

The jurisprudence of  
the South African  
Constitutional Court  
on socio-economic  
rights

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Introduction	2
Part 1: The case law	2
Standard of review: From rationality to reasonableness	2
Beneficiaries of socio-economic rights	4
Negative obligations implicit in socio-economic rights	5
The duty to assist people in crisis situations and facing mass evictions	6
The duty to engage meaningfully	8
Can the reasonableness standard be used to challenge the adequacy of socio-economic services or goods?	9
Part 2: Main issues arising from the Constitutional Court's jurisprudence	11
Reasonableness approach	11
Progressive realisation	12
Availability of resources	13
Minimum core obligations	14
Part 3: Remedies	15
Prohibitory and mandatory orders and interdicts	15
Mandatory orders	15
Orders of 'meaningful engagement' and mediation	16
Reporting orders and structural interdicts	16
Constitutional damages	16
New evictions paradigm – joinder of State organs	16
Conclusion	17
Bibliography	19
Cases	20
Glossary	20
Notes	23

## Introduction

This chapter analyses and reviews the jurisprudence of the South African Constitutional Court (Court) on the interpretation and enforcement of socio-economic rights since the enactment of the 1996 Constitution of the Republic of South Africa (Constitution). The various socio-economic rights in the Bill of Rights have presented South African courts with an opportunity to develop South Africa's legal system to be responsive to poverty in society.

The Constitution is one of the few national constitutions that expressly recognises socio-economic rights as justiciable rights. These rights include the rights to housing,<sup>1</sup> health care, food, water and social security,<sup>2</sup> children's socio-economic rights,<sup>3</sup> education,<sup>4</sup> and the socio-economic rights of persons deprived of their liberty.<sup>5</sup> This chapter will investigate the role the Court has played in interpreting and enforcing these rights through a discussion and analysis of its case law. Additionally, it will highlight some of the key issues that have emerged from these cases.

The chapter is divided into three parts. The first part provides an overview of the key socio-economic rights jurisprudence of the Court since the coming into force of the Constitution. The second part identifies and highlights the key issues emerging from the Court's socio-economic rights jurisprudence. The third part discusses the remedies that the Court has granted in socio-economic rights litigation. This part is followed by the conclusion and recommendations.

### Part 1: The case law

The Court has delivered an increasing number of judgments interpreting and enforcing various socio-economic rights, including health care rights,<sup>6</sup> housing rights,<sup>7</sup> social assistance rights,<sup>8</sup> water rights,<sup>9</sup> electricity rights,<sup>10</sup> sanitation rights,<sup>11</sup> and education.<sup>12</sup>

These judgements have dealt with two broad kinds of socio-economic rights claims. The first type relates to claims alleging failure by the State to formulate or implement a programme to give effect to socio-economic

rights. The second type has concerned claims of unreasonable exclusion from an existing legislative or other programme giving effect to socio-economic rights.

This part of the chapter provides a broad overview of these judgements.

### Standard of review: From rationality to reasonableness

*Soobramoney* was the first case in which the Court was asked to find a violation of socio-economic rights. The major question which the Court was called upon to decide was whether the health rights in section 27 of the Constitution entitled a chronically ill man in the final stages of renal failure to an order enjoining a public hospital to admit him to the renal dialysis programme of the hospital.

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

The applicant claimed that the Department's decision amounted to a breach of his constitutionally protected right under section 27(3) of the Constitution not to be refused emergency medical treatment. The applicant further argued in the alternative that the policy breached his right of access to health care services guaranteed in section 27(1)(a) of the Constitution. The Court rejected the challenge based on section 27(3) because the applicant sought access to treatment of an ongoing, chronic condition, not of an emergency kind. The Court, instead, held that the applicant's claim fell to be adjudicated in terms of sections 27(1) and (2) of the Constitution. Those provisions entrench the qualified right of access to health care services.<sup>13</sup>

The Court had to address two critical issues in determining whether the refusal to admit the applicant to the dialysis treatment programme constituted an infringement

ment of these provisions. The first issue to be determined was whether it was necessary to ration access to kidney dialysis treatment to patients such as the applicant. Secondly, if such rationing was necessary, did the policy adopted by the Department comply with the constitutional injunctions in sections 27(1) and (2) and, if so, were they applied fairly and rationally to the applicant's case.

The first issue concerns whether and under what conditions limited resources constitute a valid basis for limiting access to medical treatment for patients in the situation of the applicant. The Court noted that the scarcity of resources meant that the need for access to kidney dialysis treatment greatly exceeded the number of available dialysis machines. The Court further noted that this was a national problem extending to all renal clinics.<sup>14</sup> According to the Court, the diversion of additional resources to the renal dialysis programme and related tertiary health care interventions from within the health budget would negatively impact on other important health programmes.<sup>15</sup> Additionally, the Court pointed out that if the overall health budget was to be substantially increased to fund all health care programmes, this would diminish the resources available to the State to meet other socio-economic needs such as housing, food, water, employment opportunities, and social security.<sup>16</sup>

It is significant to note that the applicant had not suggested that the relevant guidelines established by the hospital were unreasonable. Neither did he argue that the guidelines were not applied fairly and rationally when the decision was taken that he did not qualify for dialysis treatment.<sup>17</sup> Accordingly, the Court held that there was no breach of section 27(1)(a) read with (2).

This case established rationality as the standard by which the courts could measure State compliance with its positive obligations in relation to socio-economic rights. This standard was to be superseded by the reasonable standard in *Grootboom*, handed down almost three years later.

*Grootboom* concerned a group of adults and children who had moved onto private land from an informal settlement owing to the horrendous conditions in which they were living.<sup>18</sup> Following their eviction from the private land, the claimants camped on a sports field in the area. The claimants found themselves in a precarious

position where they had neither security of tenure, nor adequate shelter from the elements.<sup>19</sup> The group launched an application to the Western Cape High Court on an urgent basis for an order against all three spheres of government, requiring them to provide temporary shelter or housing until they obtained permanent accommodation. The High Court held that there was no violation of section 26 (the right of everyone to have access to housing), but found a violation of section 28(1)(c), which protects the right of children to shelter. On appeal, the Court declared that the State's housing programme fell short of compliance with section 26(1) and (2) (the qualified right of everyone to have access to adequate housing). However, the Court found no violation of the right of children to shelter protected under section 28(1)(c) of the Constitution.

The Court rejected the contention that the right to housing provided for in section 26(1) of the Constitution had any interpretive content independently of the duty to take reasonable measures under section 26(2).<sup>20</sup> Notably, the Court rejected an interpretive approach urged by the *amicus curiae*, based on the idea that socio-economic rights had a minimum core content to which all rights bearers are entitled. This approach was based on the CESCR's General Comment 3 (1990) on the nature of States Parties' obligations, under the ICESCR.<sup>21</sup> The Court rejected the minimum core approach on the basis that it had inadequate information before it to determine the minimum core of the right to adequate housing.

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

- be comprehensive, coherent and effective;<sup>22</sup>
- have sufficient regard for the social, economic and historical context of widespread deprivation;<sup>23</sup>
- have sufficient regard for the availability of the State's resources;<sup>24</sup>

- make short-, medium- and long-term provision for housing needs;<sup>25</sup>
- give special attention to the needs of the poorest and most vulnerable;<sup>26</sup>
- be aimed at lowering administrative, operational and financial barriers over time;<sup>27</sup>
- allocate responsibilities and tasks clearly to all three spheres of government;<sup>28</sup>
- be implemented reasonably, adequately resourced and free of bureaucratic inefficiency or onerous regulations;<sup>29</sup>
- respond with care and concern to the needs of the most desperate;<sup>30</sup> 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.<sup>31</sup>

In the end, the Court held that the State had a duty, within its available resources, to provide temporary shelter for those who have been evicted or face imminent eviction and cannot find alternative shelter with their own resources. Although the Court shied away from the idea that section 26 could give rise to a right to housing on demand, its focus on the need for the State to alleviate the plight of those in a desperate situation, according to Liebenberg, suggests that, in certain situations, section 26 of the Constitution could ground a fairly immediate claim for shelter.<sup>32</sup> Liebenberg goes on to note that *Grootboom* is arguably the most far-reaching of the Court's socio-economic rights jurisprudence.<sup>33</sup> This is because the decision resulted in the adoption of a national emergency housing policy.<sup>34</sup> *Grootboom* has also led to a line of decisions in which poor people have successfully resisted evictions potentially leading to their homelessness and consequently claimed alternative shelter from State organs.<sup>[35]</sup>

The reasonableness test adopted in *Grootboom* was confirmed in *TAC*, which was handed down almost two years later. This case involved a challenge to the limited nature of the measures introduced by the State to prevent mother-to-child transmission of HIV. The Court was asked to consider the reasonableness of government policy in facilitating access to antiretroviral treatment to

prevent mother-to-child transmission of HIV. The applicants argued that the State unreasonably prohibited the administration of the antiretroviral drug, Nevirapine, at public hospitals and clinics outside a limited number of research and training sites.<sup>35</sup> This drug was of proven efficacy in reducing mother-to-child transmission of HIV. The applicants further argued that the State had failed to produce and implement a comprehensive national programme for the prevention of mother-to-child transmission of HIV. According to the applicants, the aforementioned conduct and omissions of the State constituted violations of the right of everyone to have access to health care services protected under section 27 of the Constitution, as well as children's right to have access to basic health care services, protected under section 28(1)(c).

The Court held that the State's programme to prevent mother-to-child transmission of HIV did not comply with its obligations in terms of sections 27(1) and (2) of the Constitution.<sup>36</sup> It also held 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.

### Beneficiaries of socio-economic rights

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

The Court considered the reasonableness of the exclusion of permanent residents from the Social Assis-

tance Act in terms of the right of access to social security entrenched under section 27(1)(c) read with (2) of the Constitution. The Court noted that the Constitution confers the right of access to social security on everyone.<sup>37</sup> The Court identified the following factors as being relevant to the assessment of the reasonableness of the exclusion:

- the purpose served by social security;
- the impact of the exclusion on permanent residents; and
- the relevance of the citizenship requirement to that purpose;<sup>38</sup>
- the impact that this has on other intersecting rights – for example, the equality rights protected in section 9 of the Constitution.<sup>39</sup>

After examining the claim through the lens of equality rights, the Court inquired whether the exclusion of permanent residents from social grants amounted to unfair discrimination in terms of section 9(3) of the constitutionally protected equality clause. The test for unfair discrimination involves the consideration of a number of factors, particularly its impact on the group discriminated against. The Court ruled the exclusion of South African permanent residents from state social assistance programmes as irrational.<sup>40</sup> The Court in that case was guided by the impact of the exclusion on the applicants' right to equality. The right to social security, the Court held, vests in everyone. According to the Court, the exclusion of permanent residents from the State's social security programme affected the applicants' rights to dignity and equality. The Court held that without sufficient reason being established to justify such an impairment of the applicants' equality rights, the exclusion was irrational and unconstitutional. According to the Court, the purpose of the right of access to social assistance for those unable to support themselves and their dependants is to ensure that the basic necessities of life are accessible to all.<sup>41</sup> Given these purposes and the *prima facie* entitlement of 'everyone' to have access to social security, the Court held that differentiating on the basis of citizenship in relation to social grants 'must not be arbitrary or irrational nor must it manifest a naked preference'.<sup>42</sup> The Court held that a differentiating law which did not

meet the basic requirement of rationality constituted a violation of both sections 9(1) and sections 27(2) of the Constitution.<sup>43</sup>

The Court's assessment of the reasonableness of the exclusion of permanent residents in *Khosa* incorporates a proportionality analysis. There were other less drastic methods for reducing the risk of permanent residents becoming a burden to the fiscus than excluding them from gaining access to social assistance. Ultimately, the impact of the exclusion from social assistance on the life and dignity of permanent residents outweighed the financial and immigration considerations on which the State relied.<sup>44</sup> The stringent standard of review applied in this case should be understood in the context of the denial of a basic social benefit to a vulnerable group, and the intersecting breaches of a socio-economic right and the right against unfair discrimination.<sup>45</sup>

### Negative obligations implicit in socio-economic rights

The significance of *Jaftha* lies in the fact that it is the first case in which the Court elaborated on the meaning of negative duties in the context of section 26 (and, by implication, section 27) of the Constitution. The Court also adopted a distinctive approach to the determination of cases alleging violations of negative obligations relating to these rights.

*Jaftha* involved a challenge to the constitutionality of provisions of the Magistrates' Court Act 32 of 1944 that permitted the sale in execution of people's homes in order to satisfy sometimes very small debts. Such sales-in-execution would result in the eviction of the applicants from their State-subsidised homes. The applicants would have no suitable alternative accommodation should they be evicted, and would not be eligible again for a housing subsidy from the State.<sup>46</sup>

The Court found that the impugned provisions of the Magistrates' Court Act constituted a negative violation of section 26(1) of the Constitution as they permitted a person to be deprived of existing access to adequate housing.<sup>47</sup> This negative duty, it was held, was not subject to the qualifications in subsection (2) relating to reasonableness, resource constraints and progressive realisation. According to the Court, deprivations of existing

access to housing (and by implication, other socio-economic rights) can only be justified in terms of the stringent requirements of the general limitations clause in section 36 of the Constitution.

The Court, in carrying out the limitations analysis in terms of section 36 of the Constitution, closely scrutinised the purposes that the relevant provisions of the Act were designed to serve, and found them to be overbroad. It thus held that the relevant provisions were not justifiable.

*Jaftha* shows that, as is the case with civil and political rights, socio-economic rights impose negative obligations of the State, the breach of which can be the subject of litigation. Thus, where to the State through its conduct or legislation deprives people of their existing access to socio-economic rights, such conduct or legislation will be regarded as a *prima facie* breach of sections 26 and 27 of the Constitution. The burden then shifts to the State to justify such conduct or legislation according to the general limitations clause. This shows that a stronger model of review applies to negative duties.

### The duty to assist people in crisis situations and facing mass evictions

In *Minister of Public Works v Kyalami Ridge Environmental Association (Kyalami)*,<sup>48</sup> the Ministry of Public Works relied on its constitutional obligation to assist people in crisis situations to defend its decision to establish a transit camp on State-owned land, which had previously been used as a prison, to temporarily house destitute flood victims from Alexandra Township who had been displaced by severe floods. This decision was challenged by a neighbouring residents' association on the grounds that there was no legislation authorising the government to establish the transit camp and that the decision was unlawful in that it contravened the town planning scheme and environmental legislation.

In a unanimous judgment, the Court first addressed the issue as to whether the government had power to establish a transit camp on a prison farm for the accommodation of flood victims. It held that none of the laws relied on by the applicant excluded or limited the government's common law power to make its land available to flood victims pursuant to its constitutional duty to

provide them with access to housing. It further ruled that procedural fairness did not require government to do more in the circumstances than it had undertaken to do, namely to consult with the Kyalami residents in an endeavour to meet any legitimate concerns they might have as to the manner in which the development will take place. According to the Court:

To require more would in effect inhibit the government from taking a decision that had to be taken urgently. It would also impede the government from using its own land for a constitutionally mandated purpose, in circumstances where legislation designed to regulate land use places no such restriction on it.<sup>49</sup>

The cases that would follow *Kyalami* would establish the State's duty to consult unlawful occupiers and the duty to provide alternative before an eviction order is made against them. In *Port Elizabeth Municipality*, an eviction application was brought in terms of section 6 of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) by the Port Elizabeth municipality against about 68 people who were occupying informal dwellings erected on privately owned land within the jurisdiction of the municipality. The municipality was responding to a neighbourhood petition in pursuing the eviction application.

The Court held that 'the normal ownership rights of possession, use and occupation' of property have to be balanced with 'a new and equally relevant right not to be arbitrarily deprived of a home'.<sup>50</sup> It explained the substantive interests that are threatened in an eviction context thus:

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

the more so for one that has established itself on a site that has become its familiar habitat.<sup>51</sup>

The Court further explained that the fact that people have housing rights which may conflict with property rights in an eviction application fundamentally changes the traditional approach of courts in eviction applications. It thus held that the availability to the unlawful occupier of suitable alternative accommodation was a relevant factor in determining whether it is just and equitable to grant an order for eviction in terms of section 6(3) of PIE. The Court further noted, though, that there is 'no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available'.<sup>52</sup> Having said that, the Court stipulated that a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.<sup>53</sup>

The significance of *Port Elizabeth Municipality* lies in its insistence that unlawful occupiers, who enjoyed minimal rights under the previous legislative and common-law regime, are now the bearers of constitutionally protected rights, specifically the housing rights in section 26 of the Constitution. This confers on them interrelated procedural and substantive protections in the context of legal steps to evict them from their homes.<sup>54</sup> The Court held further 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 security of tenure on any relocation site.<sup>55</sup>

*President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Modderklip)*<sup>56</sup> dealt with the State's duties in the context of a private landowner's unsuccessful efforts to execute an eviction order granted in terms of PIE against a community occupying his land. At the time of the landowner's attempted execution of the order, the community numbered approximately 40 000 residents. The Court held that the State's failure to take steps to assist the landowner to recover his property and, at the same time, avoid the large-scale social disruption

caused by the eviction of a large community with nowhere to go, was unreasonable. The Court further held that it was unreasonable for the State 'to stand by and do nothing in circumstances where it was impossible for *Modderklip* to evict the occupiers because of the sheer magnitude of the invasion and the particular circumstances of the occupiers'.<sup>57</sup> The Court ordered the State to compensate the landowner for the occupation of his property. Significantly, the Court order expressly declared that the residents were entitled to occupy the land until alternative land had been made available to them by the State or the provincial or local authority.<sup>58</sup>

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

The Court agreed that section 16 of the Act was unconstitutional and held that section 26 of the Constitution, the PIE Act and the cases decided under these provisions had established 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.<sup>59</sup> 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.<sup>60</sup> It also suggested that where it is possible to upgrade an informal settlement in situ, this must be done.<sup>61</sup> Yacoob J's dissenting judgment 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.<sup>62</sup>

While these principles were implicitly established by the jurisprudence on evictions before the *Abahlali* deci-

sion, their explicit articulation by the Court confirmed the entitlements for poor people seeking to affirm their housing rights. Thus, failure to consider an upgrade of an informal settlement (as opposed to an eviction or relocation) might render the decision to evict or relocate reviewable. Claimants will also be able to propose alternatives to their eviction if these exist. These alternatives must now be explored prior to the institution of eviction proceedings.

### The duty to engage meaningfully

The duty to engage broached in *Port Elizabeth Municipality* was elucidated more fully in *Olivia Road*. The applicants approached the Court to set aside an order that authorised their eviction from certain buildings in the inner city of Johannesburg that the City of Johannesburg alleged were unfit for habitation. The occupiers conceded that the conditions in the buildings were far from safe, but held 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, an order for their eviction should not have been granted by the Supreme Court of Appeal.<sup>63</sup> The occupiers also pointed out that the municipality's eviction proceedings against them were part of a broader strategy to evict an estimated 67 000 people from 235 allegedly unsafe properties in the inner city of Johannesburg. The City had no plan in place to find alternative accommodation for these people. The occupiers claimed that the absence of such a plan was a violation of section 26(2) of the Constitution and that the Court should declare this to be so. The occupiers further asked the Court to supervise the formulation of a reasonable housing policy by means of a structural interdict.

In its judgment, the Court affirmed the basic principle that in situations where people face homelessness due to an eviction, public authorities should generally engage seriously and in good faith with the affected occupiers with a view to finding humane and pragmatic solutions to their dilemma. It held that failure of a municipality to engage meaningfully, or an unreasonable response in the engagement process, 'would ordinarily be a weighty con-

sideration against the grant of an ejection order'.<sup>64</sup> 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. 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.<sup>65</sup>

The Court explained that the objectives of such engagement are to ascertain what the consequences of an eviction might be, whether the City could help in alleviating those dire consequences, whether it is possible to render the buildings concerned relatively safe and conducive to health for an interim period, whether the City had any obligations to the occupiers in the prevailing circumstances, and when and how the City could or would fulfil these obligations.<sup>66</sup> The Court explicitly linked the objectives of meaningful engagement with the duty of municipalities to act reasonably in relation to people's housing needs in terms of section 26(2). According to the Court in *Olivia Road*, 'meaningful engagement' would accordingly apply whenever public authorities seek to evict people from their homes in circumstances that expose them to potential homelessness, regardless of the common law or legislative power to evict.

The notion of meaningful engagement was brought into sharp focus in *Joe Slovo* which dealt with the implications of section 26 of the Constitution in circumstances where the State seeks to evict and relocate a large, settled community from their homes in order to facilitate a major housing development. In that case, claimants numbering 20 000 people appealed to the Court to set

aside an order for their eviction granted by the Cape High Court. The eviction was sought to implement the N2 Gateway housing project. The project involved the development of formal housing for low-income families on the site of the Joe Slovo informal settlement in which the occupiers resided. Thubelisha Homes, the housing company engaged by the State to implement the project, applied for the occupiers' eviction in order to implement the project. It intended 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.

The occupiers argued that they were not unlawful occupiers and could not therefore be lawfully evicted. They also argued that the eviction was being sought to avoid giving effect to their legitimate expectation that 70 per cent of the houses to be provided in the upgraded settlement at the N2 Gateway project would be allocated to them. Lastly, they argued that the eviction order would not be just and equitable because the eviction was sought without meaningful engagement between the affected people and government authorities and because the eviction would, in any event, cause considerable hardship to the affected people.

The Court was unanimous in holding that there were no grounds for reviewing the reasonableness of the N2 Gateway Project, that an in situ upgrade of the land on which the Joe Slovo community was situated was not possible. The Court therefore endorsed the decision to relocate the community to a temporary resettlement area. The Court held that it was appropriate to afford State authorities a generous margin of discretion in relation to the relevant policy choices.<sup>67</sup> Thus, the Court agreed with the High Court that an eviction order was just and equitable in the circumstances. However, the eviction order was made on condition that the applicants be relocated to temporary residential units situated in Delft 'or another appropriate location'. The order also required an ongoing process of engaging meaningfully with the affected residents concerning various aspects of the eviction and relocation process.<sup>68</sup>

Liebenberg has argued that the transformative implications of *Joe Slovo* are undermined by the readiness of

the Court to find that the inadequacies in the engagement process with the community facing eviction did not vitiate the ultimate decisions taken concerning the Joe Slovo community.<sup>69</sup> The flawed nature of the engagement between the officials and community is described by the Court as follows:

There can be no doubt that there were major failures of communication on the part of the authorities. The evidence suggests the frequent employment of a top-down approach where the purpose of reporting back to the community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision-making itself.<sup>70</sup>

Such a top-down form of engagement represents the very opposite of 'the need for structured, consistent and careful engagement' by 'competent sensitive council workers skilled in engagement' that was endorsed by the Court in *Olivia Road*.<sup>71</sup> Despite the above anomalies, the Court was prepared to conclude that the greater good which the N2 Gateway project sought to achieve outweighed the defects in the engagement process.

### Can the reasonableness standard be used to challenge the adequacy of socio-economic services or goods?

In *Mazibuko*,<sup>72</sup> the Court was asked to determine whether the City of Johannesburg's policy with regard to the supply of free basic water of six kilolitres per household per month (Free Basic Water policy) was in conflict with the Water Services Act and the right of access to sufficient water in section 27 of the Constitution. The Court was also called upon to determine whether the installation of prepayment water meters in Phiri was lawful.

The applicants argued that the City's Free Basic Water (FBW) policy was unreasonable because it was insufficient to meet the basic needs of poor households. They further argued that the decision by Johannesburg Water (Pty) Ltd (Johannesburg Water) to install prepayment water meters in Phiri amounted to administrative action and, because it was taken without consultation,

violated section 4(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Lastly, they further argued that the automatic disconnection of prepayment water meters violated section 4(3)(b) of the Water Services Act, which requires reasonable notice and an opportunity to make representations prior to the limitation or discontinuation of water services.

The Court rejected these claims. It held that the right of access to sufficient water does not require the State to provide sufficient water upon demand to every person. The right, according to the Court, only requires the State to take reasonable legislative and other measures progressively to realise the achievement of the right within available resources. The Court rejected the applicants' argument that the Court should adopt a quantified standard determining the content of the right, and not merely its minimum content.<sup>73</sup>

On the question of the constitutionality of the prepayment water meters, the Court held (contrary to the findings of the High Court and the Supreme Court of Appeal) that national legislation and the city's own by-laws authorised the latter to introduce prepaid water meters.<sup>74</sup> According to the Court, the cessation in water supply caused by a prepayment meter stopping is better understood as a temporary suspension in supply, not a discontinuation in water supply. In the Court's view, the installation of prepaid meters was therefore not in violation of the constitutional provision.<sup>75</sup>

Liebenberg has argued that the Court adopted a particularly narrow frame of reference in ascertaining the deleterious impact of the pre-payment meter system on impoverished communities.<sup>76</sup> This is particularly the case with poor households, who are only limited to the free basic provision of six kilolitres per household per month should they be unable to pay for additional water supplies. This has negative implications for the life, health and dignity of such communities. Additionally, the absence of procedural safeguards prior to the discontinuation of water supply services from a household should they fail to pay for additional water puts them at a further disadvantage.<sup>77</sup> The Court's failure to do so resulted in its inability to appreciate the impacts of a prepayment system in comparison to a credit metered water supply system taking into account the socio-economic background

of the community in question.<sup>78</sup> This is because those households from the former white suburbs experiencing financial challenges in paying for their water consumption are afforded statutory procedural safeguards of notice. They are also entitled to make representations and, if need be, enter into an arrangement with the water services supplier for a staggered payment of any arrears on their water bills. Such safeguards are not available to poor households such as those in Phiri.

Geo Quinot has pointed out the absence of any detailed reference by the Court to the perilous personal circumstances of many of the residents of Phiri and the effect of the limitation of water introduced by Operation Gcin'amanzi on their lives.<sup>79</sup>

Unlike in *Mazibuko*, in *Joseph* the Court emphasised the duty of public service providers to comply with procedural fairness under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) before taking a decision to disconnect basic services. The applicants were lessees of a building who had paid the amounts owing for their monthly electricity bills to their landlord. The contract for purposes of providing electricity to residents was between the landlord and City Power (a public entity formed by the City of Johannesburg). The landlord bore responsibility for making payments for electricity consumption on the property. The property accumulated substantial arrears for unpaid electricity bills to City Power, which resulted in the disconnection of the electricity supply by City Power. The applicants were left without power supply, despite being up to date with their payments to the landlord for electricity supply.

The tenants argued that their electricity supply was unlawfully disconnected because the right of access to adequate housing implied a right to electricity in appropriate circumstances. Whatever those circumstances were, a disconnection of an existing electricity supply to a residential property affected their constitutional right of access to adequate housing. At the very least, they argued, they were entitled to procedural fairness before the decision to disconnect them was taken. This should include notice and a reasonable opportunity to make representations. City Power argued that the tenants had no right to electricity that 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.

According to the Court, '[t]he real issue is whether the broader constitutional relationship that exists between a public service provider and the members of the local community gives rise to rights that require the application of section 3 of PAJA.' The Court held that the local government is constitutionally obliged to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider. It held that City Power had a duty to comply with the requirements of procedural fairness provided for under PAJA before taking a decision to disconnect the applicants with their electricity supply. The Court did not decide whether the right to housing implied a right to electricity.

## Part 2: Main issues arising from the Constitutional Court's jurisprudence

This section discusses some of the key areas of concern that have emerged from the jurisprudence discussed above.

### Reasonableness approach

As noted in the first part of this chapter, the Court has held that the decision whether the measures the State has taken to implement socio-economic rights meet the standards envisaged by the Constitution depends on the reasonableness of those measures. This approach was developed as the Court simultaneously dismissed arguments submitted by *amici* in cases such as *Grootboom*, *TAC* and *Mazibuko* that each socio-economic right entailed a minimum core obligation.

In *Grootboom*, where the reasonableness standard was first articulated, the Court pointed out that in reviewing these positive duties, the key question that the Court asks is whether the means chosen are reasonably capable of facilitating the realisation of the socio-economic rights in question.<sup>80</sup> This approach, it was held, was designed

to allow government a margin of discretion relating to the specific policy choices adopted to give effect to socio-economic rights. According to the Court,

a court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.<sup>81</sup>

Essentially, *Grootboom* superseded overruled *Soobramoney*, which had established rationality as the standard by which to scrutinise socio-economic rights claims. As noted earlier, *Grootboom* and *TAC* developed detailed criteria for assessing the reasonableness of the State's measures.

The reasonableness approach has been criticised for failing to engage in a sufficiently substantive analysis of the content of socio-economic rights and the obligations they impose.<sup>82</sup> It has been argued that the vagueness and openness of the reasonableness inquiry allows courts to avoid giving clear normative content to socio-economic rights. In contrast, the minimum core obligations approach attempts to develop a clear normative content for socio-economic rights.<sup>83</sup> Because of the failure of the reasonableness approach to define the content of the relevant socio-economic rights, it has been questioned whether it is capable of protecting those who are experiencing severe deprivation of minimum essential levels of basic socio-economic goods and services.<sup>84</sup> This category of vulnerable groups is in danger of suffering irreparable harm to their lives, health and human dignity if they do not receive urgent assistance.

According to Woolman and Botha, constitution adjudication involves two stages.<sup>85</sup> The first stage is concerned with developing the content of the relevant right and evaluating whether the respondent's conduct or

omissions infringes the right. The second stage entails an inquiry into the respondent's purposes for limiting the right and an inquiry into the proportionality of the means chosen to achieve this purpose, including a consideration of less restrictive means.<sup>86</sup>

Liebenberg has pointed out that reasonableness review does not clearly distinguish between determining the scope of the right, whether it has been breached, and justifications for possible infringements. For example, in *Grootboom*, the Court held that the overarching obligation of the State under section 26 was the adoption of a comprehensive, co-ordinated programme which must be capable of facilitating the realisation of the right.<sup>87</sup> No effort was made to define the right to housing. In *TAC*, there is even less engagement with the scope and content of the right of access to 'health care services, including reproductive health care', protected in section 27(1). Similarly, in *Khosa*, while the Court emphasises the significance of the values of human dignity and equality in evaluating the reasonableness of the exclusion of permanent residents from the social assistance legislation, it engages only very superficially with the content or scope of the social security and assistance rights in section 27(1)(c).<sup>88</sup> Bilchitz points out that until some understanding is developed of the content of socio-economic rights, the assessment of whether the measures adopted by the State are reasonably capable of facilitating the realisation of a particular socio-economic right takes place in a normative vacuum.<sup>89</sup>

The reasonableness approach has also been criticised for creating only an indirect entitlement to the goods and services promised by socio-economic rights since, at the end of the day, the claimant is only entitled to a reasonable government programme. Individuals and groups cannot claim concrete resources and services from the State. For instance, in *Grootboom*, the Court asserted that '[n]either section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand'. According to the Court, the State's obligation imposed by section 26 was to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations. The Court proceeded in the case to grant an order declaring the State's obligation to devise and implement a reasonable housing programme,

incorporating reasonable measures to provide relief for those in urgent housing need, and living in 'intolerable conditions or crisis situations'.

### Progressive realisation

The Court has interpreted 'progressive realisation' to mean the dismantling of a range of legal, administrative, operational and financial obstacles which impede access to the rights, and the expansion over time of such access, to a larger number and broader range of people.<sup>90</sup> The concept of progressive realisation is a reflection of the resource-dependent nature of State obligations in relation to socio-economic rights. It also reflects the complexity of access to socio-economic rights given the entrenched structural patterns of the economy and systematic disadvantage. South Africa is a case in point where, as a result of apartheid policies, the black majority was subjected to systemic deprivation and discrimination in accessing basic services such as water, health care, housing, food, education and social security.<sup>91</sup> Article 2(1) of the ICESCR enjoins States to take the necessary steps towards 'achieving progressively the full realisation of the rights recognised in [the ICESCR]'. The Committee on Economic, Social and Cultural Rights (CESCR) has pointed out that progressive realisation constitutes acknowledgement that the full enjoyment of socio-economic rights will generally not be able to be achieved in a short period of time.<sup>92</sup>

The term 'progressive realisation' shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the State must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.<sup>93</sup>

Full realisation of all human rights requires States to develop policies which progressively ensure the realisation of the relevant rights.<sup>94</sup> This does not imply that States have unfettered discretion to do as they please

when it comes to the fulfilment of socio-economic rights under the ICESCR.<sup>95</sup> In *Grootboom*, for instance, the Court held that the notion of progressive realisation implies that the State has the duty to remove all the legal, administrative, operational and financial obstacles that impede access to these rights. In the context of the right to adequate housing, Bilchitz has defined progressive realisation thus:

Progressive realisation involves an improvement in the adequacy of housing for the meeting of human interests. It does not mean some receive housing now, and others receive it later; rather, it means that each is entitled as a matter of priority to basic housing provision, which the government is required to improve gradually over time.<sup>96</sup>

Liebenberg further points out that in the case of pressing resource constraints in the provision of basic services such as water, it is important that the needs of marginalised and disadvantaged groups should receive particular attention.<sup>97</sup> Progressive realisation, according to Liebenberg, must be understood to entail the State's obligation to improve the nature and quality of the services to which people have access.<sup>98</sup> This means that the standard of socio-economic goods and services provided should be adequate, sufficient and acceptable.

Progressive realisation, it must be noted, can assist a claimant to establish the unreasonableness of a State's acts or omission where a State has not taken timely or effective steps in realising the right to water.<sup>99</sup> The concept of progressive realisation must therefore be read in light of the objective of the ICESCR, which is to establish clear obligations for States to take steps towards full realisation of socio-economic rights such as the right to water.<sup>100</sup> In this context, the Court also specifically endorsed the views of the CESCR in the *Grootboom* case that 'any deliberately retrogressive measures ... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.'<sup>101</sup>

### Availability of resources

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

It is notable that, in contrast to civil and political rights, the distributive and resource implications of socio-economic rights are often given much more prominence in the debates concerning their justiciability. This serves to emphasise the point that socio-economic rights require a degree of intervention from the State that has significant implications for pre-existing policy and resource distributions. The Court has expressly pointed out that the availability of resources will be a factor in the assessment of the reasonableness of the State's conduct.<sup>102</sup> The State is afforded the latitude to demonstrate that the measures it has adopted are reasonable, taking into account its resource and capacity constraints and the overall claims on its resources. The Court has said that although its orders in enforcing socio-economic rights claims may have budgetary implications, they are not 'in themselves directed at rearranging budgets'.<sup>103</sup>

This raises the question as to whether a court is confined to scrutinising existing budgetary allocations for the relevant socio-economic right or whether it can scrutinise the State's budgetary or macro-economic policies more broadly. In a domestic constitutional context, this raises the question whether courts have the institutional capacity and capability to make such determinations.<sup>104</sup> The cases which will present particular challenges are those where the resource implications of the claim are extensive and provision has not been made for such expenditure within existing budgetary frameworks. The question then becomes, how should the courts fulfil their constitutional mandate to enforce these rights without usurping the role of the other branches and spheres of government to distribute resources equitably among various legitimate priorities? Undoubtedly, claims involving significant budgetary implications warrant a measure of respect by the judiciary for the resource allocation decisions of the other branches of government. The courts

may not have the evidence before them to assess the impact of such a decision on other needs and priorities. The burden of adducing evidence regarding the availability of resources, distributive decisions, and the overall onus of proof in respect of the defence of resource constraints rests on the State, as is the case with all inquiries into the justifiability of a failure to implement a right or of a limitation on a right.

The Court acknowledged the significance of the availability of resources in *Grootboom*, explaining that 'both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources'.<sup>105</sup> In this case, the Court held that the government's housing programme, though in other respects rational and comprehensive,<sup>106</sup> was inconsistent with section 26 of the Constitution. This is because such a programme failed 'to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations'.<sup>107</sup>

In *TAC*, the Court scrutinised and ultimately rejected the State's arguments that it did not have sufficient resources to provide Nevirapine throughout the public health sector. The Government had defended its restrictive policy on mother-to-child transmission of HIV, raising concerns ranging from the efficacy and safety of Nevirapine to a lack of resources and capacity to roll out a comprehensive programme to prevent mother-to-child transmission of HIV throughout the public health sector. The State's resource constraints arguments were evaluated in relation to the two legs of the challenge mounted by the TAC to the programme. The first leg of the challenge concerned the restriction placed on doctors from prescribing Nevirapine in facilities where testing and counselling facilities already existed. The Court noted that the administration of the drug is a relatively simple procedure, and the manufacturers had made a free offer of the drug to the government for a period of five years. The Court held that such orders may or may not be accompanied by a reporting order or structural interdict through which judicial supervision over the engagement process is maintained.

The second leg of the challenge concerned the extension of testing, counselling and treatment facilities to clinics that currently lack these facilities.<sup>108</sup> After a close analysis, the Court concluded that the capacity and costs arguments did not have sufficient factual cogency to outweigh the impact on a particularly vulnerable group of the denial of a basic life-saving medical intervention.<sup>109</sup> The Court's jurisprudence, for instance, shows that orders with clear budgetary and resource implications will be made in situations where the State does not place sufficient evidence before the court demonstrating that it lacks available resources or has other competing urgent claims on its available resources.<sup>110</sup>

### Minimum core obligations

The idea of minimum core obligations suggests that there are degrees of fulfilment of a right and that a certain minimum level of fulfilment takes priority over a more extensive realisation of the right.<sup>111</sup> Bilchitz conceives of minimum core obligations as arising from the very basic interest people have in survival and the socio-economic goods required to survive.<sup>112</sup> Bilchitz further points out that:

The recognition of a minimum core of social and economic rights that must be realised without delay attempts to take account of the fact that certain interests are of greater relative importance and require a higher degree of protection than other interests.<sup>113</sup>

Within the South African context, Bilchitz has persuasively argued for the adoption of the minimum core concept.<sup>114</sup> Bilchitz has argued that an analysis of obligations imposed by socio-economic rights on the State should entail a minimum core obligation to realise, without delay, the most urgent survival interests.<sup>115</sup> Bilchitz's position is that the recognition that the State has a minimum core obligation to realise essential levels of each right represents a viable and principled method of approaching the justiciability of socio-economic rights.<sup>116</sup> Therefore, each substantive right imposes upon a State a variety of core obligations that the State is obliged to satisfy.

In *Grootboom*, *TAC* and *Mazibuko*, the Court rejected the concept of the minimum core in its definition of the positive obligations imposed by sections 26 and 27 of the Constitution. In *Grootboom*, for instance, it pointed out that the determination of the minimum core in the context of the right to have access to adequate housing presents difficulties because there are people who need land, others need both land and houses yet others need financial assistance.<sup>117</sup> Furthermore, the Court said that, unlike the CECSR which developed the notion of the minimum core obligations based on its extensive experience in reviewing State reports under the ICESCR, it lacked adequate information on which the content of the minimum core obligations could be based.<sup>118</sup>

### Part 3: Remedies

Since deprivations of socio-economic rights tend to be systemic and take place on a large scale, they cannot be remedied by a once-and-for-all court order sounding in money. Thus, the Court has emphasised the broader importance of developing effective and innovative remedies to redress any infringement of constitutional rights. This is particularly relevant in socio-economic rights cases, where impoverished communities often lack access to legal services, and cannot afford to engage in ongoing litigation to secure an effective remedy.

#### Prohibitory and mandatory orders and interdicts

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

#### Mandatory orders

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

In *TAC*, the orders imposed by the Court enjoined the government to act 'without delay' to 'remove the restrictions' to the provision of Nevirapine in public hospitals and clinics; 'permit and facilitate' its use when medically indicated; 'make provision' for counsellors based at public hospitals and clinics to be trained for the counselling necessary for the use of Nevirapine to reduce the risk of mother-to-child transmission of HIV; and '[t]ake reasonable measures to extend the testing and counselling facilities' at all public hospitals and clinics 'to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV'.<sup>119</sup>

In *Joe Slovo*, the Court upheld the order of the Western Cape High Court requiring the residents to vacate the Joe Slovo informal settlement in order to facilitate the development and upgrading of the settlement as part of the N2 Gateway Project. It is noteworthy that the Court affirmed the residents' right to adequate alternative accommodation during the upgrading process and set detailed substantive standards for the provision of the

temporary residential accommodation at Delft, including the provision of services and facilities.<sup>120</sup> The respondents were furthermore directed to allocate 70 per cent of the low-cost housing to be built at the site of Joe Slovo to the residents.<sup>121</sup> The parties were further directed to ‘engage meaningfully’ with each other concerning certain aspects of the order.

### Orders of ‘meaningful engagement’ and mediation

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

*Olivia Road* is the leading case in which an order was made for the parties to ‘engage meaningfully’ with each other. The Court issued an interim order requiring the City of Johannesburg and the applicants ‘to engage with each other meaningfully’ in an effort to resolve the disputes between them ‘in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned’.<sup>122</sup> The parties were further enjoined to file affidavits before the Court within two months that would report on the results of this engagement between them. Such an approach illustrates how a mandatory order by a court for the parties to engage meaningfully with each other can stimulate a dialogue leading to the provision of concrete benefits to a particular group. The orders of meaningful engagement made by the Court in cases such as *Olivia Road* and, to a lesser degree, in *Joe Slovo* and various other cases discussed above, suggest that the Court may be becoming bolder in experimenting with innovative remedies of this nature.

### Reporting orders and structural interdicts

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

### Constitutional damages

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

### New evictions paradigm – joinder of State organs

The evictions jurisprudence has shown that by virtue of its constitutional obligations, the State has a fundamental interest in all eviction applications which result in homelessness, regardless of whether the eviction is instituted by an organ of state or private entity. According to the Court, the State has a duty to protect the constitutional rights at stake in eviction applications and to facilitate dialogic and mediated solutions. The public dimensions of eviction applications have been developed further in cases such as *City of Johannesburg Metropolitan Municipal-*

*ity v Blue Moonlight Properties 39 (Pty) Ltd and Another*,<sup>123</sup> in which courts have ordered the joinder of the State as a party to eviction proceedings brought by private landowners. The purpose of such joinder is to permit an order to be made against the relevant local authorities to facilitate mediation between the parties and to provide information to the court relating to alternative accommodation for those facing eviction. Cases such as *Port Elizabeth Municipality* and *Olivia Road* have emphasised the importance of procedural fairness and the need for parties to seek dialogic solutions to eviction conflicts through mediation or meaningful engagement.

## Conclusion

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

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

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services.<sup>124</sup>

It is worth noting that not much progress has been made in economic transformation since these words were uttered fifteen years ago, as South Africa is more unequal now than it was then.<sup>125</sup> Although a black middle class is emerging, the country's poor remain unemployed, and

without access to basic goods and services such as adequate health care, water, education and housing.

This chapter has argued that one of the key weaknesses in the socio-economic rights jurisprudence thus far lies in the reasonableness review developed by the Court for adjudicating the positive duties imposed by socio-economic rights.<sup>126</sup> This standard focuses on the appropriateness of State action to give effect to socio-economic rights. It leaves out of consideration the objective norms promoted, or the specific goods and services protected by the rights themselves. In its application of the reasonableness approach, the Court has failed to develop the substantive purposes and values which these rights seek to protect by defining the scope and content of such rights. Consequently, State organs responsible for the implementation of such rights and litigants lack normative guidance on the kind of processes and outcomes which are consistent with these rights.

The Court's jurisprudence to date demonstrates a failure to engage substantively with these questions. This is illustrated in *Mazibuko* where the Court's assessment of the reasonableness of the City of Johannesburg's water policies took place in the absence of an attempt to define the normative content of the right of access to sufficient water entrenched in section 27(1)(b) of the Constitution and the interests that it seeks to protect. This case further illustrates how the flexibility of the reasonableness approach has allowed the Court to defer to the executive's socio-economic policy choices to a degree that appears to be inappropriate. *Mazibuko* contains overt statements of deference to the executive.<sup>127</sup>

The concept of reasonableness has, moreover, become too flexible and has enabled the Court to defer too easily to the executive. The Court appears to regard socio-economic rights litigation on positive obligations as doing little more than presenting the State with an opportunity to reformulate its plans in a manner which the Court will find reasonable. This approach has also been extended to those socio-economic rights of children and prisoners which are formulated as direct basic entitlements without the internal qualifications contained in sections 26 and 27. *Nokotyana* also illustrates the Court's reluctance to exercise its power to evaluate

State policies by reference to a *Grootboom*-type standard of substantive reasonableness.

By adopting the reasonableness approach, the Court opted for a flexible approach which would allow it to interpret positive obligations imposed on the State by the constitutionally-protected socio-economic rights cautiously and incrementally. The Court's cautious approach is illustrated in *TAC*, where it explained that a socio-economic right does not 'give rise to a self-standing and independent positive right' enforceable independently.<sup>128</sup> The result is that the prospects for an individual litigant approaching the court claiming specific benefits are particularly bleak and the incentive to litigate is relatively low as the reasonableness standard has often been applied to justify the Court's deference to the executive's socio-economic policy choices.

Recent socio-economic rights judgments of the Court have sought to encourage and enforce deliberative engagement between the parties in finding mutually satisfactory solutions to their disputes. This is a potentially significant development for encouraging participatory, context-specific solutions to rights conflicts. The evictions jurisprudence discussed in this report point to some features of a transformative approach to the Court's adjudication of socio-economic rights. The Court has interpreted section 26 (3) of the Constitution to impose not only procedural guarantees but also a number of substantive rights on those facing the ignominy of eviction from their homes. The Court has opined that meaningful engagement is a constituent element of reasonableness and accordingly a procedural requirement imposed by section 26(2) of the Constitution. In *Olivia Road*, the Court held that, prior to seeking an eviction, an organ of State will normally be required to show that it has engaged 'individually and collectively' with the occupiers who may be rendered homeless by an eviction and to 'respond reasonably' to the needs and concerns articulated in the process. The Court was reluctant to define what a reasonable response to potential homelessness is, but stated that the range of reasonable responses stretched from providing permanent alternative housing to the occupiers to providing no alternative accommodation at all.<sup>129</sup>

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

The Court has created new entitlements in the context of negative infringements of socio-economic rights as earlier demonstrated in *Khosa*. The Court's recognition of the right to electricity as an implied constitutional right in *Joseph* represents a transformative approach in the interpretation and enforcement of socio-economic rights. Furthermore, the principles articulated in *Abahlali* confirmed relatively novel entitlements for poor people seeking to enforce their housing rights. This case clearly demonstrated that marginalised and poor people will also be able to propose alternatives to their eviction if these exist and such alternatives must be explored prior to the institution of proceedings. The Court has thus developed, albeit incrementally, the scope and content of the right to housing.

Creating appropriate and effective remedies for the breach of socio-economic rights protected in the Constitution is a big challenge in rights adjudication.

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

The transformative potential of the Court's remedial jurisprudence has been constrained by the Court's reticence to endorse structural mandatory relief in the context of socio-economic rights cases. Structural orders are the most effective remedial option for redressing violations of socio-economic rights which require a series of

structural reforms to be adopted over a period of time. Although structural remedies will not constitute appropriate or effective relief in all socio-economic rights cases, they nevertheless constitute a valuable remedy for particular types of socio-economic rights violations and their use should not be discouraged on the basis of restrictive conceptions of the separation of powers doctrine and judicial competence.

There are certain contexts in which it is particularly appropriate to impose positive duties on private actors to protect or facilitate communities and individuals' access to socio-economic rights.<sup>130</sup> The express provision made in the Bill of Rights for the application of human rights norms in private relations challenges the public/private dichotomy in South Africa's legal culture and tradition. The classic liberalism is often premised on the need to preserve maximum freedom from interference in the private spheres of the family and marketplace. Thus, any potentially redistributive measures in favour of the poor are to emanate from State-provided benefits and services.<sup>131</sup>

The idea that some of the negative or positive duties imposed by socio-economic rights may bind private parties poses a direct challenge to the myth of a private sphere free of State influence and a public sphere in which the role of a Bill of Rights is to restrain an over-zealous State.<sup>132</sup> However, South African courts have not constructed a clear methodology to guide the application of the rights in the Bill of Rights to extend to private law. Civil society organisations and litigants thus have a role to play to ensure that the powerful hold which the liberal legal culture has in private relationships is loosened so as to ensure the application of the normative value system underpinning socio-economic rights in that realm. Civil society organisations and litigants should assist courts to develop strategies to ensure that in certain appropriate contexts, positive duties are imposed on private actors to protect or facilitate people's access to socio-economic rights.

The adjudication of socio-economic rights facilitates participation by civil society organisations, individuals and communities in the formulation and implementation of social programmes bearing on socio-economic rights protected in the Constitution. However, there are

myriad factors, institutional and political, which determine whether courts can play a transformative role in the realisation of socio-economic rights. Civil society organisations and other actors in socio-economic rights litigation should be conscious of the institutional and capacity limits of courts in delivering socio-economic goods and consider that particular claims may be appropriately considered through advocacy and other allied strategies. This also avoids the danger of inappropriate resorting to litigation resulting in judgments such as *Mazibuko* that impede rather than aid realisation of socio-economic rights.

The Constitution provides for broad remedial powers for the courts to enforce socio-economic rights. Despite this broad remit, this is another area of its socio-economic rights jurisprudence where the Court has been more deferential and cautious. Civil society organisations and other actors should ensure that the remedies that they seek from the courts in respect of socio-economic rights are tailored to the circumstances of the cases in question. As noted by Liebenberg, compliance with constitutional rights will not necessarily be achieved 'through a once-off, final judicial decree but will require an ongoing engagement between relevant organs of State, affected communities and civil society organisations.'<sup>133</sup> It is in that respect that structural interdicts discussed in this report are particularly well suited to the progressive realisation of socio-economic rights, as guidance and regular supervision by courts will ensure that any engagement process is underpinned by the norms and values entrenched in the Bill of Rights.

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CASE NAME	SALR
<i>President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (AgriSA and Others, Amici Curiae)</i>	2005 (5) SA 3 (CC)
<i>Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and Others</i>	2010 (3) SA 454 (CC)
<i>Mazibuko and Others v City of Johannesburg and Others</i>	2010 (4) SA 1 (CC)
<i>Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others</i>	2008 (3) SA 208 (CC)
<i>Abahlali baseMjondolo Movement of South Africa and Another v Premier of KwaZulu-Natal and Others</i>	2009 ZACC 31
<i>Leon Joseph and Others v City of Johannesburg and Others</i>	2010 (4) SA 55 (CC)
<i>Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others</i>	2010 (4) BCLR 312 (CC)
<i>City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another</i>	2012 (2) SA 104 (CC)

## Cases

CASE NAME	SALR
<i>Soobramoney v Minister of Health, Province of KwaZulu-Natal</i>	1998 (1) SA 765 (CC)
<i>Government of the Republic of South Africa and Others v Grootboom and Others</i>	2001 (1) SA 46 (CC)
<i>Minister of Health and Others v Treatment Action Campaign and Others (No 2)</i>	2002 (5) SA 721 (CC)
<i>Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others</i>	2004 (6) SA 505 (CC)
<i>Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others</i>	2005 (2) SA 140 (CC)
<i>Port Elizabeth Municipality v Various Occupiers</i>	2005 (1) SA 217 (CC)
<i>Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)</i>	2001 (3) SA 1151 (CC)

## Glossary

ACCESS	Alliance for Children’s Entitlement to Social Security
ACHPR	African Charter on Human and Peoples’ Rights
ADSL	asymmetric digital subscriber line
ANC	African National Congress
ARV	Anti-retroviral
ASIDI	Accelerated schools infrastructure delivery initiative
BCCSA	Broadcasting Complaints Commission of South Africa
BNG	Breaking New Ground
CALS	Centre for Applied Legal Studies
CCC	Complaints and Compliance Committee
CCL	Centre for Child Law

CDE	Centre for Development and Enterprise	EEA	Employment of Educators Act 76 of 1998
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women	EFF	Economic Freedom Fighters
CESCR	(United Nations) Committee on Economic, Social and Cultural Rights	EHP	Emergency Housing Programme
CFO	chief financial officer	ES	equitable share
CoGTA	Department of Co-operative Governance and Traditional Affairs (previously DPLG)	ESTA	Extension of Security of Tenure Act 62 of 1997
Comtask	Communications Task Group	FBSan	free basic sanitation
COO	chief operating officer	FBW	free basic water
COSATU	Congress of South African Trade Unions	FICA	Financial Intelligence Centre Act 38 of 2001
CRC	Convention on the Rights of the Child	FHR	Foundation for Human Rights
CSIR	Council for Scientific and Industrial Research	FLISP	Finance Linked Individual Subsidy Programme
CSSR	Centre for Social Science Research	FXI	Freedom of Expression Institute
DA	Democratic Alliance	GCEO	group chief executive officer
DBE	National Department of Basic Education	GCIS	Government Communication and Information System
DHS	Department of Human Settlements (previously National Department of Housing or NDoH)	GDE	Gauteng Department of Education
DMA	Disaster Management Act 57 of 2002	GEC	General Education Certificate
DMMA	Digital Media and Marketing Association	GG	Government Gazette
DORA	Division of Revenue Act (renewed annually)	HDA	Housing Development Agency
DPLG	Department of Provincial and Local Government (now CoGTA)	HOD	head of department
DPME	Department of Planning, Monitoring and Evaluation	HSDG	Human Settlements Development Grant
DWA	Department of Water Affairs (previously DWAF)	IBA	Independent Broadcasting Authority
DWAF	Department of Water Affairs and Forestry (now DWA)	ICASA	Independent Communications Authority of South Africa
ECA	Electronic Communications Act	ICCPR	International Covenant on Civil and Political Rights
ECDoE	Eastern Cape Department of Education	ICERD	International Convention on the Elimination of all forms of Racial Discrimination
ECS	electronic communications service	ICESCR	International Covenant on Economic, Social and Cultural Rights
ECT	electronic communications and transactions	ICTs	information and communications technologies
		IDP	Integrated Development Plan
		IEC	Independent Electoral Commission
		IP	Internet protocol
		IPTV	Internet protocol television
		IRDP	Integrated Residential Development Programme
		ISP	Internet service provider

ISPA	Internet Service Providers' Association	PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
LDoE	Limpopo Department of Education		
LRC	Legal Resources Centre		
LSM	Living Standards Measurement	PMSA	Print Media South Africa
LTSM	Learning and Teaching Support Materials	POCDATARA	Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004
MAT	Media Appeals Tribunal		
MDDA	Media Development and Diversity Agency	R2K	Right to Know Campaign
		RDP	Reconstruction and Development Programme
MEC	Member of the Executive Council (provincial 'cabinet minister')	RGA	Regulation of Gatherings Act 205 of 1993
MIG	Municipal Infrastructure Grant		
NDoH	National Department of Housing (now called Department of Human Settlements or DHS)	RHIG	Rural Household Infrastructure Grant
		RHLF	Rural Housing Loan Fund
		RICA	Regulation of Interception of Communications and Provision of Communications Related Information Act
NDP	National Development Plan		
NERSA	National Energy Regulator of South Africa		
NGO	non-governmental organisation	SA	South Africa
NHFC	National Housing Finance Corporation	Saarf	South African Advertising Research Foundation
NHSDB	National Housing Subsidy Database	SABC	South African Broadcasting Corporation
NHSS	National Housing Subsidy Scheme		
NIA	National Intelligence Agency	SACMEQ	Southern and Eastern Africa Consortium for Monitoring Educational Quality
NPC	National Planning Commission		
NSC	National Senior Certificate		
Nurcha	National Urban Reconstruction and Housing Agency	SADF	South African Defence Force
		SADTU	South African Democratic Teachers' Union
NUSP	National Upgrading Support Programme	SAHRC	South African Human Rights Commission
NWSRS	National Water Services Regulation Strategy	SAICE	South African Institution of Civil Engineering
OBE	Outcomes Based Education		
OECD	Organisation for Economic Co-operation and Development	SANDU	South African National Defence Union
		Sanef	South African National Editors' Forum
PAJA	Promotion of Administrative Justice Act 3 of 2000	SAPS	South African Police Service
		SASA	South African Schools Act 84 of 1996
PCSA	Press Council of South Africa	SATRA	South African Telecommunications Regulatory Authority
PDMSA	Print and Digital Media South Africa		
PDMTTT	Print and Digital Media Transformation Task Team	SCA	Supreme Court of Appeal
		SCOPA	Standing Committee on Public Accounts
PED	Provincial Education Department	SERI	Socio-Economic Rights Institute of South Africa

SERs	social and economic rights	(CC) ( <i>Port Elizabeth Municipality</i> ), <i>Jaftha v Schoeman; Van Rooyen v Scholtz</i> 2005 (2) SA 140 (CC) ( <i>Jaftha</i> ), <i>Occupiers of 51 Olivia Road, Berea Township and Another v City of Johannesburg and Others</i> 2008 (3) SA 208 (CC) ( <i>Olivia Road</i> ), <i>Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and Others</i> 2010 (3) SA 454 (CC) ( <i>Joe Slovo</i> ) and <i>Abahlali baseMjondolo v Premier of KwaZulu-Natal Province and Others</i> 2010 (2) BCLR 99 (CC) ( <i>Abahlali</i> ).
SGB	school governing body	
SHF	Social Housing Foundation	
SHI	Social Housing Institution	
SHP	Social Housing Programme	
SHRA	Social Housing Regulatory Authority	
SIU	Special Investigating Unit	
SSA	State Security Agency	
TIMSS	Trends in International Mathematics and Science Study	8. <i>Khosa and Others v Minister of Social Development and Others</i> 2004 (6) SA 505 (CC) ( <i>Khosa</i> ).
TRU	temporary residential unit	9. <i>Mazibuko and Others v City of Johannesburg and Others</i> 2010 (4) SA 1 (CC) ( <i>Mazibuko</i> ).
TV	television	
UISP	Upgrading of Informal Settlements Programme	10. <i>Joseph v City of Johannesburg</i> 2010 (4) SA 55 (CC) ( <i>Joseph</i> ).
UKZN	University of KwaZulu-Natal	11. <i>Nokotyana and Others v Ekurhuleni Municipality</i> 2010 (4) BCLR 312 (CC) ( <i>Nokotyana</i> ).
UN	United Nations	12. See <i>Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo and Others</i> 2010 (2) SA 415 (CC).
UPM	Unemployed Peoples' Movement	13. <i>Soobramoney</i> , para. 22.
UPR	Universal Periodic Review	14. <i>Soobramoney</i> , para. 24.
USAASA	Universal Service and Access Agency of South Africa	15. <i>Soobramoney</i> , paras 27–28.
USDG	Urban Settlements Development Grant	16. <i>Soobramoney</i> , para. 28.
VIP	ventilated improved pit latrine	17. <i>Soobramoney</i> , para. 25.
Waspa	Wireless Applications Service Providers' Association	18. See <i>Government of the Republic of South Africa v Grootboom</i> , para. 3.
WSA	water services authority	19. <i>Grootboom</i> , paras 9–11.
WSDP	water services development plan	20. See paras 34–46.
WSP	water services provider	21. Committee on Economic, Social and Cultural Rights, <i>General Comment No. 3 on the Nature of States Parties' Obligations</i> (Fifth Session, 1991), U.N. Doc E/1991/23. The Court considered and rejected the approach again in <i>TAC</i> at paras 26–39.

## Notes

1. See section 26 of the Constitution.
2. Section 27.
3. Section 28(1)(c).
4. Section 29.
5. Section 35(2)(e).
6. *Soobramoney v Minister of Health, Province of KwaZulu-Natal* 1998 (1) SA 765 (CC) (*Soobramoney*), and *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) (*TAC*).
7. *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom*), *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (*Port Elizabeth Municipality*), *Jaftha v Schoeman; Van Rooyen v Scholtz* 2005 (2) SA 140 (CC) (*Jaftha*), *Occupiers of 51 Olivia Road, Berea Township and Another v 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) (*Joe Slovo*) and *Abahlali baseMjondolo v Premier of KwaZulu-Natal Province and Others* 2010 (2) BCLR 99 (CC) (*Abahlali*).
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9. *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) (*Mazibuko*).
10. *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) (*Joseph*).
11. *Nokotyana and Others v Ekurhuleni Municipality* 2010 (4) BCLR 312 (CC) (*Nokotyana*).
12. See *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo and Others* 2010 (2) SA 415 (CC).
13. *Soobramoney*, para. 22.
14. *Soobramoney*, para. 24.
15. *Soobramoney*, paras 27–28.
16. *Soobramoney*, para. 28.
17. *Soobramoney*, para. 25.
18. See *Government of the Republic of South Africa v Grootboom*, para. 3.
19. *Grootboom*, paras 9–11.
20. See paras 34–46.
21. 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 26–39.
22. *Grootboom*, para. 40.
23. *Grootboom*, para. 43.
24. *Grootboom*, para. 46.
25. *Grootboom*, para. 43.
26. *Grootboom*, para. 42.
27. *Grootboom*, para. 45.
28. *Grootboom*, para. 39.
29. *Grootboom*, para. 42.
30. *Grootboom*, para. 44.
31. *Grootboom*, para. 44.
32. See Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 151–153.
33. Liebenberg, *Socio-Economic Rights* 171.

34. See Volume 4, part 2 of the South African National Housing Code (2009).
35. See TAC, paras 10–11.
36. The qualified right of everyone to have access to health care services.
37. Section 27(1). See *Khosa*, paras 53–57.
38. *Khosa*, para. 49.
39. *Khosa*, para. 45.
40. *Khosa*, paras 53 and 85.
41. *Khosa*, para. 52.
42. *Khosa*, para. 53.
43. *Khosa*, para. 53.
44. *Khosa*, para. 82.
45. *Khosa*, para. 44.
46. *Jaftha*, para. 12.
47. *Jaftha*, paras 31–34.
48. Minister of Public Works v Kyalami Ridge Environmental Association (Kyalami) 2001 (3) SA 1151 (CC).
49. *Kyalami*, para. 109.
50. *Port Elizabeth Municipality*, para. 23.
51. *Port Elizabeth Municipality*, para. 17.
52. *Port Elizabeth Municipality*, para. 28.
53. *Port Elizabeth Municipality*, para. 28.
54. Liebenberg, *Socio-Economic Rights* 277.
55. *Port Elizabeth Municipality*, para. 55.
56. President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Modderklip) 2005 (5) SA 3 (CC).
57. *Modderklip*, para. 48.
58. *Modderklip*, para. 68 Order 3 (c).
59. *Abahlali*, para. 122.
60. *Abahlali*, paras 113–115.
61. *Abahlali*, para. 114.
62. See para. 69 of Yacoob J’s dissenting judgment.
63. See *City of Johannesburg v Rand Properties* 2007 (6) SA 417 SCA.
64. *Olivia Road*, para. 21.
65. *Olivia Road*, para. 15.
66. *Olivia Road*, para. 16.
67. See, for example, *Joe Slovo*, paras 115–116.
68. *Joe Slovo*, Order paras 5 and 11.
69. Liebenberg, *Socio-Economic Rights* 309–310.
70. *Joe Slovo*, para. 378.
71. *Olivia Road*, para. 19.
72. The matter was filed in the South Gauteng High Court in Johannesburg, in July 2006. The applicants identified two key issues: whether the city of Johannesburg’s policy of supplying six kilolitres of water free to every household in the city was in compliance with section 27 of the Constitution; and whether the installation of prepayment meters was lawful. For the South Gauteng High Court judgment, see *Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as amicus curiae)* 2008 4 All SA 471 (W).
73. *Mazibuko*, para. 50.
74. *Mazibuko*, paras 157–158.
75. *Mazibuko*, paras 106–111 and 157–158.
76. Liebenberg, *Socio-Economic Rights* 478.
77. Liebenberg, *Socio-Economic Rights* 478.
78. Liebenberg, *Socio-Economic Rights* 478.
79. G Quinot “Substantive Reasoning in Administrative-law Adjudication” (2010) 3 *Constitutional Court Review* 111 126.
80. See *Grootboom*, para. 41.
81. See *Grootboom*, para. 41.
82. D Brand “The proceduralisation of South African socio-economic rights Jurisprudence or ‘What are socio-economic rights for?’” in H Botha, A J van der Walt and J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2004) 33–56.
83. Liebenberg, *Socio-Economic Rights* 173.
84. D Bilchitz ‘Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence’ (2003) 19 *South African Journal on Human Rights* 1, 9–10.
85. S Woolman and H Botha ‘Limitations’ in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed. (Juta & Co., Original Service, 2006), chapter 34, 1–6; 16–29.
86. Section 36(1)(e) of the Constitution.
87. *Grootboom* (note 7 above) para. 41.
88. See the very brief treatment of the ambit of the right of access to social security in terms of section 27(1)(c) in *Khosa*, paras 46–47.
89. Bilchitz “Towards a reasonable approach to the minimum core” 9–10.
90. *Grootboom*, para. 45.
91. See Liebenberg, *Socio-Economic Rights* xxi.
92. CESCR *General Comment* 3 (1990) para. 9.
93. *Grootboom*, para. 45.

94. Liebenberg, *Socio-Economic Rights* 129.
95. E Riedel 'Economic, Social and Cultural Rights' in C Krause and M Scheinin (eds) *International Protection of Human Rights: A Textbook* (2009) 129.
96. D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 193.
97. Liebenberg, *Socio-Economic Rights* 188.
98. Liebenberg, *Socio-Economic Rights* 188.
99. Liebenberg, *Socio-Economic Rights* 189.
100. General Comment No. 3 (1990) para. 9.
101. *Grootboom*, para. 45, citing CESCR General Comment No. 3 (1990) para. 9.
102. In *Grootboom*, para. 46, the Court held: 'There is a balance between goals and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.'
103. *Grootboom*, para. 38.
104. Liebenberg, *Socio-Economic Rights* 192.
105. *Grootboom*, para. 46.
106. *Grootboom*, paras 53–55 and 64.
107. *Grootboom*, para. 99.
108. *Grootboom*, para. 95.
109. *Grootboom*, paras 90–92, 115–120.
110. See also T Roux 'Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court' (2003) 10 *Democratisation* 92–111 for analysis of the South African Constitutional Court's approach to the issue of resource allocations.
111. Bilchitz, 'Reasonable Approach' 11.
112. Bilchitz, 'Reasonable Approach' 11.
113. Bilchitz, 'Reasonable Approach' 11.
114. In *TAC*, *Grootboom* and *Mazibuko* the Court rejected the minimum core concept in assessing the State's compliance with the positive obligations imposed by the economic, social and cultural rights in sections 26 and 27 of the Constitution. For a comprehensive analysis of the minimum core debate in South Africa's socio-economic rights jurisprudence, see Liebenberg, *Socio-Economic Rights* 148–151 and 163–173.
115. Bilchitz, 'Reasonable Approach' 2. For further discussion on the minimum core concept see also D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2002) 118 *South African Law Journal* 484–501.
116. Bilchitz, 'Reasonable Approach' 11.
117. *Grootboom*, para. 33.
118. *Grootboom*, para. 31.
119. *TAC*, para. 135. Orders 3(a)–(d).
120. *TAC*, para. 7. See particularly the order para. 10.
121. *TAC*, order, para. 17.
122. See para. 3 of Constitutional Court interim order 30 August 2007, *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg*, CCT 24/07, available at: <http://www.constitutional-court.org.za> ('City of Johannesburg Interim Order')
123. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).
124. *Soobramoney*, para. 8.
125. Liebenberg, *Socio-Economic Rights* xxi.
126. The Court first adopted the reasonableness approach as a model of review in *Grootboom*.
127. *Mazibuko*, para. 61.
128. See *TAC*, para. 39.
129. See *Olivia Road*, para. 18.
130. Liebenberg, *Socio-Economic Rights* 330.
131. Liebenberg, *Socio-Economic Rights* 61.
132. Liebenberg, *Socio-Economic Rights* 61.
133. Liebenberg, *Socio-Economic Rights* 462.