviction: Vulnerable community feels the law from the top down" Business day 2009 <http://www.antieviction.org.za/stockpile-on-joe-slovo/> page 2 (access 12 September 2012)

The notion of meaningful engagement has its origin in two cases, namely; *Port Elizabeth Municipality v Various Occupiers (PE Municipality)*<sup>122</sup> and *Occupiers of Olivia Roads v City of Johannesburg*<sup>123</sup> (*Olivia Road*) and this has marked an important development in the court's approach to remedies, in the context of the adjudication of socio-economic rights<sup>124</sup>. In the *PE Municipality* case, the Municipality requested the eviction of 68 unlawful occupiers, who had occupied private, undeveloped land within the Municipality area; in terms of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). The CCSA accepted that the court had exercised its discretion in granting an eviction order in terms of section 6 of PIE, and by doing so, the courts had to take into account, all relevant circumstances which included whether it was "just and equitable" to order an eviction and part of this determination was whether there was any mediation in terms of section 7 of PIE.

It is clear that section 26(3) of the Constitution and PIE gives the court a wide discretion in eviction proceedings, taking all relevant circumstances into account<sup>125</sup>. The court accepted that the procedural and substantive aspects of justice and equity cannot always be separated, and parties should engage with each other to find a mutually-acceptable solution<sup>126</sup>.

In the case of *Olivia Roads*, the concept of meaningful engagement was developed further. The City started evicting people from several buildings in the City, on the grounds that the buildings were unfit for human habitation, were dangerous and unhygienic, and by evicting them, would promote their health and safety. This was

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<sup>122</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (10) SA 217 (CC) paras 39-43

<sup>123</sup> *Occupiers of Olivia Roads v City of Johannesburg & Others* 2008 (3) SA 217 (CC)

<sup>124</sup> Mclean K "Meaningful engagement: One step forward or two back? Some thoughts on Joe Slovo" Constitutional Court Review (2010) 3 PULP 232

<sup>125</sup> Mclean K (2010) 233

<sup>126</sup> *PE Municipality* para 39

done by way of an Administrative Action which allowed the City to evict people under these conditions. The people challenged the legality of the process and asked the court to intervene. What followed was a lengthy analysis by the court for the parties to meaningfully engage with each other. Although real engagement occurred extremely late in the process, it nonetheless was highly effective in obtaining substantial relief with genuine commitment to the remedy from both sides. The City agreed to cease its eviction attempts and to take specific measures to make the existing buildings safer and more habitable by cleaning the buildings, providing sanitation services, access to water, and functioning toilets.

Yacoob J, referred to the case of *PE Municipality*, where the requirements of meaningful engagement was considered, and he stated that:

*“.....Engagement is a two-way process in which the city and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives and that Engagement has the potential to contribute towards the resolution of disputes and to increase understanding and sympathetic care if both sides are willing to participate in the process..... It must make reasonable efforts to engage and it is only if these reasonable 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 be managed by careful and sensitive people on its side”<sup>127</sup>.*

In the *Olivia roads* case, the court recognised the value of rendering explicit, obligations on municipalities, to engage meaningfully prior to instituting an eviction order<sup>128</sup>. The Court located this obligation of the state to act reasonably in section

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<sup>127</sup> *Olivia Road* para 14

<sup>128</sup> *Olivia Road* para 14 the court sets out five questions that needs consideration by the state before a request for eviction is made

26(2) of the Constitution, and the need to treat human beings with the appropriate respect and care for their dignity to which they have a right as members of humanity<sup>129</sup>. The court extended the scope of the engagement process and held that the engagement must have meaning and that the requirements set forth for meaning include; existence of good faith, right open-minded attitude, proactive stance of the parties and the need to adhere to transparency throughout the process<sup>130</sup>. The court clearly held that when it is presented with a case where no meaningful engagement was done prior to litigation a case for eviction, then a court should refuse the eviction order. This is unfortunately not what happened in the *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*<sup>131</sup> (*Joe Slovo*), this case will be discussed later.

Liebenberg supported the requirements set out in *Olivia Roads* and remarked that the order facilitated a participatory, contextualised solution to the impasse which had developed around the City<sup>132</sup>. However, she provided the same criticism as in the *Grootboom* case, to *Olivia Roads*, where the court failed to deal with other people in the same situation as the Applicants and the court also failed to deal with the issue of permanent housing.

Yacoob J, contentedly conceded that the desperate situation of the occupiers had been alleviated by the reasonable response of the City to the engagement process. Furthermore, he held that the court respected the undertaking provided by the state that they will engage with the Applicants in finding a solution for permanent housing<sup>133</sup>. Nothing would have prevented the court from providing a supervised order in respect of the implementation of these permanent housing engagement

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<sup>129</sup> *Olivia Roads* para 10

<sup>130</sup> *Olivia Road* paras 20-21

<sup>131</sup> 2010 (3) SA 454 (CC)

<sup>132</sup> Liebenberg S “*Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of ‘meaningful engagement’*” (2012) 12 AHRJ

<sup>133</sup> *Olivia Road* paras 34 -35

plans to all people in the same situation as the applicants. The court was not willing to extend its discussions beyond the Applicant in front of the court.

It is submitted that the deference the court provided here to the state is unearned, taking into account that these meaningful engagements on the initiation of the state could have taken place prior to the state seeking the evictions by way of Administrative sanction. The *Olivia Roads* case, even suggested that all of this could have been avoided if the City's Regeneration Strategy Plan had incorporated skilled workers to engage with the people prior to the process of eviction becoming an option<sup>134</sup>. It can be stated at this point, that the most important aspect of the development in this case of meaningful engagement, was when the court held that in the absence of meaningful engagement, no eviction should be granted<sup>135</sup>.



### 3.4.2 The consequence of failed engagement

The concept of meaningful engagement will not always result in a success story. In the case of *Mamba v Minister of Social Development*<sup>136</sup>, the court failed to resolve a dispute with meaningful engagement. This case deals with the closing of refugee camps by the government. The government portrayed an aggressive attitude and refused to engage meaningfully with the refugees. Ray criticised the court for not adhering to the engagement process laid down by *Olivia Roads* and argued that in *Mamba*, the Court could have held that closure of the camps required a reintegration plan but ordered engagement to determine the details of such a

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<sup>134</sup> *Olivia Road* para 19

<sup>135</sup> *Olivia Road* para 21

<sup>136</sup> CC 65/08

plan<sup>137</sup>. The outcome would have prevented closure before engagement and created the kind of pressure to change policy<sup>138</sup>.

### 3.4.3 Failure by the court to create consistency in meaningful engagement

The case of *Joe Slovo* is a good illustration of how meaningful engagement should not take place. Judge Hlope, in the High Court, granted the eviction order, knowing full well that the requirement for meaningful engagement, as held in the *Olivia Roads* case, was not met. Ray explained that Judge Hlope tried to justify this in his passing reference to the engagement requirement. In a parenthetical remark, he found that the numerous meetings the City Council held with residents including multiple averments in the court papers of meetings and/or consultations that were held with the residents of *Joe Slovo*, indicated that there was a sufficient amount of engagements<sup>139</sup>. Further justification was also made by taking into account the bigger picture of the project. From this discussion, it is clear that the judge ignored the requirement of meaningful engagement as set out so clearly in *Olivia Roads*. The residents appealed directly to the Constitutional Court.

The Joe Slovo informal settlement started in 1989, people invaded land belonging to the City of Cape Town on the N2 and M7 road. By 2008, there were between 18 000 and 20 000 thousand people in the settlement<sup>140</sup>. The conditions of the settlement were described as appalling. People lost their lives in fires and municipal services were non-existent, overcrowded conditions, in makeshift accommodation built of insubstantial material, and the conditions of life were unhygienic.

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<sup>137</sup> Ray B “*Proceduralisation’s Triumph and Engagement’s Promise in Socio-Economic Rights Litigation*” (2011) 27 SAJHR 109

<sup>138</sup> Ray B (2011) 109

<sup>139</sup> Ray B (2011)123

<sup>140</sup> Learning from Joe Slovo, NCHR workshop on advance socio economic rights: 2009 Section 7 – group 1, page 13 available at [www.phuhlisani.com/oid%5Cdownloads%5CLearning%20from%20Joe%20Slovo%20V%2004](http://www.phuhlisani.com/oid%5Cdownloads%5CLearning%20from%20Joe%20Slovo%20V%2004) (access on 15 September 2012)

In May 2004 the “Breaking New Ground” was introduced, which was the comprehensive plan for the creation of sustainable human settlement, which focused on upgrading of Informal Settlements (UISP). A three phase process was introduced in developing the houses. The residents of Joe Slovo were initially very happy with housing policy objectives but very unhappy with the manner in which the government went about to achieve these objectives. Part of the plan was to move the residents to Delft, with the view that some residents would be allowed to return after the houses were build. The first phase started and completed, and then the people were faced with rental payments which were beyond their means. In the second phase, people refused to move and presented evidence to the court that an in situ upgrade was possible. The government proceeded to seek an eviction court order.

The Applicants denied that there was any meaningful engagement with them and instead they argued that the government misled and lied to them. Residents also argued that housing developer Thubelisha Homes and government officials had failed to adequately include their input in the planning of the project or ensure that enough low-income housing would be built to accommodate all residents<sup>141</sup>.

The court granted the eviction order on condition that the relocated area needed to fulfill certain requirements and that 70% of the current residents must be provided houses in the developed area. After the settlement terms had been put in place, the Court then ordered the Government to engage with the residents on the specifics of relocation and included a detailed agenda of the items on which the residents must be consulted. The Court also retained jurisdiction over the case requiring the parties to report the results of these engagements.

Ray believes that it was an improvement by the court where a more specific agenda and stronger oversight was granted. Liebenberg noted that the Court was unwilling

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<sup>141</sup> *Joe Slovo* para 33



to trust the government to formulate details of the relocation to Delft and therefore, established specific terms in the order, while using engagement to determine other details. Ray concedes that this form of partial determination of the substantive issues can break an impasse in negotiations and also alter the bargaining positions of the parties more positively<sup>142</sup>. Ironically, the eviction granted in this case, was never executed and the government proceeded with in situ upgrades just as the Applicants initially requested, this was due to cost implications in moving the people to adequate alternative accommodations.

Liebenberg criticised the *Joe Slovo* court for retreating from its substantive promise of meaningful engagement in the *Olivia Roads* case, as a key consideration in determining whether an eviction was justifiable in the particular case<sup>143</sup>. Liebenberg questions the *Joe Slovo* court's willingness to condone the inadequate consultation process and labels it a serious concern. She nevertheless accepts that even though the CCSA's judgement was normatively weak, it still contained strong remedial safeguard in respect of implementing eviction orders.

A month prior to the *Joe Slovo* judgment, the court handed down the judgment of *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others*<sup>144</sup>, which was another direct appeal to the CCSA in 2009. This case reaffirmed the importance of meaningful engagement. The Applicants argued that section 16 of the KZN Slums Act<sup>145</sup> violated section 26(2) of the Constitution in three ways: it precluded meaningful engagement between municipalities and unlawful occupiers; it violated the principle that evictions should be a measure of last resort; and it undermined the precarious tenure of unlawful occupiers by allowing the eviction proceedings to begin without reference to the procedural safeguards contained in the PIE Act. The Court ruled that section 16 of

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<sup>142</sup> Ray B (2011) 20

<sup>143</sup> Liebenberg S (2010) 22

<sup>144</sup> *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others* (2009) ZACC 3. (*Abahlali*)

<sup>145</sup> KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007.

the Act was unconstitutional and invalid, as it gave too much power to the MEC and seriously undermined the protections in section 26(2) of the Constitution read with other housing legislation.

Certain key findings from the *Abahlali* judgment included the decision that if engagement takes place after there has been a decision to institute eviction proceedings, it cannot be genuine or meaningful. Another important finding was that proper engagement includes taking into consideration the needs of those who will be affected, the possibility of upgrading the area *in situ*, and the provision of alternative accommodation where necessary<sup>146</sup>. The court held that proper engagement would include taking into proper consideration, the wishes of the people who are to be evicted; whether the areas where they live may be upgraded *in situ*; and whether there will be alternative accommodation. This affirms that eviction or relocation should only ever occur as a last resort, and only after *in situ* upgrading has been considered. The revised national informal settlements upgrading programme, the National Housing Programme reiterates this principle<sup>147</sup>.

It is submitted that the above process of engagement took place after litigation was instituted, and it had indeed found a well-founded benefit as discusses above. It is further submitted that it would be ideal to have these types of engagements prior to litigation. The only question that remains is; whether there is a structural forum that can address the request for engagement prior to litigation.

#### **3.4.4 Ray's theory to develop engagement as a structural long-term process**

Ray promotes the theory of political engagement. This entails the development of engagement as a structural long-term process in government policies. He argues

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<sup>146</sup> *Abahlali* para 114

<sup>147</sup> Tissington K "A Resource Guide to Housing in South Africa 1994-2010 Legislation, Policy, Programmes and Practice Legislation, Policy, Programmes and Practice SERI" (South Africa) 2011 para 5.5 The revised National Housing Code was adopted and published in February 2009

that over-reliance on litigation, as a form of engagement, is dangerous<sup>148</sup>. Political engagement, he states, should take place before litigation commences, unless it is not possible to do so because of urgency or some other compelling reasons.

His theory emphasises that extending engagement beyond litigation and turning it into an administrative requirement offers the greatest potential for making the remedy a meaningful tool for implementing section 26 and other socio-economic rights. He suggests that as a result of the *Mamba case*, it has become important to develop engagement as a structural long-term process. He states that this form of engagement requires considerable coordination and administrative planning by the government. He recommends and this paper supports this view which, based on the engagement process by the court, the City should incorporate a structural engagement review process into the inner-city Redevelopment Plan. There should be increased agenda control, more direct management and an increased willingness to impose sanctions. All represent potentially important innovations in the engagement process. He declares that in both the *Oliva Roads* and *Joe Slovo* cases, the Court discusses the possibility of political engagement.

Ray concludes that courts have created engagement as a judicially enforceable tool, and in this manner, have crafted a way to demand a voice in policy development.

#### **3.4.5 Cases where meaningful engagement was enforced during 2012**

There were two High Court cases in 2012, where meaningful engagement was held to be of utmost importance and they were decided on 21 September 2012 in Gauteng High court and 20 August 2012 in the Cape High Court.

In the case of *Ekurhuleni Metropolitan Municipality v Various Occupiers South Gauteng High Court Johannesburg*<sup>149</sup>, the judge held that:

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<sup>148</sup> Ray B “*Engagement possibilities and limits as a socio-economic rights remedy*” Washington University Global Studies law Review 2010 (9) 405

*“It would seem that there were some positive results from this process of dialogue although the majority of disputes were not resolved”.*

The case of *Shania Amends v Megawatt Sallie Amends Western Cape Court*<sup>150</sup>, this matter deals with an individual’s claim, where the judge held that:

*“The circumstances of this case involving as they did, the unfortunate family dynamic of a father seeking to evict his three minor children together with their mother, cries out one would thought for a solution by way of mediation and engagement short of going to court”.*

A further 2012 CCSA case was *Schubart Park Residents’ Association v City of Tshwane Metropolitan Municipalities*<sup>151</sup> (*Schubart park*). This case was decided on 9 October 2012. The case dealt with four blocks of flats in the city of Pretoria and about 3000-5000 people were affected. The building deteriorated and the City was unable to identify the occupants due to an increase in urbanisation. The water and electricity supplies to the buildings were stopped<sup>152</sup>. A fire broke out on one block and all the residents were removed and after the fire was contained, the police refused the people access to the buildings. This was the start of an urgent application that followed to the North Gauteng High Court, Pretoria. The application was refused but the Court ordered temporary accommodation be made available by the City and the parties were ordered to meet and draft a proposal. The Court requested an engagement process in an attempt to reach an agreement<sup>153</sup>. The police continued to remove all of the remaining people out of the other two buildings. On the return date of the engagement process, the parties failed to reach an agreement. However, the court did confirm some of the agreement for immediate assistance. The High

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<sup>149</sup> *Ekurhuleni Metropolitan Municipality v Various Occupiers South Gauteng High Court Johannesburg* case no 2009/12111 para 43

<sup>150</sup> *Shania Amends v Megawatt Sallie Amends Western Cape Court* 12659/2009

<sup>151</sup> *Schubart Park Residents’ Association v City of Tshwane Metropolitan Municipalities* 2012 ZACC 26

<sup>152</sup> *Schubart park* paras 2-4

<sup>153</sup> *Schubart park* paras 7-9

Court in effect, granted two types of orders; namely a dismissal order and secondly, a tender implementation order, that related to the relocation of alternative accommodation.

The parties applied for leave to appeal to the CCSA as leave was refused by the High Court and Supreme Court of Appeal. The Applicants argued that the provisions of section 26(3) of the Constitution and the statutory instruments were disregarded which allowed for removal, evacuation or eviction of people from their homes<sup>154</sup>. This related to the dismissal order. They further stated that the tender implementation order was not proper under section 38 of the constitution. The High court, on the other hand, indicated that the dismissal order was granted due to safety and temporary impossibility.

The issue before the CCSA was the request for the restoration by the residents for reoccupation of their homes, as they were despoiled of possession of their homes. The court accepted that it was the ordinary requirement of spoliation and the demand for section 26(3) of the Constitution that was at issue.

The court continued to consider the issues and referred to the case of *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan*<sup>155</sup> (*Tswelopele*) who confirmed the view of the case of *Rikhotso v Northcliff Ceremics (Pty) Ltd*<sup>156</sup> (*Rikhotso*), that spoliation orders under common law, accepts that impossibility is a defence available for a spoliation order. The CCSA found that a constitutional law interpretation is required and considered the Supreme Court of Appeal's findings in *Rikhotso*, who emphasise that a remedy is needed that would vindicate the Constitution. Kriegler J profoundly held that:

*“The remedy we grant should aim to instil recognition on the part of the governmental agencies that participated in the unlawful operation, too, are*

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<sup>154</sup> *Schubart park* para 18

<sup>155</sup> 2007 (6) SA 511 (SCA)

<sup>156</sup> 1997(1) SA 526 (WLD) at 535 A-B

*bearers of the constitutional rights, and that official's conduct violating those rights trampled not only on them but on all... ....the occupiers should therefore get their shelter back"<sup>157</sup>.*

The CCSA cautioned the making of an order, under section 38 of the Constitution, where people were removed and a spoliation application was brought to court. A declaratory order the court held would be preferred where the court will not provide immediate relief for restoration and furthermore, that a refusal to order re-occupation does not mean that a foundation can now be laid for lawful evictions under section 26(3) of the Constitution. The court found that such an order should be temporary and subjected to revision.

This court accepted that it is not only eviction cases where meaningfulness is important, but in cases such as this where people are deprived of their homes and restoration of their homes are required. The dismissal order was found to be appropriate in the circumstances. However, the court accepted that the High Court could not have ordered immediate restoration but did indicate that the court could have made a declaratory order for eventual entitlement to restoration.

The court reaffirmed the principles of *PE Municipality* and *Olivia Roads*, where it was held that the exercise of competing rights and interest are best resolved by engagement between the parties. The CCSA in the *Schubart Park* case was unhappy with the City's engagement process of the City's tender, as it was seen as a unilateral process where the City decided on when, for how long and whether all of the Applicants may return to Schubart Park<sup>158</sup>. The court held that the order, in term of section 38, should provide for meaningful engagement with the Applicants being involved at every stage of the re-occupation process. A supervised order was appropriate on the facts.

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<sup>157</sup> *Rikhotso* paras 25-28

<sup>158</sup> *Schubart Park* para 50

### 3.5 Conclusion

This chapter has illustrated the vagueness of reasonable review presented in the *Grootboom* case and its failure to provide substantive reasoning to socio-economic rights. The assessment of progressive realisation of these rights in the reasonable reviews of government policies has brought us no closer to any consistency of procedure. This has been illustrated in the *TAC* case, where the court failed to interfere with the contents of government policy. However, it touched on how government should go about allocating its budget in future programmes but it fell short of granting a supervisory order to make sure that there is a fulfilment of this request. The court has not attempted to develop substantive reasoning for socio-economic rights and when provided with the opportunity in the *Masibuko* case, it firmly established its lack of understanding the need for effective remedies in socio-economic rights adjudication.

The request for a minimum core was rejected in all of the CCSA cases and rightfully so. Bilchitz's theory fell short of a long-lasting effect of socio-economic rights. In his analysis, he argues that the minimum core is important for survival of the poor, and with the implementation of this theory, he accepts that certain rights will have to be considered more important than others. Consequently, in terms of his theory, certain disadvantaged people will have to stand in line, in order for other disadvantaged people to be assisted first. This is a theory that both Liebenberg and Lehman reject for good reason. As stated elsewhere, this paper promotes the enforcement of socio-economic rights that will create consistency and sustainability from generation to generation. The application of the "minimum core" will merely have an effect of placing a plaster on an open wound; immediate relief with short-term effects.

The courts have been faced with a state that fails to enforce its declaratory and mandatory orders meaningfully. The need has arisen for the court to become more robust in its interpretation to ensure effective enforcement of its orders and the

introduction of the concept of “meaningful engagement” in the evictions cases is a welcomed development. It is especially this type of development that is much needed in socio-economic rights cases. Even though *Olivia Roads* was a form of successful engagement, the *Joe Slovo* case failed to continue a consistency in this approach. This being said, the courts have taken acceptance in this approach.

The case of *Schubart Park* has established that the concept of meaningful engagement is also important where the state deprives one of occupation in certain situations of emergency and failed to engage in the process of restoration. This case reaffirms the duties on the state to provide and to facilitate continuous engagement in all of the processes of fulfilling people’s socio-economic rights. The supervisory order attached to this engagement, will provide a long lasting effect on the needs of the residents of *Schubart Park*.

It can be argued with certainty, that meaningful engagement is one means to create some fulfilment of socio-economic rights and the courts should continue to embrace this concept. Where reasonable review fails to address policy content issues, meaningful engagement addresses it head-on.

Due to the imbalance in power of the parties, the concept of meaningful engagement is but one leg that may be added in creating a remedy that is effective. The next chapter will consider this suggestion more fully incorporating further, the structural interdict and supervision of court orders.



## CHAPTER 4

### STRUCTURAL INTERDICTS AND THE EFFECT OF SUPERVISORY ORDERS

#### 4.1 Introduction

Historically, interdicts were used as a last resort when no other remedies were available. The law on interdicts has been influenced by English law and with specific province in the English law of equality<sup>159</sup>. Christopher Mbazira agrees that in socio-economic rights cases, structural interdicts should also be used only as a last resort<sup>160</sup>. There exist a number of criticisms against the use of the interdict but this chapter will illustrate that those criticisms are overstated, by illustrating the structural and practical use raised by this interdict. Yet, as will be demonstrated, the balance is more in favour of granting the interdict due to its effective remedial nature for socio-economic rights.

Swart agrees that structural interdicts seem to be the most appropriate remedy in socio-economic rights cases of extreme urgency due to the programmatic nature of socio-economic relief<sup>161</sup>. She concedes that prohibited and declaratory orders cannot be compared to the effect of structural interdicts, as they lack an on-going supervisory function. She makes reference to the *TAC* and *Grootboom* cases which bounced back to court due to the lack of supervision in its orders. She promotes structural interdicts due to its nature and accepts that socio-economic rights, in the context of constitutional commitment do require supervision to assist with governments' inaction of orders<sup>162</sup>. The violation of socio-economic rights, she understood, cannot be remedied by an order that has a once-and-for-all effect and litigants are normally poor and cannot come to court over and over. However,

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<sup>159</sup> Mbazira C Litigating socio-economic rights in South Africa: "A choice between corrective and distributive justice" (2009) 167

<sup>160</sup> Mbazira (2009)169

<sup>161</sup> Swart M "left out in the cold? Crafting Constitutional Remedies for the poorest of the poor" (2005) 21 SAJHR 226

<sup>162</sup> Swart M (2005) 227

Liebenberg points out that as much as the purpose of the structural interdict is to ensure compliance with the terms of the order, its broader purpose is to facilitate the process of engagement between the parties, as discussed in chapter 3<sup>163</sup>. Both Mia and Liebenberg understood the importance of crafting effective sustainable remedies in a socially progressive constitution, where the courts must take care of the most vulnerable.

Extending the view of Liebenberg, one of the main purposes of this study, in terms of promoting structural interdicts and supervisory orders, is first to ensure compliance with effective court orders and secondly, to promote engagement in policy content decisions for current and future drafting of policies, by all parties concerned as a result of a litigation before the court. In this way, other people in the same position as the parties, in front of the court, will be protected via the drafting of the new policies. Furthermore, the engagement will result in an understanding of the normative interpretation of the right in its context. This result has been sought for, from the inception of the first CCSA case.

This chapter will be divided into four sections. The first section introduces the characteristics of a structural interdict with its supervisory function. Thereafter a discussion will follow as to the reasons why the courts have been reluctant to use this remedy. The third section will examine the extent of the effectiveness of the remedy in the current position of South Africa, while the fourth section will provide the possible defects in the remedy and some possible solutions thereto. Lastly, an in-depth discussion will follow on how South African courts can embrace the remedy to its fullest, by identifying a set of elements which will create the basis for when to use the remedy.

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<sup>163</sup> Liebenberg S "Socio-economic Rights: Adjudicating Social rights under a transformative Constitution" (2010) ch 8

## 4.2 Characteristics of a structural interdict

A structural interdict is defined as a continuing process, where the court will provide periodical directions regarding the process of remedying a violation of Constitutional rights, and there will be ongoing supervision<sup>164</sup>. Currie and de Waal identified five requirements associated with structural interdicts<sup>165</sup>. Firstly the court will declare that the government's conduct is in violation of its Constitutional obligation. The court will then proceed and instruct government to comply with its obligation. A positive instruction would follow where the court orders government to produce a report, under oath, over a period of time, stipulating how they intend to address this violation. The Applicants are then allowed to respond to the report and lastly, the matter is set down for hearing with the view to make such a report, part of the court order.

The court has however extended these requirements made by Currie and de Waal, in its case law. The case of *Olivia Road* has added a sixth element, namely that the parties must have meaningfully engaged before the state submits its plans to the court. Liebenberg agrees and states that the court created this foundation of meaningful engagement attached to the supervised order, to define the goals to be achieved, with the view to cure the violation. What follows during this process is the most intense and practical process of negotiation by all parties, as a plan needs to be developed to meet the goals. Finally the plan, and its approval, is subjected to on-going supervision. The reason for on-going supervision will become clearer, later in this chapter.

One of the main functions of this structural interdict is the flexibility allowed by the court and the required deference the court express to the state. It presents the state with enough latitude to formulate, implement and monitor the plan by way of

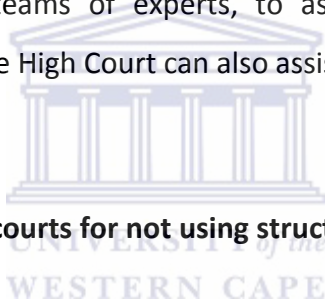
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<sup>164</sup> Liebenberg S (2010) 424

<sup>165</sup> Currie I and De Waal J (2005) 217-219. See also further the discussion on other remedies for the violation of rights pages 219 – 228

deliberative negotiation between the parties, organs of states and other stakeholders.

Currie and de Waal however, caution the court not to allow the terms of the interdict to be too flexible, which will result in supervision becoming too intrusive. The concerns expressed, relates to the supervised court order interfering with the day-to-day business of government, and the court may find it difficult to remove itself<sup>166</sup>. Ebadolahi has provided a partial solution to the concerns raised by Currie and de Waal. She suggests that the South African Human Rights Commission (SAHRC) assist with the supervision of orders<sup>167</sup>. Liebenberg agrees, but goes further and suggests that nothing prevents the court from appointing independent experts or preferably interdisciplinary teams of experts, to assist with the supervision of structural court orders<sup>168</sup>. The High Court can also assist with the supervision.



#### **4.3 Reasons illustrated by the courts for not using structural interdicts as an effective remedy**

In the *Grootboom* case, the court granted a mandatory order however; the requirements of the court order were not mandatory in nature. The government was placed under an obligation to provide shelter to children who, together with their parents, had been left homeless. The obligation was held to extend to the provision of shelter to their parents. The court made an order declaring the obligations of the respondents, and ordered them within three months to report to the court on the implementation of the order. An exchange of commentary and replies followed by the parties, and a date was to be set for ‘consideration and determination’ of the report, commentary and replies. Strangely though, the court did not make any

<sup>166</sup> Currie I and De Waal J (2005) 217-219

<sup>167</sup> Ebadolahi M “Using structural interdicts and the South African Human Rights Commission to achieve judicial enforcement of economic and social rights in South Africa” (2008) 83 NYULR 1565

<sup>168</sup> Liebenberg S (2010) 436

specific order on the government to complete anything in relation to shelter. The court merely declared the nature of the right and the obligation<sup>169</sup>.

It was clear in the *Grootboom* case that the states over-extension of the separation of power doctrine and the general deference the court has shown the other branches of government, has resulted in the court's failure to provide effective remedies. Swart is correct when she states that a court wants to settle cases once and for all. She accepts that a structural interdict might give the courts a different functional understanding, as understood traditionally, but it is something the court can embrace. However the remedy is seen as necessary, surrounding the problematic nature of socio-economic rights enforcement. The *TAC* case failed, on request from the applicant, to provide a supervisory order but said that it could be a possibility, where it is appropriate for the court to consider a supervisory jurisdiction.

The *Mazibuko* case, as discussed fully in chapter 3, has illustrated how the court has missed out on an opportunity to give the right, the much needed normative interpretation. Also, it is believed that the court has over-extended the doctrine of separation of powers here. It is clear that the court opted for a conservative approach. The amicus had raised several points in their submissions to the CCSA, which justified the granting of a structural interdict with a supervisory jurisdiction. They submitted that the City's water policy is flawed as it does not allow for people, who ran out of water, to make representation for further allocation<sup>170</sup>. They accept that the new system of representations allocated, has been designed to address this problem, but there is no evidence of how it will work, whether it will be accessible to the poor, how long it will take between making the special representations and water being available on tap, or how much additional water will be given if the representations are successful. They further submitted that evidence has shown that the City has an extraordinary capacity for foot-dragging and that it does not know

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<sup>169</sup> Liebenberg S (2010) 329

<sup>170</sup> *Mazibuko v City of Johannesburg*, Applicant's submissions para 393 available at <http://www.escri-net.org/docs/i/1110326> ( access on 16 September 2012)

what the flaws or weaknesses will be, in the implementation of the new policy. The failure on the CCSA's side to recognise the importance of a supervisory order, in these circumstances, is alarming and presents reasons for concern. It is well understood why the decision was greeted with dismay by socio-economic rights activists, community organisations and a wide range of actors working on the right to water

After the *Grootboom* case, a rich academic jurisprudence in debates was established and there was indeed an expectation that the *Mazibuko* court would take cognisance of concerns, problems and possible suggestions raised.

Ebadolahi, summarised some of the crucial observations by critics in respect of the courts reluctance to provide suitable relief to these fundamental rights. Firstly, the doctrine of separation of powers has been considered the most important observations by many critics. Furthermore, the vagueness in the Constitution of the rights and enforcement costs has obstructed the South African judiciary's effort to enforce socio-economic rights, meaningfully<sup>171</sup>. It remains the duty of the court though to provide substance to the right and to create a proper enforcement of the right through appropriate relief. She introduces a two stage approach for change; one is an increase in using structural interdicts and secondly, an advanced, collaborative role for the South African Human Rights Commission (SAHRC) to monitor the supervisory<sup>172</sup>. She recommends that the assistance the SAHRC can provide government is to help formulate plans and to follow up on the implementation of the plan, after an order has been granted. Furthermore, the commission can assist the court in identifying weaknesses in the potential plan of the government, to the court; and make proposals and suggestions. The commission will thus have an advisory and a supervisory function, depending on the issues before the court. The court must be cautious, not allowing the commission to take

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<sup>171</sup> Ebadolahi M (2008) 1565

<sup>172</sup> Ebadolahi M (2008)1598-1606

over the functionary role of the court, as this will result in the court merely becoming a rubber stamp. This is where the importance of the correct attitude from all parties becomes relevant. The aim should always be on finding a workable, practical and sustainable solution to the violation at issue.

The characteristic of the structural interdict in the first section of this chapter, has illustrated that this remedy would protect the doctrine of separation of powers, without minimising the right. One of the main functions of this structural interdict is the room allowed by the court, or the deference the court express to the state. This presents the state with enough latitude to formulate, implement and monitor the plan by way of deliberative negotiation between the parties, organs of states and other stakeholders. With this in mind, there should be no holding back by the court to use the remedy to its full potential.

#### **4.4 The extent of the effectiveness of the remedy**

A structural interdict is a remedy to eliminate the systematic violation that is found in institutional and organisational settings. It will adjust the future performance of the state departments, and it provides on-going government performance to supply relief. The structural interdict calls for government to restructure its internal structural organisation, to give effect to its obligation. This request for change has been incorporated into the constitutional values<sup>173</sup>.

Abadolahi illustrates the positive effects of a structural interdict. She accepts that it will avoid the difficulty of the doctrine separation of powers problem; as the plans presented to the court will be prepared with the assistance of the appropriate political role players. The plans are then scrutinised by the court in order to consider compliance with Constitutional provisions. The order will ensure accountability from the correct government department. This is important as the officials are able to identify which departments are responsible, to ensure the fulfilment of certain

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<sup>173</sup> Mbazira C (2009) 177

services and rights. Furthermore, the order will provide the court with valuable insight into the functionality of governmental departments and its challenges. Lastly, the order will provide for a more fundamentally fair outcome in comparison to other remedies<sup>174</sup>.

The effectiveness of this remedy can indeed be democratic as it allows for a dialogue which strengthens accountability, participation and respect between the judiciary, government and its citizens. The High Court has identified the accumulative value in the remedy; one major accomplishment is the continued deference the court can give the state with the doctrine of separation of powers. There should be no further resistance from government to enforce these orders as they will be involved in the process of formulating the order<sup>175</sup>.

The dialogue that this remedy creates can restore some of the hostility that has been visible in the state's attitude towards the judiciary, when other remedies were used. The notion of dialogue is not a new idea. Dixon states that this concept has received attention in Canada, the United States, Australia and the United Kingdom for decades; even though it is not so familiar in socio-economic rights cases<sup>176</sup>. It does, however, promote the theory of co-operative constitutionalism.

The case of *Olivia Road* further illustrates the benefits of this interdict. It was the High Court who recognised the desperate need of the people for housing. Unfortunately, the Supreme Court failed to accept the High Court's judgment and an eviction was granted. The CCSA realised the negative effects of government's housing policies and was satisfied that a supervisory jurisdiction is needed, and granted an interim structural interdict. A process of meaningful engagement followed between the parties. The engagement process also resulted in the parties

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<sup>174</sup> Ebadolahi M (2008) 1596

<sup>175</sup> See *City of Cape Town v Rudolph and others* 2003 (11) BCLR 1236 (C)

<sup>176</sup> See Dixon R "Creating dialogue about socio-economic rights: strong v weak-from judicial review revisited" (2006) 3 NYU School of law, for a further discussion on the issue of dialogue as an effective remedy



providing the solutions and the court merely measured its reasonableness. This interim relief can only be sought in negative rights, thus restraining government from taking away an existing right until a final decision is reached. Highlighted again here, is the strong collateral effect structural interdicts possess.

#### 4.5 Defects in the remedy and possible solutions

Ebadolahi, along with many others, admit that structural interdicts do have their defects. The main issue being cost in supervised orders of government planning; as this can lead to excessive enforcement cost, resource diversion or waste. Another concern raised is the lack of implementing the plan after it has been approved by the court. The consequence may well be that litigants find themselves in the same position prior to the order being granted, and contempt proceedings are complicated and time consuming. It has been said that these defects can undermine the judiciary's credibility.

The active role judges have to play in the supervised process, according to Mbaziro, could be detrimental if the court is not cautious. He states that the task of the court may appear administrative in nature, which might seem to affect the impartiality and independence of the judge<sup>177</sup>. This is unfortunately the nature of the structural interdict and judges must make room for the state to provide possible remedial strategies themselves; and only interfere when absolutely necessary via its supervised process. Despite this, Mbaziro suggests that judges must just make sure that their decisions are realistic, just, and impartial and supported by reasons<sup>178</sup>. A fully reasoned judgment will avoid a minimalist approach as this will weaken the criticisms.

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<sup>177</sup> Mbazura (2009) 217

<sup>178</sup> Mbazura (2009) 218

Furthermore, the concern of limited resources may result in the court continuing to avoid these orders which require further judicial supervision, without additional institutional support from other participants<sup>179</sup>. It is now appropriate at this point of the study to introduce Liebenberg's possible solution that addresses resource allocation at the appropriate forum and in the same solution also silence the infringement of separation of power critics that structural interdicts have gained.

Liebenberg promotes the "experimental remedial approach" as described by Charles Sabel and William Simon, from the United States, as the possible solution<sup>180</sup>. This is a type of structural interdict that facilitates the experimentalist remedial approach. This approach, Liebenberg describes, has a different functionality compared to the features of judicial remedies which have as its characteristics, an approach of finality and command-and-control.

The concept of experimentalism advance, in this study, is to illustrate the broader understanding of how socio-economic rights should be dealt with in the future, for its fulfilment. The study promotes an idea that government will, by way of institutional changes; deal with socio-economic rights via an administrative process. This would be possible where the court has already established the foundation and the benchmarks of these rights to the government in its jurisprudence. The experimentalist remedial approach, as defined by Sabel and Simon, will start from an appointed centre, such as government or a government agency, which is a centre that will oversee the function and performance of the administrative processes associates with the implementation of human rights and social welfare<sup>181</sup>. The ambitious role of the experimentalist approach will help the state to regulate by way of regulations; social welfare, and human rights issues. Experimentalism highlights the involvement in which central government provides a broad discretion to local

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<sup>179</sup> Sabel C F and Simon W H "Minimalism and Experimentalism in the Administrative State" *The Georgetown Law Journal* (2011) 100:53 [georgetownlawjournal.org/files/2011/11/sablesimon.pdf](http://georgetownlawjournal.org/files/2011/11/sablesimon.pdf) (access on 18 September 2012)

<sup>180</sup> Ebadolahi M (2008) 1597

<sup>181</sup> Sabel C F and Simon W H (2011) 62

administrative units. In this manner there will be a continued measure and assessment of administrative performance in ways designed to encourage continuous learning and the revision of standards. This will certainly assist with the growing territory of policy areas, characterised by uncertainty about, both the definition of the relevant problem and its solution.

The concept of experimentalism will help to solve many of the current socio-economic problems as the aim of this approach is to accommodate continuous change and variations that are observed in challenged public problems. Policies should thus be experimental in nature, in the sense that they will be considered subject to constant and well-equipped observations of consequences. The policies will also be subjected to ready and flexible revision in the light of the observed consequence and this can then be addressed<sup>182</sup>. The monitoring body, which is the centre, will pool information in disciplined comparisons, and create pressures and opportunities for continuous improvement at all levels. This will enhance careful thinking engagement among officials and stakeholders. The fact that the revision of framework goals, performance measures, and decision-making procedures are periodically revised will assist in measuring performance and identify problems. This process mainly strives to ensure accountability of administrative action<sup>183</sup>.

It is submitted that the approach by Sabel and Simon creates enough space for respect between the functionality of the judiciary and the state. The fact that the state is allowed to define its own measures to achieve its goals through a participatory process, are much more effective than a final order<sup>184</sup>. The transparency that these orders create will be welcomed, as it promotes accountability and sensitivity towards the needs of the claimants and openness in the state's attempts to address the violation.

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<sup>182</sup> Sabel C F and Simon W H (2011) 69

<sup>183</sup> Sabel C F and Simon W H (2011) 78

<sup>184</sup> Liebenberg (2010) 435-438

Liebenberg strongly promotes the “experimentalist” structural interdicts as the emphasis is on collaborative dialogue and the function of these interdicts will facilitate long-term structural reform, a concept this study promoted from the outset<sup>185</sup>.

Wim Trengove was correct when he said that socio-economic rights violations may be remedied by a variety of means and he also promotes structural and institutional reform over a period of time. He accepts that it is the court’s responsibility to assist with the prevention of the violation, by any means necessary<sup>186</sup>.

In his theory, he first discusses foreign court methods of enforcement, where government has shown a reluctance to cooperate. The discussion, will illustrate that these countries will not be prevented from implementing and authorising structural changes to ensure fulfilment of fundamental rights. Countries such as India, the United States and Canada follow a robust approach in dealing with fundamental rights infringements. Where it has been established in these countries that a right has been breached by the state, the state is allowed an opportunity to indicate how it intends to fulfil its obligation. The courts in these countries will issue an order directing the legislature and executive branches of government to bring about improvements, described in terms of their objectives, and the court will obtain a supervisory jurisdiction to supervise the implementation of those improvements. If the state parties fail to bring an improved plan to court; then the court will, with the help of the other parties and court experts, draft its own plan. This is to ensure compliance when the state is reluctant to comply with the court’s request. A negative effect will result, as the court will be writing policies and it is not their domain to do so. However, if the court accepts that this is the only means to give effect to a violated right, it will do so. Unlike in South Africa, the failure to adhere to

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<sup>185</sup> Liebenberg S (2010) 438

<sup>186</sup> Trengove W “*Judicial Remedies for Violations of Socio-Economic Rights*” (1999) 1 ESR Review March 1999 available at <http://www.communitylawcentre.org.za/Socio-Economic-Rights/esr-review/esr-previous-editions/esr-review-vol-1-no-4-march-1999> (access on 24 October 2012)

a court order could result in contempt of proceedings; but this is not an effective alternative.

The CCSA jurisprudence has demonstrated that they will under no circumstances, interfere with government policy-making. However the above discussion has demonstrated well, that with the supervisory element attached to a structural interdict and the process of meaningful engagement, the court does not need to concern itself with interfering in policy decisions. The structure and nature of the structural interdict will deal with this issue.

#### **4.6 Embracing the remedy: Some elements to identify**

The previous sections illustrated the importance of the practical implications and effectiveness of structural interdicts and their supervisory functions. This section will provide guidelines to the court, to help identify certain elements in cases with the view of understanding when it will become relevant to make use of this type of relief. A range of factors are identified by Mbazira that describe structural interdicts as the most creative of the remedies considered by the CCSA in socio-economic rights cases<sup>187</sup>. He accepts that the use of structural interdicts goes beyond the traditional perception of the role of the courts, and he correctly states that the judges must take a position which makes them participants in the dispute. It is this change in role that has created many debates in the legal sector; mostly questioning whether this relief can be considered an appropriate relief. The above sections have dealt with the answering this question.

Mbazira provides the court with some norms, principles and procedural guidelines associated with structural interdicts<sup>188</sup>. He accepts that the norms must be capable of application in various contexts. They include the use of structural interdicts only

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<sup>187</sup> Mbazira C (2009) 165

<sup>188</sup> Mbazira C (2009) 166

when necessary. The structure of the order should be flexible and divided into smaller portions to ensure participation of all the effected stakeholders, ensuing in promoting, impartiality, independence and transparency.

From this discussion of Mbazira it can be argued that his principles may be considered the foundation on which the elements that will be discussed must rest. Roach and Budlender present the first element; when it comes to the court's attention that a lack of capacity or lack of competency exists in government, then it will become important for government to submit a plan and advise the court on how they intend addressing the issues<sup>189</sup>. The other party must present evidence to the court that shows a possibility that the government may not comply promptly. In the case of *S v Sibiyi v Director of Public Prosecution*<sup>190</sup>, a 2006 case, where the court dealt with government's slow pace to replace the death penalty with an appropriate sentence, after the *Makwanyana* case in 1995 ruled the death penalty as unconstitutional. The court felt it appropriate in the *Sibiyi* case to continue to supervise its order until the process was complete, as it had a serious impact on the group. Similarly, in *N v Government of the republic of South Africa (No.1)*<sup>191</sup>, the High Court recognised the measures adopted to assist the prisoners with anti-retroviral treatment, as unworkable, and characterised by delays, obstacles and restrictions. The court felt that a structural interdict was warranted as the failure would seriously compromise the health of the prisoners.

The second element was identified in the *Olivia Road and N v Government of the Republic of South Africa* cases; where it is clear to the court that if the parties in front of the court are in desperate need of relief, a structural interdict should be granted. The engagement between the parties may result in the state adopting plans to first

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<sup>189</sup> Roach K and Budlender G "Mandatory Relief and Supervisory Jurisdiction: When is it appropriate, just and equitable" (2005) 122 SALJ, 325-351 at 349

<sup>190</sup> *Sibiyi v Director of Public Prosecutions (Sibiyi III)* 2006 (2) BCLR 293 (CC)

<sup>191</sup> 2006 (6) SA 543 (D)

address the desperate needs. There could also be a need for the state to refrain from acting, pending a final order and an interim structural interdict will assist.

The next element relates to; when it come to the court's attention that the violations that the court is dealing with does not only affect the parties in front of the court , then the granting of a structural interdict in this situation is to make sure that the state includes those people in their policy drafts as future beneficiaries. In the *Olivia Road* case, where it was clear that there were people in other buildings, with similar issues as the Applicants, the court could have instructed the state to include those people in its engagement process. The *Mazibuko* case with its inflexible and unclear water policy implementation procedure and processes would have certainly qualified.

The final element for consideration is; where the court finds itself unable to make a decision due to a lack of sufficient information of a technical or substantive nature, or where the court is uncertain as to how long the process of engagement will take. This element is supported by the case of the *Schubart Park Residence Association case*<sup>192</sup>. The court accepted that the meaningful engagement in respect of the re-occupation process will be a long process and that it is necessary to supervise the process; but that the High Court will take the supervisory role.

This section has provided much insight into the characteristics, functionality and defects of the structural interdict and it can be said with confidence that all the defects raised have been cleared to an extent that make this type of order more attractive than those granted in previous cases. From the above discussion, it would appear that the creative use of the structural interdict is well-identified in the elements that have been raised, coupled with the meaningful engagement process and the supervision of the order.

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<sup>192</sup> 2012 ZACC 26 para 51

#### 4.7 Conclusion

This chapter has fully demonstrated, how effective structural interdicts and supervisory orders can be to fulfil compliance by the state to court orders. This type of order was compared to the jurisprudence of the previous court orders and it has been found to be much more effective and reliable. The ancillary effect that these orders have is irreplaceable, in view of the fact that meaningful engagement is part of the supervisory requirement. With this in mind it allows for much needed clarity in future policies of government relating to socio-economic rights.

This chapter has further set out the characteristics and effectiveness of supervisory orders demonstrating that with proper time frames in place for meaningful engagement, a process of finality can be reached faster. It has been accepted that the defects in the structural interdicts and supervisory orders remedy related mainly to cost but this is a natural consequence of these types of orders and not much weight should be attached to it in a democratic state, where participation is key.

The benefits outweighs the defects outright, and one such benefit is that it addresses the doctrine of separation of powers creatively, as the court is merely allowing the state time and room to present its own solutions to socio-economic rights but only in a more creative manner. The result of this paper is achieved if these creative manners of operation provide the much needed fulfilment of socio-economic rights.

Further, this chapter presented useful guidelines to the court to take into consideration when to use supervisory orders, this will also present the state with prior insight into what the courts will be looking out for, when using the remedy of structural interdicts with supervisory orders. In essence it is submitted that these guidelines also present a normative value to socio-economic rights.



## CHAPTER 5

### CONCLUSION AND RECOMMENDATION

When considering meaningful constitutional remedies, it must be asked meaningful to whom, to those whose socio-economic rights has been infringed or to government who has to enforce these rights. It is submitted that the word “meaningful” will find a different description depending on the party being promoted.

This has been demonstrated in the above discussion. It has become important, in the jurisprudence of socio-economic rights, that innovative and creative remedies must be developed by the courts that recognise the challenges inherent in enforcing socio-economic rights, while still preserving the ability of courts to play a role in ensuring that these rights are not merely empty promises.

It is for this very reason that this paper has systematically pointed out the path the court’s jurisprudence has developed in its implementation of various constitutional remedies in socio-economics rights cases and presented criticisms for certain of its interpretations.

It is submitted that the court’s failure in the outset of its jurisprudence to define a normative concept for socio-economic rights, is the core reason why this right has failed to find an identity of its own. What followed is the court’s reluctance to provide clear court orders to the state when the court merely granted vague orders by way of declaratory and mandatory orders. Even though the TAC presented a positive outcome, the court’s reluctance to provide supervisory jurisdiction is indicative of a courts historical nature to finalise the matter once and for all for.

The development of reviewing government’s policies to establish reasonable review, has shown to be ineffective in the *Grootboom* case, it is submitted that the notion of reasonable review and progressive realisation are merely excuses used by

government to prolong fulfilling the much needed socio-economic rights of marginalised citizens. Liebenberg has emphasised on many occasions that what is needed in socio-economic rights is assuring equal sustainable distribution.

Promoting structural interdicts with a supervisory jurisdiction as stated in chapter 4, is to ensure that the courts exercise a watchful eye over the fulfilment of socio-economic rights. The process of meaningful engagement will always be an element to these types of orders and this, in essence, will ensure participation from all parties concerned. This was well demonstrated in the *Olivia Road* and much later in the *Joe Slovo* cases.

It is submitted that the views of Liebenberg and Lehman regarding the concept of “minimum core” is supported, as Lehman correctly pointed out when she said that minimum core is an inappropriate tool for judicial decision making.

It is recommended, that with the guidelines stipulated in chapter 4, the courts will be in a position to identify certain criteria in each case and when faced with any one mentioned in chapter 4, the court needs to consider using the structural interdict with a supervisory order as a possible remedy. Considering the entire positive effects the remedy has on fulfilling socio-economic rights and the consistence it will create amongst the courts, this remedy have proved itself throughout this paper to be the much needed creative and effective remedy required in socio economic right violations.

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