

# ADJUDICATION OF SOCIO-ECONOMIC RIGHTS BY THE CONSTITUTIONAL COURT OF SOUTH AFRICA: WALKING THE TIGHTROPE BETWEEN ACTIVISM AND DEFERENCE?

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*The prominent presence of South Africa in discussions on the adjudication of socio-economic rights can be attributed to two principal reasons - one, the absence of any constitutional distinction between these rights and civil and political rights, and two, their acceptance as being fundamental and justiciable. African courts, particularly the Constitutional Court which is the highest court of the land, have been central to the moulding and evolution of these sanctions, a role which becomes more appreciable when contextualised with the country's relatively poor socio-economic development. This article presents a snapshot of some of the landmark contributions made by the Constitutional Court in this field through which the author sheds light on the complex balancing act undertaken by the Court. In the backdrop of the principle of separation of powers, the author also illustrates the interplay that is seen between the Court's activist and deferential dispositions and resultant emerging tensions between the executive and judiciary.*

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## I. INTRODUCTION

The Constitution of the Republic of South Africa was introduced to heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights. Boldly, it proclaims the desire to improve the quality of life of all citizens and the need to free the potential of each person living in the country.<sup>1</sup> The Bill of Rights represents the cornerstone of the South African constitutional project, enshrining the rights of all people and affirming the democratic values of human dignity, equality and freedom, upon which the country has been founded post-transition.<sup>2</sup> Crucially, the drafters of the Constitution resisted the temptation to separate and distinguish between civil and political rights, on the one hand, and socio-economic rights, on the other. Recognising that these groups of rights are inherently linked and mutually supportive, the Constitution provides for an expansive range of socio-economic rights as part of the Bill of Rights. Unlike the Constitution of India, such rights are justiciable in South Africa, despite having been challenged, at the time of their inclusion, as being rights which have not been universally accepted as fundamental and because of their perceived inconsistency with the notion of separation of powers.<sup>3</sup> In particular, objectors argued that inclusion of socio-economic rights as justiciable rights in the Constitution would result in courts dictating the government how the budget should be allocated. In rejecting such assertions, the Constitutional Court held as follows in the *Certification* judgment:<sup>4</sup>

It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, 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. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In

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1 Preamble, CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 [*Hereinafter*, "the Constitution"].

2 Section 7 read with Section 1, CONSTITUTION.

3 See e.g., *Certification of the Constitution of the Republic of South Africa 1996*, [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) ¶ 77. For a useful summary of the history of the inclusion of socio-economic rights in the Constitution, including a discussion regarding the key objections against such inclusion, see, Eric Christiansen, *Adjudicating non-justiciable rights: Socio-economic rights and the South African Constitutional Court* 38 COLUMBIA HUMAN RIGHTS LAW REVIEW 321 (2007). For an argument as to why, under the right conditions, constitutionalising social rights may advance social justice, see, Jeff King, *JUDGING SOCIAL RIGHTS* (2012).

4 *Id.*

our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights, that it results in a breach of the separation of powers ... we are of the view that these rights are, at least to some extent, justiciable.

The Constitutional Court accordingly concluded that the fact that socio-economic rights would almost inevitably give rise to budgetary implications was not a bar to their justiciability. At the very least, according to the Court, socio-economic rights could be negatively protected from improper invasion.<sup>5</sup> The effect of the decision in the *Certification* judgment was that socio-economic rights to education,<sup>6</sup> access to land and housing,<sup>7</sup> health care, food, water and social security, including, if people are unable to support themselves and their dependants, appropriate social assistance,<sup>8</sup> were interspersed with other (civil and political) rights in the Bill of Rights.

This landmark inclusion of socio-economic rights as justiciable 'fundamental' rights was not without limitation. With a few notable exceptions, the State was only directed to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these socio-economic rights.<sup>9</sup> In addition, the general limitations clause of the Constitution confirms that "*The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors ...*"<sup>10</sup> Beyond such limitations, the legislature, executive, judiciary and all organs of State are bound by the Bill of Rights, which applies to all laws,<sup>11</sup> and the State must respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>12</sup>

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5 *Supra* note 3

6 Section 29, CONSTITUTION.

7 Sections 25 and 26, CONSTITUTION.

8 Section 27, CONSTITUTION.

9 *See e.g.*, the so-called "internal limitations" contained in sections 26(2) and 27(2), CONSTITUTION.

10 Section 36, CONSTITUTION. *See also*, section 7(3). Relevant factors listed in section 36 include the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

11 According to section 2, the Constitution itself proclaims that it is the supreme law of the Republic of South Africa, and that any law or conduct inconsistent with it is invalid.

12 Sections 8(1) and 7(2), CONSTITUTION.

Such ambitious undertakings must be contextualised against the backdrop of the reality of the situation in the country, which has been criticised for making slow progress in terms of addressing job creation, poverty and inequality. According to the Ipsos survey, for example, less than four in every ten South Africans are employed on either a full-time or a part-time basis and almost three in every ten are unemployed and looking for work (the official statistics suggest that the unemployment figure in South Africa is presently 25.2%). Statistics also reflect that the position of women in South African society is worse than that of men.<sup>13</sup> Even basic matters, such as access to water, are problematic in parts of the country, with only 74.8% of Eastern Cape households enjoying such access in 2011.<sup>14</sup> Although official data relating to the decline of absolute poverty and the reduction of inequality in the country has previously been released (thanks largely to the large increase in the number of people benefiting from social grants), indicating a number of positive and improving impacts on poverty, it has been acknowledged that poverty remains one of South Africa's most serious developmental challenges.<sup>15</sup> The employment to population ratio, for example, remains poor (and is worse for women than for men), resulting in an exceptionally large number of non-working people depending on each employed person. The effects of a declining GDP have also apparently affected the poor detrimentally, and income and expenditure remain heavily skewed towards the rich.<sup>16</sup>

People in South Africa who are unable to support themselves or their dependants (or other interested parties / classes of people) are increasingly turning to the courts in the hope that the various socio-economic rights contained in the Constitution may be interpreted in a fashion which will benefit the marginalised. The response of the courts, in particular the Constitutional Court, has been very interesting from academic and practical perspectives, and warrants comment and reflection. Bearing in mind that the judgments emanate from the particular South African context (including the unique wording of the South African Constitution), it is nevertheless suggested that the judicial approach to the enforcement of socio-economic rights in South Africa may hold lessons for jurists in other countries. This contribution, following some preliminary remarks regarding the characteristics of activist and deferential judiciaries, briefly discusses some of the key judgments of

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13 See, *Ipsos Survey*, available at <http://ipsos-markinor.co.za/news/ipsos-survey-19-years-after-democracy-south-africans-still-have-to-deal-with-slow-progress-in-terms-of-job-creation-unemployment-and-inequality> (Last visited on 30 July 2013).

14 Statistics South Africa, *GENERAL HOUSEHOLD SURVEY*, 27, 32 (2011).

15 Republic of South Africa, *MILLENNIUM DEVELOPMENT GOALS: COUNTRY REPORT (2010)*, available at [http://www.statssa.gov.za/news\\_archive/Docs/MDGR\\_2010.pdf](http://www.statssa.gov.za/news_archive/Docs/MDGR_2010.pdf) at 37 (Last visited on 30 July 2013).

16 *Id.*

the South African Constitutional Court in socio-economic rights-related matters. It critically analyses the approach adopted in the past, also commenting on likely trends for the future interpretation of these rights.

## II. THE JUDICIARY AND THE NOTION OF SEPARATION OF POWERS

The judicial authority of South Africa vests in the courts.<sup>17</sup> The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.<sup>18</sup> An order or decision issued by a court binds all persons to whom and organs of State to which it applies.<sup>19</sup>

The court system in South Africa is headed by the Constitutional Court, which consists of a Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.<sup>20</sup> The Constitutional Court is the highest court in all constitutional matters.<sup>21</sup> When deciding a constitutional matter within its power, a court, including the Constitutional Court, must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.<sup>22</sup> A court may also make any order that is just and equitable.<sup>23</sup>

The separation of powers is an over-arching organising principle in the exercise of public power in South Africa.<sup>24</sup> As the Deputy Chief Justice of the country has noted:<sup>25</sup>

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17 Section 165(1), CONSTITUTION.

18 Section 165(2), CONSTITUTION. Section 165(3) provides that no person or organ of state may interfere with the functioning of the courts. Section 165(4) provides that organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

19 Section 165(5), CONSTITUTION.

20 Section 167(1), CONSTITUTION. An "Office of the Chief Justice" is soon to be established and will control the administration of the courts.

21 Section 167(2)(a), CONSTITUTION. Section 167(4) provides for various matters which only the Constitutional Court may decide. As per section 167(5) the Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional.

22 Section 172(1)(a), CONSTITUTION.

23 Section 172(b), CONSTITUTION.

24 Dikgang Moseneke, *Transformative Adjudication in Post-Apartheid South Africa – Taking Stock after a Decade* in P Osode and G Glover (eds.) *LAW AND TRANSFORMATIVE JUSTICE IN POST-APARTHEID SOUTH AFRICA* 26 (2010). For an analysis of the doctrine of separation of powers, see, Johan D. Van der Vyver, *The Separation of Powers* SAPL 177 (1993).

25 Moseneke, *supra* note 24, at 26.

It subjects all exercise of public power to forensic review by an independent judiciary, and yet it does not permit unwarranted judicial incursion in to the domain of parliament or the executive. In its essence separation of powers is an antidote for tyranny and abuse of power. Therefore, when the separation of power principle operates optimally, there should be no trespass by the judiciary into the domain of the legislature, or by the legislature into the areas set aside for judicial function.

It is also well-known by now that the function to be performed by judges in South Africa includes an element of transformative adjudication,<sup>26</sup> requiring that those in judicial office must embrace the fundamental transition envisioned by the Constitution.<sup>27</sup> The courts are, however, well aware that the duty to advance social justice rests mainly on the State, which carries the duty to protect socio-economic rights (and other matters) by regulating such rights through legislation and administrative conduct. In *Treatment Action Campaign*,<sup>28</sup> the Constitutional Court held, for example, that the government was better placed than the courts to formulate and implement policy on HIV but that it had failed to adopt a reasonable measure to achieve the progressive realisation of the right of access to health care services in accordance with section 27 of the Constitution.

Professor Sandra Liebenberg has noted that the separation of powers doctrine is particularly liable to be invoked as a rigid device in socio-economic rights adjudication, allowing courts to avoid making decisions which are perceived to challenge the authority of the executive and legislative branches of government.<sup>29</sup> "This is particularly the case when the doctrine assumes an idealised form of separate terrains with strict demarcation between the roles of each branch instead of a functional and pragmatic device to facilitate responsive, accountable governance"<sup>30</sup> she observes. According to Liebenberg, such an approach is at odds with South Africa's ideal of transformative constitutionalism, in terms of which the three branches of government ought to cooperate in order to facilitate the State's endeavours in relation to development and redistribution, particularly with reference to socio-

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26 Karl Klare, *Legal Culture and Transformative Constitutionalism* 14 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 146 (1998).

27 See e.g., Dikgang Moseneke, *The fourth Bram Fisher Memorial Lecture: Transformative adjudication* 18 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 309-319 (2002).

28 *Minister of Health v. Treatment Action Campaign*, 2002 10 BCLR 1033 (CC) [Hereinafter, "TAC"].

29 Sandra Liebenberg, *Towards a Transformative Adjudication of Socio-Economic Rights in Osode and Glover* (eds.), at 51.

30 *Id.*, at 52.

economic rights realisation.<sup>31</sup> The Constitution itself suggests a “flexible and co-operative model of relations between the three branches of government, involving a mutual relationship of “accountability, responsiveness and openness”.<sup>32</sup> As Liebenberg notes, the appropriate inter-relationship has been described as a constitutional dialogue, aimed at<sup>33</sup>

[P]rodding government to be more responsive to the needs of the poor in order to fulfil their constitutional rights and have access to economic and social resources and services. Taking this role seriously will require, in appropriate cases, decisions which have extensive policy and budgetary implications. However, in other cases, it may require judicial restraint and deference to the institutional strengths and skills of the other branches.

### III. THE JUDGMENTS OF THE CONSTITUTIONAL COURT: A BRIEF RECAP

In the few landmark socio-economic rights cases which have come before the Constitutional Court, the Court’s decision-making has been the subject of intense scrutiny within the country and abroad. The Court’s decisions in matters such as *Sobramoney*,<sup>34</sup> *Grootboom*,<sup>35</sup> *TAC*<sup>36</sup> and *Khosa*<sup>37</sup> are by now well known, having been the subject of debate for around a decade already.<sup>38</sup> It is, however, important to summarise the key features of such judgments for readers who may not yet have considered their impact abroad. The more recent judgment in *Mazibuko*<sup>39</sup> also warrants discussion, and is considered below.

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31 Liebenberg, *supra* note 29, at 52.

32 Liebenberg, *supra* note 29, at 52. *See also*, section 1(d), CONSTITUTION and Constitutional Principle VI to the Interim Constitution.

33 Liebenberg, *supra* note 29, at 53.

34 1998 (1) SA 765 (CC).

35 2001 (1) SA 46 (CC).

36 2002 (5) SA 721 (CC).

37 2004 (6) SA 505 (CC).

38 Avinash Govindjee, *The Role of the Courts in Addressing Poverty, Inequality and Unemployment in South Africa* 8(2) SOCIO-LEGAL REVIEW 55 (2012).

39 *Mazibuko v. City of Johannesburg*, 2010 (4) SA 1 (CC). Readers may also consider the judgment in *Nokotyana v. Ekurhuleni Municipality*, 2010 4 BCLR 312 (CC) and *Beja v. Premier of the Western Cape*, 2011 3 All SA 401 (WCC).

**A. *Soobramoney v. Minister of Health, KZN***

Soobramoney was a diabetic suffering from various life-threatening conditions involving failure of the kidneys. He approached the Court for an order directing a public hospital to provide him with ongoing dialysis treatment. His condition was irreversible and his life could only be prolonged (not saved) by the regular renal dialysis treatment which he sought. Unfortunately, the hospital in question, because of a lack of resources, only had a limited number of dialysis machines available and could accordingly only treat a limited number of patients. As Soobramoney's condition made him ineligible for a kidney transplant, the hospital policy was to disallow him from accessing dialysis treatment (because the machines were better served assisting people who were eligible for the transplant). The Constitutional Court was asked to adjudicate whether Soobramoney was entitled to receive dialysis treatment in terms of everyone's constitutional right not to be refused emergency medical treatment and the right to health care.

The Constitutional Court acknowledged the reality of high poverty, levels of unemployment, inadequate social security and general lack of access to health services, some of which has been reflected above. The Court came to the conclusion that the realisation of the wide variety of socio-economic rights which had been promised by the Constitution was dependent upon the availability of resources. An unqualified obligation to meet the needs of everyone immediately was not possible. The Court held that the purpose of affording everyone the right not to be refused emergency medical treatment was to ensure that necessary and available treatment was provided immediately in order to avert harm. The type of long-lasting treatment sought by Soobramoney did not constitute an 'emergency' in this context. The State had presented evidence demonstrating that additional funds and resources could not be allocated to the hospital. Allowing the applicant and others in a similar condition to receive the dialysis treatment would collapse the already over-extended resources of the State and indeed the entire health care system itself. The difficult decisions regarding budgetary allocations were to be made by the State in a holistic fashion and the Court promised that it would be slow to interfere with *rational decisions taken in good faith* by authorities responsible for such matters. As in Soobramoney's case, the consequence of this reality would be that the interests of particular individuals in society would occasionally have to give way to the larger needs of society. The State, in the circumstances, was held not to have breached its constitutional obligations, and Soobramoney's application was dismissed.



## B. *Government of the Republic of South Africa v. Grootboom*

In this case, a group of poor residents had been rendered homeless as a result of their eviction from privately owned land. Prior to their occupation of the private land, they lived in Wallacedene, an informal squatter camp. About half the population were children, a quarter of households had no income and more than two thirds earned less than R500 per month; they all lived in shacks. Residents of Wallacedene lacked basic services such as water, sewage and refuse removal services. The intolerable conditions prompted their migration to the new area, the private property from which they were later evicted.

Following their eviction, the group applied to the High Court (a court of lower status than the Constitutional Court) for an order requiring the government to provide them with adequate basic shelter or accommodation until they could obtain permanent accommodation. Evidence before the Court showed that the people had nowhere else to go. The High Court ordered the government to provide children, accompanied by their parents, with shelter. The government challenged the correctness of this decision.

The Constitutional Court confirmed that sections 26(1) and 26(2) of the Constitution (providing for the right of access to housing and the State's obligations to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right) were related and must be read together. Though not expressly stipulated, there exists a negative obligation upon the State and other entities to refrain from preventing or impairing the right to access to adequate housing. Subsection 2 placed a positive obligation upon the State: the State was required to take reasonable legislative and other measures within its available resources to achieve progressive realisation of the right.<sup>40</sup>

In the case of housing, this obligation was shared by all spheres of government. A reasonable programme must clearly allocate responsibilities to the different spheres of government and ensure that appropriate financial and human resources were available.<sup>41</sup> Legislative measures were, on their own, insufficient to comply with the constitutional mandate. The State must act to achieve the envisaged results.<sup>42</sup> For example, measures to establish a public housing programme must be directed towards progressive realisation of the right. The State was, however,

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40 *Grootboom*, *supra* note 35, at ¶ 39.

41 *Grootboom*, *supra* note 35, at ¶ 40.

42 *Grootboom*, *supra* note 35, at ¶ 42.

not obliged to immediately realise the right on demand. The government housing plan did not reasonably make provision to facilitate access to temporary relief for people who have no access to land, had no roof over their heads and who were living in intolerable conditions. The programme was held to be not flexible enough to respond to the needs of people in such situations.

The Constitutional Court concluded that all spheres of government were to cooperate and devise a coordinated public housing plan which properly took cognisance of the need to provide immediate relief and accommodation for persons in emergency situations. Access to immediate and temporary accommodation included the provision of water and other basic facilities. The State was ordered to revise its housing plan for the area concerned in order to ensure that the plan reasonably contemplated and provided for the various considerations raised.

### ***C. Minister of Health v. Treatment Action Campaign***

HIV/AIDS, has been acknowledged to be a major challenge facing South African society and qualifies as a government priority. As a result, the government implemented a programme which consisted of establishing a series of testing and research centres. The Treatment Action Campaign (TAC) a non-government association, brought an application before the High Court to force the government to make the antiretroviral drug Nevirapine generally available (i.e. even outside testing and research centres) and to develop a coherent programme to deal with HIV/AIDS. The High Court found that the government programme to combat HIV/AIDS fell short of the constitutionally mandated standard in two material aspects:

1. The refusal to make Nevirapine generally available where attending doctors considered it medically indicated; and
2. Failure to set out a time frame for a national programme to prevent mother-to-child transmissions through the administration of Nevirapine.

The government appealed to the Constitutional Court. The Court found the government's policy to be inflexible. Mothers and their new born children at public hospitals and clinics outside the research and training sites were denied the opportunity of receiving a single dose of Nevirapine which was potentially a lifesaving drug at the time of birth of the child. Whereas Nevirapine was available exclusively for research and training sites, the drug could be administered within the State's available resources, with no known harm to the mother and child at public health institutions where testing and counselling was available.

The Constitutional Court accordingly confirmed the High Court's finding: the government's policy relating to the limited use of Nevirapine at research and training sites constituted a breach of constitutional rights. Implicit in the Court's finding was that the waiting period before taking a decision to make the drug generally available was not reasonable within the meaning of section 27(2) of the Constitution.

The Court also had to review the government's programme to determine whether measures taken in respect of the prevention of mother-to-child HIV transmission were reasonable. Restricting the use of Nevirapine to research and training sites was held to be unreasonable because hospitals and clinics with testing and counselling facilities could easily be equipped to prescribe Nevirapine where this was medically necessary.

With respect to the separation of powers divide, the Constitutional Court confirmed that policy-making remained the executive's prerogative (and not that of the courts). As a result, the courts would be slow to make orders that had the effect of requiring the executive to pursue a particular policy. The Court emphasised the duty of each arm of government to respect and be sensitive to the separation of powers ideal. Significantly, however, this doctrine did not restrain the courts completely from making orders that impacted on policy. The courts' primary duty remained to the Constitution and law, which they were obliged to apply impartially and without fear, favour or prejudice. The Constitution required the State to respect, protect, promote and fulfil the rights in the Bill of Rights. Where State policy was challenged as being inconsistent with the Constitution, courts had to consider whether the State, in formulating and implementing such policy, had given effect to its constitutional obligations. Crucially, in as so far as this constituted an intrusion into the executive domain, the Constitutional Court held that such an intrusion was constitutionally mandated.

In the circumstances, the government was ordered to devise and implement, within its available resources, a comprehensive and coordinated programme to progressively realise the rights of pregnant women and their new born children to have access to health care services and to combat mother-to-children HIV transmissions. This programme had to include reasonable measures for counselling and testing and the State was ordered, without delay, to remove restrictions that prevented Nevirapine from being made available at public hospitals and clinics.

**D. *Khosa and Others v. Minister of Social Development and Others; Mahlaule and Another v. Minister of Social Development***

The applicants in these cases were destitute permanent residents (not citizens) of South Africa who would have qualified for social assistance (in terms of the Social Assistance Act 2004) but for the fact that this Act reserved social grants for 'citizens'. The main contention before the Constitutional Court was that the citizenship requirement in section 3 of the Social Assistance Act was inconsistent with section 27(1)(c) of the Constitution, in terms of which the State was obliged to provide access to social assistance to *everyone*. It was argued that the limitation constituted an infringement of the right to equality and did not pass muster under the general limitations clause of the Constitution.

Although the State argued that it did not possess sufficient budgetary resources to extend social assistance benefits to permanent residents, the Court rejected this argument by looking at the available information, by considering the amount already spent on social assistance grants for citizens and by noting the adverse effect of the legislation on permanent residents (who contributed to the country's fiscus through the payment of tax) who required state assistance in times of need. The exclusion of permanent residents from the social assistance system was, therefore, held to be unfairly discriminatory and the applicants were considered to be part of a vulnerable group who were worthy of protection.

Accordingly, the exclusion of permanent residents by section 3 of the Social Assistance Act was found to be inconsistent with section 27 of the Constitution. The Court's declaration of invalidity was coupled with reading in the words 'or permanent residents' into the relevant section so that permanent residents could apply for social assistance in future.

**D. *Mazibuko for Others v. City of Johannesburg and Others***

Operation Gcin'amazi, a project of the city of Johannesburg, was implemented to address severe problems of water losses and non-payment for services in Soweto, a poor community situated in Johannesburg. The project involved re-laying water pipes to improve water supply and installing pre-paid meters to charge for use of water in excess of the monthly free basic water allowance per household, which was fixed at six kiloliters. The applicants, who were residents of Phiri, Soweto, challenged the city's basic water supply together with the lawfulness of the installation of prepaid water meters in Phiri. The High Court held the installation of pre-paid water meters was unlawful and unfair and that the city's free basic

water policy was unreasonable. It ruled that the city should provide fifty litres of free basic water daily to Phiri residents and people in similar situations.

On appeal, the Supreme Court of Appeal held that 42 litres per day was 'sufficient water' in terms of the Constitution and directed the city to formulate policy in light of this finding. The installation of pre-paid water meters was held to be unconstitutional. The applicants appealed to the Constitutional Court and sought reinstatement of the more favourable High Court order.

The applicants firstly contended that the Court should determine a quantified amount of water as 'sufficient water' within the meaning of section 27 of the Constitution (which affords everyone the right to have access to sufficient food and water) and that this amount should be set at fifty litres of free water per person per day. The Constitutional Court refused the invitation to set a 'minimum core' amount of free basic water, once again restricting its role to an assessment of the reasonableness of State conduct. The State, the Court held, was constitutionally obliged to take reasonable legislative and other measures in order to progressively realise the achievement of the right of access to sufficient water within its available resources.

The Court's judgment in *Mazibuko* reflects that, ordinarily, it is of the view that it would be institutionally inappropriate for a court to determine both what the content of a particular social economic right entails and the precise steps that the government should take to ensure progressive realisation of the right. Courts should, in terms of this approach, only enforce the positive obligations imposed on the government if the government takes no steps or adopts measures that are unreasonable.<sup>43</sup> The Court concluded, in the circumstances, that the six kilolitres of free water per household per month (which amount could be progressively increased over time) was not unreasonable. The argument that the introduction of a prepaid water system in Soweto discriminated unfairly against poor black South Africans also failed. This was on the basis that the government had the authority to decide how to provide essential services, so long as the mechanisms chosen were reasonable, lawful and not unfairly discriminatory.<sup>44</sup>

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43 *Mazibuko*, *supra* note 39, at ¶ 52.

44 *Mazibuko*, *supra* note 39, at ¶ 157.

#### **IV. A CRITICAL ASSESSMENT OF THE CONSTITUTIONAL COURT JURISPRUDENCE AND A GLANCE AHEAD: WILL THE TIGHTROPE WALK CONTINUE?**

By and large, it is generally accepted that the jurisprudence of the Constitutional Court of South Africa offers some of the richest defences to justiciable socio-economic rights in the world, and that the judgments have themselves resulted in positive changes for some of the most impoverished people in the country. The brief, oft-repeated survey of landmark socio-economic rights cases<sup>45</sup> provides a snapshot of the adjudicative approach presently being adopted. It also illustrates the complex balancing act which the Constitutional Court is being required to perform in South Africa. Perhaps understandably, the difficult work of the Court has resulted in tensions between the executive and judiciary emerging. Predictably, it has also proved to be impossible to please all critics. In the broader African context, for example, it has been argued that judiciaries must play the role of social reformers, often necessitating activism in order for such an endeavour to succeed.<sup>46</sup>

Judges must use their judicial power in order to give social justice to the poor and economically and socially disadvantaged. South Africa is best equipped to do this. Its bill of rights contains social and economic rights. In interpreting those provisions which protect social and economic rights, judges should remember that they cannot remain aloof from the social and economic needs of the disadvantaged. Through their activism, judges can nudge their governments so that they move forward and improve the social and economic conditions of the poor. In South Africa the bill of rights is, without interpretation, activist in its own right. However, it requires activist judges to make its provisions living realities.

In fact, it is suggested that the 'activist' nature of the South African Constitution makes it easier for judges to deliver judgments which positively impact the situation of the most vulnerable members of society, without themselves becoming "activist" in their approach.<sup>47</sup> Somewhat strangely, there has nevertheless been a paucity of cases relating to socio-economic rights protection, which has

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45 Other important cases focusing on the right to property and the context of evictions have not been included in this instance.

46 Enoch Dumbutshena, *Judicial activism in the quest for justice and equity* in Bola Ajibola and Deon Van Zyl (eds.), *THE JUDICIARY IN AFRICA*, 188 (1998).

47 Avinash Govindjee and Morne Olivier, *Finding the Boundary – the Role of the Courts in Giving Effect to Socio-Economic Rights in South Africa* in Osode and Glover (eds.), at 94.

resulted in the available jurisprudence being criticised for demonstrating a stunted growth.<sup>48</sup> *Khosa* is one of the few cases where some measure of activism might be discerned. The manner in which the Court dealt with the lack of resources argument presented by the State resulted in it involving itself in an area which traditionally would be left to the domain of the executive. Nevertheless, *Khosa* was essentially a case concerned with equality and the Court was aided by a poorly prepared State response to the challenge of differentiating between citizens and a limited category of permanent residents.

The Court has, in addition and somewhat contrastingly, also been criticised for being overly deferential to the executive at times. For example, Brand suggests that the strategy of deference amounts to a failure in the democracy-related aspect of the transformative duty of courts:<sup>49</sup>

... judicial deference not only reflects a limited understanding of democracy at odds with the Constitution's substantive participatory vision of democracy, it also replicates the depoliticisation of issues of poverty that routinely occurs in other spheres of society and so actively works against rather than promotes the political capacity of impoverished people and the "establishment of a ... democratic society" in the constitutional sense.

King, citing Kavanagh, has noted an increased Anglo-Canadian focus on the idea of 'judicial deference', ultimately linking judicial concern for deference to a concern "about the limits of their institutional role in the constitutional framework".<sup>50</sup> Kavanagh defines 'deference' to mean "a matter of assigning weight to the judgment of another, either where it is at variance with one's own assessment, or where one is uncertain of what the correct assessment should be".<sup>51</sup> She differs, according to King, between minimal deference, which is always owed, and substantial deference, which is to be earned by the decision-maker when the judge recognises his / her own 'institutional shortcomings' in respect of an issue. The three main situations where this may occur are when there is a deficit of institutional competence, expertise or institutional or democratic legitimacy, in addition to defer.<sup>52</sup>

48 Moseneke, *supra* note 24, at 32.

49 Danie Brand, *Judicial Deference and Democracy in Socio-Economic Rights cases in South Africa* in Sandra Liebenberg and Geo Quinot (eds.) *LAW AND POVERTY: PERSPECTIVES FROM SOUTH AFRICA AND BEYOND*, 174, 182, 188 (2012). Brand also suggests that the use by courts of judicial deference in socio-economic rights cases replicates the process of the technicisation of poverty and in the process works to limit the capacity for political action of impoverished people in a particularly powerful way. *Id.*, at 186.

50 Jeff King, *JUDGING SOCIAL RIGHTS*, 135 (2012).

51 *Id.*

52 *See*, King, *supra* note 50, at 136.

A set of institutional concerns (about the institutional capacity, legitimacy, integrity and security of courts and about separation of powers requirements) have influenced the (deferential) development of South African courts' approach to deciding socio-economic rights cases.<sup>53</sup> *TAC* and *Mazibuko* are the cases which, according to critics, demonstrate a measure of unwanted deference on the part of the court. As Brand argues, from the perspective of claimants, deference has up to now in South African socio-economic rights jurisprudence operated as an obstacle to effective enforcement, leading in those cases where claims are successful to attenuated forms of relief and, with specific reference to *Mazibuko*, explicitly forming the basis for rejection of claims.<sup>54</sup> As the Court held in *Mazibuko*:<sup>55</sup>

... 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 Constitutional Court has, according to Brand, neither left alone difficult questions relating to the separation of powers nor engaged with such issues, but has instead deliberately deferred those issues for decision to the other branches of government.<sup>56</sup> This deference has operated in practically all aspects of socio-economic rights jurisprudence, such as the choice of which questions to engage with, the formulation of standards and tests and as a strategy to avoid or account for institutional problems in relation to remedies.<sup>57</sup>

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53 Brand, *supra* note 49. See also, Stuart Wilson and Jackie Dugard, *Taking Poverty Seriously: The South African Constitutional Court and Socio-economic Rights* in Liebenberg and Quinot (eds.), at 222.

54 Brand, *supra* note 49, at 173. The Court's decision not to determine the substantive content of the right to sufficient water resulted in the rejection of the applicant's challenge to the city's free basic water policy. See also, Wilson and Dugard, *supra* note 53, at 223.

55 *Mazibuko*, *supra* note 39, at ¶ 60.

56 Brand, *supra* note 49, at 176.

57 Brand, *supra* note 39, at 176-177. For an example in relation to remedies, see, *Grootboom*, *supra* note, 35, at ¶¶ 96-97.



The Constitutional Court's consistent rejection of the minimum core argument has, in addition, been a source of contention,<sup>58</sup> and may prove to be a terrain of dispute in the years to come. This is because South Africa has recently made reference to its intention to ratify the International Covenant on Economic, Social and Cultural Rights [Hereinafter, "ICESCR"]. Article 2 of the Covenant imposes a duty on all parties to "take steps ... to the maximum of its available resource, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". This principle of progressive realisation, far from rendering the Covenant meaningless, has been interpreted by the Committee on Economic, Social and Cultural Rights as imposing *minimum core obligations* to provide at least minimum essential levels of each of the rights. The Constitutional Court must surely revisit its prior rejection of this notion once the ICESCR is ratified, given South Africa's obligation to consider international law in the interpretation of the Bill of Rights.<sup>59</sup>

## V. CONCLUSION

A court's main function in a constitutional democracy is to adjudicate various, vague (and often qualified) constitutional obligations by assessing the justifications put forward by the State for compliance with such obligations.<sup>60</sup> The vagueness of this task necessitates a theory of judicial restraint<sup>61</sup> which is somewhere between an activist mindset on the part of judges seeking to 'legislate' social rights for people in need, on the one hand, and an overly deferential approach which leaves all difficult issues involving social rights to other branches of government on the other hand. In analysing and appreciating various considerations impacting an appropriate theory of judicial restraint, King concludes that the role for judges in constitutional social rights adjudication ought ordinarily to proceed incrementally:<sup>62</sup>

Judges, on this view, ought to take small steps either by particularising their judgments, or, when reviewing policies that apply to a broad or macro-level set of interests, would impose constraints to the decision-making process that leave substantial room for future adaptation. This approach is a dynamic, searching process, one that seeks out

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58 The denial of a directly enforceable obligation on the state to provide sufficient water on demand to every person in *Mazibuko*, the cursory reference to international law and limited meaningful engagement with relevant foreign law have been further grounds for gripe.

59 Section 39(1)(b), CONSTITUTION.

60 King, *supra* note 50, at 323.

61 *Id.*

62 King, *supra* note 50, at 324-325.

feedback and takes new steps based on the wisdom culled from previous steps... That role may appear restrained to some. People will want more from the courts, and even accuse judges of denying the promise of a new constitution. Yet the true concern of any advocate of social rights must be that people are secured their social human rights and social citizenship rights in the best of available ways. Legal avenues can only work effectively if they complement and ultimately collaborate with other institutions, even if that involves prodding those institutions into action.

Service delivery failure and general lack of progress has led to agitation at grass-roots level in the country. Although recourse to the courts is not always the route followed in seeking to address the problems of South African society, people in desperate need appear to be increasingly utilising the courts in circumstances where they feel that the other arms of government have failed them. This has resulted in courts being increasingly drawn into issues where resource constraints lie at the heart of the matter in dispute, such as disputes involving the eviction of squatters and the responsibility of the State to provide reasonable accommodation. The extent to which courts are able to directly influence living conditions in the country on a large-scale, without resorting to activism, is questionable. Rather, the courts appear to be comfortable to vindicate and give effect to the ambitious, transformative spirit of the Constitution in a manner which does not trample on the domain of the executive. One reason for this, practically speaking, must surely be the concern that over-reaching on the part of the judiciary might eventually result in total non-compliance with court orders, resulting in a form of a constitutional crisis.

In seeking to strike an appropriate balance, the judiciary does well to participate in the transformation of society in a manner which safeguards the foundational values of a democratic society. Constitutional interpretation must surely (continue to) occur within a holistic framework, set against the backdrop of the values of South African society, and in light of an emergent national sense of justice. Judgments of the court may, in this fashion, justifiably continue to have budgetary implications without themselves being directed towards the rearrangement of budgets. The response of the bench to challenging situations involving poverty and deprivation has certainly not been muted, and has gone far beyond the repetition of well-known platitudes and 'austere formalism'. Rather than resort to activism, the courts have restrained themselves in accordance with the constitutional principles which they continuously seek to uphold. It is suggested, in conclusion, that courts ought to continue not to shy away from challenging cases involving socio-economic rights. By remaining true to the values of the Constitution, courts in South Africa may continue the search for substantive social justice in a manner which vindicates the

very design of the Constitution itself. Courts must appreciate that people resort to this forum as a result of unresponsiveness or other failings on the part of the more 'democratic' branches of government. It would certainly enhance the ordinary understanding of their approach if more attention was paid to providing normative clarity regarding the actual content of socio-economic rights – a matter which is usually sidestepped by proceeding immediately to a reasonableness / limitations analysis and by focusing on the conduct of the State, rather than the content of the right itself. International law obligations on South Africa may, as indicated above, assist in moving the courts towards a new, more clearly defined role in respect of providing meaningful content for socio-economic rights.