

## 2. Constitutional Jurisprudence:

### The First and Second Waves

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There has been a remarkable focus on the jurisprudence of the South African Constitutional Court since its inception in 1995. This has included much analysis of the "first wave" of socio-economic rights cases, including *Soobramoney*, *Grootboom* and *TAC*, between 1998 and 2005. Following a three year gap, in 2008 the Constitutional Court revisited socio-economic rights in five decisions dealing with the rights of access to water, electricity, adequate housing and basic sanitation. These recent decisions, or the "second wave" have not yet received much attention. In this chapter we consider how the Constitutional Court has forged a role for itself in enforcing these rights<sup>1</sup> and how and to what extent litigation strategies have managed to impact the legal construction of constitutional socio-economic rights. We critically examine both waves of socio-economic rights jurisprudence in an attempt to take stock on what the decisions mean for socio-economic rights litigation in South Africa.

#### 1. Introduction

South Africa's constitutional project will fail if its vast inequalities and deep poverty are not addressed. This much has been acknowledged by the Constitutional Court itself:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.<sup>2</sup>

Regrettably, little progress has been made in economic transformation since these words were written twelve years ago. South Africa is more unequal now than it was then (Seekings 2007: 11). A multiracial elite and middle class has prospered, but South Africa's poor remain unemployed, and without access to adequate healthcare, education, housing and basic

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<sup>1</sup> There have been a number of powerful and precedent-setting socio-economic rights cases below the Constitutional Court level which we do not address in this chapter. Examples include *City of Cape Town v Neville Rudolf* 2004 (5) SA 39 (C); *EN and Others v Government of the Republic of South Africa and Others* DCLD Case No. 4576/2006 (unreported) and *Modderklip East Squatters v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA).

<sup>2</sup> *Soobramoney v. Minsiter of Health, KwaZulu Natal* 1998 (1) SA 765 (CC) (*Soobramoney*), para. 8.

municipal services.

The judicial enforcement of socio-economic rights is one limited means of addressing their needs. In this chapter we consider the role South Africa's Constitutional Court (the Court) has forged for itself in enforcing these rights<sup>3</sup> and, in essence, examine how and to what extent litigation strategies have impacted the shaping of the legal construction of constitutional socio-economic rights. Such an examination is timely. Before February 2008, the Court's last major socio-economic rights decision was handed down in October 2004.<sup>4</sup> That decision was itself the last of a string of six cases dating back to 1999, when the Court delivered its first socio-economic rights judgment.<sup>5</sup> We refer to these cases as the "first wave" of socio-economic rights decisions. In 2008 and 2009 the Court revisited socio-economic rights in five decisions dealing with the rights of access to water, electricity, adequate housing and basic sanitation. These recent decisions – or the "second wave",<sup>6</sup> as we will refer to them - have received little attention.<sup>7</sup> There has been no attempt as yet to sum up what the decisions mean for socio-economic rights litigation in South Africa, in terms of past and future impact. This is what we hope to achieve here.

We take an analytic approach to the Courts' jurisprudence. Our aim is to characterise the scope and limitations of the Court's approach to the interpretation of socio-economic rights and what this means for litigants approaching it for redress. Accordingly, we do not focus on the remedial powers the court has exercised, the effectiveness of the implementation of its decisions or on the specific strategies adopted by litigants before it. Our purpose is more modest: to evaluate the meaning assigned to socio-economic rights have by the Court itself, and to comment on the impact the Court's interpretive moves will likely have on the prospects of future socio-economic rights litigation.

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<sup>4</sup> *Jaftha v. Schoeman; Van Rooyen v. Scholtz* 2005 (2) SA 140 (CC) (*Jaftha*).

<sup>5</sup> The string of cases we refer to as first wave cases are: *Soobramoney* (note 2 above); *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (*Grootboom*); *Treatment Action Campaign v. Minister of Health* (No. 2) 2002 (5) SA 721 (CC) (*TAC*); *Khosa and others v. Minister of Social Development and others* 2004 (6) SA 505 (CC) (*Khosa*); *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (*Port Elizabeth Municipality*); and *Jaftha* (n. 3 above).

<sup>6</sup> The string of cases we refer to as second wave cases are: *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v. the City of Johannesburg and others* 2008 (3) SA 208 (CC) (*Olivia Road*); *Residents of the Joe Slovo Community, Western Cape v. Thubelisha Homes and others* 2010 (3) SA 454 (CC) (*Thubelisha Homes*); *Nokotyana and others v. Ekurhuleni Municipality* 2010 (4) BCLR 312 (CC) (*Nokotyana*); *Joseph v. the City of Johannesburg* 2010 (4) SA 55 (CC) (*Joseph*); *Abahlali base Mjondolo v. Premier of KwaZulu Natal Province and others* 2010 (2) BCLR 99 (CC); and *Mazibuko and others v. City of Johannesburg and others* 2010 (4) SA 1 (CC) (*Mazibuko*).

<sup>7</sup> For the few exceptions see, Brian Ray (2008); Sandra Liebenberg (2010); Stuart Wilson (forthcoming); and Jackie Dugard (forthcoming).

In the first part of this paper, we review the most important features of the first wave jurisprudence. We distinguish between the approach of the Court in enforcing positive obligations and in protecting against negative infringements of socio-economic rights. We describe the role of a substantive, contextualised reasonableness test in defining the state's positive socio-economic rights obligations, and we show how the Court has given some a-contextual content to socio-economic rights when adjudicating negative aspects of each right. We also emphasise, as other authors have done, the extent to which the Court has borrowed from administrative law in order to construct a scheme within which to evaluate the state's compliance with its positive obligations.

In the second part of the paper, we show how the Court has persisted with the reasonableness standard and with its willingness to borrow from administrative law in its second wave decisions. It also continued to give socio-economic rights substantive content when asked to adjudicate cases of negative infringements or the adoption of regressive measures. We point out however, that the reasonableness standard has taken on three characteristics that appear to us to weaken the potential of socio-economic rights litigation to produce substantial benefits for poor people. First, the Court has developed the reasonableness test in an a-contextual manner which takes little account of the lived experience of poverty. Second, the Court's focus on the reasonableness standard appears at times to have displaced other, more determinate constitutional and statutory rights. Third, the Court's focus on the reasonableness standard has led to a denuded conception of the role of socio-economic rights litigation in developing the state's socio-economic rights obligations.

We conclude by pointing out that the flexibility of the reasonableness standard makes success in any socio-economic rights claim difficult to predict. This means that the inevitability risk-averse poor litigant will hesitate before turning to the Court for relief. As a consequence, the number of socio-economic rights claims brought by poor litigants will likely continue to be very low in future.

## **2. The First Wave Jurisprudence**

In its first socio-economic rights decisions, the Court was faced with the dual task of finding an interpretive paradigm within which to enforce socio-economic rights while at the same time maintaining its institutional stability. As Theunis Roux points out, new constitutional courts which have been quick to antagonise executives in transitional societies have seen their powers curtailed or their Judges replaced (Roux 2004). In South Africa, socio-economic policy and 'service delivery' lay at the heart of the African National Congress's claims to legitimacy. Members of South Africa's new Constitutional Court may have felt that adopting a strongly critical and interventionist approach to the enforcement socio-economic rights was incompatible with the Court's institutional consolidation.

In addition, socio-economic rights were, in the mid-1990s, still conceptually novel. There

was very little experience in other common law jurisdictions on which the Court could draw in interpreting and enforcing general socio-economic rights guarantees contained in a supreme law Bill of Rights.<sup>8</sup> The only reasonably well developed conceptual framework was the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), and the General Comments from the Committee on Economic, Social and Cultural Rights (CESCR). However, at the time of the first wave of socio-economic rights cases in South Africa, the ICESCR had found limited direct application in local jurisdictions. Moreover, because South Africa had not (and still has not) ratified the ICESCR, it had no direct application through section 231 (2) of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution), which states that international agreements are only binding once ratified by a resolution of the National Assembly.<sup>9</sup>

A further problem was South Africa's conservative legal culture. Mired in traditions of judicial deference and legal positivism, South Africa's dominant strains of legal thought were ill-suited to new open-text provisions which required purposive, value-laden interpretation. The task of evaluating socio-economic policy based on complex factual assumptions against substantive norms was quite alien to South African jurists and scholars. This was especially the case because all these norms required definition from scratch.

## **2.1 "Reasonableness in Context" and the Apparent Rejection of the Minimum Core**

For all of these reasons, it is unsurprising that the Court opted for a flexible approach which would allow it to construct the state's positive obligations under the socio-economic rights jurisprudence cautiously and incrementally. The "reasonableness test" adopted by the Court in *Grootboom*. It has been adhered to, in some form, ever since. The test focuses on the fairness or appropriateness of government action to give effect to socio-economic rights. It leaves out of account the objective norms promoted, or the specific goods and services guaranteed, by the rights themselves.

This approach was fore-grounded in the Court's first socio-economic rights decision, *Soobramoney*. There, the Court considered healthcare rationing. Mr Soobramoney was denied access to dialysis because he suffered from chronic renal failure and was not a candidate for a kidney transplant. He would need kidney dialysis for the rest of his life and his condition was incurable. The KwaZulu Natal Department of Health's policy was to limit access to dialysis to persons suffering from acute renal failure or chronic renal failure patients

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<sup>8</sup> The possible exception being the Indian Supreme Court, but there is anecdotal evidence to suggest that the South African Court did not want to emulate the Indian Supreme Court, especially in so far as its public interest litigation record was based on advancing direct access.

<sup>9</sup> Nevertheless, the ICESCR and the General Comments of the CESCR can still be used by the Court as an aid in interpreting socio-economic rights.

awaiting a kidney transplant. This was necessary to ensure that those whose kidneys could be completely cured were given the best chance of eventually living without dialysis.

In the Court, Mr Soobramoney claimed that the Department's decision amounted to a violation of his right, under section 27 (3) of the Constitution, not to be refused emergency medical treatment. In the alternative, he argued that it breached his right of access to healthcare services in section 27 (1) (a).

The Court rejected the challenge based on section 27 (3) because Mr Soobramoney sought access to treatment of an ongoing, chronic condition. Section 27 (3), the Court held, was intended primarily to ensure that "a person who suffers a sudden catastrophe which calls for immediate medical attention" is not denied ambulance services or access to hospitals which are, in principle, able to provide the necessary treatment (para. 20).

What Mr Soobramoney claimed was, in essence, the lifting of the exclusion from state renal dialysis facilities of persons with chronic renal failure who do not qualify for a transplant. That meant requiring the state to re-allocate resources to meet the cost of doing so, or to ration existing resources in a manner which would prejudice those to whom renal dialysis was not merely palliative, but potentially curative. The Court declined to weigh up these competing needs explicitly. It simply found that the decision to limit access to dialysis in these circumstances was rational and that "a court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters" (para. 29).

It is relatively easy to justify the Court's general conclusion. Healthcare rationing is widespread and, on some level, unavoidable. On any account of the right of access to healthcare services, it would be difficult to fault the view that, absent a challenge to the adequacy of the allocation of resources to a particular service, it is far better to treat those who can be cured than those who cannot. However, the Court's approach was indicative of its reluctance to delve into a substantive account of what entitlements fall within the scope of the right of access to health care services, and particularly how these may impact on the allocative decisions taken by the state. To be justifiable, a decision to limit access to healthcare need only be "rational" and taken honestly by a lawful authority. In principle, this statement of the law left any claimant under section 27 no better off than he would have been had he challenged the decision to deny him a healthcare benefit in terms of existing legislation using the administrative common law in force at the time.

In its second socio-economic rights decision, however, the Court was more expansive in its approach. This is partly because it was faced not with a resource allocation decision taken in the context of an existing state programme, but with a failure to have a programme at all. The lacuna identified by the Court in *Grootboom* was the failure to take any steps to assist those in desperate and immediate housing need. The state's failure to take steps was isolated and

analysed by reference to the new Constitutional value of “reasonableness”. Consistently with its approach in *Soobramoney*, the Court rejected the contention – at least for the purposes of that case – that the right to housing in section 26 (1) had any interpretive content independently of the duty to take reasonable measures under section 26 (2) of the Constitution (paras 34 to 46; see also *TAC* para 39). In particular, the Court rejected an interpretive approach urged by the amicus curiae, based on the idea that socio-economic rights had a minimum core content, consisting of a basket of goods and services to which all rights bearers were entitled. This approach was based on the CESCR’s General Comment 3 on the nature of states parties’ obligations, under the ICESCR.<sup>10</sup>

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

- be comprehensive, coherent and effective (para. 40);
- have sufficient regard for the social economic and historical context of widespread deprivation (para. 43);
- have sufficient regard for the availability of the state’s resources (para. 46);
- make short, medium and long term provision for housing needs (para. 43);
- give special attention to the needs of the poorest and most vulnerable (para. 42);
- be aimed at lowering administrative, operational and financial barriers over time (para. 45);
- allocate responsibilities and tasks clearly to all three spheres of government (para. 39);
- be implemented reasonably, adequately resourced and free of bureaucratic inefficiency or onerous regulations (para. 42);
- respond with care and concern to the needs of the most desperate (para. 44); and
- achieve more than a mere statistical advance in the numbers of people accessing housing, by demonstrating that the needs of the most vulnerable are catered for (para. 44).

On their own, however, these criteria are insufficient to define a reasonable housing policy.

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<sup>10</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 3 on the Nature of States Parties’ Obligations* (Fifth Session, 1991), U.N. Doc E/1991/23. The Court considered and rejected the approach again in *TAC* at paras 26 to 39.

They do not state what the ends of such a policy are. The Court's innovation in *Grootboom* lay in its remedy for this difficulty. The Court held the reasonableness of state measures is determined by the context in which they are taken. The Court found that the minimum core content assigned socio-economic rights in General Comment 3 of the CESCR may possibly be relevant to what is reasonable in any given context, but it would not be determinative of the state's obligations. The question is whether, having regard to the CESCR, the principles set out above, and the context in which it is sought to be implemented, state policy is a reasonable measure capable of giving effect to the right.

The Court's shift in *Grootboom* towards a contextualised account of reasonableness was significant. The interpretive scheme it developed allowed it to steer clear of developing concrete entitlements of universal application while at the same time setting a meaningful standard by which to evaluate state action. This standard could take account of what Sandy Liebenberg has called the "needs and purposes" served by the right in a specific context Liebenberg (2010). The Court in *Grootboom* decided that it was contextually unreasonable not to at least have a policy which would provide relief for people with "no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations" (para. 99).

On the face of it, the *Grootboom* judgment obliged the state, within its available resources, to provide temporary shelter for those who have been evicted or face imminent eviction and who cannot find alternative shelter with their own resources. They are the most vulnerable members of society. While the Court had shied away from the idea that section 26 could give rise to a right to housing on demand, its focus on the need for the state to alleviate the plight of those in desperate circumstances suggested that, in certain situations, section 26 could ground a fairly immediate claim for shelter. Because of this, *Grootboom* is arguably the most far reaching of the Court's socio-economic rights decisions. It has resulted in the adoption of a national emergency housing policy.<sup>11</sup> It has also led to a line of decisions in which poor people have successfully resisted evictions which would lead to their homelessness and claimed alternative shelter from the state (Wilson 2009: 270-290). In our view, it represents the high-water mark of the Court's socio-economic rights jurisprudence.

## **2.2 Negative obligations and the content approach**

It is instructive to compare the Court's interpretive approach in positive obligations cases with cases dealing with a negative invasion of a socio-economic right. In *Jaftha* the Court considered whether the attachment and sale in execution of residential property without judicial oversight constituted a violation of the right of access to adequate housing. The Court found that it did. It declared section 66 (1) (a) of the Magistrate's Court Act 32 of 1994

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<sup>11</sup> See Volume 4, part 2 of the South African National Housing Code (2009).

unconstitutional because it allowed residential property to be declared executable without judicial oversight. The failure to provide a judicial oversight was, the Court held, an unjustifiable limitation of the right of access to adequate housing guaranteed in section 26 (1) of the Constitution.

The Court rejected a finding by Van Reenan J, in the High Court, that the right of access to adequate housing only protected occupation of residential property, and that, as a result, a mere deprivation of ownership could not amount to a violation of the right. The Court held instead that ownership was an incident of security of tenure. Relying directly on the extensive international law on the minimum core content of the right to housing – which had been treated with circumspection in *Grootboom* – the Court held that security of tenure is constitutive of the right of access to adequate housing. Accordingly, to deprive a person of security of tenure, or to weaken a person’s existing tenure rights, is to infringe their right of access to adequate housing. Such an infringement may be justified under section 36 of the Constitution, but the fact remains that tenure rights form part of the right of access to adequate housing (paras 25-34).

A similar approach appeared to motivate the Court’s decision in *Port Elizabeth Municipality*. In that case, the Court considered an application for leave to appeal against a decision of the Supreme Court of Appeal (SCA). The SCA set aside an eviction order on the basis that it would not be “just and equitable” within the meaning of section 4 (7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act) to relocate a community of 68 informal settlers to a place where they would not enjoy a measure of tenure security. In an expansive decision which provided a sensitive, generous and pro-poor interpretation of the duties of local authorities in eviction cases, the Court held that it would not be just and equitable to evict a community without prior consultation with them and without at least considering the possibility that they could be provided with tenure security on any relocation site (para. 55).

While it is true that the Court in *Port Elizabeth Municipality* was not directly considering the content of section 26 of the Constitution, the decision is clearly an attempt to interpret the PIE Act through the prism of section 26 of the Constitution and the *Grootboom* decision. The Court’s concern for the need to provide the occupiers with some measure of tenure security is clear throughout the judgment (paras 17 and 18). *Port Elizabeth Municipality* accordingly reinforces the view that security of tenure is a constituent of the right of access to adequate housing. The limitation of tenure security will always have to be justified.

### **2.3 The Administrative Law Paradigm**

Aspects of the Court’s first wave jurisprudence have led some commentators to suggest that



the Court has adopted an “administrative law model” for the enforcement of socio-economic rights.<sup>12</sup> In its attempt to balance the need to hold the state accountable to the Constitution with deferring to its socio-economic policy choices, the Court has borrowed from administrative law in constructing a framework within which to evaluate compliance with the state’s positive obligations (Brand 2003). We consider that the contextual reasonableness test set out above, read with the Court’s willingness to give socio-economic rights some content in cases of negative infringement, is an indication that the Court’s jurisprudence cannot simply be reduced to an application of an adapted conception of administrative law. However, there are aspects of the Court’s jurisprudence which indicate that it has been willing to deploy the administrative law concepts of rationality, reasonableness and procedural fairness in testing state policy.

*Soobramoney*, *TAC* and *Khosa* are examples of this in that they all focus on the rationality of conscious decisions to exclude classes of persons from socio-economic programmes. In *TAC*, the Court was asked to consider the reasonableness of government policy in facilitating access to antiretroviral treatment to prevent mother to child transmission of HIV. It found that the decision to limit access to antiretroviral treatment to a few test sites was irrational because there was no compelling reason to not provide treatment where it was medically indicated outside a limited number of research and testing sites. Likewise, *Khosa* characterised the exclusion of South African permanent residents from state social assistance programmes as irrational (paras 53 & 85). The Court in that case was guided by the impact of the exclusion on the applicants’ right to equality. The right to social security, the Court held, vests in “everyone”. To exclude permanent residents from its social security programme affected the applicant’s rights to dignity and equality in material respects. Without sufficient reason being established to justify such an impairment of the applicants’ equality rights, the exclusion was irrational and unconstitutional. *Soobramoney*, as we have pointed out, was about the rationality of a healthcare rationing decision. In *Port Elizabeth Municipality*, the Court appeared moved by the lack of adequate consultation with the occupiers before an eviction order was made against them.

The deployment of administrative law concepts in this way has provided another device with which the Court can evaluate state policy without creating novel entitlements or designing new tests to which socio-economic policy may be subjected. It has also created an apparent overlap between the constitutional and administrative law concepts of reasonableness. Both the constitutional and administrative law concepts of reasonableness require more than a simple connection between means and ends, but admit of a range of possibly reasonable

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<sup>12</sup> For a critique of the administrative law model see David Bilchitz (2002); David Bilchitz (2003); Danie Brand (2003); Sandra Liebenberg (2004); and Sandra Liebenberg (2008).

decisions or policies within which the court will defer to the executive.<sup>13</sup> The question a court will ask in both cases is: on the facts placed before it has the state adopted measures or taken a decision which can reasonably achieve the relevant legislative or constitutional purpose?<sup>14</sup>

Yet there is a crucial difference. In the case of the exercise of administrative power, the legislation in terms of which the decision is taken will normally define the purpose of the exercise of the power, and the interests to be taken into account, with some precision. This is almost never the case when considering the reasonableness of measures to give effect to socio-economic rights, because the purpose of the rights in question, or the needs they exist to satisfy, are not defined in the Constitution. The Court must identify them through interpretation. In doing so, the Court may (and, as we argue below, often does) consider the content of legislation passed to give effect to various aspects of individual socio-economic rights. However, the Constitution assigns the power to determine the meaning of socio-economic rights not to the legislature, but to the Court itself, and the Court has appeared reluctant to exercise this power with any enthusiasm.

In *TAC*, *Soobramoney*, *Khosa* the Court was able to come to a conclusion by weighing up the facts before it and making a value judgment as to whether or not the measures under scrutiny were rational or reasonable. It did so without importing any particular conception of the purposes served by the rights to healthcare services and social assistance. *Jaftha* and *Grootboom* are different, because they saw the court appeal (while nonetheless applying the reasonableness test) to second order principles which gave some definition and purpose to the right of access to adequate housing. These principles were that a limitation of tenure security will always have to be justified (in *Jaftha*) and the desperately poor must be provided with temporary shelter (in *Grootboom*).

Outside these two decisions, the Court's borrowings from administrative law have assisted it to forge remedies for socio-economic rights claimants without much transformative jurisprudential adjudication, at least at the interpretive level.<sup>15</sup> It is accordingly clear that the reasonableness standard is sufficiently flexible to allow the Court to defer to the executive's policy choices (as it did in *Soobramoney*), but also, if it chooses, to define the purposes served by specific socio-economic rights much more closely (as it did in *Grootboom*).

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<sup>13</sup> Compare, for example, *Grootboom* para 41 with *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) ("*Bato Star*") para 49.

<sup>14</sup> Again, compare *Grootboom* para 41 with *Bato Star* para 48.

<sup>15</sup> The remedial, as opposed to interpretive, record of the Court is beyond the scope of this chapter. See for example Kameshni Pillay (2004).

### **3. The Second Wave Jurisprudence**

Socio-economic rights litigation is difficult to mount. The need to organise client communities, the necessity of a command of the detail of state policy, the time and expense involved in accessing the courts – especially the appellate courts – all militate against poor people being able to vindicate their socio-economic rights through litigation with any regularity. Because of the protracted and expensive nature of litigation, poor people are dependent on legal aid organisations, NGOs and other civil society groups to litigate. This may be one reason why there was an apparent hiatus – almost three and a half years - between the *Jaftha* and the *Olivia Road* decisions. Except as an indication of the relative difficulty poor people experience in bringing socio-economic rights cases to the Court, we attach no particular significance to this period.

In the second wave, the Court persisted with its reasonableness standard. However, much greater emphasis was placed on developing the procedural aspects of socio-economic rights rather than on deepening the contextual reasonableness standard set out in *Grootboom*. On the contrary, the second wave decisions have seen the reasonableness standard applied, more often than not, to justify the Court's deference to the executive's socio-economic policy choices. In addition, the Court often chose to reach its desired outcome by enforcing procedural rights through directing the implementation of pre-existing policy and through directing the state to keep promises it was alleged to have made to the claimants in a particular case. Where it can, the Court has also relied on applicable legislation and policy to give content to rights. The Court has, though, avoided providing much direction to the state on the impact of particular socio-economic rights on the design and implementation of policy giving effect to positive obligations.

#### **3.1 Meaningful Engagement**

Nowhere was this habit more in evidence than in the case of *Olivia Road*. In this case several hundred desperately poor people (the occupiers) approached the Court to set aside an order that they be evicted from buildings in the inner city of Johannesburg that the City of Johannesburg alleged were unfit for habitation. The occupiers conceded that conditions on in the buildings were far from ideal, but that the buildings presented their only alternative to homelessness. The City had refused to offer the occupiers any alternative accommodation. In those circumstances, the occupiers said that an order for their eviction should not have been granted (as it was by the SCA).<sup>16</sup>

The occupiers also pointed out that the municipality's eviction proceedings against them were

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<sup>16</sup> See *City of Johannesburg v. Rand Properties* (2007) (6) SA 417 SCA.

part of a broader strategy to evict an estimated 67 000 people from 235 allegedly unsafe properties in the inner city of Johannesburg. The City had no reasonable plan in place to find alternative accommodation for these people. The occupiers claimed that the absence of such a plan was a violation of section 26 (2) of the Constitution and that the Court should declare this to be so. They also asked the Court to supervise the formulation of a reasonable housing policy by means of a structural interdict.

By the time the matter reached the Court, the City had taken some steps to develop a policy which might create housing opportunities for the poor in the inner city, but did very little to suggest that it intended to provide alternative accommodation to poor people it intended to evict in future.

The Court was astute to note the very first defence the occupiers raised to the municipality's eviction application. This was the procedural unfairness of the decision to evict. The City had taken no steps to ascertain the identity or housing needs of the occupiers. Nor had it sought representations from them on what the consequences of an eviction might be before taking the decision to evict. This, coupled with the City's indications at the hearing of the matter that it may be willing, finally, to consider the occupiers' demand for alternative shelter, led the Court to issue its first engagement order. The order required the municipality and the occupiers to "engage meaningfully" with each other in an attempt to resolve the dispute. Subsequently, an agreement was reached in terms of which the occupiers agreed to vacate the buildings in return for secure tenure in a municipally managed property elsewhere in the inner city. Rent was to be calculated at 25 percent of the occupiers' income and the occupiers were allowed to stay in the property until permanent accommodation became available to them.

This agreement, so the Court held, obviated the need for a decision on the constitutionality of the municipality's failure to plan and implement a policy to meet the housing needs of the broader class of 67 000 persons the occupiers claimed to represent. Instead, the Court's judgment was devoted almost entirely to the importation of the concept of "meaningful engagement" into socio-economic rights jurisprudence.

The Court held that meaningful engagement is a constituent of reasonableness and accordingly a procedural requirement imposed by section 26 (2). Meaningful engagement is, in essence, a particularly strong form of the administrative common law principle of *audi alterem partem*. The Court in *Olivia Road* held that, prior to seeking an eviction, an organ of state will normally be required to show that it has engaged "individually and collectively" with the occupiers who may be rendered homeless by an eviction and to "respond reasonably" to the needs and concerns articulated in the process. The Court was reluctant to define what a reasonable response to potential homelessness is, but stated that the range of reasonable responses stretched from providing permanent alternative housing to the occupiers

to providing no alternative accommodation at all (para. 18).

The Court's decision in *Olivia Road* is a classic example of the proceduralisation of socio-economic rights through the adoption of administrative law norms. Rather than ground the right to housing in substantive norms, the Court chose instead to create the space in which concrete entitlements could possibly be negotiated and implemented by agreement. This is a significant resource for poor people, but its exercise relies on them being well organised, appropriately resourced and properly informed about the possibilities inherent in a process of engagement. It also requires the state to act in good faith with sympathy and respect toward the poor. As the Court held:

Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side. (Para. 15)

The problem is that without a sense of what the community engaged with can reasonably expect to receive from the state, engagement may often degenerate into the enforcement of a pre-determined policy which is inappropriate to the needs of the community engaged with. This is especially so if the state is not sensitive to the needs of the relevant community and is not willing to respond flexibly to those needs. While engagement, as a prerequisite to an eviction, provides an important resource around which a community may mobilise, it is not sufficient to ensure that housing appropriate to their needs is provided.

### **3.2 Giving Effect to Promises and Expectations**

This problem was thrown in to sharp relief by the decision of the Court in *Thubelisha Homes*. In this case, 20 000 people (the occupiers) appealed to the Court to set aside an order for their eviction granted by the Cape High Court. The eviction was sought by Thubelisha Homes, the Minister of Housing and the Member of Executive Committee (MEC) for Housing in the Western Cape, all of whom argued that the eviction was necessary to implement the N2 Gateway housing project. The project involved the development of formal housing for low-income families on the site of the Joe Slovo informal settlement in which the occupiers resided. Thubelisha Homes, the housing company employed by the state to implement the project, applied for the occupiers' eviction in order to implement the project. They tendered to provide temporary accommodation at a new housing development near Delft, some 15 kilometres away from the settlement, where the occupiers could live until they were provided

with permanent housing. Crucially, Thubelisha Homes did not undertake to ensure that the relocated occupiers would be provided with permanent housing within the N2 Gateway project. Thubelisha Homes was unable to say where or when permanent accommodation would be provided to the occupiers, after they had been relocated.

The occupiers' case was divided into three broad assertions. The first was that they were not unlawful occupiers and could not therefore be lawfully evicted. The second was that the eviction was being sought to avoid giving effect to their legitimate expectation that that 70% of the houses to be provided in the upgraded settlement at the N2 Gateway project would be allocated to them. The third was that the eviction order would not be just and equitable for two reasons. First, the eviction was sought without meaningful engagement, particularly on the option of upgrading the Joe Slovo settlement *in situ* without a relocation. Second, the eviction would, in any event, cause considerable hardship because the site to which they were to be relocated lacked social amenities such as hospitals and clinics. It also took them far away from their existing access to jobs and livelihoods. In most cases, the cost of commuting back to the occupiers' jobs every month would likely double. Given the meagre incomes already earned by the occupiers, these costs could add up to half or more of their monthly incomes.

The Court apparently found the *Thubelisha Homes* case difficult. It took 10 months to decide the matter and delivered 5 separate judgments. In the end, however, all the members of the Court agreed to an order which authorised an eviction and relocation on conditions that staggered the eviction out over 45 weeks, sought to ensure that sufficient schools and clinics were provided on the relocation site and laid down stringent conditions as to the nature of the temporary houses to be provided at Delft and the services to be made available. The order also specified that the alternative accommodation to be provided must be ready and available for occupation at the point of eviction. Finally, the Court directed the government to give effect to the occupiers' expectations that 70 percent of the houses to be constructed at Joe Slovo would be allocated to the people relocated to Delft. This was also pursuant to a concession made by counsel for Thubelisha Homes at the hearing of the matter. The Court also required the government to engage with the individual households in occupation of Joe Slovo and to report back to the Court at regular intervals on the progress with the implementation of the order.

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

Largely because of the difficulty it would have in complying with the stringent conditions set out in the order of the Court, the provincial government soon agreed to look again at upgrading the settlement *in situ* – an option it had previously told the Court was impossible, but which the applicants had sought all along.

The Court dealt with the *Thubelisha Homes* application explicitly on the basis of reasonableness. All the judges of the Court reduced the question of whether the eviction would be just and equitable to the question of whether it constituted a reasonable measure to give effect to the right of access to adequate housing. That question itself seemed to have been split into two parts. The first was whether, in the absence of meaningful engagement, the eviction was reasonable. The second was whether the eviction was reasonable in light of the broader housing policy it was intended to implement. The Court answered both these questions in the affirmative, but its judgment was notable for the limited consensus between the judges as to why the eviction was considered reasonable.

All five separate judgments agreed that the fact that adequate housing (as defined by the Court's order) was to be provided at Delft, and that the occupiers' expectation to be allocated 70 percent of the N2 Gateway units to be provided at Joe Slovo would be given effect to, went a long way towards establishing the reasonableness of the eviction, even though there had been no meaningful engagement. Moseneke DCJ, Yacoob J, Sachs J and O'Regan J appeared to consider this dispositive of the question of reasonableness. They accepted that the relocation would be "an inevitably stressful process" (para. 399) and would "entail immense hardship" (para. 107). However, as Yacoob J put it "there are circumstances in which there is no choice but to undergo traumatic experiences so that we can be better off later" (para. 107). Moseneke DCJ appeared explicitly to hold that the eviction would not be reasonable if there were no prospect of the occupiers returning to Joe Slovo after the completion of the N2 Gateway project (para. 138).

Notable in these judgments is the inability of the reasonableness test, as formulated and applied in the context of the *Thubelisha Homes* case, to account for or adequately incorporate the admittedly drastic consequences the eviction would have for the occupiers. These hardships are dealt with summarily or ignored altogether. They were, in the main, connected to the difficulty the occupiers would have sustaining their incomes, access to livelihoods, jobs and social services after the relocation. They were largely written off as unfortunate consequences of policy choices over which the Court was unable to exercise any scrutiny (para. 381). Moseneke DCJ's judgment did acknowledge the need for "special concern where settled communities face the threat of being uprooted to other neighbourhoods distant from employment, schooling and other social amenities" (para. 165). However, this concern seemed only to add up to a need to ensure that the negative consequences of the eviction are ameliorated insofar as is practical and that adequate alternative accommodation is provided,

consistent with the expectations created by the state's housing plans for Joe Slovo.

Only the judgment of Ncgobo J appeared to address the hardships caused by Delft's distant location head on. He held that, on the facts of the *Thubelisha Homes* case, these were justified. However, he suggested that this will not always be so. The government is under a duty to "have regard to the proximity of schools and employment opportunities when it seeks to relocate people for the purposes of providing them with decent houses" (para. 256). Where it is not possible to choose a location with adequate access to social amenities and employment, the government must do what it can to ameliorate the impact eviction to a poor location will have on the community "by providing access to schools and other public amenities, as the government has done in this particular case" (para. 257).

For the most part, however, the Court appeared to conceive of its role as one of requiring the government to implement the best possible version of the policy it had presented. Reasonableness was about giving effect to the expectations of the Joe Slovo community which were consistent with that policy. It was not about delving into the question of whether the policy was appropriate to the community's objectively established needs. Yet the fact that the Court was willing to hold the government to its own account of what the policy was meant provide, and to ensure that it was implemented accordingly, was ultimately to prove decisive. As noted above, for practical and political reasons, the government has to date found itself unable to implement the Court's detailed and exacting order. Accordingly, Joe Slovo has been given another opportunity to press for an *in situ* upgrade.

The Court's approach was similar in another case involving an informal settlement: *Nokotyana*. In this matter, occupiers of the Harry Gwala informal settlement near Johannesburg approached the Court to compel the provision of toilets and high mast street lighting pending a decision on whether the settlement was to be upgraded *in situ* or relocated to formal housing. The High Court had, by agreement between the parties, ordered the municipality to expand provision of potable water in the settlement and then dismissed the occupiers' claims to toilets and street lighting.

Before the matter reached the Constitutional Court, the municipality adopted a new policy in terms of which every informal settlement within its jurisdiction would be provided with 1 chemical toilet per 10 households. The occupiers criticised this policy as unreasonable in two respects. First, it was claimed that expecting 10 households to share 1 toilets compromised the occupiers' dignity. Second, it was argued that the occupiers should be given Ventilated Improved Pit Latrines (VIPs), which was their preferred choice of toilet.

By the time the case reached the Court, the National Minister of Housing, the Director General of Housing and the MEC for Housing in Gauteng province had been joined to the proceedings. In light of the adoption of municipality's new policy on the provision of chemical toilets to informal settlements, the Minister, the Director General and the MEC



offered to provide additional funding to ensure that 1 chemical toilet could be provided to every four households in the Harry Gwala settlement. The occupiers and the municipality both rejected this offer on the basis that this would be unfair to other informal settlements within the municipality's jurisdiction (paras 53 & 54).

The occupiers also persisted in their demand for VIP toilets, provided at a frequency of 1 or 2 toilets per household. In buttressing this argument, the occupiers relied on Chapters 12 and 13 of the National Housing Code.<sup>17</sup> Chapter 12, adopted in response to the Court's decision in *Grootboom*, regulates the provision of funds to municipalities to deal with emergency housing situations by providing temporary shelter and access to services. Chapter 13 deals with the upgrading of informal settlements. They also placed general reliance on multiple provisions of the Constitution.

The Court did not decide the issues placed before it by the occupiers. It noted that reliance on Chapter 12 of the National Housing Code was misplaced because the occupiers did not find themselves in a state of emergency, but rather an ongoing state of need. Reliance on Chapter 13 of the Code was misplaced because that instrument only provided for the installation of interim services once a decision to upgrade an informal settlement had been taken. Having found that neither Chapter 12 nor Chapter 13 created the rights relied upon by the occupiers, the Court found that they could not rely directly on the Constitution either, because they had not challenged the failure of Chapter 12 or 13 to provide for interim services to an informal settlement pending a decision on whether to upgrade it (paras 37-44). Although the occupiers challenged the new policy introduced on appeal, the Court did not entertain this.

The Court did, though, identify what it considered to be one of the "root causes of the applicants' plight" (para. 61). This was the failure of the MEC to take a decision on whether to upgrade the settlement in terms of Chapter 13. The Court directed that a decision be taken within 14 months of the date of its order (para 62). At the time of writing, it appears that the MEC has indeed decided to upgrade the settlement, although it is unclear whether all or even most of the residents of the settlement will benefit from the upgrade.<sup>18</sup> The Court also noted the municipality's new policy (undoubtedly developed as a consequence of the litigation) and the municipality's intention to implement it speedily. The Court may have been persuaded to incorporate the new policy into its order, had the occupiers agreed to its implementation (paras 51 & 52).

*Nokotyana* is another example of the Court giving effect to socio-economic rights by

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<sup>17</sup> The National Housing Code has since been repackaged. For the "new" Emergency Housing Policy and Informal Settlement Upgrading Policy (which are substantially the same) see Volume 4 of the South African National Housing Code, 2009.

<sup>18</sup> Personal communications with Moray Hathorn (attorney to the residents) and Marie Huchzermeyer (a researcher following the case), Monday 1 November 2010.

identifying pre-existing government policy and requiring its prompt implementation. The case also illustrates the Court's reluctance to exercise its power to evaluate policy by reference to a *Grootboom*-type standard of substantive reasonableness. To be fair, the way in which the occupiers' case was framed limited the Court's ability to do this. The reasonableness test, even at its most expansive, was never intended to address the questions the occupiers' legal representatives chose to place before the Court. The reasonableness test simply cannot tell us how many toilets should be provided per informal settlement households pending a decision to upgrade. Nor is it really intended to assist in deciding whether VIPs or chemical toilets are best suited to give effect to constitutional rights.

In any event, the Court declined to take into account the contextual evidence placed before it on the relative suitability of VIP and chemical toilets, ruling the evidence inadmissible. It did so on the grounds that it fundamentally changed the issues between the parties, making the Court one of first and final instance in relation to a new policy adopted after the hearing in the High Court (para. 19).

### **3.3 Creating New Entitlements**

The Court has persisted with its approach in creating new entitlements in the context of adjudicating alleged negative infringements of rights. In *Joseph*, the Court was asked to decide whether the tenants of a block of flats in Ennerdale, to the south of Johannesburg, were entitled to notice before the City's electricity utility, City Power (Pty) Ltd (City Power), disconnected their supply. The tenants had paid their rent, which included electricity, to the owner of the property, who controlled the building's electricity account with City Power. Despite payment from the tenants, the owner allowed substantial arrears to run up on the account. City Power accordingly disconnected the property. It gave the owner notice of its intention to do so, but did not notify the tenants. Nor did the owner.

The tenants argued that their electricity supply was unlawfully disconnected because the right of access to adequate housing implied a right to electricity in appropriate circumstances. Whatever those circumstances were, a disconnection of an existing electricity supply to a residential property affected their constitutional right of access to adequate housing. At the very least, they argued, they were entitled to procedural fairness before the decision to disconnect them was taken. This should include notice and a reasonable opportunity to make representations.

City Power argued that the tenants had no right to electricity which was enforceable against it. While the owner of the property had a right to receive electricity in terms of his contract with City Power (and accordingly the right to notice prior to the disconnection of their supply) tenants had no such right in the absence of a direct contractual nexus between them and City Power.

The Court did not decide whether the right to housing implied a right to electricity. It did, though, find that the duty of the Johannesburg Municipality to provide services in terms of section 152 of the Constitution, sections 4 (2) (f) and 73 of the Municipal Systems Act 32 of 2000 and section 9 (1) (a) (iii) of the Housing Act 107 of 1997 all implied a correlative general public law right to receive electricity on the part of the tenants, and the public generally (paras 34-40). Whatever the obligations imposed by this right, on the facts of the *Joseph* case, City Power was at least obliged to observe the basic precepts of procedural fairness before disconnecting the tenants' supply.

The creation of a constitutional right to electricity in *Joseph* was a significant advance in the interpretation and enforcement of socio-economic rights. The positive obligations correlated to the right are likely to be at least as circumscribed and difficult to define and enforce as they are with other socio-economic rights. However, the *Joseph* judgment opens up a range of new possibilities for holding electricity providers accountable. At the very least, the steps taken by electricity utilities which might affect existing supply will now have to be taken in a procedurally fair manner. It is also possible that utilities will also in future attract the obligations to act reasonably in deciding whether or not to disconnect an electricity supply, by at least considering the consequences of doing so. The *Joseph* decision also raises the possibility of reviewing inaccurate billing practices and unjust disconnections that follow from them (paras 41-47). Indeed, during 2010, the Socio-Economic Rights Institute of South Africa (SERI) secured the reconnection of electricity to 420 low-income residents of Soweto, relying directly on the *Joseph* precedent.<sup>19</sup>

New entitlements were also created in *Abahlali*. There, the Court was asked to consider the constitutionality of the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act 6 of 2007 (Slums Act). Section 16 of the Act authorised the MEC for Housing in KwaZulu-Natal to issue a notice directing that eviction proceedings be instituted by municipalities and landowners against all informal settlements listed in the notice within a period determined by him. The applicants argued that section 16, read together with various other provisions of the Act, constituted a regressive measure which retarded access to adequate housing, contrary to section 26 (2) of the Constitution. In theory, it allowed the MEC to set a deadline for the eviction of every single unlawful occupier in the province in one notice.

The applicants brought their challenge to section 16 before the MEC had purported to act in its terms. This was because they dared not wait until a notice requiring their eviction had already been issued. They argued that section 16 was facially incompatible with section 26 of

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<sup>19</sup> *Residents of Chiawelo Flats v. Eskom Holdings Limited and City of Johannesburg* unreported case no 2010/35177: [http://www.seri-sa.org/images/stories/order\\_10sep10.pdf](http://www.seri-sa.org/images/stories/order_10sep10.pdf)

the Constitution. In addition, however, they tendered into evidence a report<sup>20</sup> on widespread unlawful evictions carried out by the eThekweni Municipality. They argued that section 16 of the Act would merely encourage more state officials to take the law into their own hands. They also argued, on the basis of the report, that section 16 was incapable of implementation consistently with the applicants' constitutional rights.

The Court agreed that section 16 was unconstitutional, but decided that it need not have regard to the report tendered into evidence. It held that section 26 of the Constitution, the PIE Act and the cases decided under these provisions had constructed a "dignified framework for the eviction of unlawful occupiers" and that section 16 was, on its face, incapable of an interpretation consistent with the framework (para. 122). In reaching this conclusion, the Court suggested that eviction must normally be a measure of last resort, after all reasonable alternatives have been explored through engagement (paras 113-115). The Court also suggested that where it is possible to upgrade an informal settlement *in situ* this must be done (para. 114). Yacoob J's dissent also affirmed that the obligation to meaningfully engage fell on private parties seeking eviction, and not just on the state, as had previously been thought (para. 69).

While these principles might have been considered implicit in the jurisprudence on evictions before the Abahlali decision, their articulation by the Court confirmed relatively novel entitlements for poor people seeking to affirm their housing rights. After Abahlali, the failure to consider an upgrade of an informal settlement (as opposed to an eviction or relocation) probably renders the decision to evict or relocate reviewable at administrative law. Poor people will also be able to propose alternatives to their eviction if these exist. These alternatives must now be explored prior to the institution of proceedings. The Court was driven to make these principles explicit precisely because it was required to say exactly how the Slums Act infringed section 26 of the Constitution. In doing so, it was required to develop, albeit incrementally, the scope and content of the right itself.

### **3.4 Reasonableness and Deference: *Mazibuko and others v City of Johannesburg and others***

*Mazibuko* illustrates how the flexibility of the reasonableness test has allowed the Court to defer the executive's socio-economic policy choices to a degree that appears to us to be inappropriate. In this case, the Court had to consider whether the City of Johannesburg's Free Basic Water (FBW) policy - which limited FBW provision to six kilolitres (6 kl) of water per household per month regardless of household size - was reasonable in terms of section 27 (1) (b) of the Constitution, which guarantees everyone's right of access to sufficient water. It also

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<sup>20</sup> *Business as Usual? Housing Rights and Slum Eradication in Durban, South Africa*, Centre on Housing Rights and Evictions (September 2008).

had to consider whether the installation of prepayment water meters as a means of delivering the FBW supply was lawful.

The applicants were five poor households from Phiri, Soweto who brought their case in the public interest. They argued that the City's FBW policy was unreasonable because it was insufficient to meet the basic needs of poor, multi-dwelling, households. This was so for two main reasons. First, it was based on a per person per day calculation of 25 litres, whereas the international standard in the CESCR's General Comment 15 on the right to water suggests that 50 litres per person per day is the minimum amount of water to meet basic human health and dignity needs.<sup>21</sup> Second, the 6 kl FBW policy was based on a calculation of 8 persons per household (defined as the number of persons living on a stand), whereas in Phiri there were commonly 15 or more people per household as most stands had backyard shacks that also had to share the one monthly FBW allocation.

It was common cause that the twin effect of the installation of prepayment meters and implementation of the FBW policy was that the applicants' water supply ran out around halfway through each month. This was in circumstances where they could not afford to pay for more water to meet their basic washing, cooking, drinking, health and sanitation needs. In challenging the pernicious effects of these measures, the applicants' main arguments were:

- The FBW policy was not a reasonable policy capable of giving effect to the applicants' right of access to sufficient water;
- The decision by Johannesburg Water (Pty) Ltd (Johannesburg Water) to install prepayment water meters in Phiri amounted to administrative action and, because it was taken without consultation, violated section 4 (1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA);
- The automatic disconnection of prepayment water meters violated section 4 (3) (b) of the Water Services Act 108 of 1997 (Water Services Act), which requires reasonable notice and an opportunity to make representation prior to the limitation or discontinuation of water services.

The Court rejected these claims. Its judgment was remarkable for its apparent retreat from the contextual reasonableness standard adopted in *Grootboom*. It attached little significance to the facts that the applicants were desperately poor, had inadequate access to water and suffered greatly as a result. These undisputed facts relating to the applicants' circumstances received almost no attention in the judgment. The Court did not ask whether the City had a reasonable programme that was "capable of facilitating the realisation of the right" in the context of its implementation (*Grootboom* para. 41). It focussed instead on a plethora of

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<sup>21</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 15, The right to water* (Twenty-ninth session, 2002), U.N. Doc. E/C.12/2002/11 (2003), fn. 14.

bureaucratic data on the difficulties the City said it faced in supplying water to Soweto. Sandy Liebenberg has noted that, whereas the *Grootboom* reasonableness standard required state conduct to be “assessed in the light of the rights entrenched in the first subsections” of section 27, in *Mazibuko* the Court was only prepared to use reasonableness as an over-flexible, abstract and decontextualised standard of governance (Liebenberg 2010: 470). In *Mazibuko*, this rendered the reasonableness standard – upon which the applicants had based much of their claim – virtually meaningless.

Having adopted this approach, the Court was easily able to conclude that the City’s FBW policy fell “within the bounds of reasonableness”. It did so largely on the basis that in the course of the lengthy litigation, the City had changed features of the policy. The Court took this to be evidence of flexibility (paras 9 & 93).<sup>22</sup> It was able to reach this conclusion by admitting vast quantities of new evidence tendered by the City on appeal. This was a novel departure from the approach the Court usually adopts, and from the especially strict approach it took to the new evidence sought to be introduced by both of the main parties in *Nokotyana*. It was explained in the judgment by reference to the special nature of socio-economic rights litigation, in which the introduction of the evidence was said to promote the values of responsiveness, accountability and openness (para. 161).

The Court also rejected the applicants’ contention that the decision to install prepayment water meters should have been preceded by either a public enquiry or a notice and comment procedure as required by section 4 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It did so by interpreting the executive powers of a municipality extremely broadly, finding that the decision to install prepayment water meters amounted to executive, rather than administrative action (para. 131). This is inconsistent with the interpretation of executive action advanced by O’Regan J in, for example, *Permanent Secretary, Department of Welfare, Eastern Cape v Ed-U College (PE) (Section 21) Inc.*<sup>23</sup> The provision of water services, including the conditions under which water services may be disconnected or limited, is comprehensively regulated by the Water Services Act. Accordingly, decisions related to the installation of prepayment water meters clearly constitute decisions relation to the implementation of a pre-existing policy framework, codified in legislation. These decisions constitute “policy formulation in a narrow rather than a broad sense”. This kind of policy formulation “in the narrow sense”, so the Court held in *Ed-U-College*, is administrative rather than executive action (para. 21).

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<sup>22</sup> In paragraph 95 the Court held that, had the City not increased the amount of FBW available to some residents, it “may well have been concluded that the policy was inflexible and therefore unreasonable”. Yet the Court did not inquire whether the increased allocation, as part of the City’s indigency policy, was operational and readily available, or if it met the basic water needs in the context of Phiri.

<sup>23</sup> *Permanent Secretary, Department of Welfare, Eastern Cape v. Ed-U College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC).

In addition, the Court held that pre-payment meters did not result in unlawful disconnections. Explaining that the “ordinary meaning of ‘discontinuation’ is that something is made to cease to exist”, the Court found:

[T]he water supply does not cease to exist when a pre-paid meter temporarily stops the supply of water. It is suspended until either the customer purchases further credit or the new month commences with a new monthly basic water supply whereupon the water supply recommences. It is better understood as a temporary suspension in supply, not a discontinuation. (para. 120)

In coming to this conclusion the Court had to virtually ignore the use of the word “limit” in the Water Services Act. The Act provides that the City may not “*limit or discontinue*” a water supply without notice and an opportunity to make representations. Had the Court given consideration to the meaning of the word “limit”, it may have been driven to the conclusion that its meaning must encompass “temporarily suspend”. On the Court’s reasoning, the Water Services Act’s procedural protections are rendered nugatory in most cases, because all disconnections of an existing metered water supply can be considered as “suspensions” rather than as “discontinuations” or “limitations”. In this context, it is worth remembering that, as Yacoob J held in his dissent in *Abahlali*, “Words should not be ignored” (para. 61).

These features of *Mazibuko* – the decontextualised reasonableness test, the relaxation of rules relating to new evidence, the failure to apply its own prior jurisprudence on executive action, and its restrictive approach to the concept of a discontinuation or limitation of a water supply – lead us to conclude that the court’s dismissal of the applicants’ claims cannot be explained simply by reference to the submissions they advanced. It was, in our view, a function of the Court’s consciousness of the limited role it has adopted in the enforcement of socio-economic rights.

The *Mazibuko* judgment contains strong and overt statements of deference to the executive (para. 61). However, the approach it adopts to the purpose of socio-economic rights litigation – at least insofar as positive obligations are concerned – towards the end of its judgment is perhaps the clearest indicator of the limitations under which the Court has placed itself. There, the Court holds that the purpose of socio-economic rights litigation is served simply because the state has been given an opportunity to justify and revise its policy. Litigation is less a process through which claimants enforce entitlements than a particularly elaborate (and expensive) form of participation in policy making (paras 159-169). If it is persisted with in future decisions, this conception of the purpose of socio-economic rights litigation – coupled with the minimal interpretive meaning the Court is willing to give to the state’s positive obligations – makes the prospect of future positive obligations litigation an unedifying one for the poor.

### 3.5 New Trends in Reasonableness

From the analysis of “second wave” cases set out above, we suggest that reasonableness review, as an interpretive instrument, has undergone at least three changes. First, it appears to have been shorn of any potential to define the interests and goods protected by the right in question.<sup>24</sup> This is partly because the Court has shown itself unwilling to take into account contextual evidence of the difficulties the poor face in accessing socio-economic goods. In *Mazibuko*, it ignored such evidence. In *Abahlali* and in *Nokotyana* it ruled such evidence inadmissible (in *Abahlali* because the evidence was not relevant to the interpretive exercise which the Court considered itself seized with; in *Nokotyana* because the evidence had not been properly introduced or integrated into the argument). In *Nokotyana* and *Mazibuko*, considering this evidence might have changed the result, had the Court stuck to the letter of its decision in *Grootboom*. In the second wave’s positive obligations decisions, the Court has developed reasonableness more by assertion than analysis. The concept of reasonableness has, moreover, become too flexible and has enabled the Court to defer too easily to the executive.

Second, reasonableness review has even displaced some of the more substantively developed administrative law rights. In *Mazibuko*, the right to a hearing before disconnection was all but ignored because the Court found the City’s policy to fall “within the bounds of reasonableness”. In *Thubelisha Homes*, the right to meaningful engagement was significantly watered down because the Court was convinced (after much agonising) that the housing policy to be implemented in that case was reasonable overall.

Third, the Court appears to characterise socio-economic rights litigation on positive obligations as doing little more than presenting the state with an opportunity reformulate its plans in a manner which the Court will find reasonable (paras 159-169). It does not, apparently, present poor litigants with the opportunity to expand and give meaning to the idea of reasonableness by reference to their own needs, purposes and lived reality. This is unfortunate. To expect the poor (and those who represent them) to put up with lengthy and costly litigation for the sake of giving the state an opportunity to reformulate its policy on paper will have a chilling effect on future litigation – especially if the Court will neither order the state to implement its reformulations, or to show that they have actually been implemented.<sup>25</sup>

## 4. Conclusion: Reasonableness Entrenched

For better or worse, it seems that reasonableness review is here to stay. The Court has

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<sup>24</sup>A similar point is made in Pieterse (2007), in which the author refers to the “emptiness” of the socio-economic rights jurisprudence of the Court.

<sup>25</sup>The Court declined to order the implementation of revised policy in *Mazibuko* and in *Nokotyana*.



demonstrated itself immune to many ingenious attempts to get it to set normative standards towards which the state must strive in the progressive realisation of socio-economic rights.

However, socio-economic rights litigation can still achieve some progressive impact. The Court is willing to give rights content when dealing with a negative infringement (it prefers to say what is being infringed, not whether the infringement is reasonable), or when requiring the state to take steps provided for in, or consistent with, its own policy, or when expanding on the content given to the right by applicable legislation.<sup>26</sup> We consider that litigators in future cases would be well advised to colour their claims by references to the concrete entitlements contained in legislation. Claims based on the failure to implement existing policy, or to give effect to policy are, in our view, the most likely of socio-economic rights claims to succeed. Claims which seek to impose a duty to act fairly in the implementation of socio-economic programmes, and in limiting access to those programmes, also stand good prospects of success. It may also be possible to use the content the Court has given to socio-economic rights in cases of negative infringement to give definition to future claims seeking to impose positive obligations on the state.

The real difficulty is in compelling the state to respond to the objective needs of the poor in formulating and implementing policy. What needs must be met and what purposes served in order for a policy to be considered a reasonable measure to give effect to socio-economic rights? The Court has simply not considered this question since *Grootboom*. There is no indication that the Court is willing to revisit it in the near future. In considering the possibility of pursuing litigation to give effect to positive socio-economic rights obligations, the poor are, it seems, left with the rather thin statement of the Court's role set out in para. 67 of *Mazibuko*:

Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom*, it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in Treatment Action Campaign No 2, the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.

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<sup>26</sup> Although, as we point out, in *Mazibuko*, the Court all but ignored the substantive entitlements contained in the Water Services Act.

This passage makes it fairly obvious that, where the state takes no steps, or excludes a class of persons from its policy, the Court will intervene. Beyond this the passage begs more questions than the Court is willing to answer. The biggest one is exactly what reasonableness is. This is important, because it allows poor people to predict in advance whether litigating positive rights obligations bears any prospect of success. The failure to give any contextual meaning to reasonableness hinders the poor in making these choices.

Without a “substantive analysis of the normative purposes and values underpinning the relevant socio-economic rights”<sup>27</sup>, the options open to future socio-economic rights litigants are likely to be limited. Socio-economic rights litigation will, however, continue to have some potential, especially when combined with other progressive strategies and forms of organisation, to achieve pro-poor outcomes. Those strategies and outcomes, and how they have been pursued, are examined in the chapters which follow.

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<sup>27</sup> Liebenberg (n. 5 above), p. 467.

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