LAW, DEMOCRACY & DEVELOPMENT

"Dreams and aspirations deferred?": The Constitutional Court's approach to the fulfilment of socio-economic rights in the Constitution

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ABSTRACT:

The Dean's Distinguished Lectures were initiated in 2015, with the following judges as speakers: Dikgang Moseneke (2015), Navi Pillay (2016), Edwin Cameron (2017), Bernard Ngoepe (2018) and Mahomed Navsa (2019). The onslaught of COVID-19 brought with it a temporary interruption to the Dean's Distinguished Lectures. Justice Steven Majiedt, who presented the lecture in 2022, obtained the BA (law) and LLB degree from UWC in 1981 and 1983 respectively. In his lecture, Justice Majiedt emphasised the important role played by the Constitutional Court as apex court in giving effect to the fulfilment of socio-economic rights. The deferential path adopted by the court when adjudicating socio-economic rights issues was highlighted with reference to a reluctance to define minimum core obligations and an abiding recognition of the duty imposed upon the state in the progressive realisation of such rights that has been subsumed in the principle of reasonableness.

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LECTURE:

1 INTRODUCTION

President Nelson Mandela famously exhorted that "to deny people their human rights is to deny their very humanity". He cautioned that "a nation should not be judged by how it treats its highest citizens, but its lowest ones". These observations by our most famous citizen assume special pertinence when addressing a topic such as the one I do today. It is often said that the law is but a means to achieve the ends of justice. This then begs the question as to how the Constitutional Court has fared in respect of the enforcement of socio-economic rights.

I propose first outlining the historical perspective. I will then wade into the challenging debate concerning minimum-core obligations, briefly deal with a few selected cases from the Constitutional Court, and conclude with my views on the question. It is, however, important that I make a disclaimer at the outset. At the risk of stating the obvious, the views propounded here are my own and not that of the Court. I cannot and do not presume to speak for the Court. In fact, there may conceivably be some of my colleagues in that Court with views diametrically opposed to my own. And, inasmuch as I now hold an honorary position in the esteemed law faculty of this venerable institution, even less do I presume to speak on its behalf.

With that out of the way, let me attempt to grasp the nettle. In taking on this quite challenging topic (one chosen by myself – this gives new meaning to *volenti non fit iniuria*), I must emphasise that this is meant to be the introduction to a more comprehensive debate about this very important issue. I hope to facilitate panel discussions and debates by retired Constitutional Court justices and academics on this topic in the forthcoming months here at UWC. Colloquially speaking, then, I am merely getting the ball rolling today.

At the start, perhaps we need to remind ourselves again of the place of socio-economic rights (or "second generation rights"), juxtaposed against civil and political rights (or "first-generation rights"). In my view, despite the numerical categorisation, there is hardly any difference between them. There appears to be some reticence to accord socio-economic rights their proper status within human rights discourse. The central question in this enquiry ought to be: What is the nature of the obligation created by the different rights?[1] Both of these sets of rights trigger concomitant obligations: a primary duty to respect, a secondary right to protect, and a tertiary duty to fulfil.[2]

Thus viewed, it becomes plain that there is a substantial overlap between these two sets of rights. The differentiation is more apparent than real. Let me take one simple example: the right to life (a first-generation right) can conceivably encompass the rights to health, a decent livelihood and even housing (second-generation rights). This is the route that the Indian Supreme Court has taken.[3]

2 HISTORICAL PERSPECTIVE

In the negotiations leading up to the 1993 interim Constitution and the 1996 Constitution, there was a lively debate, not only in academic circles, but also amongst the public at large, as to whether socio-economic rights should be included in the Constitution and, if so, in which from they should be included. The liberation movements were, generally, firm proponents of their inclusion. Their concern was that the recognition of political and civil rights in the supreme law should be accompanied by express provisions requiring the redress of social and economic disadvantage. Liebenberg notes that clauses in the Freedom Charter that related to land, housing, education and health, found resonance, in particular, with the ANC and its supporters and hence in their strong support for the inclusion of socio-economic rights in the Constitution.[4] She cites President Mandela's May 1991 address to an ANC Constitutional Conference:

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1 Fredman S *Comparative human rights law* Oxford: Oxford University Press (2018) 76; Fredman S *Human rights transformed: Positive rights and positive duties* Oxford: Oxford University Press (2008).

2 See generally Shue H *Basic rights: Subsistence, affluence and US foreign policy* 2nd ed Princeton: Princeton University Press (1996).

3 *Mohini Jain v State of Karnataka* 1992 SCR (3) 658 at 667F (Indian Supreme Court).

4 Liebenberg S "Judicially enforceable socio-economic rights in South Africa: Between light and shadow" (2014) 37 *Dublin University Law Journal* at 142.

> A simple vote, without food, shelter and health care is to use first generation rights as a smokescreen to obscure the deep underlying forces which dehumanise people. It is to create an appearance of equality and justice, while by implication socioeconomic inequality is entrenched. We do not want freedom without bread, nor do we want bread without freedom. We must provide for all the fundamental rights and freedoms associated with a democratic society.[5]

Within the ANC, two of the strongest proponents of the inclusion of socio-economic rights were Dullah Omar and Albie Sachs. There was also support from some of the smaller parties and some academics. The drafters of our Constitution, after extensive and intensive negotiations, had to decide whether to include socio-economic rights and, if so, what was an appropriate model. There was wide-ranging debate about three possible models:

a) at the one end of the spectrum, notwithstanding the strong push for inclusion, to include no socio-economic rights provisions at all and to steer clear of the myriad pitfalls they may present;
b) at the other extreme, a fully justiciable socio-economic rights provision, with no limitation at all on its enforcement; and
c) the *via media*, with a limited justiciability clause, enforceable only with regard to reasonable availability of resources and a progressive realisation of the rights.

Of course, as we now know, the negotiators and, later, Parliament, settled for the *via media*. The Constitutional Court, in certifying the 1996 Constitution in compliance with the 34 Constitutional Principles, dismissed objections to the inclusion of socio-economic rights in the Constitution.

The first objection to their inclusion was that they are not universally accepted fundamental rights. The Court held that "such an objection cannot be sustained because [Constitutional Principle] II permits the [Constitutional Assembly] to supplement the universally accepted fundamental rights with other rights not universally accepted".[6] The second objection was that the inclusion of these rights was inconsistent with the

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[5] Mandela N "Address: On the occasion of the ANC's Bill of Rights Conference" in *A Bill of Rights for a Democratic South Africa: Papers and report of a conference convened by the ANC Constitutional Committee, May 1991* Cape Town: Centre for Development Studies, University of the Western Cape (1991) 9 at 12.

[6] *Certification of the Constitution of the Republic of South Africa, 1996* 1996 ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 76.

separation of powers required by Constitutional Principle VI, because the judiciary would have to encroach upon the proper terrain of the legislature and executive. The objectors argued that it would result in the courts dictating to the government as to how the budget should be allocated. The Court held that, while

> [i]t is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters … even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications.[7]

This latter pronouncement by our highest court fortifies my view that the claimed divide between first- and second-generation rights is illusory. Our Bill of Rights does not establish rigid hierarchies, nor does it draw a hard line between different types of rights.

The third objection concerned the justiciability of these rights. The Constitutional Court made short shrift of this contention. It said that the mere fact that socio-economic rights may have budgetary implications is not an automatic bar to their justiciability. And, said the Court, at the "very minimum, socio-economic rights can be negatively protected from improper invasion".[8] With that historical background, I discuss the vexed question of minimum-core obligations.

3 MINIMUM CORE VERSUS PROGRESSIVE REALISATION

As we all know, the second-generation rights in our [South African] Constitution impose a concomitant duty on the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right". A difficult question that arises time and again is whether there ought to be a minimum core to these rights. The concept of a minimum-core obligation refers to the obligation on a state to ensure that no significant number of individuals is deprived of the "minimum essential levels" of socio-economic rights. This obligation is premised on the notion that a basic minimum level of subsistence is required for the enjoyment of a dignified human existence.

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[7] See *Certification* (1996) at para 77.

[8] See *Certification* (1996) at para 78.

The Constitutional Court has firmly rejected that proposition, to substantial chagrin in some quarters. It did so in *Grootboom*,[9] *Treatment Action Campaign II*[10] and *Mazibuko*.[11] In *Mazibuko*, the Court followed *Grootboom* and *Treatment Action Campaign II*, noting that these same arguments concerning the minimum core of a right were rejected in these two cases. The Court summarised the reasoning for this conclusion in those two cases as being twofold. First, it flows textually from the Constitution, and secondly, for a proper understanding of the true role of the courts in our constitutional democracy, that is, the separation of powers principle. This latter reason has come in for criticism from the variety of critics of the Constitutional Court's socio-economic rights jurisprudence. I shall return to this later when I discuss the selected cases, including *Grootboom* and *Mazibuko.*

The minimum core concept has received the endorsement of the UN Committee on Economic, Social and Cultural Rights (UNCESCR)[12] in interpreting state parties'

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[9] *Government of the Republic of South Africa v Grootboom* 2000 ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 32: "It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum-core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right."

[10] *Minister of Health v Treatment Action Campaign* 2002 ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (*Treatment Action Campaign II*)at para 34: "Although Yacoob J indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the [s]tate are reasonable, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core was thus treated as possibly being relevant to reasonableness under section 26(2), and not as a self-standing right conferred on everyone under section 26(1)."

[11] *Mazibuko v City of Johannesburg* 2009 ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at para 55: "The applicants' argument that this Court should determine a quantity of water which would constitute the content of the section 27(1)(b) right is, in effect, an argument similar to a minimum core argument though it is more extensive because it goes beyond the minimum. The applicants' argument is that the proposed amount (50 litres per person per day) is what is necessary for dignified human life; they expressly reject the notion that it is the minimum core protection required by the right. Their argument is thus that the Court should adopt a quantified standard determining the content of the right not merely its minimum content. The argument must fail for the same reasons that the minimum core argument failed in *Grootboom* and *Treatment Action Campaign [II].*"

[12] The committee consists of 18 independent experts. Its purpose is to assist the United Nations Economic and Social Council to carry out its responsibilities relating to the implementation of the Covenant. See Craven M *The international covenant on economic, social and cultural rights* Oxford: Clarendon (1995) at 1 and 42.

obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR).[13] Distilled to its essence, the primary reasons for the rejection of this concept by the Constitutional Court in *Grootboom* and *Treatment Action Campaign II*, apart from those enunciated in *Mazibuko*, appear to be that:

a) socio-economic needs vary according to varying contexts;[14]
b) there is a lack of information to determine the content of minimum-core obligations;[15]
c) the text of the relevant provisions requires consideration of resource constraints and, consequently, of the progressive realisation limit pertaining to these rights;[16]
d) there are pragmatic considerations – minimum-core obligations would impose unrealistic demands on the state inasmuch as it is "impossible to give everyone access even to a 'core' service immediately";[17] and
e) imposing such an obligation is incompatible with the role and institutional competence of courts.[18]

The Constitutional Court, in place of the imposition of a minimum-core obligation, has laid emphasis instead on an enquiry into the reasonableness of the measures taken by the state to realise the particular socio-economic right. That "reasonableness review", first enunciated in *Grootboom*, approaches the question thus:

> 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 [s]tate to meet its obligations. Many of these would meet the

[13] See generally Chenwi L "Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance" (2013) 46 *De Jure Law Journal*. This article is based on a research paper, written for the Studies in Poverty and Inequality Institute, called "Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court" (2010).

[14] *Grootboom* (2000) at paras 32–33.

[15] *Grootboom* (2000) at para 31.

[16] *Grootboom* (2000) at para 95. See also *Treatment Action Campaign II* (2002) at para 35.

[17] *Treatment Action Campaign II* (2002) at para 37.

[18] *Treatment Action Campaign II* (2002) at para 38.

requirements of reasonableness. Once it is shown that the measures do so, the requirement is met.[19]

This approach has been followed consistently by our apex court. Based on the Constitutional Court's early socio-economic rights jurisprudence, Liebenberg identifies the following features that a reasonable government programme would have in the context of socio-economic rights:

a) It must be capable of facilitating the realisation of the right.
b) It must be comprehensive, coherent and co-ordinated.
c) Appropriate financial and human resources must be made available for the programme.
d) It must be balanced and flexible, and make appropriate provision for needs in the short, medium and long term.
e) It must be reasonably conceived and implemented.
f) It must be transparent and made known efficiently to the public.
g) It must make provision for short-term provision for those whose needs are urgent and who are living in intolerable conditions.[20]

In summary, the Court has consistently resisted the urging upon it to intrude in the domain of elected institutions of democracy, which are eminently more suited to make policy-laden decisions. Fuller explains that those are disputes arising in litigation that give rise to many diverging issues, each of which is linked to the other in a complex web of interdependent relationships. An adjudicative decision in one area of such a dispute generates unforeseen budgetary and policy implications impacting on parties not represented in the particular litigation.[21] The Constitutional Court's reasoning in rejecting the minimum-core approach can be said to be based in general on that concept's inflexibility and absolutism and the fact that it cannot deal with the exigencies of the real world, including limitations imposed by the scarcity of resources. The Court opted instead for a more flexible approach sensitive to the state's difficulties in realising these rights.

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[19] *Grootboom* (2000) at para 41.

[20] Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* Cape Town: Juta (2010) at 152–153.

[21] Fuller L "The forms and limits of adjudication" (1978) 92 *Harvard Law Review* 353.

I have alluded to the criticism levelled against the Constitutional Court's socio-economic jurisprudence, something on which I will comment later.[22] It suffices to state at this juncture that, generally, the criticism is aimed at the Court's jettisoning of a minimum-core obligation and imposing the reasonableness test in its stead. It is said that the Court's focus is misdirected – that there is an under-emphasis by it on the content of the various rights in issue and a consequent lack of analysis of the content of these rights. Any enquiry into the reasonableness of the measures to realise progressively the right in question, say the critics, requires first that proper content be given to the right; only then, as a next step, can the reasonableness of the measures to realise progressively the right in question be assessed by a court.

4 DISCUSSION ON SELECTED CASES

Turning from these general observations to specifics, I discuss a selection of five socio-economic rights cases decided in the apex court: *Soobramoney*, *Grootboom*, *Treatment Action Campaign II*, *Mazibuko*, and *Thubakgale.* The sequence of discussion is deliberately

[22] See, among others, Liebenberg (2010) 466; Bilchitz D "Giving socio-economic rights teeth: The minimum core and its importance" (2002) 119 *South African Law Journal* 484; Chenwi (2013); O'Connell P "The death of socio-economic rights" (2011) 74 *Modern Law Review* 532 at 550–552; Couzens E "Avoiding Mazibuko, water security and constitutional rights in Southern African case law" (2015) 18 *PER* 1162; Pieterse M "Resuscitating socio-economic rights, constitutional entitlements to health care services" (2006) 22 *South African Journal on Human Rights* 473; Bilchitz D "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; Brand D & Russell S *Exploring the core content of socio-economic rights: South African and international perspectives* Pretoria: Protea Book House (2002); Brand D "The proceduralisation of South African socio-economic rights jurisprudence, or 'What are socio-economic rights for?'" in Botha H et al. (eds) *Rights and democracy in a transformative constitution* Stellenbosch: African Sun Media (2003) 33 at 36–7, 39, 49, 55; Chetty C "The right to health care services: Interpreting section 27 of the Constitution" (2002) 17 *South African Public Law* at 453, 455, 461; Coomans F "Reviewing implementation of social and economic rights: An assessment of the reasonableness test as developed by the South African Constitutional Court" (2005) 65 *Heidelberg Journal of International Law* at 167, 188; Currie I "Bill of Rights jurisprudence" (2002) *Annual Survey of South African Law* at 36, 72; Liebenberg S "South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?" (2002) 6 *Law, Democracy & Development* at 159, 176; Newman D "Institutional monitoring of social and economic rights: A South African case study and a new research agenda" (2003) 19 *South African Journal on Human Rights* at 189, 196; Pieterse M "Possibilities and pitfalls in the domestic enforcement of socio-economic rights: Contemplating the South African experience" (2004) 26 *Human Rights Quarterly* at 882, 898. There have been some writings in defence of the Court's jurisprudence, though. See, for example, Lehmann K "In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core" (2006) 22 *American University International Law Review* at 163–197; Kende MS "The South African Constitutional Court's embrace of socio-economic rights: A comparative perspective" (2003) 6 *Chapman Law Review* at 137.

chronological. It is, I hope, of some help to analyse how the Court's jurisprudence has evolved (although, as will become plain, many will say that in one or two cases the Court has retrogressed in its socio-economic jurisprudence).

4.1 Soobramoney

I commence with *Soobramoney*.[23] In that matter, the Constitutional Court was confronted with an application by a patient who was suffering from chronic renal failure as well as cardiac- and diabetes-related complications. Mr Soobramoney sought an order that the state render to him life-saving dialysis. Mr Soobramoney relied on section 27 of the Constitution, the right to health-care services.

The Court decided that his claim based on the right to emergency medical treatment had to be rejected. This right to emergency care could be claimed by or on behalf of someone who collapsed suddenly or who was the victim of sudden trauma. It did not apply to chronic medical conditions, even if they reached life-threatening proportions. The Court recognised that there was a scarcity of funds and capacity in the state health system. It held that in respect of the right of access to health care, the access granted by the state health services to Mr Soobramoney had not been shown to be unreasonable. The evidence from the hospital showed that its plan was eminently rational and non-discriminatory, and accordingly his claim on this ground failed.

The main judgment, penned by Chaskalson P, held that the obligations imposed on the state in respect of access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources.[24] In a separate concurrence, Sachs J noted that socio-economic rights are different in their mode of enjoyment, if not in their essence, from civil and political rights, the first-generation rights. Sachs J also observed that the problem in all socio-economic rights cases is that resources are always limited. The learned Judge was at pains to point out that Chaskalson P, in his main judgment, did not simply "toll the bell of lack of resources". Sachs J stated that these second-generation rights by their nature involve curtailment due

[23] *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 ZACC 17, 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC).

[24] *Soobramoney* (1997) at para 11.

to the lack of available resources. Such curtailment should not be considered a restriction of or limitation on the right of access to health care, but the very condition for its proper exercise. As he said:

> When rights by their very nature are shared and inter-dependent, striking appropriate balances between the equally valid entitlements or expectations of a multitude of claimants should not be seen as imposing limits on those rights (which would then have to be justified in terms of section 36), but as defining the circumstances in which the rights may most fairly and effectively be enjoyed.

4.2 Grootboom

Then came *Grootboom*, a landmark decision on the justiciability of socio-economic rights. Mrs Grootboom, and many other destitute occupiers, sought an order that the local municipality in Cape Town be compelled to meet its constitutional obligations and provide them with temporary accommodation. Early on in the new constitutional era, this case answered the question of whether socio-economic rights can be regarded as fundamental rights enforceable directly by the courts, and if so, how. The challenge facing the Constitutional Court head-on was how to find a secure jurisprudential foundation for responding to the applicants' desperate situation and how to provide a remedy both consonant with the state's limited institutional capacity and capable of meaningful enforcement.

In a unanimous judgment, the Court held that the central concept in the provisions on access to adequate housing was the obligation on the state to take "reasonable legislative and other measures" progressively to realise the right. In its view, the concept of reasonable measures was one capable of being adjudicated on by the Court. If the measures failed to meet the standard of reasonableness, the state would be in breach of its constitutional obligations. In deciding whether the measure met this standard, the Court acknowledged the special expertise of the other branches of government in this area and the fact that a range of policy choices would be consistent with reasonableness. The Court found that the state housing programme made no provision for persons such as Mrs Grootboom who found themselves in situations of such crisis and desperation that their dignity was seriously assailed.

In other words, however reasonable the state's housing programme in its broad reach, it had one serious shortcoming that prevented it from satisfying the constitutional requirement of being reasonable: there was no comprehensive plan, or indeed, any national plan at all, to deal with homeless people in situations of extreme desperation, such as victims of disaster or persons in Mrs Grootboom's situation. The Court accordingly declared the state's housing programme unreasonable and in conflict with the Constitution to the extent that "it failed to make reasonable provision within its available resources for people . . . with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations".[25]

As to remedy, the Court left it open to the state to decide how to remedy its failure – the state itself had to decide how best to deal with emergency situations. This is where most of the strident criticism is directed, as will be elaborated upon presently.

4.3 Treatment Action Campaign II

Treatment Action Campaign II concerned government policy in respect of the provision in the public health sector of nevirapine, an antiretroviral drug that drastically reduces the likelihood that the HI virus will be transmitted from mother to child at birth. The manufacturers of nevirapine offered the drug free of charge to the government for five years. Government policy made nevirapine available in the public sector only at a small number of research and training sites throughout the country. This restricted use was meant to evaluate the effectiveness of a future nationwide programme to combat mother-to-child transmission of the HI virus, by studying the results of a comprehensive programme instituted at these particular sites. The applicant, the Treatment Action Campaign, sought to persuade government to accelerate its programme to provide nevirapine beyond the selected research and training sites. The government, however, maintained its position.

The first issue in this case was whether the restriction of nevirapine to research sites constituted a violation of the rights to access to health care in section 27, read with section 28(1)(c) of the Constitution. The second issue was whether these rights obliged the government to plan and implement an effective, comprehensive and progressive

[25] *Soobramoney* (1997) at para 99.

programme for the prevention of mother-to-child transmission of HIV throughout the country.

In a unanimous decision, the Court held that the central question was whether the measures taken by the state to realise the relevant rights were reasonable. Thus, it had to be determined whether the policy of confining nevirapine to the research and training sites was reasonable in the circumstances. The Court considered the objections that the government made against providing nevirapine beyond the research sites: first, the government doubted the efficacy of the drug in the absence of a comprehensive programme; secondly, the government feared the development of resistance to nevirapine; thirdly, the government expressed doubts as to the safety of the drug; and finally, the government claimed that the public health system lacked the capacity to deliver the drug nationally.

After rejecting these arguments in turn, the Court considered a number of factors relevant to determining whether the policy of the government was reasonable. It stated that "[t]he policy of confining nevirapine to research and training sites fails to address the needs of mothers and their new-born children who do not have access to these sites".[26] In determining reasonableness, it held that a Court must take account of the degree and extent of the denial of the right that the government is meant to realise. In addition, a reasonable programme must be one that is balanced and flexible; that pays attention to short-, medium- and long-term needs; and that does not exclude a significant sector of society. The Court went on to say that:

> [t]o the extent that government limits the supply of nevirapine to its research sites, it is the poor outside the catchment areas of these sites who will suffer. There is a difference in the positions of those who can afford to pay for services and those who cannot. State policy must take account of these differences.[27]

In addition, it was found that the cost of providing nevirapine was not a factor, as the drug had been offered to the public health system free of charge. The administration of nevirapine is also simple and can save lives.

[26] *Soobramoney* (1997) at para 67.
[27] *Soobramoney* (1997) at para 70.

Taking into account these considerations, the Court concluded that government policy was an inflexible one that denied mothers and their newborn children at public hospitals and clinics outside the research and training sites the opportunity of receiving a single dose of nevirapine at the time of the birth of the child. A potentially lifesaving drug was on offer, and, where testing and counselling facilities were available, it could have been administered within the available resources of the state without any known harm to mother or child.[28] Thus, the Court found that the policy of confining the provision of nevirapine to research sites was unreasonable and in contravention of the state's obligations in terms of the Constitution.

With regard to the second issue, the question was again whether the programme instituted by the government in attempting to prevent mother-to-child transmission of the HI virus was reasonable. The Court found that the rigidity of the government's approach affected its policy as a whole. Since it was not reasonable to restrict nevirapine to the research sites, the policy as a whole had to be reviewed. The Court declared that government policy was inconsistent with the Constitution to the extent that it confined the use of nevirapine to research sites and did not train counsellors in the use of nevirapine beyond them. The Court considered it appropriate to issue a mandamus. It ordered the government, without delay, to extend the provision of nevirapine beyond the research and training sites where this was medically indicated, and ordered it to extend testing and counselling services to hospitals and clinics which were not research sites.

4.4 Mazibuko

In *Mazibuko,* where, like the other cases discussed thus far, the Court was also unanimous, the central issue concerned the proper interpretation of section 27(1)(b) of the Constitution, which provides that everyone has the right to have access to sufficient water. The Court was acutely cognisant of the crucial importance of water. It examined the provisions of the Water Services Act 108 of 1997, which highlights the connection between the rights of people to have access to a basic water supply and government's duty to manage water services sustainably. The Court's primary enquiry was into the role of courts in determining the content of social and economic rights, that is, the proper interpretation of section 27 of the Constitution. It understood the essential question to be

[28] *Soobramoney* (1997) at para 80.

the extent of the state's positive obligations under section 27 in respect of the right of access to sufficient water. It considered *Grootboom* and *Treatment Action Campaign II.* With reference to these two cases, the Court pointed out that the argument in *Grootboom* was that the Constitution entitles citizens to approach a court to claim a house from the state.

Such an interpretation of section 26 would imply a directly enforceable obligation upon the state to provide every citizen with a house immediately. The Court concluded that section 26 does not impose such an obligation. Instead, it held that the scope of the positive obligation imposed upon the state by section 26 is carefully delineated by section 26(2). Section 26(2) provides explicitly that the state must take reasonable legislative and other measures progressively to realise the right of access to adequate housing within available resources. It said that in *Treatment Action Campaign II*, the Court had repeated this in the context of section 27(1)(a), the right of access to health-care services. The Court concluded that, when applying this approach to section 27(1)(b), the right of access to sufficient water, coupled with section 27(2), it is clear that the right does not require the state, upon demand, to provide every person with sufficient water without more. Rather, it requires the state to take reasonable legislative and other measures to progressively realise the achievement of the right of access to sufficient water, within available resources.[29]

As already stated, the Court also rejected the minimum-core argument, noting that the same argument had been firmly rejected in *Grootboom* and *Treatment Action Campaign II.* Importantly, the Court held that:

> ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice … The Constitution envisages that legislative and other measures will be the primary

[29] *Treatment Action Campaign II* (2002) at para 50.

> instrument for the achievement of social and economic rights. Thus, it places a positive obligation upon the state to respond to the basic social and economic needs of the people by adopting reasonable legislative and other measures. By adopting such measures, the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness.[30]

4.5 Thubakgale

Lastly, the only one of these five cases where I was part of the Bench, a case close to my heart, is *Thubakgale*.[31] I wrote the main judgment but, sadly, was in the minority. The case concerned a severe failure by the state in providing housing. The applicants were living in dire conditions, which in certain circumstances consisted of houses of up to ten people with little to no water, sanitation or electricity. The applicants were terribly poor and did not have the financial means to sustain themselves. Without delving into the facts, which are a morass, the state had failed to provide the applicants with access to adequate housing for a period of 20 years. To make matters worse, the local authority had unlawfully given possession of the subsidised houses intended for the applicants, and to which they were still matched on the national housing database, to other residents, through either fraud or incompetence.

The High Court made an order requiring the local authority to provide the applicants with housing. Ultimately, the state failed to comply with this court order and the applicants were in no better position. After various court proceedings in the lower courts, the applicants applied to the Constitutional Court for an order compelling the local authority to provide them with housing and then also for constitutional damages.

I wrote the first judgment, which held that the local authority had failed to discharge its duties under section 26 of the Constitution. Thus, I found that the municipality had failed under the legislative framework to provide housing to the applicants. The matter was not the same as the case in *Grootboom*, where the question pertained to whether the content of the nationwide housing policy was reasonable. In this matter, the Court was concerned with the implementation of the legislative framework. In other words, the question to be determined was whether the state acted in accordance with its own legislative requirements. Thus, importantly in my view, the Court was required to travel

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[30] *Treatment Action Campaign II* (2002) at para 61.

[31] *Thubakgale v Ekurhuleni Metropolitan Municipality* 2021 ZACC 45; 2022 (8) BCLR 985 (CC).

beyond the terrain covered in *Grootboom*.[32] Furthermore, I reasoned that the state had failed to comply with a court order which required it to provide housing. In view of the magnitude of the state's failures, I ordered the local authority to pay constitutional damages as an effective and appropriate remedy.[33] Unfortunately, as I have said, mine was the minority decision.

Jafta J, who penned the second judgment, found that this was not a case that called for constitutional damages. In his view, constitutional damages are not appropriate in cases that concern breaches of socio-economic rights.[34] No proper case was pleaded for constitutional damages and there was no proof of any damages, let alone constitutional damages.[35] A third judgment, by Madlanga J, elected not to go as far as to hold that constitutional damages could never be claimed for breaches of socio-economic rights, as was held by Jafta J. It found that the applicants had not made out a case for such damages, in this case. The matter is currently before the High Court to allow the local authority to adduce further evidence.

5 CRITICISMS OF THE CONSTITUTIONAL COURT'S SOCIO-ECONOMIC RIGHTS JURISPRUDENCE

Now for the most difficult part of this lecture: an assessment of the validity of the criticism of the Constitutional Court's socio-economic rights jurisprudence. Is it true that, as some assert, the Court, through its judgments, has deferred the dreams and aspirations of the millions of South Africans who continue, almost three decades after the passing of the interim Constitution, to live in abject poverty in the most unequal society in the world? Has the Court been misguidedly "tolling the bell of lack of resources"?[36] I have already summarised the gravamen of the main criticism in general terms. It is necessary to focus briefly at this juncture on *Mazibuko*, which has come in for particularly strident reproval (some go as far as calling it "controversial"). That criticism is representative of the general criticism of the Constitutional Court's approach in these cases, so it is useful to spend some time on it.

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[32] *Thubakgale* (2021) at para 7.

[33] *Thubakgale* (2021) at paras 72–83.

[34] *Thubakgale* (2021) at para 122.

[35] *Thubakgale* (2021) at 122.

[36] As alluded to by Sachs J in *Soobramoney* above n 23 at para 52, citing *R v Cambridge Health Authority, Ex Parte B* 1995 2 All ER 129 (CA) at 137c–d.

The criticism is, in the main, directed at the Constitutional Court's perceived inertia and for being overly deferential to the policy choices of the first respondent, the City of Johannesburg. It is said to have considerably narrowed down the reasonableness standard set in the earlier cases of *Grootboom* and *Treatment Action Campaign II.*[37] Liebenberg's forceful criticism is insightful. She bemoans the fact that the Court there appeared to have significantly "retreat[ed] from its earlier substantive reasonableness standard". The passage I cited above comes in for criticism generally and from Liebenberg in particular.[38] Roithmayr contends that the Court had arguably rejected:

> the idea that affirmative socio-economic rights created some minimum core of obligation that government owed citizens, and emphasised the need to defer to government decision making in assessing the rights of access for those who could not afford water.[39]

Now, when well-respected academics like Liebenberg, one of our foremost commentators on socio-economic rights, speaks on this topic, it demands close attention. After discussing *Mazibuko*, she concludes:

> The Court's early jurisprudence on socio-economic rights has the potential to evolve into a rich, substantive set of normative criteria for guiding fundamental social and economic reforms in South Africa. It is regrettable that in *Mazibuko* the Court chose to place the narrowest possible construction on these criteria and to engage in a superficial analysis of the impact of the City's water policies on the Phiri community. Revisiting and developing the early potential of the Court's approach to socio-economic rights is a major challenge for the constitutional adjudication of claims to decent social and economic services and benefits over the next decade.[40]

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[37] Liebenberg (2010) at 470.

[38] "[O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice."

[39] Roithmayr D "Lessons from Mazibuko: Persistent inequality and the commons" (2010) *CCR* 317 at 323.

[40] Liebenberg (2010) at 480.

The criticism of *Mazibuko* encompasses not only the constitutional right dimension, but also an environmental law perspective.[41] As far as the reasonableness approach is concerned, the criticism generally is that it resembles an administrative law inquiry into the rationality, coherence, flexibility, even-handedness and inclusiveness of state policy. Much of the lament in respect of *Grootboom* and *Treatment Action Campaign II*, concerns the Court's allegedly narrow focus on the reasonableness of legislative or policy measures, which has the effect of dismantling socio-economic rights of meaningful independent content and diverting the attention of socio-economic litigation away from the satisfaction of urgent and vital material needs. Critics say that this approach makes a mockery of the progressive-realisation standard contained in sections 26(2) and 27(2) of the Constitution and unduly restricts the remedial potential of socio-economic rights. The Constitutional Court, say the critics, has failed in being the highly effective social change agent that it could have become had it opted for a minimum-core approach.

A strongly held view, further, is that the reasonableness criterion is vague and lacks clarity. Typical of his line of criticism is Bilchitz's observation:

> [T]here is a need for the Court to clarify the state's obligations imposed by socio-economic rights. This would entail that the state is not left with an amorphous standard with which to judge its own conduct, but would be able to assess its conduct against clear benchmarks. The current system of invoking the amorphous notion of reasonableness does not provide a clear and principled basis for the evaluation of the state's conduct by judges or other branches of government in future cases."[42]

6 MY VIEW ON THE CRITICISM

[41] See: Kidd M *Environmental law* 2nd ed Cape Town: Juta (2011) at 92 ("a deeply flawed judgment"); Bond P "Water rights, commons and advocacy narratives" (2013) *South African Journal on Human Rights* 125 at 141–143 (the residents erred in respect of the narrow ambit of the case they brought and should have broadened it to include wider societal and environmental concerns); De Vos P "Water is life (but life is cheap)" (13 October 2009) available at http://constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap/ ("the reasoning in the judgment is utterly unconvincing"); Couzens (2015) at 1170 (after an overview of the various criticisms of the judgment, he opines that "there have not been many judgments of [the] Constitutional Court which have attracted such near-universal condemnation").

[42] Bilchitz (2003) at 10. See also Liebenberg (2002) at 175: "The Court does not escape the interpretative difficulties of clarifying the state's obligations in relation to socio-economic rights by rejecting the minimum-core obligation. The review standard of 'reasonable measures' endorsed by the Court does not lend itself to easy definition or application."

None of the commentators, as far as I am aware, takes issue with the Court's approach that on the plain wording of the text, there is a *reasonableness requirement*, coupled with the *progressive realisation* of these rights. That wording must be understood within the context of a new democratic state being called upon to transform a society burdened by the yoke of many decades of institutionalised segregation and grossly unequal opportunities, preceded by centuries of colonialism along the same ideological lines. The new democratic state's mandate to correct centuries of inequality and repression emanates from a transformative constitution whose drafters calculatedly chose in respect of the inclusion of socio-economic rights, a limited justiciability clause, enforceable only with regard to the *reasonable availability of resources and a progressive realisation of the rights.* The inference is overwhelming that the legislature was mindful of (a) the massive scale of the inequalities that had to be addressed after the ravages wrought upon the disadvantaged sections of society over so many centuries; and, coupled with this, (b) the limited financial means available to the state to achieve this.

The justiciability of socio-economic rights is not unbounded. We have seen earlier that there was a strong push, particularly by the liberation movements, for the inclusion of these rights in the Constitution. The drafters chose, as I have said, the *via media* when deliberating on a suitable model. I suggest that for the two reasons advanced, their choice is explicable. Axiomatically, courts cannot and ought not to legislate: they must stay in their lane to respect the separation of powers principle. Where legislation, in this instance our supreme law, is plain and unambiguous, courts must give effect to what the legislature was seeking to achieve in its enactment. Where a right in clear and explicit language renders it subject to the rider that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of th[e] right", effect must be given to that unambiguous proviso. That is precisely what the Court has done in its early socio-economic jurisprudence. Its reasoning in the cases bears testimony to a careful and meticulous traversing of this challenging terrain.

The fierce criticism that I have alluded to appears to lose sight of this first, fundamental obstacle in its contentions – the clear language of the proviso. But there is a further problem. Accepting for the moment that reasonableness is a less than satisfactory tool for some or all of the reasons advanced by the critics, the minimum-core concept is itself hardly the panacea advocated for. It is jurisprudentially unsound, certainly

considerably more than reasonableness (I am still operating on the assumption mentioned earlier) and is conceptually and pragmatically troubling. I must make the point right upfront that it is a treacherous path to simply follow the route that the UNCESCR[43] has tread. The Court in *Grootboom* rightly pointed to the lack of information before it in respect of minimum-core obligations compared to the wealth of information available to the UNCESCR.[44]

The first conceptual difficulty is this. In establishing minimum core, is the particular right (for example, the right of access to health care or to housing) absolute or relative? Put differently, is the content of the minimum core determined by the state's resources, such that the minimum core differs between countries depending on their respective wealth, or is the minimum core an absolute, in the sense that it is identical for all states? Must the South African reality be taken into account, or are the state's obligations in respect of the minimum core of the right exactly judged as it would be in, say, the US or Germany? Does it matter that we are concerned here with an emerging democracy and a Third World economy battling to set right the ravages of a terribly skewed past allocation of resources – a system that was isolated as the polecat of the world with significant impact on its economic health and access to foreign aid and funding?

The answer, it seems to me, is self-evident: minimum-core proponents would demand that the core of the right must be absolute. Relativism would not work, because the reasonableness approach already does that, in that a determination of the resources available to the state informs the content of the right. If there are resources available for housing, the state is obliged *to use all of it* for housing. Thus viewed, the minimum core becomes a moving target, dependent on what the state can afford. It amounts to the same thing as an enquiry into whether a policy or programme is reasonable having regard to the resources that are available. The *Grootboom* approach of saying that "both the content of the obligation . . . as well as the reasonableness of the measures employed to achieve

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[43] See Craven (1995) at 1 and 42.

[44] *Grootboom* (2000) at para 31, Yacoob J pointed out that "[t]he committee developed [the minimum core concept] based on 'extensive experience gained by [it] ... over a period of more than a decade of examining States parties' reports'. The general comment is based on reports furnished by the reporting states and the general comment is therefore largely descriptive of how the states have complied with their obligations under the Covenant." Later, at para 32, the learned Judge emphasises that "[t]he committee developed the concept of minimum core over many years of examining reports by reporting states. This Court does not have comparable information."

the result are governed by the availability of resources" is, from this point of view, no good. That point of departure, the minimum-core adherents would say, is fallacious: the correct starting point should be the content and ambit of the right in question.[45]

Absolutism implies that there is an innate, rigid universal set of entitlements within housing, representing the minimum each individual requires to lead a dignified life, to be determined quite regardless of the state's available resources. This absolutist approach loses sight of the fact that in fulfilling socio-economic rights, there is a constant tension between needs and resources. The classic case is one where the need is immediate and large and the resource availability, constrained. Absolutist proponents do not tell us how competing interests are to be categorised. Courts deal with hard cases, and the general non-derogable minimum-core obligations outlined by the UNCESCR in its general comment in respect of health-care obligations are rather unhelpful.[46] The UNCESCR comments are generally unclear about whether the core of the right is absolute or relative. That is also true in respect of the differing approaches taken by the various *amici* in the two leading cases, *Grootboom* and *Treatment Action Campaign II*. In the former, the *amici* contended for a relative conception of the minimum core, whereas in the latter, the *amici* argued for the absolute conception of the minimum core.

That brings me to the second conceptual difficulty, the lack of specificity with regard to the minimum core. Its protagonists say that there need not be a rigid definition of the core. It would suffice to "define the general principles underlying the concept of minimum-core obligations in relation to socio-economic rights and apply these on a case-by-case basis".[47] Lehmann rightly observes that:

> [t]he lack of specificity from those who urge the adoption of the minimum core, and who themselves argue that it requires a ranking of interests, is unsurprising. For, no principled basis exists on which the court can rank the interests of claimants when their interests are incommensurable.[48]

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[45] Bilchitz (2003) at 19, who is stridently critical of this approach in which a court defines the state's obligations by first determining the availability of the state's resources.

[46] UNCESCR *General Comment No. 14: The Right to the Highest Attainable Standard of Health,* U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) at 47.

[47] Liebenberg S "The interpretation of socio-economic rights" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2nd ed Cape Town: Juta (2013) at 33–1, 33–23.

[48] Lehmann (2006) at 188.

Courts, especially the apex court, are increasingly faced with hard cases of competing fundamental rights. Making the hard choices is hardly assisted by vague, unclear principles advocated by the minimum-core lobby. The key dilemma, of course, is the effective negation (or, at the very least, severe limitation) of rights by the dire resource constraints. An economy devastated by the pandemic and the staggering looting of public resources just cannot cope with all the demands imposed by socio-economic rights based on a minimum-core conception. And judges must be acutely mindful of that. The cake is small (and getting smaller), but the demand for a slice is large (and rapidly growing larger).

Thirdly, human rights concern individuals, not the collective. Individual rights must always trump those of the collective. And those individual rights can only be limited within carefully circumscribed parameters under section 36 of the Constitution. That is the essential difficulty with locating the right within its content, as the minimum-core protagonists advocate. Practically, pragmatically and conceptually, the Constitution demands, and the apex court has rightly held, that the availability of resources, and not the content of the right, should be key. And the notion that minimum core by itself would protect the individual does not bear scrutiny.[49] Human rights can hardly countenance the conception that individual rights can be sacrificed for those of others. The individual has an equal interest in having that right realised, but the right of one individual to receive the promised good will be sacrificed if the welfare of the majority requires it. That is why the apex court's decision in *Soobramoney*, prioritising the welfare of the general public over the individual needs of those with advanced chronic illnesses that may be terminal, when it comes to the use of scarce resources like dialysis machines, is a sensible one.[50] The Constitutional Court endorsed that approach in *Treatment Action Campaign II*.[51] But, it surely cannot be that one individual's rights may be sacrificed for another. That would be the antithesis of the values and objectives of a rights-based system. The minimum core does not protect the individual against the collective; but what it does is to justify the sacrifice of individuals on grounds that appear to be principled, but which are in reality merely a matter of practicality.

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[49] Bilchitz (2002) at 499.

[50] *Soobramoney* (1997) at paras 19 to 30.

[51] *Treatment Action Campaign II* (2002) at para 37.

A litigant who comes to court to assert a socio-economic right must demonstrate that resources are available to meet the need asserted. The court cannot merely assume that it is the case. Some basis must exist for the court to examine the public purse to assess the availability of resources. We all know that there are numerous claims on the public purse besides those that directly implicate the fulfilment of a right. There appears to be no reason, in principle, why the court could not scrutinise the reasonableness of budgetary allocations, once a basis is laid that, on the face of it, resources are available to meet the need identified in the socio-economic right asserted by a claimant. In recognising that socio-economic rights, together with civil and political rights, are cornerstones of democracy, the state has a constitutional duty to meet the socio-economic needs of its people. It can only do so in terms of the proviso in the socio-economic rights clauses of the Constitution.

6 CONCLUSION

In closing, my disinclination towards a minimum-core approach and preference for the apex court's approach must by now be plain. I believe that the latter approach is true to the wording, context and objectives of the relevant constitutional text. And, most importantly, it recognises the exigencies of the South African situation. Undoing centuries of terrible deprivation within limited and ever-shrinking means in the face of ever-increasing demands based on justified needs is no small task. The courts must stay in their lane, remain true to their constitutional mandate with fidelity to constitutional text, context and purpose.

This conclusion, I immediately concede, must come as a disappointment to some if not most. Bear in mind, though, that, in adjudicating the hard socio-economic rights cases, the resource implications of positive duties might require difficult choices to be made. That balancing of priorities is, I would contend, a process which ought to undertaken by those who are directly accountable to the electorate rather than judges. My concern is that the minimum-core approach does not properly allow for the separation of powers and that the primary concern this raises in the context of socio-economic rights is one of institutional appropriateness and effectiveness. Judges should never get involved in policy-making, as they may easily err; and even if they get it right, an overly intrusive ruling made in good faith and with good intentions may have unintended adverse consequences.

Our courts, and the highest court in particular, have taken an understandably deferent approach to socio-economic rights adjudication. For that they have endured, and continue to endure, strident criticism. They have exhibited a clear reticence to defining the substance of the right, even its minimum core, and have instead shifted the focus to whether the measures taken by the state were reasonable. Even then, the very notion of progressive realisation has been subsumed in the principle of reasonableness.

But for those harbouring an acute sense of disappointment, it may not be all doom and gloom. With a great deal of unashamed subjectivity, I commend to you a close reading of the main judgment in *Thubakgale*. There is a growing lobby of commentators who suggest that the way forward out of our South African socio-economic rights adjudicative conundrum is that determining whether the state is progressively realising the right does not require courts to specify the means, but rather to develop criteria to assess, from a deliberative standpoint, the state's definition of the requirements of the right, and the state's explanation of its chosen means to move towards that end. These criteria can be derived from the underlying principle behind incorporating rights giving rise to positive duties in a constitution. In the South African case, these fundamental values are explicit: the values of dignity, equality and freedom. The state's duties to fulfil the socio-economic rights in the Constitution are not simply aspirational, but require evidence of steps taken and of an interpretation of the right which enhances these values. What do I mean by this?

In *Thubakgale*, I developed the notion that, in the context of South Africa's highly segregated urban areas, with deeply uneven access to resources, spatial justice should be considered in determining what constitutes adequate housing. The case has been welcomed by some, as the Constitutional Court's

> housing jurisprudence's evolution having [been jolted] by its convergence with jurisprudence on access to land and public participation, a juncture which has reinvigorated the positive dimensions of the right, its resonance with the social function of property and its embodiment of proximity- and livelihood concerns associated with the 'right to the city'.

It is said that, in this fashion, "the right currently provides considerable counterweight against housing-market-related displacement of poor and marginalised urban communities and begins to embody an enforceable positive obligation to use well-located

urban land towards ensuring their inclusion".[52] Earlier, Cameron J in *Dladla* adopted an interesting approach, one that I believe is indicative of the approach I chose to follow in *Thubakgale*.[53]

That case was a sequel to *Blue Moonlight*,[54] where the Constitutional Court held that the City of Johannesburg was in breach of the right to access adequate housing in section 26, by failing to take responsibility for re-housing people evicted by private landlords. It ordered the City to provide temporary accommodation to the occupants. In response, the City provided temporary accommodation at Ekuthuleni Shelter. That temporary shelter became virtually permanent. The residents challenged the Shelter's rules, which were problematic as far as the residents' working and living arrangements were concerned. The Constitutional Court found that the rules were unjustifiable infringements on the applicants' constitutional rights. The majority held that the Shelter's rules should be separated from the provision of accommodation. While the provision of temporary accommodation implicated section 26(2), the Shelter rules did not. Instead, held the majority, the rules breached the rights to dignity, freedom and security of the person and privacy.

Cameron J, in a separate concurrence, concurred with the outcome as per the majority, but pursued a different route in getting there. He focused on the question of the adequacy of the housing. The Shelter's rules plainly informed the adequacy of housing. The provision of temporary accommodation was a measure to achieve the progressive realisation of the right to access to housing. This meant that the standard of scrutiny to be applied by the Court was whether the accommodation at issue constituted reasonable measures within available resources to fulfil the right, as required by section 26(2). Applying this standard, Cameron J found that the Shelter's rules were unreasonable and section 26(2) had been breached.

I cite these two cases to show that the apex court's jurisprudence regarding the right to housing is evolving slowly but surely. The fact that both *Dladla* and *Thubakgale* were minority judgments does not detract from this point. Wilson is right when he points out

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[52] Pieterse M "Towards a right to the city? The slow convergence of rights to housing and land in South African constitutional jurisprudence" (2022) 11 *International Human Rights Law Review* 36 at 37–8.

[53] *Dladla v City of Johannesburg* 2017 ZACC 42; 2018 (2) SA 327 (CC); 2018 (2) BCLR 119 (CC).

[54] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC).

that the transformative potential of individual judgments is often not immediately apparent. The reason for that is because:

> changes in the law create the potential for changes in practice, but they need to be exploited and acted upon. The spaces created by agency-enhancing legal rules need to be pushed to their full extent. Agents need to act in those spaces, to create new opportunities for action, and to expand further the range of possibilities for social change.[55]

And, as Pieterse points out:

> Rights work slowly. With hindsight, initial scepticism after *Grootboom* that judicial vindication of the constitutional right to housing would make little difference to those excluded from South African cities was premature. Not only did the judgment eventually deliver to its applicant community what it promised, but it also bestowed on civil society and the legal community crucial jurisprudential platforms from which, over time, far more broadly transformative gains could be leveraged.[56]

I said at the start that I am just starting the conversation on this important topic. Thus, space must be created for opposing voices. As a newly appointed honorary professor at this venerable institution for which I have such great affinity, I shall make it my mission to invite those opposing voices and others who share my approach, to visit and give us insights into this very important debate. So, this is not the last, but indeed the first of many voices, I hope, on this topic.

I thank you.

Steven A Majiedt

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[55] Wilson S *Human rights and the transformation of property* Cape Town: Juta (2021) at 136.
[56] Pieterse (2022) at 59.

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