

**SOCIO-ECONOMIC RIGHTS LITIGATION AS A MEANS TO  
ENGENDERING SOCIAL CHANGE IN SOUTH AFRICA: AN  
INTRODUCTION AND CONTEXT**

**DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE  
REQUIREMENTS OF THE DEGREE LLM (HUMAN RIGHTS AND  
DEMOCRATISATION IN AFRICA)**

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## **Dedication**

To the poor and vulnerable in the African continent - the law may not put food on your table nor clothe and shelter you but it can be effectively used by its officers to protect you in a world fraught with poverty and inequalities.

I also dedicate this dissertation to my parents, Omoniyi and Margaret Adewoye - you are the gods used of God to steer me into the paths of greatness. I love you.

## **Acknowledgment**

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I appreciate you all.

## Acronyms

ARVs	Anti-retrovirals
CAWP	Coalition Against Water Privatization
CSO	Civil Society Organisation
FBW	Free Basic Water
ICESCR	International Covenant on Economic, Social and Cultural Rights
PPM	Pre-paid Water Meter
PSDM	Private Service Delivery Markets.
UN	United Nations

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# Chapter One

## Introduction

### 1.1 Background

Millions of people in the world and especially in Africa are yet to be delivered from the scourge of poverty.<sup>1</sup> ‘Over three billion people in the world live on less than \$2.50 per day and more than 80% of the world’s population are living in countries where income differentials are widening. About 1.1 billion people in developing countries lack access to clean water, one out of every three urban dwellers in the cities of developing countries are living in slum conditions and about 790 million people in the world are chronically undernourished’.<sup>2</sup> These statistics reveal the extent to which millions of people cannot access the very basic services needed for survival due to poverty.

There have been several debates on the most appropriate definition of poverty.<sup>3</sup> The United Nations Committee on the International Covenant on Economic, Social and Cultural Rights (ICESCR) has defined poverty as ‘sustained or chronic deprivation of resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights’.<sup>4</sup> An emerging consensus sees poverty as generally being characterized by the inability of individuals, households, or communities to command sufficient resources to satisfy a socially acceptable minimum standard of living.<sup>5</sup> It is the condition of not being able to access the most valuable resources necessary for maintaining a being’s survival. According to Bilchitz, a certain supply of water, food, housing and health is necessary for the survival of all human beings and without satisfaction of these basic needs upon which a person’s survival depends, an individual’s right to life, personal security, and the right to participate in political and economic processes is diminished.<sup>6</sup> The lack of the ability to access resources that can meet these ‘survival needs’ is the context of poverty that this research is based upon.

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<sup>1</sup> J Sachs ‘Ending Africa’s poverty trap’:

<http://www.unmillenniumproject.org/documents/BPEAEndingAfricaspovertyTrapFINA> (accessed 17 August 2011).

<sup>2</sup> A Shah ‘Poverty facts and statistics’: <http://www.globalissues.org/article/26/poverty-facts-and-stats> (accessed 17 August 2011).

<sup>3</sup> JC Mubangizi ‘Know your rights: Exploring the connections between human rights and poverty reduction with specific reference to South Africa’ (2005) 21 *South African Journal on Human Rights* 33.

<sup>4</sup> ‘Poverty and the International Covenant on Economic, Social and Cultural rights’:

[http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2001.10.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2001.10.En) (accessed 23 August 2011).

<sup>5</sup> ‘Poverty and Inequality report on South Africa - A summary report prepared for the office of the executive deputy president and the inter-ministerial committee for poverty and inequality’ (1998) 2: <http://www.polity.org.za/govdocs/reports/poverty/html> (accessed 18 August 2011).

<sup>6</sup> D Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 39.



There might be a broad consensus on the affirmation that legally, everyone has a right to food, health, housing and education<sup>7</sup> but the challenge is how to translate these affirmations into provision of greater access to amenities especially for the poor who find it more difficult to gain access to these basic services. Poverty, drought, lack of adequate health care, lack of shelter and lack of education are on the increase in most developing countries.<sup>8</sup> There is the need to bridge the inequality gap between the poor and the rich if other human rights such as equality and the preservation of human dignity must be promoted and fulfilled. There is therefore the need for the fulfilment of socio-economic rights which are very pivotal in enhancing the means through which basic human needs are met and necessary for the preservation of human dignity and worth. It has been said that socio-economic rights, suitably interpreted and enforced have the potential to help alleviate much of the suffering of those in desperate need<sup>9</sup> and ultimately engender social change. Social change<sup>10</sup> in this context implies the creation of a society in which all people can achieve their full potential as human beings despite apparent differences in their social and economic status as individuals.<sup>11</sup>

Due to the fact that socio-economic rights are widely regarded as aspirational goals having few practical implications for government policy and distribution of resources, it has been regarded as having little to offer a world filled with severe poverty and inequality.<sup>12</sup> Many of such arguments on the non-enforceability of socio-economic rights have been given in their comparisons with civil and political rights. In recent times however, the traditional view that only civil and political rights are human rights *per excellence* which warrant clearly defined mechanism for their enforcement has been taken over by the idea that all human rights are indivisible and interdependent.<sup>13</sup> The classification of rights into first, second and third generations is superficial and a hierarchy of importance should not be derived from such classification. The indivisible nature of human rights should therefore necessitate the validation of all human rights.<sup>14</sup>

The academic debate that has taken the front burner over the last decade is the need to strengthen the mechanism for the enforcement and implementation of socio-economic rights as they are as important

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<sup>7</sup> B Goldewejik 'From Seattle to Porto Alegre: Emergence of a new focus on dignity and the implementation of economic, social and cultural rights' in P Cesar et al (eds) *Dignity and human rights: The implementation of economic, social and cultural rights* (2002) 8.

<sup>8</sup> Shah 'Poverty facts and statistics' (n 2 above).

<sup>9</sup> Bilchitz (n 6 above) ix.

<sup>10</sup> 'Social Change' is more appropriate in the context of this research because this research seeks to measure even the very little positive difference engendered by litigation. Social transformation and social justice are similar terms used by other authors which usually depict a more revolutionary and monumental change in social structures.

<sup>11</sup> P deVos 'Grootboom; the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights* 265.

<sup>12</sup> Bilchitz (n 6 above) 1.

<sup>13</sup> J Benvenuto 'The expanding nature of human rights and the affirmation of their indivisibility and enforceability' in Cesar et al (n 7 above) 45.

<sup>14</sup> Benvenuto (as above) 49.

as civil and political rights. In the past decade, many countries have enshrined socio-economic rights in their constitutions either as part of the bill of rights or as part of the directive principles of state policy. The judicial enforcement of socio-economic rights has therefore countered the perception that socio-economic rights are mere political aspirations beyond the purview of the judicial branch of government.<sup>15</sup> It has been said that court action plays a very important role in delivering social justice and an egalitarian society because the court can be an important forum for ventilating popular concerns bringing them to public attention and in some cases for finding satisfactory remedies.<sup>16</sup> However doubts have been expressed on the extent to which the judicial approach to socio-economic rights enforcement has engendered social change for right bearers.<sup>17</sup> It has been said that the enforcement of socio-economic rights has not translated constitutional guarantees of these rights to tangible benefits for all citizens - the poor are still finding it very difficult to access basic social services.

Some of the many challenges posed to the judicial enforcement of socio-economic rights will now be highlighted. One of the major objections to the judicial enforcement of socio-economic rights is that it is inappropriate for judges to decide how the budget of the government should be allotted for the fulfilment of socio-economic rights because judges are not experts on the complex issues of economic policy and budget determination.<sup>18</sup> While there has been the counter argument that the enforcement of civil and political rights also has budgetary implications, the rationale for the argument against socio-economic rights enforcement is based on the fact that court orders enforcing socio-economic rights have significant budgetary implications on nearly every occasion that the court finds the state in violation of the right.<sup>19</sup> Even so, this latter argument against socio-economic rights enforcement has been generally flawed on the basis that 'budgetary arguments are not strong enough to justify the judiciary adopting a hands-off approach to adjudicating claims based on socio-economic rights.'<sup>20</sup> More so, courts are already involved in a considerable number of matters which also have resource and budget implications.<sup>21</sup>

Another argument against the judicial enforcement of socio-economic rights is that it is inconsistent with the separation of powers doctrine and it is undemocratic. In essence the judiciary which is an unelected organ of government should not dictate to the government how the budget should be

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<sup>15</sup> M Pieterse 'Possibilities and pitfalls in the domestic enforcement of socio-economic rights: Contemplating the South African experience' (2004) 26 *Human Rights Quarterly* 896.

<sup>16</sup> G Budlender 'South Africa: Law and the search for justice' quoted in C Mbazira *Strategies for effective implementation of court orders in South Africa* (2008) 5.

<sup>17</sup> Pieterse (n 15 above).

<sup>18</sup> Bilchitz (n 6 above) 128.

<sup>19</sup> P Lenta 'Judicial restraint and overreach' (2004) 20 *South African Journal on Human Rights* 567.

<sup>20</sup> Bilchitz (n 6 above) 130.

<sup>21</sup> UN Committee on Economic, Social and Cultural Rights General Comment No. 9, 'The domestic application of the Covenant' (19th session, 1998) U.N. Doc. E/C.12/1998/24 para 10.

allocated or how a policy should be made in socio-economic rights adjudication.<sup>22</sup> It has thus been argued that the courts do not have the institutional legitimacy and capacity to adjudicate socio-economic rights.<sup>23</sup> A counter argument for the lack of institutional competence of the judiciary is the fact that;

Democracy encompasses such notions as constitutionalism and the rule of law. Constitutionalism and the rule of law impose restrictions on the government and the majority and it is the duty of the courts to enforce these restrictions especially in favour of the minority. Constitutionalism allows the judiciary to demand that the other organs of government justify their policy choices, programmes and legislations.<sup>24</sup>

Where a court reviews the decisions, policies or programmes of the government for compliance with fundamental human rights, there is a 'flow of power' to the judiciary – this is the very notion of balance of powers in democracies based on human rights.<sup>25</sup>

Another argument against the judicial enforcement of socio-economic rights is the problem of polycentricity faced by courts.<sup>26</sup> It is the argument that courts are ill-suited to adjudicate upon issues which have complex repercussions extending beyond the parties and the facts before the court.<sup>27</sup> This argument has also been countered on the basis that 'this concern is not unique to socio-economic rights adjudication. The civil and political claims of one group may impact on the rights of others. What is therefore important is the competency in balancing rights'.<sup>28</sup>

As shown above, many of the arguments against the judicial enforcement of socio-economic rights have been countered and are beginning to wane in the face of need and economic hardships faced by citizens of countries. States which give no concern to the welfare and well-being of its citizens may begin to lose their legitimacy. More legal protection is being given to socio-economic rights in more African countries<sup>29</sup> through litigation (even though it is via the protection of civil and political rights) and many more African states may be left with no other choice than to include socio-economic rights in their reviewed constitutions.<sup>30</sup>

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<sup>22</sup> S Gutto 'Beyond Justiciability: Challenges of enforcing/implementing socio-economic rights in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 92.

<sup>23</sup> A Sachs 'The judicial enforcement of socio-economic rights: The Grootboom case': <http://www.lawsociety.ie/documents/committees/hr/lectures/23.6.2005.pdf> (accessed 27 September 2011).

<sup>24</sup> C Mbazira *Litigating Socio-economic rights in South Africa: A choice between corrective and distributive justice* (2009) 32.

<sup>25</sup> A Nolan et al 'The justiciability of social and economic rights: An updated appraisal' (2007) *Center for Human Rights and Global Justice Working Paper* No. 15 12.

<sup>26</sup> L Fuller & K Winston 'The forms and limitations of adjudication' (1978) 92 *Harvard Law Review* 353.

<sup>27</sup> Nolan (n 25 above) 16.

<sup>28</sup> Nolan (n 25 above) 16.

<sup>29</sup> Many Civil Society Organizations are beginning to take responsibility to litigate socio-economic rights in countries where the bill of rights do not even include socio-economic rights.

<sup>30</sup> Kenya's 2010 constitution contains impressive socio-economic rights provisions. See section 43 of the Kenyan constitution.

Although the arguments against the enforceability of socio-economic rights have been rejected at the justiciability stage, they usually resurface at the remedial stage. The current challenge is the granting of effective remedies in socio-economic rights cases. The judiciary has been heavily criticized for granting weak remedies for socio-economic rights cases.<sup>31</sup> Hence, although socio-economic rights litigation is growing in many African countries, one cannot confidently assert that it has led to social change which is inclusive of a greater access to basic or minimum services for the citizenry.

For the purpose of this research, socio-economic rights litigation in South Africa is examined. The choice of South Africa being that it is a country that has a high percentage of poor people despite its economic buoyancy.<sup>32</sup> It is also one of the most inequitable countries in the world.<sup>33</sup> ‘Approximately 40% of South Africans are living in poverty, with the poorest 15% in desperate struggle for survival. The Gini-coefficient (measures the distribution of national income in a country) for South Africa is about 0.6 and this Gini score is lower among black African households than among non-black African households’.<sup>34</sup> The 1996 South African Constitution is well known internationally for its progressive Bill of Rights which not only includes civil and political rights but also a comprehensive set of social, economic and cultural rights.<sup>35</sup> All these rights are enforceable by the courts and the judiciary has a wide discretion to grant just, equitable and appropriate remedies.<sup>36</sup> The South African constitution has a transformative vision that requires the state to be more than a passive bystander in shaping the society in which individuals can fully enjoy their rights and reach their full potentials.<sup>37</sup> The inclusion of socio-economic rights in the South African Bill of Rights has encouraged a growing jurisprudence on socio-economic rights litigation and adjudication. It is indeed interesting to examine what contribution socio-economic rights litigation has made to the achievement of social change in post apartheid South Africa.

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<sup>31</sup> Mbazira (n 24 above) v.

<sup>32</sup> ‘The state of South Africa’s real economy 2005’3: [http://www.esastap.org.za/esastap/pdfs/sa\\_real\\_economy\\_2005.pdg](http://www.esastap.org.za/esastap/pdfs/sa_real_economy_2005.pdg) (accessed 16 October 2011).

<sup>33</sup> V Govender ‘Economic, social and cultural rights in South Africa: Entitlements, not mere policy options’ in Cesar et al (n 7 above) 75.

<sup>34</sup> JP Landman ‘Breaking the grip of poverty and inequality in South Africa 2004 – 2014: Current trends, issues and policy options’ (2003): [http://www.sarpn.org/documents/d0000649/p661-poverty\\_report3b.pdf](http://www.sarpn.org/documents/d0000649/p661-poverty_report3b.pdf) (accessed 18 August 2011).

<sup>35</sup> S Liebenberg ‘Adjudicating social rights under a transformative constitution’ in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 75.

<sup>36</sup> As above.

<sup>37</sup> De vos (n 11 above) 264.

## 1.2 Problem statement and research questions

The adjudicatory process in socio-economic rights cases in South Africa has been heavily criticized as not being sensitive to the plight of the poor because the type of remedies couched for socio-economic rights violations have been said to be very weak and not complied with by the government.<sup>38</sup> While we wait for these criticisms to give rise to better adjudicatory processes in South Africa, there is the need to ensure that the poor and needy in South Africa have better access to food, water, health services, housing, education and other resources that will enhance their well-being.

The many challenges faced by the courts and the government in enforcing and implementing socio-economic rights cases will not simply fade away - the 'separation of powers debate' will persist and the court cannot be forced to always give structural interdicts in socio-economic rights cases no matter how effective we perceive such remedies to be. The existing debates on the extent to which the judicial enforcement of socio-economic rights can alleviate the plight of the poor leaves one to ask the question: What is the next step for socio-economic rights litigation in South Africa? If the government and the courts have failed in translating socio-economic rights to realities, then the answer to the question of effective socio-economic rights enforcement may be found in strengthening the process of litigation. Adjudication which has been so heavily criticized is very much dependent on litigation. Litigation to a very large extent determines the outcome of adjudication.

Litigation in South Africa needs to get the best of the existing jurisprudence, taking maximum advantage of the reasonableness approach and paying attention to litigation methods that have yielded positive results in order to ensure that future socio-economic rights litigation results in the achievement of social change. Strategic litigation has been effectively used by pro-LGBTIA's (Lesbians, gays, bisexual, transgender, inter-sexed and A-sexual) in South Africa. Strategic Litigation may be used to move the courts to devise appropriate remedies which may guarantee compliance from the government in socio-economic rights cases. Litigants can engage the courts in a way that the court can also effectively engage the government with regards to the protection of socio-economic rights. This leads me to the main research questions:

1. How has socio-economic rights litigation engendered social change in South Africa?
2. How can the process of litigation be reinforced to achieve greater results in terms of social change in South Africa?

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<sup>38</sup> M Swart 'Left out in the cold? Crafting constitutional remedies for the poorest of the poor' (2005) 21 *South African Journal on Human Rights* 215 – 217.

### **1.3 Significance of research**

This study sheds light on the different litigation strategies that may be used to ensure the effective adjudication and implementation of socio-economic rights for the achievement of social change. This will add to the existing discourse on how socio-economic rights litigation can be effectively done. Other domestic and international jurisdictions can draw lessons from this study on socio-economic rights litigation in South Africa.

### **1.4 Limitation of research**

This study may not be able to assess on the whole, to what extent socio-economic rights litigation has produced social change in South Africa as this study is based on a few socio-economic rights cases in South Africa. However, through secondary data, the research identifies indicators that enable the researcher to reach a safe conclusion on the impact of socio-economic rights litigation on social change in respect of particular socio-economic needs discussed.

### **1.5 Literature review**

Mbazira argues that although there is greater advocacy for socio-economic rights in present times, the courts as the institutional protection mechanism might fail to drive socio-economic change as rapidly as would be expected because it is usually a contest between just two parties.<sup>39</sup> He also argues that though litigation has been considered the weakest link in the realization of socio-economic rights because the success of court action is conditional upon cases being instituted, court action still plays a very important role in delivering social justice and realizing an egalitarian society.<sup>40</sup> According to him, court action can precipitate policy formulation and/or reformulation, lead to political mobilization and achieve enforcement of legal standards.<sup>41</sup> Mbazira also argues that a major challenge in socio-economic rights litigation is the fact that although a number of decisions on socio-economic rights have been made by the courts, there is doubt that these decisions have made any difference in the lives of the poor because many of the orders given by the court are not complied with and the remedies given not implemented.<sup>42</sup>

In another academic work,<sup>43</sup> Mbazira examines the foundation upon which the selection of judicial remedies is based and uses this foundation to critique the approach of the court as regards remedy selection and enforcement mechanisms in socio-economic rights litigation. He also contends that socio-

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<sup>39</sup> C Mbazira *Strategies for effective implementation of court orders in South Africa* (2008) 5.

<sup>40</sup> As above.

<sup>41</sup> Mbazira 9n 30 above).

<sup>42</sup> Mbazira (n 39 above) 2.

<sup>43</sup> Mbazira (n 24 above) 4.

economic rights must be enforced in accordance with the theory of distributive justice and not corrective justice.

Jagwanth argues that ‘a review of the constitutional litigation in South Africa reveals that it is the more privileged and not the disadvantaged in the society that seek the protection of the bill of rights. He also states that the jurisprudence of the Court has not yielded much protection for vulnerable groups as the constitution envisaged’.<sup>44</sup>

Roach has also argued that the redress of past wrongs is not sufficient to effectively enforce socio-economic rights and that in granting compensation for socio-economic rights violations, governments pay damage awards in individual cases but do not usually engage in reforms that will prevent future violations and ensure justice for people not before the court.<sup>45</sup>

Pieterse has argued that socio-economic rights litigation seems to focus on the satisfaction of individual rights at the expense of giving more attention to addressing the underlying structural factors that cause and sustain inequality and social hardship.<sup>46</sup>

Gloppen investigates the conditions that are suitable for litigation as a policy shaping strategy for the advancement of social rights. He argues that the factors that make for successful public interest litigation in social rights cases are – effective voicing of social rights grievances, responsiveness of courts to social rights claims, judges’ capability to find appropriate remedies, authorities’ compliance with judgments and implementation through social policies.<sup>47</sup>

Dugard and Wilson have examined how and to what extent litigation strategies have impacted the shaping of the legal construction of constitutional socio-economic rights.<sup>48</sup>

As a departure from the works of these authors, my research focuses more on the short and long term aftermaths of socio-economic rights litigation (by examining specific cases) in order to measure the degree of social change in South Africa. My research also seeks to look into other strategies besides the

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<sup>44</sup> S Jagwanth ‘Democracy, civil society and the South African Constitution: Some challenges’ *UNESCO Discussion paper 65* (2003) 15: <http://www.unesdoc.unesco.org/images/0012/00/295/129557e.pdf> (accessed 16 October 2011).

<sup>45</sup> K Roach ‘The Challenges of crafting remedies for violations of socio-economic rights’ in Langford (n 35 above) 57.

<sup>46</sup> M Pieterse ‘The potential of socio-economic rights litigation for the achievement of social justice: Considering the example of access to medical care in South African prisons’ (2006) 50 *Journal of African Law* 2 118 – 119.

<sup>47</sup> S Gloppen ‘Public interest litigation, social rights and social policy’, a conference paper delivered in Arusha (2005) 1: <http://www.derechocambiosocial.pbworks.com/f/gloppen.rev.3%5B1%5D.pdf> (accessed 19 October 2011).

<sup>48</sup> J Dugard & S Wilson ‘Constitutional jurisprudence; the first and second waves’ in M Langford et al *symbols or substance: The roles and impact of socio-economic rights strategies in South Africa* (forthcoming 2011) 3: <http://www.seri-sa.org> (accessed 20 August 2011).

ones that have been identified, that can be used by socio-economic rights litigation in South Africa in order to engender social change.

## **1.6 Research methodology**

This study is qualitative in nature and employs the descriptive and analytical approach based on a case study design. The descriptive approach is used to give an overview of the outcome of socio-economic rights litigation in a few cases in South Africa while the analytical approach through secondary data analysis is used to critically examine whether such litigation has resulted in social change.

## **1.7 Overview of chapters**

### Chapter 1

Introduction – gives a background to the research and highlights the research questions.

### Chapter 2

The nexus between the enforcement of socio-economic rights and social change - expounds on the potential of socio-economic rights to engender social change

### Chapter 3

Assessing the contribution of socio-economic rights litigation to social change in South Africa – highlights positive outcomes of socio-economic rights litigation in selected socio-economic rights cases.

### Chapter 4

Strengthening socio-economic rights litigation to engender social change in South Africa – spells out a few strategies that could be employed by socio-economic rights litigation in order to engender social change.

### Chapter 5

Conclusions and Recommendations.



## Chapter Two

### The nexus between the enforcement of socio-economic rights and social change

#### 2.1 Introduction

The attention given to civil and political rights within human rights law has resulted in the interests and values protected by socio-economic rights being marginalized.<sup>49</sup> Many commentators have argued that though socio-economic rights have the potential to engender social change, they are mere social and economic goals and not rights properly so-called which states should merely aspire to realize.<sup>50</sup> However, the reality of poverty and material deprivation refutes the notion that the affirmation of human dignity can only be done by the protection of civil and political rights.<sup>51</sup>

This chapter will critically examine the arguments and counter-arguments that have been made with regards to the justiciability of socio-economic rights. It also examines the potential of socio-economic rights to transform a socially unequal society to a just one.

The arguments against the enforceability of socio-economic rights are usually in four parts based on universality, fundamentality, immediate realization, specificity and lack of remedies.

#### a. Universality

Cranston argues that socio-economic rights are not universal because they apply to only specific sets or classes of people while civil and political rights are rights properly so called which apply to all persons by virtue of their humanity.<sup>52</sup> Cranston therefore describes socio-economic rights as ‘mere utopian aspirations’ unlike civil and political rights which are morally compelling because they belong to human beings simply because they are human.<sup>53</sup> Again, civil rights are believed to be ensured in all countries,

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<sup>49</sup> S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 35 – 36.

<sup>50</sup> Bilchitz (n 6 above) 39.

<sup>51</sup> S Liebenberg ‘The value of human dignity in interpreting socio-economic rights’ (2005) 21 *South African Journal on Human Rights* 7.

<sup>52</sup> M Cranston ‘Human rights, real and supposed’ (1967) quoted in K McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009) 94.

<sup>53</sup> M Cranston ‘What are human rights?’ (1973) quoted in Mbazira (n 24 above) 23.

rich or poor but the implementation of socio-economic rights must necessarily vary dependent on the wealth of each country as well the measure of priority given to that goal.<sup>54</sup>

Kirsty McLean has countered this argument by saying that ‘the perception that socio-economic rights are not universal reveals a misunderstanding of the nature of human rights. Rights are universal when they apply to all persons irrespective of whether the persons fall into the class for whom the right operates’.<sup>55</sup> Kirsty also states that in some context civil and political rights are not universal. For example the right to vote is not enforceable by persons of all ages and fair trial rights only apply to persons on trial. A failure to accept socio-economic rights as universal only undermines the development of sufficient political support for the implementation of these rights which are as important as civil and political rights.<sup>56</sup>

Mbazira has also argued that Cranston’s use of the notion of universality to discredit socio-economic rights lacks merit because both categories of rights have elements that focus on the protection of not only individuals but collective interests.<sup>57</sup> Human rights, whether civil and political or socio-economic are aimed at creating an environment in which individuals flourish and where their individual or collective interests are protected.<sup>58</sup>

## **b. Fundamentality**

It has also been argued that socio-economic rights are not of paramount importance since human beings are able to determine what is of importance by common sense.<sup>59</sup> This argument is somewhat baseless because different people with different status and preferences will perceive differently what is considered as important. Socio-economic goods will obviously be more important to the poor than the liberty to vote or be voted for. The fundamentality of rights can therefore not be objectively discerned. Both socio-economic and civil and political rights are fundamentally important for a complete protection of human rights.

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<sup>54</sup> EW Vierdag ‘The legal nature of the rights granted by the International Covenant on Economic, Social and Cultural rights’ (2009) 9 *Netherlands Year book of International Law* 81 – 82.

<sup>55</sup> K McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009) 94.

<sup>56</sup> A An-Nai’im ‘To affirm the full human rights standing of economic, social and cultural rights’ in Y Ghai & J Cottrell (eds) *Economic, social and cultural rights in practice* (2004) 11.

<sup>57</sup> Mbazira (n 24 above) 23.

<sup>58</sup> Mbazira (n 24 above) 23 – 24.

<sup>59</sup> Cranston (n 52 above) 95.

### **c. Immediate realization of socio-economic rights**

It has been argued that while civil and political rights are negative rights which are costless and easily realizable by the state, socio-economic rights are positive rights which are resource dependent and cannot be immediately realized where there is a scarcity of resources.<sup>60</sup> Kirsty has countered these arguments stating that the assumption that only negative rights can be immediately realized begs the question whether the negative-civil-political versus the positive-socio-economic rights divide is valid.<sup>61</sup> All basic rights contain positive and negative duties which can be divided into three levels – the duty to avoid depriving, the duty to protect from deprivation and the duty to aid the deprived<sup>62</sup> otherwise understood as the duty to respect, protect and fulfil. These duties are cross cutting and not restricted to a particular category of rights.

Wiles also argues that the enforcement of civil and political rights equally require resource expenditure, hence this category of rights are also positive.<sup>63</sup> While the state has the obligation not to prevent citizens from exercising their freedom of expression or assembly, the state is also obliged not to evict people without alternative accommodation. While the provision of health care has resource implications, so also is the right to live in dignity in good prison conditions. It is therefore misleading to assume that socio-economic rights are not rights properly so-called because they have resource implications. All rights make claims one way or the other on public treasury even though it is widely accepted that the resource implications of civil and political rights may be narrower than that of socio-economic rights.<sup>64</sup>

### **d. Specificity and lack of remedies**

Another criticism for the enforcement of socio-economic rights is the argument that these rights are not sufficiently specific to constitute rights.<sup>65</sup> In other words, socio-economic rights are vague, indeterminate and concrete remedies cannot be devised for their violations<sup>66</sup> unlike the more precise civil and political rights. This argument has been rebutted institutionally because the United Nations Committee on Economic, Social and Cultural rights has clarified the obligations of states in the protection of socio-

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<sup>60</sup> R Plant 'Needs, agency and rights' in C Sampford & D. Galligan (eds) *Law, rights and the welfare of state* (1986) 22 & 31.

<sup>61</sup> McLean (n 55 above) 96.

<sup>62</sup> H Shue 'Basic rights: Subsistence, affluence, and US foreign policy' (1996) quoted in McLean (n 55 above) 97.

<sup>63</sup> E Wiles 'Aspirational principles for enforceable rights? The future for socio-economic rights in national law' (2006) 22 *American University International Law review* 46.

<sup>64</sup> As above.

<sup>65</sup> C Scott & P Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1 45.

<sup>66</sup> M Brennan 'To adjudicate and enforce socio-economic rights: South Africa proves that domestic courts are a viable option' (2009) 9 *Queensland University of Technology Law and Justice Journal* 1 69.

economic rights through its General comments<sup>67</sup> which have also to a large extent given content to these rights. In support of socio-economic rights enforcement, it is argued that ‘these rights can be given detailed interpretation and elaboration through domestic courts. Civil and political rights also warrant interpretation but the vagueness of this category of rights has been cleared up through many years of adjudication’.<sup>68</sup> In fact, some civil and political rights such as freedom of association, privacy and expression are yet to have a cast in stone interpretation and are still undergoing re-evaluation.<sup>69</sup> The more socio-economic rights are enforced the clearer the jurisprudence on their interpretation and appropriate remedies for violation gets.<sup>70</sup>

Now that it has been established that socio-economic rights are no lesser rights that warrant equal protection, the next thing is to examine the connection between the effective enforcement of these rights and the achievement of social change. What can the enforcement of socio-economic rights mean for a society fraught with poverty and inequality?

## **2.2 Socio-economic rights enforcement and the achievement of social change**

Scholars of Critical Legal Studies (CLS) have suggested that focusing on needs rather than rights would better serve the quest for social change and would be more effective in securing discernible social benefits for poor and marginalized sectors of society because of the indeterminate nature of socio-economic rights.<sup>71</sup> In response to the CLS challenge to rights, Pieterse has correctly argued that a mere articulation of a need in itself is more often than not, insufficient to satisfy such need because such articulation in no way compels society to heed its call.<sup>72</sup> In order to compel society to acknowledge and address the needs of those who are vulnerable and marginalized, it is necessary for articulations of need to be moulded into an effective political tool through which denial of need may be confronted.<sup>73</sup> ‘The rights-based approach through a legal process is one of the most effective means by which needs can be met and the enforcement of socio-economic rights can be an effective tool for engendering social change. By using the rights-based approach, political significance is given to claims of social goods because such interests

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<sup>67</sup> General comments No. 4 (right to adequate housing), No.12 (right to adequate food), No. 13 (right to education), No. 14 (right to the highest attainable standard of health), No.15 (right to water): <http://www.ohchr.org/English/bodies/cescr/comments.htm> (accessed 10 October 2011).

<sup>68</sup> McLean (n 55 above) 104.

<sup>69</sup> Wiles (n 63 above) 53.

<sup>70</sup> McLean (n 55 above) 104.

<sup>71</sup> M Pieterse ‘Eating socio-economic rights: The usefulness of rights talk in alleviating social hardship revisited’ (2007) 29 *Human Rights Quarterly* 3 800 – 801.

<sup>72</sup> Pieterse (as above) 801.

<sup>73</sup> Pieterse (n 71 above) 801.

are elevated to the status of a right'.<sup>74</sup> 'Rights-terminology are therefore instrumental in reconceptualising needs as entitlements rather than aspirations and in ensuring that the satisfaction of such needs becomes and remains a societal priority'.<sup>75</sup> Socio-economic rights thus have a transformative character in that they present a legal framework for processes of social change<sup>76</sup> and can serve as useful tools that enable people to gain access to basic social services and resources in order to live a life consistent with human dignity.<sup>77</sup> As Liebenberg has correctly pointed out,

...at the heart of socio-economic rights enforcement lies the concept of human dignity and equal worth. The quest for equal worth is not a quest for uniformity but a quest to eliminate the disadvantages and inferior status of those whose capacity for development are stunted by poverty. Treating others equally includes acknowledging social and economic differences. Respect for human dignity requires society to ensure that resources are pooled for the purpose of improving access to basic socio-economic need.<sup>78</sup>

Socio-economic rights reflect specific areas of basic needs and the enforcement of these rights, such as the right to adequate housing, food, water and healthcare which are called 'subsistence rights' has the potential to assist in developing a legal framework to address one of the most pressing problems of our world at present – widespread socio-economic deprivation.<sup>79</sup> The essence of protecting socio-economic rights by the provision of basic services is to offset inequalities caused by differentiated access to economic resources that fail to take the specific characteristics of poor sectors into consideration,<sup>80</sup> especially in Africa. A substantive jurisprudence on the judicial enforcement of socio-economic rights can expose the socially constructed nature of poverty and inequality and facilitate the inclusion of marginalized voices in the debate on what is required to have a socially just society.<sup>81</sup>

The fulfilment of socio-economic rights implies that the government is obliged to adopt comprehensive programmes which are well coordinated, effectively implemented, properly funded and transparent.<sup>82</sup> It is important to state here that the fulfilment of socio-economic rights as a step to engendering social change is not all about the provision of the basic needs of the poor. It is also inclusive of the resources made available for the delivery of services, the standard and quality of the service, the

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<sup>74</sup> R Dworkin *Taking rights seriously* (1977) 199.

<sup>75</sup> Patricia J Williams 'Alchemical notes: Reconstructing ideals from deconstructed rights' (1987) quoted in Pieterse (n 71 above) 802.

<sup>76</sup> Goldewejik (n 7 above) 8.

<sup>77</sup> S Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty' (2002) 6 *Law, Democracy and Development* 159.

<sup>78</sup> Liebenberg (n 51 above) 14 - 17.

<sup>79</sup> Bilchitz (n 6 above) 133.

<sup>80</sup> Benvenuto (n 13 above) 58.

<sup>81</sup> S Liebenberg 'Needs, rights and change: adjudicating social rights' (2005) *Center for Human rights and Global Justice working paper*, Economic and Social Rights series No.8 33.

<sup>82</sup> S Liebenberg 'The right not to languish in poverty' available at SA Media – university of Free State, Reference No 6258 (2010) 1: <http://www.library.up.ac.za/law/index.htm> (accessed 7 September 2011).

promptness of intervention, the involvement of the recipients of the services and the creation of accessible mechanisms put in place for the protection of socio-economic rights.<sup>83</sup> Fulfilling socio-economic rights to engender social change ‘necessitates meaningful participation of citizens in socio-economic decisions to be taken by the government. This represents a departure from the notion of socio-economic rights as only commodities to be delivered to passive citizens’.<sup>84</sup> Socio-economic rights enforcement therefore enhance participatory democracy giving the impoverished and marginalized communities leverage to demand that democratic institutions pay attention to their needs and also demand accountability from public and private actors where their actions or omissions unreasonably hinder access to these rights.<sup>85</sup> On the whole, the consistent pursuit of socio-economic rights can over a long period of time allow for meaningful structural change by the expansion of possible avenues for affirmative relief providing leverage for popular mobilization around more structural reforms.<sup>86</sup>

Social change entails a re-distribution of wealth and resources that will enhance the ability of individuals to interact with others as peers and participate in society.<sup>87</sup> Although affirmative strategies have the capacity to result in social change if pursued consistently,<sup>88</sup>

[A]ffirmative strategies are used by the liberal welfare state to redress mal distribution through income transfer and to correct outcomes of social arrangements without altering the underlying social structures that generate them. Transformative strategies on the other hand address the underlying causes of an unjust distribution of resources. One of the disadvantages of the affirmative strategy is that they mark out beneficiaries as inherently deficient, dependent and always needing more and more. The transformative strategy on the other hand tends to cast entitlements in universalist terms to promote solidarity and reduce inequality without creating stigmatized classes of vulnerable people who are benefitting from the largess of the state. The disadvantage of the transformative strategy however is that it may not meet immediate subsistence needs unlike the affirmative strategy.<sup>89</sup>

Litigation based on constitutionally entrenched rights can be categorised as a social transformative strategy. On the question of socio-economic rights litigation as a transformative strategy, Liebenberg has observed as follows:

...[I]t can first, provide a forum where the impact of legislation and policies on the lives of the poor is seriously considered in light of constitutional values and commitments. Second, adjudication of socio-economic rights can facilitate meaningful participation of civil societies and communities in the

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<sup>83</sup> Govender (n 33 above) 90.

<sup>84</sup> Liebenberg (n 82 above) 2.

<sup>85</sup> Liebenberg (n 81 above) 17.

<sup>86</sup> Liebenberg (n 81 above) 7.

<sup>87</sup> N Fraser ‘Redistribution or recognition? A political – philosophical exchange’ (2003) quoted in Liebenberg (n 81 above) 6.

<sup>88</sup> Liebenberg (n 81 above) 10.

<sup>89</sup> Fraser (n 87 above) 6 - 7.

formulation and implementation of social programmes of the government. Third, it can develop the normative basis of those parts of a country's legal system that regulate traditionally private relations in ways that protect and facilitate poor people's access to socio-economic resources. Finally, socio-economic rights adjudication can prod our polity to be more sensitive and responsive to systemic socio-economic inequalities and deprivations.<sup>90</sup>

It is in this respect that the courts play an indispensable role. Through court judgments, judges can articulate the normative content of socio-economic right provisions in the constitution, thereby developing the criteria for measuring the extent to which government and other relevant actors have fulfilled the obligations that these rights impose.<sup>91</sup> Through the interpretation of socio-economic rights, courts have a significant role in engendering social change.

Despite the potential significant role that can be played by the judicial institution in the achievement of social change through the enforcement of socio-economic rights, there are many challenges and limitations that weaken the efficacy of the court as a veritable tool for social change. Some of these challenges that have been identified in the preceding chapter are – separation of powers doctrine, the argument on the institutional incompetence of the judiciary and the polycentric nature of socio-economic rights. The judiciary in its effort to protect the interests of the poor has had to grapple with these challenges torn between its role as the hope of the common person and the need to protect its legitimacy vis-à-vis other organs of government.

## 2.3 Conclusion

Litigation has the potential of addressing the underlying institutions and structures that generate poverty and systemic inequalities when courts help the government and the society at large build a right perception of what socio-economic rights implies for right bearers. 'Litigation strengthens the "entitlement systems" in order that complex system of rights, property and program entitlements that determine what goods and services people have access to, is designed and regulated such that these goods and services become available to all'.<sup>92</sup> This is what socio-economic rights litigation means for social change.

The extent to which socio-economic rights litigation and adjudication has been effective as a transformative strategy in South Africa will now be discussed in the next chapter.

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<sup>90</sup> Liebenberg (n 49 above) 38.

<sup>91</sup> Liebenberg (n 49 above) 37.

<sup>92</sup> A Sen 'Poverty and Famines: An essay on entitlements and deprivation' (1982) quoted in B Porter *Justiciability of ESC rights and the right to effective remedies: Historic challenges and new opportunities* (2008) 4: <http://www.socialrights.ca/documents/Beijing%20paper.pdf> (accessed 10 October 2011).

## Chapter Three

### Assessing the contribution of socio-economic rights litigation to social change in South Africa

#### 3.1 Introduction

The constitution of South Africa is premised on the founding values of social justice and the ethos of improving the quality of life of all citizens so as to free the potential of each person.<sup>93</sup> The South African constitution was written with a conscious effort to address the inequalities and discrimination of the apartheid period.<sup>94</sup> The constitution has very clear socio-economic rights provisions which can promote the constitutional objectives for social change.<sup>95</sup> These socio-economic rights are entitlements to be claimed by every South African citizen. The inclusion of these socio-economic rights reflects the understanding that the core values of dignity, freedom and equality are not just about the absence of civil and political violations.<sup>96</sup> This chapter will seek to assess to what extent the social objectives for change has been achieved through socio-economic rights litigation in South Africa.

In the apartheid dispensation, many South Africans were stripped of their land and denied access to decent housing, health care services, food, water, social security and education.<sup>97</sup> Apartheid produced gross racial, class and gender inequalities that rendered the vast majority (especially the black majority) of the population economically and socially impoverished.<sup>98</sup> The budget during the apartheid years was used to institutionalize economic inequality and social injustice and there was an accumulation of wealth by the white minority which led to a generalized social degradation for many South Africans.<sup>99</sup> Consequently, South Africa remains one of the most inequitable countries in the world even though it is placed as one of the fifty wealthiest nations and among the thirty-five largest economies.<sup>100</sup> Some parts of South Africa resemble the most developed areas of the first world (North) while some other parts are as under-developed as the worst areas in the third world (south).<sup>101</sup> Although South Africa is an upper-middle income class country with relative wealth, many South African households are either one of

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<sup>93</sup> Preamble of the 1996 South African Constitution.

<sup>94</sup> JC Mubangizi 'Prospects and challenges in the protection and enforcement of socio-economic rights: Lessons learnt from the South African experience', Paper delivered at the *VII world congress of the International association of Constitutional law*, Athens 11 – 15 June 2007 3: <http://www.enelysn.gr/papers/w13/paper%20by%20prof.%20john%20cantiuc%20mub> (accessed 15 September 2011).

<sup>95</sup> Sections 24, 26, 27, 28 and 29 of the South African Constitution.

<sup>96</sup> Govender (n 33 above) 76.

<sup>97</sup> Mubangizi (n 94 above).

<sup>98</sup> D Mckinley 'Where it counts: The struggle for a people's budget in South Africa' in Cesar et al (n 7 above) 245.

<sup>99</sup> Mckinley (as above).

<sup>100</sup> J Aguero et al 'Poverty and Inequality in the first decade of South Africa's democracy: What can be learnt from panel data' (2005) 1 – 4: <http://www.aae.wisc.edu/carter/papers/Aguero%20carter%20and%20May.pdf> (accessed 15 October 2011).

<sup>101</sup> Mckinley (n 98 above) 248.



outright poverty or of continued vulnerability to become poor.<sup>102</sup> Although some progress has been made since the new constitutional dispensation, a lot must still be done for a total social and economic transformation to take place in South Africa. The Constitutional Court acknowledged the state of affairs in South Africa when it stated thus;

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services.<sup>103</sup>

Socio-economic rights are especially important to poor people and communities still suffering from the disadvantages of the apartheid regime<sup>104</sup> and the court is looked up to as the hope of the common person in South Africa. The inclusion of socio-economic rights in the 1996 South African Constitution was aimed at advancing the socio-economic needs of the poor,<sup>105</sup> on the basis that judicial intervention based on sound legal doctrine can lead to important improvements in policy for those who are most needy and vulnerable in the society.<sup>106</sup>

Although it has been more than a decade since the adoption of the final constitution which is inclusive of socio-economic rights, a significant number of South Africans still live in appalling conditions on the peripheries of the country's modern economy.<sup>107</sup> Poverty has been exacerbated by the unequal income distribution and the poor are still unable to access basic services. The question that comes to mind is - has socio-economic rights litigation in South Africa in any way contributed to social change? This is the question that this chapter seeks to answer. In order to be able to give answer to this question, it is important to look at a few socio-economic rights cases that have been litigated in South Africa. This research will find out the outcomes of litigation in these cases and the extent to which socio-economic rights enforcement in these cases have resulted in social change. The cases that this research will look into are those decided by the Constitutional Court of South Africa on the right to housing, right to health and the right to access water.

### **a. The government of the Republic of South Africa and others v Grootboom and others**

In May 1999, Mrs Irene Grootboom and other respondents (510 children and 390 adults) had been forcibly evicted from their informal homes situated on private land earmarked for formal low-cost

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<sup>102</sup> 'Poverty and Inequality report on South Africa' (n 5 above).

<sup>103</sup> *Soobramoney v. Minsiter of Health, KwaZulu Natal* 1998 1 SA 765 (CC) para 8.

<sup>104</sup> Govender (n 33 above) 76.

<sup>105</sup> Liebenberg (n 77 above) 160.

<sup>106</sup> Bilchitz (n 6 above) 132.

<sup>107</sup> *In re Certification of the Constitution of the Republic of South Africa 1996* 10 BCLR 1253 (CC) para 77.

housing.<sup>108</sup> Mrs Grootboom on behalf of the respondents launched an application in the Cape High Court for an order that the appellants provide the respondents with adequate basic temporary shelter until they obtain permanent accommodation. The appellants challenged the order given by the High Court in the Constitutional Court. The Constitutional Court emphasized the interrelatedness and importance of all rights especially in a society founded on the principles of dignity, equality and freedom.<sup>109</sup> The issue before the Constitutional Court was not whether socio-economic rights such as the right to adequate housing were enforceable or not, but the obligations such rights placed on the government.

In its decision, the Constitutional Court explained the importance of socio-economic rights and examined international human rights law but refused to endorse the ‘minimum core’ approach<sup>110</sup> that had been laid down by the United Nations Committee on Economic, Social and Cultural rights.<sup>111</sup> Instead it laid down the reasonableness test which was a test to measure whether the steps taken by the government in realizing a right can be said to be reasonable.<sup>112</sup> Using the reasonableness test, the Court found that the housing programme in Cape Metropolitan fell short of the requirements of a reasonable programme because it failed to make reasonable provision within its available resources for those living in deplorable situations and those in desperate need of shelter.<sup>113</sup> The court did not give the supervisory remedy requested by the plaintiffs and instead ordered the Human Rights Commission to monitor progress on the implementation of the remedy given. An important question to ask is - did socio-economic rights litigation in the *Grootboom* case engender social change with respect to housing in South Africa?

The Constitutional court has been criticized for the declaratory remedy that it gave in this case because it facilitated government intransigence which has failed to help fulfil the constitution’s promise of change.<sup>114</sup> It has also been argued that by failing to use the minimum core approach in the *Grootboom* case, the Constitutional Court failed to meet competing social demands by deferring to the legislature and the executive.<sup>115</sup>

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<sup>108</sup> *The government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) para 4.

<sup>109</sup> The *Grootboom* case (as above) para 83.

<sup>110</sup> Many authors have made arguments for and against the use of the minimum core approach - D Bilchitz ‘Towards a reasonable approach to the minimum core: Laying the foundation for future socio-economic rights jurisprudence’ (2003) 19 *South African Journal on Human Rights*; M Pieterse (n 71 above); Dugard & Wilson (n 48 above); M Pieterse ‘Resuscitating Socio-economic rights: Constitutional entitlements to Health care’ (2006) 22 *South African Journal on Human Rights*; MS Kende *Constitutional rights in two worlds, South Africa and the United States* (2009)

<sup>111</sup> The *Grootboom* case (n 108 above) paras 31 – 33.

<sup>112</sup> The *Grootboom* case (n 108 above) paras 41 - 44.

<sup>113</sup> The *Grootboom* case (n 108 above) para 99.

<sup>114</sup> Bilchitz (n 6 above) 150.

<sup>115</sup> T Roux ‘Understanding Grootboom – A response to Cass R. Sunstein’ (2002) 12 *Constitutional Forum* 2 46 - 50.

From the foregoing, one could conclude that litigation in the *Grootboom* case contributed little or nothing to social change with regards to housing in South Africa. South African Sunday Times reported that after the judgment in the *Grootboom* case, ‘officials erected a small building containing showers and toilets for the *Grootboom* community and the government paid locals to clean the building but did not give them sufficient cleaning supplies or equipment. The amenities therefore stopped functioning and this created rubbish and smelly pool’.<sup>116</sup> According to the judgment of the High Court in *City of Cape Town v Rudolph*,<sup>117</sup> the Cape Metropolitan Council had failed to release new land for homeless families as at 2003. The Human Rights Commission also did not provide sufficient monitoring.<sup>118</sup> Unfortunately, Irene Grootboom died in 2008 while still living in a squatter settlement.<sup>119</sup>

On a positive note, although the government took several months to comply with the orders given by the Constitutional Court, the government eventually implemented the orders providing temporary shelter and permanent sanitation and water services after the Grootboom community brought an urgent application pursuant to the failure of the government to implement the court orders.<sup>120</sup> The *Grootboom* decision also had some broader outcomes and impact. According to Budlender, the *Grootboom* decision forced the government to adjust its housing programme to accommodate the needs of those living in intolerable conditions.<sup>121</sup> Some programmes that reflect an influence of the *Grootboom* case in their formulation are: the National Housing Programme, Housing Assistance in Emergency Circumstances (Emergency Housing Programme) and the Informal Settlement Upgrading Programme (Informal Settlement Programme).<sup>122</sup> In August 2003, national and provincial governments approved the short-term emergency relief for people in desperate circumstances.<sup>123</sup> The Emergency Housing Programme expressly acknowledges the influence of the *Grootboom* case because its main objective is to provide temporary assistance in the form of securing access to land and/or other basic municipal services including shelter.<sup>124</sup> This was to be done by the allocation of grants to municipalities.<sup>125</sup> Although it has been said that there has not been any revolutionary change in either the availability or delivery of housing for South Africa’s

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<sup>116</sup> Swart (n 38 above) 215 – 216.

<sup>117</sup> 2003 ZAWCHC 89 59.

<sup>118</sup> M Wesson ‘Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court’ (2004) 20 *Southern African Journal on Human Rights* 306.

<sup>119</sup> P deVos ‘Irene Grootboom died homeless, forgotten, no C-class Mercedes in sight’ (August 2008): <http://www.abahlali.org> (accessed 20 September 2011).

<sup>120</sup> G Marcus & S Budlender ‘A strategic evaluation of public interest litigation in South Africa’ (2008) 61.

<sup>121</sup> G Budlender ‘Justiciability of socio-economic rights: Some South African experiences’ in Ghai & Cottrell (n 56 above) 41.

<sup>122</sup> Mbazira (n 39 above) 23.

<sup>123</sup> Marcus & Budlender (n 120 above) 63.

<sup>124</sup> Mbazira (n 39 above) 23.

<sup>125</sup> Mbazira (n 39 above) 23.

urban poor,<sup>126</sup> it is also true that ‘the decision played a major role in altering South African law on housing and evictions because it has been held in many such cases that eviction orders will not be granted where there are no effective programmes of emergency for vulnerable people in desperate circumstances. The decision in *Grootboom* sent the message that the government must act reasonably in coming to the aid of the poor in the society with regards to housing’.<sup>127</sup> The *Grootboom* case laid a good foundation for the many eviction cases that have been adjudicated upon by the Constitutional Court. It is from this case that an important unqualified constitutional duty emanated - ‘to respect and protect the right to have access to adequate housing implies a right to alternative accommodation on eviction especially where the evictees are poor and cannot find an alternative accommodation for themselves’.<sup>128</sup>

In the *Modderklip* cases, the Constitutional Court upheld the decision of the Supreme Court of Appeal granting an award of damages to the applicants and ordered the state to among other things provide alternative accommodation for the unlawful occupiers who do not qualify for housing subsidies.<sup>129</sup>

In *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*,<sup>130</sup> the Constitutional Court emphasized that the City must take a holistic decision in relation to eviction, engaging the potential evictees taking into account the fact that they will be rendered homeless.<sup>131</sup> The Constitutional Court in this case ordered that the city of Johannesburg have a meaningful engagement with the evictees and read-in into section 12(6) of the National Buildings Regulations and Building standards Act 103 of 1977 to imply that continued occupation of a building will not amount to a criminal offence without a court order for eviction being made, the court taking into account all relevant circumstances before giving such an eviction order.<sup>132</sup>

In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others*,<sup>133</sup> a case that concerned the eviction of about 20 000 people from the ‘Joe Slovo informal settlement’ pursuant to section 6 of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act (PIE Act), the Constitutional Court gave quite impressive orders. The Court ordered that the state should meaningfully

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<sup>126</sup> E Wickeri ‘Grootboom’s legacy: Securing the right to access adequate housing in South Africa’ *Center for Human Rights and Global Justice working paper, Economic, Social and Cultural Rights Series No. 5* (2004) 6.

<sup>127</sup> Swart (n 38 above) 230.

<sup>128</sup> G Budlender ‘The right to alternative accommodation in forced evictions’ in Squires et al (eds) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 136.

<sup>129</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3(CC) paras 694 A-D.

<sup>130</sup> 2008 5 BCLR 475 (CC).

<sup>131</sup> The *Olivia Road’s* case (as above) para 44.

<sup>132</sup> The *Olivia Road’s* case (n 130 above) para 50.

<sup>133</sup> 2009 9 BCLR 847 (CC).

engage the evictees and also specified the quality of alternative accommodation to be provided to them.<sup>134</sup> This order provided the residents with an authoritative indication of what they were entitled to<sup>135</sup> by stating that 70% of the subsidized houses to be built at Joe Slovo were to be given to the current and former residents who apply and qualify for such housing and that temporary accommodation be provided for the evictees.<sup>136</sup>

One can say that from the *Grootboom* case has emanated constitutional principles that have given content to the right to adequate housing in South Africa.

It is important to state that one need not be pessimistic about the potential of socio-economic rights to engender social change when there is no immediate positive result from socio-economic rights litigation. The pronouncement of the court on a particular socio-economic right expounds on what the right implies for right bearers and spells out the obligations of the state vis-à-vis the right. This is in fact the foundation of sustainable social change – the development of the law. The process of litigation itself could contribute to the achievement of social change. The focus of litigation should not only be on the remedy given in a socio-economic rights case but the positive outcomes that can result from the litigation process itself. The Ad Hoc Committee for the campaign on Social and Economic Rights submission puts it succinctly thus;

Social and economic rights do not have as their only or primary remedy the provision of a commodity on demand. Rather, they require the creation of an environment and process which enable individuals and communities to realize these rights...<sup>137</sup>

Without doubt, it is evident that socio-economic rights litigation has brought about some change with regard to the eviction of the poor from their shelter. Socio-economic rights litigation may not have resulted in the granting of houses to the poor but one must acknowledge the fact that the poor are no longer rendered homeless as a result of evictions. Thanks to socio-economic rights litigation in the *Grootboom* case which was the bedrock for the progressive judgments in similar cases.

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<sup>134</sup> The *Joe Slovo* case (as above) para 400.

<sup>135</sup> L Chenwi 'A New approach to remedies in socio-economic rights adjudication: Occupiers of 51 Olivia Road and others v City of Johannesburg and others' (2009) 2 *Constitutional Court Review* 386.

<sup>136</sup> The *Joe Slovo* case (n 133 above) para 400.

<sup>137</sup> 'Submission of the Ad Hoc Committee for the campaign on Social and Economic Rights', May 16 1995 quoted in MS Kende (n 110 above) 263.

## **b. Minister of Health and others v Treatment Action Campaign and others**

This case was instituted in the Constitutional Court in 2002 by the Treatment Action Campaign (TAC) and a number of other organisations. The applicants challenged the South African government's programme on the prevention of mother-to-child-transmission of HIV on the ground that the programme restricted the provision of Nevirapine (medication for the prevention of mother-to-child- transmission of HIV). The medication could only be gotten from specific pilot sites and doctors outside these sites were prohibited from administering this drug. The administration of Nevirapine was restricted to two state hospitals on a two-year trial basis in each of the nine provinces.<sup>138</sup> The applicant also alleged that HIV testing and counselling were not comprehensively available outside specified research and training sites.<sup>139</sup> The applicants wanted the government to create a more inclusive and comprehensive programme. The Constitutional Court had to determine whether the restriction placed on the administration of Nevirapine was reasonable. The Court held in favour of the applicants stating that the programme excluded the most vulnerable because not all mothers and their new born babies could access the designated pilot sites. The Court declared that the government policy that limited Nevirapine to research and training sites was inflexible and constituted a breach of the government's obligation pursuant to section 27(2) of the constitution.<sup>140</sup> The Constitutional Court in this case ordered the government to remove the restrictions preventing Nevirapine from being made available and that the government should facilitate the availability of Nevirapine at public hospitals and clinics.<sup>141</sup>

The government failed to immediately implement the court order and the litigants had to institute contempt-of-court proceedings to secure compliance with the court order.<sup>142</sup> The fact that the court gave mandatory orders instead of declaratory orders as in the *Grootboom* case indicates that continued and consistent socio-economic rights litigation can give rise to better remedies. The mandatory orders also gave TAC the leverage to monitor and supervise the order given in its favour.<sup>143</sup>

To see whether the determination of this case has led to the achievement of social change with respect to HIV/AIDS in South Africa, it will be good to find out to what extent the judgment given has influenced changes in the government's response to the problem of HIV/AIDS.

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<sup>138</sup> *Minister of Health and others v Treatment Action Campaign and others* 2002 50 SA 721 para 16.

<sup>139</sup> The *TAC case* (as above) para 84.

<sup>140</sup> The *TAC case* (n 138 above) para 80.

<sup>141</sup> The *TAC case* (n138 above) para 135.

<sup>142</sup> Pieterse (n 71 above) 809.

<sup>143</sup> C Mbazira 'From ambivalence to certainty: Norms and principles for the structural interdict in socio-economic rights litigation in South Africa' (2008) 24 *South African Journal on Human Rights* 16.

The South African government has been notable for its inadequate response in tackling the HIV/AIDS epidemic and its slow progress in addressing the health crisis.<sup>144</sup> The denial of AIDS by the then president, Thabo Mbeki to some extent accounted for the lack of political will in the battle against the HIV/AIDS epidemic.<sup>145</sup> While many countries in the world (particularly the western world) began to use anti-retrovirals (ARVs) to treat HIV as far back as 1996, in South Africa, ARV treatment was only available to the privileged who could afford to access private medical care.<sup>146</sup> It was not until 2003 that the South African government began to provide ARV therapy through the public health sector.<sup>147</sup>

It is reasonable to conclude that the response of the South African government to the plight of those affected by HIV/AIDS must have been prompted by the *TAC* case (decided in 2002) which brought a lot of international attention to the unacceptable government response to the HIV pandemic in South Africa. Ever since the decision of the *TAC* case, the South African government has been more responsive to the HIV/AIDS pandemic. In 2003 after the *TAC* decision was handed down, ‘The National Health Act<sup>148</sup>’ was enacted to replace the Health Act of 1977. This National Health Act is regarded as the most important piece of legislation for the health sector in South Africa and an aspect of the Act is significant to the right of access to medicines for HIV/AIDS’.<sup>149</sup> Again in 2003, the government came up with a National Operation Plan for comprehensive HIV and AIDS Management, Treatment and Support.<sup>150</sup> ‘In 2004 a National Antiretroviral Treatment Guideline was enacted. In 2006, a broad framework for HIV, AIDS and STI strategic plan for South Africa 2007 – 2011 was set out, which indicated the HIV prevalence trend in antenatal clinic attendees in South Africa. In 2008, there was a United Nations report stating that South Africa had the largest HIV treatment in the world and in 2010 a new treatment policy was launched. Also in 2010, more provinces launched the HIV/AIDS counselling and testing campaigns.’<sup>151</sup>

Litigation in the *TAC* case was anchored in broader legal and social mobilization<sup>152</sup> and this resulted in much publicity and media attention being given to the state of HIV/AIDS in South Africa. *TAC* in 2001 engaged in intensive public mobilization attracting enormous support and media interest in

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<sup>144</sup> As above.

<sup>145</sup> JC Mubangizi & B Twinomugisha ‘The right to health care in the specific context of access to HIV/AIDS medicines: What can South Africa and Uganda learn from each other?’ (2010) 10 *African Human Rights Law Journal* 106.

<sup>146</sup> Mubangizi & Twinomugisha (n 145 above) 116.

<sup>147</sup> As above.

<sup>148</sup> Act 61 of 2003.

<sup>149</sup> Mubangizi & Twinomugisha (n 145 above) 117.

<sup>150</sup> As above.

<sup>151</sup> ‘The activities of the department of Health, South Africa’: <http://www.doh.gov.za/list.php?type=HIVandaids> (accessed 15 September 2011).

<sup>152</sup> J Dugard ‘Litigation strategy and impact’ Lecture given at the *short course on socio-economic rights adjudication* at the Centre for Human Rights, University of Pretoria, South Africa, March 9 2011.

the case.<sup>153</sup> On the first day of the hearing of the case at the Constitutional Court, a decision was taken to have a ‘stand-up for your rights’ rally and demonstrations were prepared in Johannesburg, Cape Town and Durban.<sup>154</sup> The *TAC* case is an example of how litigation when combined with social mobilization can yield great results in terms of Social change. Commending TAC’s use of social mobilization in its litigation strategy, Budlender states thus;

The TAC built a strong alliance with key pillars of civil society – trade unions, churches and the media .It built a genuine social movement and showed how the constitution, which represents the best ideals and values of our country, can be a powerful tool for holding government to those ideals and values. In some ways, the final judgment of the Constitutional Court was simply the conclusion of a battle that the TAC had already won outside the courts, but with the skilful use of the courts as part of a broader struggle.<sup>155</sup>

Although socio-economic rights litigation in the *TAC* case did not result in an immediate solution to the HIV/AIDS epidemic in South Africa, it however laid the foundation for further advocacy and mobilization resulting in long-term positive effects which can be said to have engendered social change to some extent in terms of the right to health of persons living with HIV.

### **c. Mazibuko v City of Johannesburg**

The *Mazibuko* case dealt with the right of access to water. It was instituted in the Johannesburg High Court but later appealed to the Supreme Court of Appeal and finally appealed to the Constitutional Court. Lindiwe Mazibuko and other plaintiffs from the Phiri township in Johannesburg contested the constitutional validity of the regulations relating to Compulsory National Standards and measures to conserve water of the third respondent (Minister of Water Affairs and Forestry) and water policies of the first (city of Johannesburg) and second respondents (Johannesburg Water).<sup>156</sup> ‘Historically, the majority of the Phiri residents were poor, uneducated, unemployed and ravaged by HIV/AIDS. The old water piping system in Phiri allowed for the loss of considerable amount of water for the city. The pre-payment meters were therefore introduced in Phiri in order to upgrade this system. Each of the Prepayment meter dispensed six kilolitres of water per stand per month and the water was shut off once the six kilolitres was exceeded. The residents would then have to pre-pay to purchase more water or wait till the next month to have the water turned on again’.<sup>157</sup> The free six kilolitres of water was not sufficient to sustain Lindiwi and her extended family. She indicated that in her household of twenty people, they were only able to

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<sup>153</sup> Marcus & Budlender (n 120 above) 78.

<sup>154</sup> Marcus & Budlender (n 120 above) 87.

<sup>155</sup> G Budlender ‘A paper dog with real teeth’ *Mail and Guardian* 12 July 2002.

<sup>156</sup> *Mazibuko v City of Johannesburg* 2008 ZAGPHC 106 (HC) para 5.

<sup>157</sup> *Mazibuko* case (as above) para10.



flush the toilets not more than once every two days and each person could only have a bath once in four days.<sup>158</sup> The High Court and the Supreme Court of Appeal in order to give a normative content to the right to access water as contained in section 27(1) of the South African Constitution called-in international water experts who gave evidence as to the amount of water required for the dignified existence of individuals daily.<sup>159</sup> While Liebenberg and Dugard have commended the High Court and Supreme Court of Appeal for giving content to the right to access water,<sup>160</sup> Stewart posits that by expounding on the normative content of rights, the Court may be setting unattainable standards for the government which may bring the credibility of the Court to transform the society into disrepute.<sup>161</sup> The Constitutional Court held that neither the Free Basic Water (FBW) policy nor the introduction of the Pre-paid Meters (PPMs) in Phiri constituted a breach of section 27(1) of the South African Constitution.<sup>162</sup>

The decision of the Constitutional Court in the *Mazibuko* case has usually been described as a step backwards from *Grootboom* and *TAC* because the judgment denied the existence of a direct obligation on the government to provide sufficient water on demand to every person.<sup>163</sup> Although it may be easy for one to conclude that the *Mazibuko* case did not mean much for the advancement of socio-economic rights and social change in South Africa, it may be wrong to do so. Some of the progress that had been made since the High Court and the Supreme Court of Appeal decisions ‘were revealed in the respondent’s heads of argument before the Constitutional Court. The City of Johannesburg indicated that some changes had been made to the city’s policy on the provision of water to indigent citizens. One of them being that the expended social package was reviewed and those on the highest band of the city’s poverty index were able to receive fifty litres of water per person per day’.<sup>164</sup> ‘Other revised policy changes include special mechanisms which allow individuals to make representations based on special needs for further allocations. Such extended benefits are based on special needs including amongst others, households with a history of abuse, pensioner-headed households, single-parent households, households with chronic illness, and households with members living with HIV/AIDS’.<sup>165</sup>

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<sup>158</sup> Founding Affidavit before the High Court para 101 & 104, *Mazibuko v City of Johannesburg*, No 489-08, (CC Apr. 2009): <http://www.ConstitutionalCourt.org.za/Archimages/13516.pdf> quoted in L Stewart ‘Adjudicating Socio-economic rights under a transformative Constitution’ (2010) 28 *Penn State International Law Review* 497.

<sup>159</sup> Dr Peter Gleick in his expert evidence in the high court recommended fifty litres of water per person per day while Ian Palmer in his expert evidence in the Supreme Court of Appeal recommended forty-six kilolitres of water per person per day.

<sup>160</sup> J Dugard & S Liebenberg ‘Muddying the Waters: The Supreme Court of Appeal’s Judgment in the *Mazibuko* case’ (2009) 10 *Economic and Social Rights Review* 15.

<sup>161</sup> L Stewart (n 158 above) 501.

<sup>162</sup> *Mazibuko v City of Johannesburg* CC case CCT 39/09 2009 ZACC para 169.

<sup>163</sup> *Mazibuko* case (as above) 28 paras 48 – 50.

<sup>164</sup> *Mazibuko v City of Johannesburg* CC case CCT 39/09 2009 ZACC 28, first and second respondents’ head of arguments, 6.2, 12.1 and 18.1 quoted in Stewart (n 158 above) 502.

<sup>165</sup> Stewart (n 158 above) 502.

Garavito in his typology of the effects of judicial decisions<sup>166</sup> highlights the difference between a traditional model of impact and an expanded model of impact using the *Mazibuko* case as an example. He explains that an expanded model of impact takes into consideration the impact of not only the judicial process but the impact of the mobilization process in socio-economic rights litigation.

According to him, the enabling and material impacts of the **judicial process** in the *Mazibuko* case are;

- *Crystallized community discontent against PPMs as a right violation.*
- *Provided a huge amount of information on water-services related planning and budget.*
- *The High Court victories legitimized water rights struggle.*
- *Provided some delay in the imposition of PPMs in other places in South Africa. During that time the Ethekewini municipal took a political decision not to install PPMs.*

The enabling and material impacts of the **mobilization process** for the *Mazibuko* case are;<sup>167</sup>

- *A new coalition for water rights was created – Coalition against water privatization (CAWP).*
- *Public opinion was raised about usage, pricing and equity of water services.*
- *The media was sensitized to the struggles of the poor to access basic services.*
- *The issue of PPMs and access to sufficient water in Soweto (an informal settlement) was politicized.*
- *Additional Free basic water was made available to the poorest households*
- *PPMs have been fitted with a ‘trickler’ device so that there is no longer an automatic disconnection following the exhaustion of the FBW amount.*
- *The city has undertaken not to prosecute anyone for bypassing PPMs or standpipes.*

The *Mazibuko* case demonstrates that socio-economic rights litigation can have both direct and indirect impacts for social change irrespective of the remedy given in such cases.

### 3.2 Conclusion

From the cases discussed above one can conclude that socio-economic rights litigation and adjudication in South Africa is contributing to the development of the law on socio-economic rights and to some extent engendering social change. Justiciability of socio-economic rights may not have fully translated into the

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<sup>166</sup> R Garavito ‘Litigation strategy and impact’ Lecture given at the *short course on socio-economic rights adjudication* at the Centre for Human Rights, University of Pretoria, South Africa, March 9 2011.

<sup>167</sup> Garavito (as above).

greater provision of goods and services in South Africa but it has impacted on the development of transformative normative ideas, values and institutional arrangements.<sup>168</sup> Socio-economic rights litigation can be a veritable means for social change if litigants can be coordinated, strategic and consistent. However, it is important to note that socio-economic rights litigation alone may not be able to address the root causes of poverty and inequality in South Africa. Litigation must therefore be complemented with other strategies such as advocacy and social mobilization for it to adequately address poverty and inequality in South Africa.<sup>169</sup>

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<sup>168</sup> Gutto (n 22 above) 99.

<sup>169</sup> Mbazira (n 39 above) 5.

## Chapter Four

# Strengthening socio-economic rights litigation to engender social change in South Africa

### 4.1 Introduction

Although it has been established in the preceding chapter that socio-economic rights litigation in the cases discussed has engendered some social change, directly and indirectly, there is still a need to harness the full potential of socio-economic rights litigation to engender more social change in South Africa. One means by which this can be done is to consistently review already existing methods and strategies used in socio-economic rights litigation. Those involved in socio-economic rights litigation must strengthen existing strategies and methods of litigation. This chapter will now discuss a few strategies that can be employed by those involved in socio-economic rights litigation in order to engender social change.

### 4.2 The focus of litigation on a single supply-side of rights

Under economic globalization, people have to rely on privatized markets to find adequate health, housing or educational services. The current liberalization and privatization of all kinds of social services seriously affects the equitable and non-discriminatory access to basic services and basic services are increasingly out of reach of the poor.<sup>170</sup>

There is a growing consensus that private entities and private corporations which command substantial power and resources are increasingly implicated in socio-economic rights violations.<sup>171</sup> ‘The increasing capacity of private entities to determine access to socio-economic amenities suggests that the transfer of state powers and functions to the private sector should also be accompanied by a transfer of socio-economic responsibility and accountability’.<sup>172</sup> The duty of the state to respect, protect, promote and fulfil the rights in the bill of rights<sup>173</sup> includes the recognition, regulation and enforcement of private or horizontal socio-economic obligations.<sup>174</sup> ‘The South African government has the responsibility to monitor the private sector where accountability to the population is scant’.<sup>175</sup> The focus of socio-economic rights litigation in South Africa has been limited to cases brought against the South African

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<sup>170</sup> Goldewejik (n 7 above) 10.

<sup>171</sup> M Pieterse ‘Rethinking the boundaries of socio-economic rights litigation: The private law impact of justiciable socio-economic rights’: <http://www.enelysn.gr/papers/w13/paper%20by%20marius%20pieterse.pdf> (accessed 4 October 2011).

<sup>172</sup> DM Chirwa ‘Responsibility for socio-economic rights: The nature of their obligations under the South African constitution’ (2002) quoted in Pieterse (n 171 above) 2.

<sup>173</sup> Section 7(2) South African Constitution.

<sup>174</sup> Pieterse (n 171 above) 4.

<sup>175</sup> Govender (n 33 above) 88.

government or government agencies for not being able to supply basic services. If socio-economic rights litigation will bring about social change and the increase in accessibility to basic services, the government should be taken to court for failing to regulate Private Service Delivery Markets (PSDM). According to Goldewejik, there is a misconception that the rights to food, water, housing, health or education can only be realized by the government providing these services or giving financial assistance in form of social grants to poor people. He argues that by simply focusing on this one supply-side of rights, people's basic inequality and need will remain. In the end, people's socio-economic rights will not be fulfilled - there may only be a greater dependency on the government.<sup>176</sup>

'Realising the right to health, housing, food, water or education thus has to do with government's obligation to protect and fulfil these rights by regulating the market or intervening in the market to protect poor and vulnerable groups'.<sup>177</sup> The government must ensure that there are laws that control and regulate private businesses and corporations in order to prevent such private corporations from exploiting the people and making services inaccessible to the poor in the society. Litigation must come to terms with the reality that there will never come a time when government's resources will be sufficient to meet every need. Citizens will necessarily depend on privatized markets for their basic needs. Litigation must therefore not focus only on government's failure to make available basic services but also on its failure to take appropriate measures to regulate and remedy situations that lead to violation of socio-economic rights. Thus, those involved in public interest litigation in socio-economic rights cases can challenge the government for failing to regulate PSDM on the grounds that the activities of such PSDM are discriminatory and fuel inequality in the society.

### **4.3 Taking advantage of the reasonableness approach**

The key features of the reasonableness review were set out in the *Grootboom*<sup>178</sup> and *TAC*<sup>179</sup> cases. It states that a reasonable programme must be comprehensive, coherent, coordinated, balanced and flexible, make appropriate provision for short, medium and long term needs, not exclude a significant segment of the society, cater for those in urgent need, must be reasonably conceived and implemented, transparent and its content must be made known effectively to the public.

Some authors have argued that the application of the reasonableness review to claims involving a deprivation of the basic necessities of life is inadequate because it gives a high threshold for individuals

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<sup>176</sup> n 7 above, 10.

<sup>177</sup> Govender (n 33 above) 11.

<sup>178</sup> The *Grootboom* case (n 108 above) paras 39- 43.

<sup>179</sup> The *TAC* case (n 138 above) para 123.

and groups who approach the court for their socio-economic needs to be met.<sup>180</sup> It has also been said that the reasonableness review places an onerous proof upon the litigant to demonstrate the unreasonableness of a government programme.<sup>181</sup> On the contrary, some have also argued that the reasonableness review has opened up political participation in socio-economic rights cases.<sup>182</sup>

Credible as these arguments are, the Constitutional Court of South Africa is yet to review the reasonableness approach. However, what needs to be done in the mean time is to take maximum advantage of this review approach and strategically utilize it to engender social change in South Africa.

Liebenberg has argued that socio-economic rights claims should trigger a presumption of unreasonableness thereby placing a burden of justification on the state.<sup>183</sup> This argument fails to acknowledge the challenges which have been posed to socio-economic rights enforcement; competing interests of the government, inadequate resources and the question of institutional competence of the judiciary.<sup>184</sup> If the court should work by such a presumption, then the court may be seen not to respect the fact that the executive has some competence to set out effective policies and programmes. The court may be setting up itself against the executive which will more often than not refuse to comply with court remedies if the court is too quick to declare government policies unreasonable.

Justice Zak Yacoob, a judge of the Constitutional Court of South Africa posited that litigants would be more successful if they gave evidential basis for proving non-reasonableness of government policies.<sup>185</sup> Socio-economic rights cases have implications for government resources and budget and for litigants to get the court to order the government on such issues as resources; litigants need to beef up their arguments with relevant information. Litigants in socio-economic rights cases should therefore be well armed with information that can reveal to the court why a government programme has failed to provide for those in urgent need. For example, evidence that a particular housing policy is incapable of granting a particular number of people access to housing in the next five years or that the government can afford to improve upon a programme to cater for more people without a major increase in its budget.<sup>186</sup> Pictorial evidence where necessary (for example showing deplorable housing or health care conditions)

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<sup>180</sup> Liebenberg (n 51 above) 22.

<sup>181</sup> Liebenberg (n 51 above) 22.

<sup>182</sup> Kende (n 110 above) 260.

<sup>183</sup> Liebenberg (n 51 above) 23.

<sup>184</sup> The Constitutional Court acknowledged the question of institutional incompetency of the Court in the *TAC* case para 37.

<sup>185</sup> 'Panel discussion on Current trends and issues in the adjudication of socio-economic rights claims in South Africa', *the third workshop on Social and Economic Rights, Co-sponsored by University of Pretoria, South Africa and the project on Human Rights and Global Economy, North Eastern University School of Law, Boston, Massachusetts, United States*, June 2, 2011.

<sup>186</sup> The Court gave a judgment in favour of the litigants in the *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) after it established the fact that granting social security to permanent residents in South Africa will only amount in a possible two percent increase in government budget.

can also be adduced to reinforce the arguments of litigants. If the government is unable to rebut sufficient evidence adduced by litigants, it gives litigants an upper hand in socio-economic rights litigation. First, the executive may be willing to comply with court remedies after it has failed to justify why the resources allocated for meeting basic and urgent needs are demonstrably inadequate in the context of other government needs.<sup>187</sup> Second, the court will not lose its legitimacy on the ground that it is too quick to condemn government policies without substantial evidence on the unreasonableness of policies or programmes. Where the state is unable to justify why it has failed to take concrete and targeted budgetary and other measures either in terms of making temporary provision for those in urgent need or why its mainstream programmes and policies have not catered for the needy in the society given the available resources,<sup>188</sup> the court can be justified in declaring government programmes unreasonable, consequently devising appropriate remedies.

Even though the Court has stated that it will not go the way of determining the minimum core of every right, the court will not be opposed to litigants furnishing the court with information on the minimum amount of resources or services that is necessary for survival which the government should not go below on a case-by-case basis. The Court in the *Grootboom* and *TAC* cases already indicated that evidence in a particular case may show that there is a minimum core of a particular service which should be taken into consideration when determining the reasonableness of state measures in providing the service.<sup>189</sup> The Court in light of such information is better placed to indicate to the government what is required to remedy the breach in accordance with constitutional obligations while leaving a margin of discretion to the state to decide the most appropriate means to take active steps at remedying the breach. The use of credible evidence and information must be used to better the outcomes of litigation in order to engender social change.

In order for socio-economic rights litigation in South Africa to take advantage of the already existing jurisprudence, litigants must ask questions before they set out to take socio-economic rights cases to court. Such questions as - for cases that the court gave appropriate remedies, what factors worked in the favour of that case? What was the reasoning of the court in such cases? What arguments weighed strongest in the case? What are the similarities and differences between past socio-economic rights cases and the one that is about to be instituted before the Court.

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<sup>187</sup> General Comment 3 of the Committee on Economic, Social and Cultural rights 'The nature of state parties Obligations' (art 2(1) of the Covenant) (50th session, 1990) UN doc. E/1991/23 para 10.

<sup>188</sup> Liebenberg (n 51 above) 22.

<sup>188</sup> Liebenberg (n 51 above) 26.

<sup>189</sup> The *Grootboom* case (n 108 above) para 33; The *TAC* case (n 138 above) para 34.

## **4.4 Nudging the court to devise appropriate, just and equitable remedies that will guarantee compliance**

### **4.4.1 Strategic litigation in socio-economic rights cases**

‘The successes attained in litigation on gay and lesbian issues in South Africa can be attributed to the careful and coordinated strategy adopted by the gay and lesbian groups’.<sup>190</sup> Litigation was successful in this area because it was dependent substantially on the mobilization and advocacy strategies adopted.<sup>191</sup> Not less than seven separate cases ranging from non-discrimination against gays and lesbians<sup>192</sup> and adoption by same-sex partners<sup>193</sup> to marriage between same-sex couples<sup>194</sup> have been brought before the Constitutional Court and all of them have resulted in victory for those seeking to enforce gay and lesbian rights. The gay and lesbian equality (the Coalition) were very strategic in litigating these cases by understanding what time was ripe to bring a particular case (it did not bring the case of same-sex marriage until it got some hints to do so from the bench of judges) and affirmed the development of jurisprudence in this area.<sup>195</sup> ‘The Coalition ensured that it got the Court to establish and entrench principles regarding the need for equal treatment of gays and lesbians in all contexts so emphatically that it became virtually impossible for the Court to do anything but follow through to the logical conclusion that same-sex marriage was necessary’.<sup>196</sup>

In order to engender social change in South Africa, similar litigation strategies should be employed by those involved in public interest litigation for socio-economic rights cases. Socio-economic rights litigation can make use of such carefully devised strategy by getting the court to establish principles regarding the dignity of the poor and the obligations of the government to provide basic services and regulate PSDM. Although the exact strategy used by the gay and lesbian Coalition may not be directly employed by socio-economic rights litigation because of the urgency that comes with remedying socio-economic rights violations, public interest litigation in socio-economic rights cases must ensure that arguments are formulated in ways that will nudge the Court to devise the most effective remedies such as meaningful engagement and structural interdicts.

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<sup>190</sup> Marcus & Budlender (n 120 above) 28.

<sup>191</sup> Marcus & Budlender (n 120 above) 29.

<sup>192</sup> *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC).

<sup>193</sup> *Dutoit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC).

<sup>194</sup> *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC).

<sup>195</sup> Marcus & Budlender (n 120 above) 37.

<sup>196</sup> Marcus & Budlender (n 120 above) 37.



### **a. Meaningful engagement of the parties in a socio-economic rights case**

Compliance with remedies given in socio-economic rights cases is crucial if the potential of socio-economic rights litigation to engender social change will be actualized. Thus, litigants should demand for remedies that will allow the court to draw upon the expertise of other branches of government.<sup>197</sup> It is important to note that for the courts to successfully discharge their functions, they require a great deal of support from other organs of the state.<sup>198</sup> If the executive receives court orders with hostility and unwanted criticism, compliance with such orders will become impossible because the judiciary is highly dependent on the executive for the enforcement of its orders. Litigation should not be done with the aim of getting the judiciary to always declare a government policy unreasonable in every case. Otherwise the government may not be so receptive to complying with court orders that are critical of government plans and policies. As an alternative, litigants should seek remedies that will enhance dialogue, as this will facilitate compliance and implementation after the remedy has been handed down by the judiciary.<sup>199</sup> Compliance was easy after the court judgment in the *Olivia Road's* case because the parties had agreed on the terms by which the court should give the judgment. A remedy that flows from an amicable settlement surmounts concerns about the separation of powers, institutional capacity of the court and the issues of polycentricity in socio-economic rights adjudication.<sup>200</sup>

The court will be able to devise appropriate remedies if it appreciates the polycentric nature of a socio-economic rights case.<sup>201</sup> It is important to state here that litigation is in a good position to help the court appreciate the multiple social and economic consequences that a violation has. Litigants can help the judiciary appreciate the fact that the stakeholders in a particular case are not limited to the parties but includes others that might be affected by the violation or the remedy given in the case.<sup>202</sup> Helping the court appreciate the polycentric nature of a case will give the judiciary the opportunity to devise better remedies that can remedy systemic violations and engender social change cutting across a multitude of other people or institutions that are important for the effective enforcement of socio-economic rights. It may also assist the court to determine the necessary stakeholders for the purpose of having meaningful engagements. However caution must be taken that wide stakeholder participation does not slow down or dilute remediation process.<sup>203</sup> It is important to state here that ‘the court should find liability in the case before it gives orders for a meaningful engagement between the relevant stakeholders, as this will ensure

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<sup>197</sup> Bilchitz (n 6 above) 132.

<sup>198</sup> Mbazira (n 24 above) 37.

<sup>199</sup> Chenwi (n 135 above) 382.

<sup>200</sup> Chenwi (n 135 above) 382.

<sup>201</sup> Mbazira (n 24 above) 44.

<sup>202</sup> Chenwi (n 135 above) 384.

<sup>203</sup> Mbazira (n 24 above) 217.

better results for the negotiation process. It sets the limit within which the engagement will operate because the rights and duties of the parties have been authoritatively determined'.<sup>204</sup> The ordering of meaningful engagement by the Constitutional Court before it determines the violation in a case has been criticized because the parties embark on the negotiation without knowing their legitimate entitlements and this may amount to inequality in bargaining power between the state and its citizens.<sup>205</sup>

## **b. Structural interdicts**

Structural interdicts have been identified as a very effective remedy in socio-economic rights cases because the court is prepared to engage the government until full compliance with a court remedy is obtained from the government.<sup>206</sup> However, the Constitutional Court has pronounced that it may not always give structural interdicts as remedies because it does not have a good reason to believe that the government will not respect its declaratory orders.<sup>207</sup> The rationale for such deference to the government is that structural interdicts are given as last resort remedies and not a routine response to claims for the enforcement of socio-economic rights.<sup>208</sup> This goes to show that even though structural interdicts have been identified as very effective remedy for socio-economic rights cases, the Constitutional Court is not willing to dish out such remedies for every socio-economic rights case. Socio-economic rights litigation must therefore be strategic in demanding for such a remedy.

Litigants must furnish the court with evidence of non-compliance with court orders on the part of the government in order to nudge the court to give structural interdicts. The Constitutional Court has used structural interdict in cases where there is evidence that the government has failed to comply with court orders. In the *Sibiya* case,<sup>209</sup> the court was concerned that the process of commuting death sentences after its judgment in the *Makwanyane* case<sup>210</sup> was taking an unduly long period of time. The Court in this case,

ordered a structural interdict calling on the government to take immediate steps to ensure that all sentences of death imposed before June 5 1995 were set aside and replaced by appropriate alternative sentences. The government was also to report to the Court not later than 15 August 2005 on the steps taken to comply with

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<sup>204</sup> D Brand 'socio-economic rights and transformative politics' unpublished LLD thesis, University of Stellenbosch 2009 137 quoted in Chenwi (n 135 above) 385.

<sup>205</sup> Chenwi (n 135 above) 384.

<sup>206</sup> Mbazira (n 143 above) 13.

<sup>207</sup> The *TAC* case (n 138 above) para 129.

<sup>208</sup> Former chief Justice Arthur Chaskalson's speech 'Implementing socio-economic rights: The role of the courts' quoted in Mbazira (n 148 above) 14.

<sup>209</sup> *Sibiya and Others v DPP*, Johannesburg High Courts and Others 2006 2 BCLR 293 (CC).

<sup>210</sup> *S v Makwanyane and Another* 1995 3 SA 391 (CC).

the order. Government continually reported to the Court until 1 September 2006 when the Court was satisfied that all death sentences had been substituted.<sup>211</sup>

Although this structural interdict was with regards to a civil and political right, it indicates that the Constitutional Court may be more willing to give structural interdicts as a remedy in socio-economic rights cases if litigants can prove to the court that the state has on many occasions failed to implement orders in cases similar to the one before the court.

Litigation in its demand for structural interdict as a remedy should also not appear to be demanding a policing of an inept and incapable government. Litigation should seek for structural interdicts because such remedies are deeply democratizing, creating space for dialogue between the court, the executive and civil society actors.<sup>212</sup> In essence where the court is not clear on the most appropriate way of remedying a violation, litigation may demand that some latitude be given to the executive to craft the appropriate remedies through structural interdicts thereby executing self imposed rather than judicial imposed remedies.<sup>213</sup>

#### **4.5 Litigating socio-economic rights cases based on equality and non-discrimination arguments**

‘The right to equality and various socio-economic rights are interrelated and mutually supporting’.<sup>214</sup> This implies that the determination of constitutional acceptability of state action or inaction with regards to realizing socio-economic rights must be conducted with an understanding of the general structural inequalities in a society and specific inequalities of particular groups.<sup>215</sup>

Due to the apartheid history of South Africa, the Constitutional Court has become very sensitive to the plight of the unequally treated and those discriminated against in the society. The Constitutional Court referring to the need for measures that will alleviate the disadvantages created by past discrimination has interpreted the right to equality to go beyond a formal guarantee of equal treatment for all individuals.<sup>216</sup> The Court in the *Hugo* case adopted a ‘contextual approach’ to the interpretation of the right to equality in line with the transformative vision of the constitution – the notion of substantive equality. In the context of fulfilling socio-economic rights, while a formal guarantee of equality may further perpetuate present patterns of social and economic disadvantage because it does not take into

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<sup>211</sup> Mbazira (n 143 above) 13.

<sup>212</sup> Mbazira (n 143 above) 9.

<sup>213</sup> Mbazira (n 143 above) 10.

<sup>214</sup> De vos (n 11 above) 267.

<sup>215</sup> De vos (n 11 above) 267.

<sup>216</sup> *President of the republic of South Africa v Hugo* (CCT 11/96) [1997] ZACC 4 para 41.

consideration the entrenched structural inequality and the actual socio-economic disparities,<sup>217</sup> substantive equality requires the state to advance socio-economic rights with due regard to the different social and economic circumstances of different groups.<sup>218</sup> Substantive equality places an obligation on the state to take steps towards achieving a society wherein all individuals reach their full potential.<sup>219</sup> It is this interpretation of equality that can be used in socio-economic rights litigation to engender social change. Litigants can bring the state to court on equality grounds for its failure to implement programmes in a way that caters specially for the needs of vulnerable groups.

Litigants can also investigate the inadequacies of government programmes and challenge such programmes as being discriminatory or not carried out equally. This will help the court to criticize such discriminatory programmes based on the constitutional provisions of equality and non-discrimination<sup>220</sup> in a way that its legitimacy is not questioned. This is in line with the function of the judiciary – upholding the constitution and setting aside any laws or conduct inconsistent with the constitution. Equality and non-discrimination provisions have been successfully used to defend the economic and social interests for individuals and groups of people in employment arrangements.<sup>221</sup> The Constitutional Court expatiated on the interrelatedness between the right to equality and socio-economic entitlements in the *Khosa* case.<sup>222</sup> The Constitutional Court in this case acknowledged that equality like dignity is both a foundational value and an enumerated right in the South African Constitution.<sup>223</sup> The court held in that case that ‘the exclusion of permanent residents from the social grants legislation constituted a limitation of the right to access social assistance in section 27 of the constitution and the right against unfair discrimination in section 9 of the constitution. It also held that where the state chooses to limit the provision of social welfare benefits to certain categories of people, it must do so consistently with the value of equality’.<sup>224</sup> This is an indication that equality arguments can strengthen socio-economic rights arguments especially where some discrimination is involved.

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<sup>217</sup> De Vos (n 11 above) 266.

<sup>218</sup> De Vos (n 11 above) 266.

<sup>219</sup> De Vos (n 11 above) 265 – 266.

<sup>220</sup> Section 9 South African Constitution.

<sup>221</sup> *Public Servants’ Association of South Africa v Minister of Justice* 1997 3 SA 925 (T). It was held that the targets and quotas suggested by the minister were discriminatory of Afrikaner men and the few Afrikaner women lawyers in public service in an unfair manner.

<sup>222</sup> *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 42 – 45.

<sup>223</sup> The *Khosa* case (as above) paras 41 – 42.

<sup>224</sup> The *Khosa* case (n 222 above) paras 44 - 45.

#### **4.6 Litigating for the purpose of getting a two-track remedy**

A two-track remedy is crucial if social change will be the result of socio-economic rights litigation and adjudication. A two-track remedy is one that combines more immediate relief for successful litigants with longer-term processes designed to achieve systemic reform for similar groups in the litigant's predicament.<sup>225</sup> 'Two-track remedial strategies allow immediate, individual and interim remedies to be combined with group-based and systemic remedies that allow for participation by all affected interests. It allows the court not only to order corrective justice but preventive and distributive justice as well'.<sup>226</sup> Socio-economic rights litigation must not only be focused on getting favourable remedies for the litigants in courts. It must be done with the intention of getting remedies that can help improve social programmes of the government which can better the lives of the poor and which can address the root causes of poverty and inequality in the society. It is only by so doing that monumental social change can be achieved through socio-economic rights litigation.

#### **4.7 Conclusion**

It is apposite to state that in order that socio-economic rights litigation results in the achievement of social change, it should be strategically done not only to focus on particular socio-economic needs but also expose the underlying patterns of social injustice that generate the deprivations in question as this will facilitate more judicial discourse that locates the need in question within a broader historical and social context of systemic injustice.<sup>227</sup>

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<sup>225</sup> Roach (n 45 above) 57.

<sup>226</sup> Roach (n 45 above) 57.

<sup>227</sup> Liebenberg (n 81 above) 31.

## Chapter Five

### Conclusions and recommendations

#### 5.1 Conclusion

The enforcement of socio-economic rights is crucial for the survival of the poor in our society because it is one of the important means legally speaking by which the basic needs of the poor can be satisfied. Like other human beings, poor people have rights and their dignity must be protected. According to Govender, socio-economic rights are set out to transform and improve the standards and quality of people's lives, not only as an end in itself but as a means to preserving the dignity of persons. Thus the very core of socio-economic rights is human dignity and equality.<sup>228</sup> The protection of the socio-economic rights of poor people is therefore one way the law can offer protection of the human dignity of the poor in our society. Socio-economic rights by their nature involve rationing which makes an immediate realization of all socio-economic rights quite challenging but in spite of this and other challenges posed to socio-economic rights litigation and adjudication, socio-economic rights enforcement has the potential to engender social change in a society fraught with poverty and inequality as South Africa.

First, socio-economic rights litigation engenders the development of the law. Through socio-economic rights litigation and adjudication, content is given to these rights and there is better jurisprudence on how these provisions should be interpreted and realized. An analysis of the *Grootboom* case revealed how socio-economic rights litigation and adjudication brought about the development of constitutional principles that prohibited evictions without a court order and placed on the government the duty to provide alternative accommodation for the poor and vulnerable in eviction cases.

It may be easy to conclude that socio-economic rights litigation has no positive impact when the government refuses to implement court decisions. However, it is also correct to state that socio-economic rights litigation creates an opportunity for the court to always emphasize the transformative goal of the constitution when the court interprets the constitutional provisions. The decisions of the court in some way provoke the state to be more inclined to giving consideration to the most vulnerable when implementing its policies and programmes. This was reflected in the type of programmes that the government implemented following the decision in the *Grootboom* and *TAC* cases. The state is influenced to give due consideration to the socio-economic needs of all, including the poor and vulnerable because they are perceived to be right bearers and not persons who simply benefit from the largess of the state. Also, the state is more conscious of the fact that it is accountable to the people through the courts. Indeed, with time, the executive may

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<sup>228</sup> n 33 above, 89.

develop a ‘socio-economic rights protection culture’ such that the state puts into consideration the decisions of the court without waiting for a socio-economic right violation to put things right.

Second, when the courts are given the opportunity to give content to socio-economic rights provisions in the constitution and expound on the obligation of the state vis-à-vis the rights, it encourages citizens to perceive themselves as right bearers who can lay a demand either through litigation or other means on the government where the government is seen to be failing in its duties. People begin to see the need to challenge the state on unreasonable programmes. They are not passive but aware that they have a legitimate leverage to demand for social change. Litigation in the *TAC* case created an opportunity for the advocacy and mobilization for the rights of individuals with HIV/AIDS to be legitimized by the courts. The litigation in the *Mazibuko* case also crystallized community discontent against PPMs as a right violation.

Third, socio-economic rights litigation drives political sensitization on the socio-economic needs of people. The *Mazibuko* case clearly highlights how socio-economic rights litigation can create political will for the protection of the rights of people. Although the court did not give judgment in favour of the applicants in the *Mazibuko* case, the issue of PPMs and access to sufficient water in Soweto (an informal settlement) was politicized and the Ethekwini municipality at that time took a political decision not to install PPMs.

‘The value of litigation should not only be judged in terms of how a case fares in court (*success in the narrow sense*), or whether the terms of the judgment are complied with (*immediate impact*). It is important to look at the *systemic impact* – the broader impact of the litigation process on social policy, public discourses on socio-economic rights and the development of jurisprudence nationally and internationally’.<sup>229</sup> From the foregoing, one can safely conclude that socio-economic rights litigation can engender social change directly and indirectly especially when litigation strategies and methods are reinforced towards this end. Continued and consistent socio-economic rights litigation will eventually produce social change and transformation.

Although this research has revealed some strategies that can help strengthen socio-economic rights litigation in South Africa as a tool for social change, it is necessary to state that litigation by itself is not sufficient as a tool for the achievement of social change. It is important to combine litigation with other strategies as rights awareness, advocacy and social mobilization. Litigation efforts that are part of a broader mobilisation strategy are more likely to result in positive judgments and judgments that are implemented.<sup>230</sup>

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<sup>229</sup> Gloppen (n 47 above) 4.

<sup>230</sup> Gloppen (n 47 above) 27.

The mobilization process in itself has the potential to yield positive outcomes for socio-economic rights claims as revealed in the *Mazibuko* case.

An analysis of the *TAC* case revealed that social mobilization and public engagement should not be limited to the pre-litigation period. It should continue during and after litigation in form of public presence in courts, publicity involving the media, campaigns and political lobbying. Chief justice P.N Bhagwati of the Indian Supreme Court emphasizes the importance of social mobilization for litigation strategies thus;

Social action litigation is a necessary and valuable ally in the cause of the poor, but it cannot be a substitute for the organization of the poor, the development of community self reliance and establishment of effective organization structures through which the poor can combat exploitation and injustice, protect and defend their interest, and secure their rights and entitlements.<sup>231</sup>

## 5.2 Recommendations

1. Civil societies should engage more in public interest litigation on behalf of the poor and disadvantaged. Public interest litigation is crucial especially for poor litigants who may not be aware of their rights and may be unable to pay litigation costs.<sup>232</sup> Litigation will only engender social change when socio-economic rights claims are aired and violations are articulated by the victims.

Civil society organizations should also pull efforts and resources together to enhance the quality of litigation for socio-economic rights. CSOs involved in public interest litigation should not see litigation only as an end but also as a means to an end because ‘it can be used as part of a broader strategy for social and political mobilization. Litigation can be effective in bringing out facts that can be used for advocacy purposes, fed into social and political discourses and directly used to inform policy processes’.<sup>233</sup>

2. Civil societies need to embark on awareness campaigns and programmes that will sensitize the poor about their constitutional rights and the institutions and mechanisms in place for the enforcement of their socio-economic rights. This is the very first step that must be taken so that the poor can appropriately utilize the option of litigation for the enforcement of their socio-economic rights. Otherwise only the privileged will keep benefitting from an improved process of litigation for socio-economic rights. ‘Public information is valuable in terms of changing attitudes and empowering individuals to make socio-economic rights

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<sup>231</sup> Chief justice Bhagwati quoted in J Cooper Public interest law revisited (1999) 25 *Common Wealth Law Bulletin* 140.

<sup>232</sup> Mubangizi & Twinomugisha (n 145 above) 119.

<sup>233</sup> Gloppen (n 47 above) 1.



claims'.<sup>234</sup> This is very important to ensure that communities are actively involved in asserting their rights in socio-economic rights claims and even outside the legal environment.<sup>235</sup>

3. Litigants should demand for amicable settlements as remedies from the courts, calling on the government to enter deliberations with the aggrieved person and others whose same socio-economic rights have been violated. This will facilitate better compliance from the government instead of forcing positive actions upon the government. It will also bring about social change not just for the litigant before the court, but other persons with similar socio-economic needs.

Finally, it is apposite to conclude by stating that socio-economic rights if purposively interpreted and consistently enforced are capable of making invaluable contributions to the pursuit of social change. It is only through litigation that the courts can engage other organs of government vis-à-vis the implication of its policies on socio-economic rights. It is therefore important that the use of litigation is justified by ensuring that the jurisprudence of socio-economic rights litigation and adjudication is not only critically assessed but strategically used in future socio-economic rights cases to push for the achievement of social change not only in South Africa but in the world.

**Word Count – 17 949 words, excluding table of contents and bibliography**

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<sup>234</sup> Marcus & Budlender (n 120 above) 96.

<sup>235</sup> Marcus & Budlender (n 120 above) 94.

## Bibliography

### Books

An-Nai'im, A 'To affirm the full human rights standing of economic, social and cultural rights' in Ghai, Y & Cottrell, J (eds) (2004) *Economic, Social and Cultural rights in practice: The role of judges in implementing Economic, Social and Cultural Rights*: Interights

Benvenuto, J 'The expanding nature of human rights and the affirmation of their indivisibility and enforceability' in Cesar, P; Goldewejik, B, & Contreras, A (eds) (2002) *Dignity and human rights: The implementation of Economic, Social and Cultural rights*: Intersentia

Bilchitz, D (2007) *Poverty and fundamental rights: The justification and enforcement of socio-economic rights*: Oxford University press

Budlender, G 'Justiciability of socio-economic rights: Some South African Experiences' in Ghai, Y & Cottrell, J (eds) (2004) *Economic, Social and Cultural rights in practice: The role of judges in implementing Economic, Social and Cultural Rights*: Interights

Budlender, G 'The right to alternative accommodation in forced evictions' in Squires, J; Langford, M & Thiele, B (eds) (2005) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights*: University of New South Wales press

Dworkin, R (1977) *Taking rights seriously*: Cambridge Oxford University Press

Goldewejik, B 'From Seattle to Porto Alegre: Emergence of a new focus on dignity and the implementation of economic, social and cultural rights' in Cesar, P; Goldewejik, B, & Contreras, A (eds) (2002) *Dignity and human right: The implementation of Economic, Social and Cultural rights*: Intersentia

Govender, V 'Economic, social and cultural rights in South Africa: Entitlements, not mere policy options' in Cesar, P; Goldewejik, B, & Contreras, A (eds) (2002) *Dignity and human rights: The implementation of Economic, Social and Cultural rights*: Intersentia

Kende, MS (2009) *Constitutional Rights in two worlds, South Africa and the United States*: Cambridge University Press

Liebenberg, S (2010) *Socio-economic rights adjudication under a transformative constitution*: Juta & Co Ltd

Liebenberg, S 'Adjudicating social rights under a transformative constitution' in Langford, M (ed) (2008) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*: Cambridge University Press

Marcus, G & Budlender, S (2008) *A strategic evaluation of public interest litigation in South Africa*: Atlantic Philanthropies

Mbazira, C (2009) *Litigating Socio-economic rights in South Africa: A choice between corrective and distributive justice*: Pretoria University Law Press

Mbazira, C (2008) *Strategies for effective implementation of court orders in South Africa*: Socio-economic Rights Project, Community Law Centre, University of Western Cape

Mckinley, D 'Where it counts: The struggle for a people's budget in South Africa' in Cesar, P; Goldewejik, B, & Contreras, A (eds) (2002) *Dignity and human rights: The implementation of Economic, Social and Cultural rights*: Intersentia

McLean, K (2009) *Constitutional deference, courts and socio-economic rights in South Africa*: Pretoria University Law Press

Roach, K 'The Challenges of Crafting Remedies for Violations of Socio-economic Rights' in Langford, M (ed) (2008) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*: Cambridge University Press

### **Journal articles**

Bilchitz, D 'Towards a reasonable approach to the minimum core: Laying the foundation for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights*

Brennan, M 'To adjudicate and enforce socio-economic rights: South Africa proves that domestic courts are a viable option' (2009) 9 *Queensland University of Technology Law and Justice Journal*

Chenwi, L 'A new approach to remedies in socio-economic rights adjudication: Occupiers of 51 Olivia Road and others v City of Johannesburg and others' (2009) 2 *Constitutional Court Review*

De vos, P 'Grootboom; the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights*

Dugard, J and Liebenberg, S 'Muddying the Waters: The Supreme Court of Appeal's judgment in the Mazibuko case' (2009) 10 *Economic and Social Rights Review*

Dugard, J & Wilson, S 'Constitutional jurisprudence; the first and second waves' in Cousins, B; Dugard, J; Langford, M, & Madlingozi, T (forthcoming 2011) *Symbols or substance: The roles and impact of socio-economic rights strategies in South Africa*: <<http://www.seri-sa.org>> (accessed 20 August 2011)

Fuller, L & Winston K 'The forms and limitations of adjudication' (1978) 92 *Harvard Law Review* 2

Gutto, S 'Beyond justiciability: Challenges of enforcing/implementing socio-economic rights in South Africa' (1998) 4 *Buffalo Human Rights Law Review*

Jagwanth, S 'Democracy, civil society and the South African Constitution: Some challenges' (2003) *UNESCO Discussion paper 65*: <<http://www.unesdoc.unesco.org/images/0012/00/295/129557e.pdf>> (accessed 16 October 2011)

Lenta, P 'Judicial restraint and overreach' (2004) 20 *South African Journal on Human Rights*

Liebenberg, S 'Needs, rights and change: Adjudicating social rights' (2005) *Center for Human Rights and Global Justice Working Paper, Economic and Social Rights Series No. 8*

Liebenberg, S 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty' (2002) 6 *Law, Democracy and Development*

Liebenberg, S 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights*

Mbazira, C 'From ambivalence to certainty: Norms and principles for the structural interdict in socio-economic rights litigation in South Africa' (2008) 24 *South African Journal on Human Rights*

Mubangizi, JC & Twinomugisha, B 'The right to health care in the specific context of access to HIV/AIDS medicines: What can South Africa and Uganda learn from each other?' (2010) 10 *African Human Rights Law Journal*

Mubangizi, JC 'Know your rights: Exploring the connections between human rights and poverty reduction with specific reference to South Africa' (2005) 21 *South African Journal on Human Rights*

Nolan, A; Porter, B & Langford, M 'The justiciability of social and economic rights: An updated appraisal' (2007) *Center for Human Rights and Global Justice Working Paper No. 15*

Pieterse, M 'Eating socio-economic rights: The usefulness of rights talk in alleviating social hardship revisited (2007) 29 *Human Rights Quarterly*

Pieterse, M 'Possibilities and pitfalls in the domestic enforcement of socio-economic rights: Contemplating the South African experience' (2004) 26 *Human Rights Quarterly*

Pieterse, M 'Resuscitating Socio-economic rights: Constitutional entitlements to Health care' (2006) 22 *South African Journal on Human Rights*

Pieterse, M 'The potential of socio-economic rights litigation for the achievement of social justice: Considering the example of access to medical care in South African prisons' (2006) 50 *Journal of African Law*

Roux, T 'Understanding Grootboom – A response to Cass R. Sunstein' (2002) 12 *Constitutional Forum*

Scott, C & Macklem, P 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review*

Stewart, L 'Adjudicating Socio-economic rights under a transformative Constitution' (2010) 28 *Penn State International Law Review*

Swart, M 'Left out in the cold? Crafting constitutional remedies for the poorest of the poor' (2005) 21 *South African Journal on Human Rights*

Vierdag, EW 'The legal nature of the rights granted by the International Covenant on Economic, Social and Cultural rights' (2009) 9 *Netherlands Year book of International Law*

Wesson, M 'Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *Southern African Journal on Human Rights*

Wickeri, E 'Grootboom's legacy: Securing the right to access adequate housing in South Africa' (2004) *Center for Human Rights and Global Justice Working Paper, Economic, Social and Cultural Rights Series No. 5*

Wiles, E 'Aspirational principles for enforceable rights? The future for socio-economic rights in national law' (2006) 22 *American University International Law review*

### **International instruments**

General Comments of the Committee on Economic, Social and Cultural Rights  
<<http://www.ohchr.org/English/bodies/cescr/comments.htm>> (accessed 10 October 2011)

### **Internet sources and others**

'Poverty and Inequality report on South Africa - A summary report prepared for the office of the executive deputy president and the inter-ministerial committee for poverty and inequality' (1998):  
<<http://www.polity.org.za/govdocs/reports/poverty/html>> (accessed 18 August 2011)

'Poverty and the International Covenant on Economic, Social and Cultural rights':  
<[http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2001.10.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2001.10.En)> (accessed 23 August 2011)

'The activities of the department of Health, South Africa':  
<<http://www.doh.gov.za/list.php?type=HIVandaids>> (accessed 15 September 2011)

'The state of South Africa's real economy 2005'  
<[http://www.esastap.org.za/esastap/pdfs/sa\\_real\\_economy\\_2005.pdg](http://www.esastap.org.za/esastap/pdfs/sa_real_economy_2005.pdg)> (accessed 16 October 2011)

Aguero, J; Michael, R & May, J 'Poverty and Inequality in the first decade of South Africa's democracy: What can be learnt from panel data' (2005):

<<http://www.aae.wisc.edu/carter/papers/Aguero%20carter%20and%20May.pdf>> (accessed 15 October 2011)

De vos, P 'Irene Grootboom died homeless, forgotten, no C-class Mercedes in sight' (August 2008):

<<http://www.abahlali.org>> (accessed 20 September 2011)

Dugard, J 'Litigation strategy and impact' Lecture delivered at the *short course on socio-economic rights adjudication* at the Centre for Human Rights, University of Pretoria, South Africa, March 9 2011

Garavito, R 'Litigation strategy and impact' Lecture delivered at the *short course on socio-economic rights adjudication* at the Centre for Human Rights, University of Pretoria, South Africa, March 9 2011

Gloppen, S 'Public interest litigation, social rights and social policy', a conference paper delivered in Arusha December 2005:

<<http://www.derechocambiosocial.pbworks.com/f/gloppen.rev.3%5B1%5D.pdf>> (accessed 19 October 2011)

Landman, JP 'Breaking the grip of poverty and inequality in South Africa 2004 – 2014: Current trends, issues and policy options' (2003) <<http://www.sarpn.org/documents/d0000649/p661-poverty-report3b.pdf>> (accessed 18 August 2011)

Liebenberg, S 'The right not to languish in poverty' available at SA Media – University of Free State, Reference No 6258 (2010) <<http://www.library.up.ac.za/law/index.htm>> (accessed 7 September 2011)

Mubangizi, JC 'Prospects and challenges in the protection and enforcement of socio-economic rights: Lessons learnt from the South African experience', Paper delivered at the *VII world congress of the International association of Constitutional law*, Athens 11 – 15 June 2007:

<<http://www.enelysn.gr.papers/w13/paper%20by%20prof.%20john%20cantiuc%20mub>> (accessed 15 September 2011)

Pieterse, M 'Rethinking the boundaries of socio-economic rights litigation: The private law impact of justiciable socio-economic rights':

<<http://www.enelysn.gr/papers/w13/paper%20by%20marius%20pieterse.pdf>> (accessed 4 October 2011)

Porter, B 'Justiciability of ESC rights and the right to effective remedies: Historic challenges and new opportunities' (2008): <<http://www.socialrights.ca/documents/Beijing%20paper.pdf>> (accessed 10 October 2011)

Sachs, A 'The judicial enforcement of socio-economic rights: The Grootboom case':

<<http://www.lawsociety.ie/documents/committees/hr/lectures/23.6.2005.pdf>> (accessed 27 September 2011)

Sachs, J 'Ending Africa's poverty trap':

<<http://www.unmilleniumproject.org/documents/BPEAEndingAfricaspovertyTrapFINA>> (accessed 17 August 2011)

Shah, A 'Poverty facts and statistics': <<http://www.globalissues.org/article/26/poverty-facts-and-stats>> (accessed 17 August 2011)

## **Newspaper**

Budlender, G 'A paper dog with real teeth' *Mail and Guardian* 12 July 2002

## **South African cases**

*City of Cape Town v Rudolph* 2003 ZAWCHC 89

*Dutoit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC)

*Khosa v Minister of Social Development* 2004 6 SA 505 (CC)

*Mazibuko v City of Johannesburg* 2008 ZAGPHC 106 (HC)

*Mazibuko v City of Johannesburg CC case CCT 39/09 2009 ZACC*

*Minister of Health v Treatment Action Campaign* 2002 50 SA 721

*Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC)

*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC)

*Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 5 BCLR 475 (CC)



*President of the Republic of South Africa v Hugo* (CCT 11/96) [1997] ZACC 4  
*President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3(CC)  
*Public servants' Association of South Africa v Minister of Justice* 1997 3 SA 925 (T)  
*Re Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC)  
*Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* 2009 9 BCLR 847 (CC)  
*S v Makwanyane and Another* 1995 3 SA 391 (CC)  
*Sibiya and Others v DPP, Johannesburg High Courts and Others* 2006 2 BCLR 293 (CC)  
*Soobramoney v. Minsiter of Health, KwaZulu Natal* 1998 1 SA 765 (CC)  
*The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC)

### **South African laws**

National Buildings Regulations and Building standards Act 103 of 1977

National Health Act 2003

National Housing Act 1997

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998

The South African Constitution 1996

