

SOCIO-ECONOMIC RIGHTS LITIGATION: A POTENTIAL STRATEGY IN THE STRUGGLE FOR SOCIAL JUSTICE IN SOUTH AFRICA

Dissertation Submitted in Fulfilment of the Requirements for the Degree Master of
Laws (LLM) in Socio-Economic Rights

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SUMMARY

In this study I investigate how and to what extent socio-economic rights litigation can be used as a pragmatic strategy in the struggle for social justice in South Africa. In response to arguments that litigation lacks potential to change the socio-economic conditions that poor people often contest, I examine its potential to create social transformation. My analysis is premised on the fact that the constitutional project promises to construct South African society among others on the pillar of social justice, where the potential of every individual to enjoy improved quality of life is guaranteed. However, I illustrate how apartheid legacy and the neo-liberal politics of the post-apartheid government have conspired to keep the poor in perpetual deprivation. While much has been achieved in terms of the provision of basic services, millions of South Africans continue to battle with escalating poverty, deprivation and inequalities in resource redistribution. Consequently, a number of academic commentaries on the post-apartheid experience have expressed uncertainty that the constitutional experiment will result in improve livelihood.

In interrogating this claim I construct a theoretical analysis, from a socio-legal point of view, in which I explain the concept of socio-economic rights litigation. I examine the instrumental role of civil society, including the activism of social movements in converting political demands into legal claims framed in the language of socio-economic rights. I explain how recourse is had to the courts to challenge political conduct, to contest the unconstitutionality of state policies and to demand the fulfillment of political promises with the aim to achieve redistributive justice. In examining the context within which socio-economic rights litigation applies I identify three phases in its trajectory, which include a period of contestation, a first decade and a second decade of litigation. These phases illustrate significant trends that have developed in socio-economic rights litigation over the years. Thus I argue that socio-economic rights litigation has potential to engineer social transformation but that potential has not adequately been explored. Given the magnitude of socio-economic challenges that need to be redressed, I further argue that socio-economic rights litigation needs to be developed as a pragmatic strategy in the struggle to achieve social justice.

To substantiate this argument I analyse the decisions of the Constitutional Court in *Mazibuko*, *Modderklip*, *Abahlali baseMjondolo* and *Schubart Park* to illustrate the practical dimensions how and to what extent litigating socio-economic rights has contributed to social transformation. Based on the analysis of the judgments, I identify certain determining and necessitating factors that either cause litigation to happen or facilitate the process. I then further examine some challenges and constraints that inhibit the potential of litigation with the aim to point out flaws that need to be overcome when planning future socio-economic rights litigation. I conclude by looking at prospects for the future of socio-economic rights litigation in driving not only social transformation but also in creating possibilities for the advancement of the law, the further development of jurisprudence on socio-economic rights as a pragmatic strategy in the broader commitment to achieve social justice. I argue that to develop the potential of litigation for social change entails developing a balanced jurisprudence that provides a forum for the prevalence of social justice to ensure that benefits accrue equitably to the poor.

Key Words: socio-economic rights, public interest litigation, poverty and inequality, social justice, South African jurisprudence on socio-economic rights.

DECLARATION

I declare that this dissertation is my original work. It has been carried out primarily through desktop research, which entailed the analysis of primary and secondary sources. Therefore, where other people's works have been used, due reference has been provided. It is in this regard that I declare the dissertation my own original work. It has not been submitted for the award of a degree at any other university or institution. I do hereby submit it in fulfillment of the requirements for the award of the degree LLM in Socio-Economic Rights at the Department of Public Law, University of Pretoria.

Signed: _____

Carol CHI NGANG

Date: _____

This dissertation has been submitted for examination with my approval as University Supervisor

Signed: _____
Supervisor

DEDICATION

I dedicate this dissertation to my beloved wife, Mercy NGANG and kids, NGANG Thercy Fusi and NGANG Myra Wuffi Manyonga for their sacrificial love and most especially to God almighty for His abundant grace.

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CHAPTER ONE

Introduction – Rationale for the Study

1. Background Overview

Prior to 1994 South Africa was a deeply divided society characterised by gross violations of human rights and the transgression of humanitarian principles in violent conflicts.¹ Apartheid politics permitted the undemocratic parliament to enact prescriptive laws that were used to keep the black population in perpetual poverty, underdevelopment and deprivation.² The black communities endured on the margins of society and were only perceived as a source of cheap labour for the apartheid economy.³ The system exemplified not only civil and political tyranny but also social and economic subjugation with the complicity of the law and the courts.⁴ In spite of the extensive violations of the continuum of internationally recognised human rights apartheid South Africa was devoid of legal instruments of resistance and hardly any established channels of social justice existed by which to vindicate rights.⁵ Human rights organisations such as the Legal Resources Centre and Lawyers for Human Rights exploited gaps in the legal system through a range of successful public interest litigation efforts, which became a strategic tool by which to challenge apartheid legislation.⁶ The courts gradually became a legal battleground in the liberation struggle.⁷ A broad coalition of political parties, trade unions, civil society organisations, social movements, religious bodies and the international community brought pressure to bear on the apartheid regime, which was overthrown in the early 1990s.⁸

¹ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 5.

² Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 3.

³ Ndangwa N ‘Civil society and poverty reduction in South Africa’ (2006) available at: http://www.sarpn.org/documents/d0002086/Civil-society_PR_SA_Noyoo.pdf (accessed: 30 August 2012).

⁴ Dugard John ‘The South African judiciary and international law in the apartheid era’ (1998) 14 *S Afr J Hum Rts* 73.

⁵ Dugard John (n 4 above) 73.

⁶ Marcus G & Budlender S *A Strategic Evaluation of Public Interest Litigation in South Africa* (2008) 8-9.

⁷ Marcus & Budlender (n 6 above) 8.

⁸ Ballard R ‘Social movements in post-apartheid South Africa: An introduction’ in Jones P & Stokke K (eds) *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 80.

The transition to democracy was marked by a negotiated settlement that became codified in the Constitution. The preamble opens with a transformative commitment to, ‘[h]eal the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights.’⁹ This ignited pent-up expectations for the restoration of social justice and improvement in the livelihood circumstances of the impoverished black population.¹⁰ The democratic landscape of the country however, remains scarred by the apartheid legacy.¹¹ The new government embarked on a combined effort with civil society formations to redress the challenges of poverty, deprivation and inequality.¹² This did not happen. The collaboration with civil society ruptured as a result of the state’s unprecedented drift towards ‘centralized control and technocratic domination’ instead of pursuing the pro-poor agenda that it had preached in the crusade against apartheid.¹³ Terreblanche has argued that during the transition negotiations the new government opted to embrace the ideology of free market capitalism to the detriment of the predominantly poverty-stricken constituencies.¹⁴

The powerful corporate sector cajoled the government into compromising its social and economic policies and the moral obligation to ameliorate the plight of the poor, in favour of a neo-liberal economic policy which barred the possibility of comprehensive redistributive measures.¹⁵ The new hegemony facilitated the creation of a *nouveaux-riches* class of African elite with a greedy appetite for self-enrichment and corruption rather than with genuine concerns for those in

⁹ Preamble of the Constitution.

¹⁰ Terreblanche S A *History of Inequality in South Africa 1652-2002* (2002) 27; Ballard (n 8 above) 81.

¹¹ Pieterse M ‘Legitimizing/insulating effects of socio-economic rights’ (2007) 22 *Canadian J of L & Society* 1, 4.

¹² Ndangwa (n 3 above) 2.

¹³ Patel R ‘Cities without citizens: A perspective on the struggle of Abahlali baseMjondolo, the Durban Shackdweller Movement’ in McMichael P (ed) *Contesting Development: Critical Struggles for Social Change* (2010) 33, 39.

¹⁴ Terreblanche (n 10 above) 20 & 27.

¹⁵ Terreblanche (n 10 above) 29; see also Davis D ‘Socioeconomic rights: Do they deliver the goods?’ (2009) 6 *I.CON* 687, 697-698. For a general account on transition in South Africa, see Bond P *Elite Transition: From Apartheid to Neoliberalism in South Africa* (2000); Seekings J ‘Poverty and inequality after apartheid’ (2007) *Working Paper 200 - Centre for Social Science Research University of Cape Town*.

desperate need.¹⁶ Jeremy Seekings has remarked that the basis of inequality quickly shifted from race to class, which by extension created new dimensions of social injustices.¹⁷

A new formation of civil society soon emerged, which had as its rallying point the state's inability and lack of political will to stand up as a provider of essential services.¹⁸ The ambitious civil society however, encountered huge challenges in its effort to uplift communities out of poverty.¹⁹ The stage was set for renewed anti-apartheid style struggles as the poor felt abandoned in the wilderness of the new South Africa; denigrated and alienated from mainstream politics and the socio-economic order, and above all betrayed of the constitutional promises of a better life.²⁰ They resorted to the 'means that are to hand' to vent out their dissent.²¹ Chantal Mouffe has noted that when 'political frontiers' become blurred; disaffection creeps in – resulting in the emergence of other types of collective identities.²² I borrow from Mouffe's vocabulary to illustrate the fact that when the balance of political forces become overbearing against the disempowered²³ or when conventional strategies at vindicating popular demands are exhausted people normally resort to associational tactics to achieve their goals. Consequently, the past few years have witnessed the resurgence of a new wave of vibrant oppositional civil-society-orchestrated mobilisation combined with litigation in pursuit of redistributive justice. Much of the litigation has dealt with contemporary livelihood issues, some resulting in significant impact on public policy.²⁴

It is established that post-apartheid South Africa needs 'large-scale social change.'²⁵ I assume that social change does not just happen. In the absence of a prescribed strategy or mechanism by which to induce the change process, diverse strategies – not excluding socio-economic rights

¹⁶ Terreblanche (n 10 above) 37.

¹⁷ Seekings (n 15 above) 7.

¹⁸ Patel (n 13 above) 39.

¹⁹ Ndangwa (n 3 above) 2.

²⁰ Ballard (n 8 above) 79-80.

²¹ Sachs A *Advancing Human Rights in South Africa* (1992) vii-viii.

²² Mouffe C *On the Political: Thinking in Action* (2005) 30.

²³ Handler J *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (1978) 22.

²⁴ Ballard (n 8 above) 80-86.

²⁵ Klare K 'Legal culture and transformative constitutionalism' (1998) *S Afr J Hum Rts* 150.

litigation have been employed.²⁶ In a bid to identify a pragmatic strategy for social transformation, some scholars have suggested that litigation has the potential to respond to the challenges of improving the conditions of the poor.²⁷ It is worth noting that the justiciability of socio-economic rights is no longer an issue for debate.²⁸ The socio-economic rights jurisprudence of the courts has demonstrated that socio-economic rights can effectively be enforced through litigation.²⁹ However, socio-economic rights litigation has been surrounded with a lot of controversy. In the section that follows I state the problem that arises as a result of the adjudication of socio-economic rights by the courts.

2. Statement of the Problem

The controversy surrounding the judicial enforcement of socio-economic rights stems from the fact that socio-economic rights litigation has not comprehensively been understood, definitely because it has not adequately been explored. The obligation that the constitutional project poses to all sectors of South African society requires a holistic commitment towards an equitable society guaranteed by improved livelihood for the socio-economically marginalised. An evaluation conducted to measure the extent to which legal reform has been instituted found that the law has indeed changed considerably but has not translated into the much anticipated transformation in the lives of the poor.³⁰ While much is presumed to have been achieved in terms of the provision

²⁶ Sect 34 of the Constitution provides access to justice by allowing for everyone with a legitimate claim to approach a court or any other independent and impartial tribunal or forum.' Sect 38 further facilitates access to justice by allowing for representative actions to be brought on behalf of adversely affected parties where the litigant is not necessarily a party to the litigation.

²⁷ See generally Dugard J 'Civic action and legal mobilization: The Phiri water meters case' in Handmaker J & Berkhouw R (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010); Marcus & Budlender (n 6 above); 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) 50:2 *J Afr L* 2; Brand JFD 'Courts, socio-economic rights and transformative politics' (2009) *unpublished LLD thesis, Stellenbosch University* 3.

²⁸ Mubangizi J 'The constitutional protection of socio-economic rights in selected African countries: A comparative evaluation' (2006) 2 *Afr J Legal Stud* 3; Brennan M 'To adjudicate and enforce socio-economic rights: South Africa proves that domestic courts are a viable option' (2009) 9:1 *QUTLJJ* 64, 69.

²⁹ Brennan (n 28 above) 83.

³⁰ Klaaren J *et al* 'Public interest litigation in South Africa: Special issue introduction' (2011) 27 *S Afr J Hum Rts* 1.

of basic services, millions of South Africans continue to battle with the realities of daily survival.³¹ According to Davis, social justice is accomplishable only through a dramatic change of socio-economic conditions.³² As a means to accomplish this goal recourse has been had to socio-economic rights litigation.³³ However, scholarly observations appear sceptical that the constitutional experiment will result in the elimination of poverty or in curbing social inequalities.³⁴

I take as point of departure for this study the call made by Jonathan Klaaren *et al* to explore the most pragmatic litigation strategies that illustrate potential to facilitate the struggle for social justice and the possible challenges and constraints that these strategies may encounter.³⁵ With this focus in mind, I aim to create understanding of socio-economic rights litigation and to demonstrate its potential to be used as a pragmatic strategy in the struggle for social justice. I argue that socio-economic rights litigation is not an absolute remedy to the challenges of poverty, deprivation and exclusion but it has potential to guarantee protection and empowerment to the poor.³⁶ Based on this argument, I suggest that socio-economic rights litigation needs to be explored and developed for the cause of social justice. Key to this is first of all to understand the nature of the problem, which arises from the commitment to redress social injustices.³⁷ Secondly, to understand the commitment imposed by the Constitution to strive towards social justice and

³¹ Von Broembsen M & Davis D ‘South Africa must address social justice’ (2008) *The South African Civil Society Information Service* available at: <http://sacsis.org.za/site/article/186.1> (accessed: 20 August 2012).

³² Davis 2009 (n 15 above) 706.

³³ For a general account on transformative constitutionalism, see Klare (n 25 above) 146; Albertyn C & Goldblatt B ‘Facing the challenge of transformation: Difficulties in the development of an independent jurisprudence of equality’ (1998) 14 *S Afr J Hum Rts* 148; Pieterse M ‘What do we mean when we talk about transformative constitutionalism?’ (2005) 20 *SAPR/PL* 155; Langa P ‘Transformative constitutionalism’ (2009) *Prestige Lecture, Stellenbosch University* 2; Van Marle K ‘Transformative constitutionalism as/and critique’ (2009) 2 *STELL LR* 286; Van Marle K ‘The spectacle of post-apartheid constitutionalism’ (2007) 16 *Griffith L Rev* 411; Roux T ‘Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without difference’ (2009) 2 *STELL LR* 258.

³⁴ See generally Jones P & Stokke K (eds) *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005).

³⁵ Klaaren *et al* (n 30 above) 7.

³⁶ See 2.1.3 of chapter three and 2.1.1 of chapter four.

³⁷ I discuss this in 3.1.1.1 of chapter two.

thirdly, to understand the means and the mechanisms by which to attain that goal.³⁸ How and to what extent this has been accomplished remains a major concern.³⁹ However, many scholars have identified that public interest litigation has the potential to do so.⁴⁰ In dealing with this concern my enquiry is guided by the questions outlined below.

3. Research Questions

The major question that the enquiry centres on is to create understanding on:

- How and to what extent socio-economic rights litigation responds to the challenges of poverty, deprivation, inequality and social exclusion in present day South Africa?

The following subsidiary questions are also dealt with.

- What is socio-economic rights litigation and how is it relevant in contemporary South Africa?
- How effectively has socio-economic rights litigation been used as a strategy in the struggle for social justice and what impact has it produced?
- What are the factors that determine and necessitate the use of litigation as a potential strategy in the struggle for social justice?
- What are the challenges and constraints on the prospects of future of socio-economic rights litigation?

4. Purpose of the Study

The study aims primarily to contribute to the discourse on socio-economic rights and more specifically to the potential of litigation to be used as a strategy in the struggle to achieve social

³⁸ See 3.1.1 and 3.1.2 of chapter two.

³⁹ Liebenberg S ‘South Africa’s evolving jurisprudence on socio-economic rights: an effective tool in challenging poverty?’ (2002) 6 *Law, Democracy & Dev’t* 159; Pieterse M ‘Resuscitating socio-economic rights: constitutional entitlements to health care services’ (2006) 22 *S Afr J Hum Rts* 473.

⁴⁰ See Brand (n 27 above) 3; Pieterse (n 27 above) 118; Dugard (n 27 above) 73; Tissington K ‘Demolishing development at Gabon informal settlement: Public interest litigation beyond Modderklip?’ (2011) 27 *S Afr J Hum Rts* 1; Marcus & Budlender (n 6 above); Ballard (n 8 above).

justice. In this light, I define socio-economic rights as ‘empowerment rights.’⁴¹ By means of this definition I look at poverty as representing not only a lack of material needs and resources but also as a deprivation of capability and a ‘violation of human rights’.⁴² As a result, poverty translates into a legal problem that necessitates enforcement through litigation.⁴³ Davis has argued that when law is combined with a broader political objective the actions produce more transformative outcomes.⁴⁴ It is often difficult to tell how transformative constitutionalism can directly translate into improving the lives of the poor if the nature of poverty is not accurately understood.⁴⁵ The necessity to do so has been captured by Justice Yacoob when he remarked in *Grootboom* that:

A society must seek to ensure that the bare necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality.... Those, whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.... Furthermore, the Constitution requires that everyone must be treated with care and concern.⁴⁶

In this context transformation would entail a consistent dramatic change of the livelihood circumstances of the poor through diverse strategies, not excluding litigation.⁴⁷ It is through seeking to achieve this goal that I assess the potential of socio-economic rights litigation. I presume that litigation that progressively aims to improve the circumstances of the poor is much more pragmatic and measurable. Thus, I argue that socio-economic rights litigation should be seen as a potential strategy in the struggle for social justice rather than as an oppositional force to the democratic functioning of the state.⁴⁸

⁴¹ I would define civil and political rights on the other hand as ‘emancipation rights’ which inform the struggle against oppression, subjugation and discrimination. Socio-economic rights as ‘empowerment rights’ aim at improving quality of life and recognises the potential of every individual. Taken together in their indivisibility and interconnectedness, both categories inform the struggle for social justice.

⁴² Prada M F *Empowering Poor through Human Rights Litigation* (2011) UNESCO 7.

⁴³ Prada (n 42 above) 17.

⁴⁴ Davis D ‘Adjudicating the socio-economic rights in the South African Constitution: Towards “deference lite”?’ (2006) 22 *S Afr J Hum Rts* 301, 326.

⁴⁵ Rosa S ‘Transformative constitutionalism in a democratic developmental state’ (2011) 3 *STELL R L* 543, 545.

⁴⁶ *Government of the Republic of South Africa v Grootboom* 2000 11 BLCR 1169 (CC) para 44.

⁴⁷ Preamble of the Constitution

⁴⁸ See 3.4.2 of chapter five.

Research in the area of judicial enforcement of socio-economic rights in South Africa is still developing. By socio-economic rights litigation I mean litigation that deals with the rights to housing, health care, food, water and social security, education and those specifically pertaining to children. My purpose is to establish and to illustrate how by instituting legal action in the courts to claim these rights, litigation contributes to the achievement of social justice. In making this determination I argue that when something is said to have potential it means that it is capable of being used and therefore needs to be developed for good cause.⁴⁹ I substantiate this theoretical argument with analysis of the *Mazibuko*,⁵⁰ *Modderklip*,⁵¹ *Abahlali baseMjondolo*⁵² and *Schubart Park*⁵³ judgments. I illustrate with evidence from these judgments how and the extent to which socio-economic rights litigation has practically translated into litigation for social change. On the one hand, I use the *Mazibuko* judgment to illustrate the imperfections of socio-economic rights litigation.⁵⁴ On the other hand, I explore the transformative potential of litigation for social change in the *Modderklip*, *Abahlali baseMjondolo* and *Schubart Park* judgments.⁵⁵

I further examine the factors that determine and necessitate the use of socio-economic rights litigation in the pursuit of social justice. I argue that these factors remain favourable for the advancement of litigation in the quest to achieve social justice. The difficulty with litigating socio-economic rights as I have figured out earlier in section 1 of this chapter is that its potential has neither comprehensively been understood nor has it adequately been explored. This is due to a number of challenges and constraints that limit the potential of litigation or inhibit its use in efforts to achieve social change. However, I argue that the future of socio-economic rights litigation remains promising and therefore, needs to be explored and developed for the cause of social justice.⁵⁶ This entails on the one hand, developing a balanced socio-economic rights jurisprudence that provides a forum for the prevalence of social justice and ensures that benefits

⁴⁹ See section 1 of chapter four and 2.5.2 of chapter five.

⁵⁰ *Mazibuko & Others v City of Johannesburg & Others* CCT 39/09 (2009) ZACC 28.

⁵¹ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

⁵² *Abahlali baseMjondolo Movement SA & Another v Premier of the Province of KwaZulu-Natal & Others* 2010 (2) BCLR 99(CC).

⁵³ *Schubart Park & Others v City of Tshwane & Another* CCT 23/12 [2012] ZACC 26.

⁵⁴ See 2.1 of chapter three

⁵⁵ See 2.2, 2.3 and 2.4 of chapter three

⁵⁶ See 2.5 of chapter five.

accrue equitably to the poor.⁵⁷ I go further to determine how socio-economic rights litigation could on the other hand be advanced so that it can effectively respond to the struggle for social justice.⁵⁸

5. Assumptions Underlining the Study

The study is guided by a number of assumptions. Firstly, I assume that the embodiment of rights and institutional mechanisms provided for by the Constitution constitutes an effective tool for addressing poverty and socio-economic vulnerability.⁵⁹ The assurances of full and equal enjoyment of all rights and freedoms,⁶⁰ creates access to the entitlements guaranteed by socio-economic rights.⁶¹ Secondly, I assume that poor peoples' right of access to these entitlements is often compromised by social exclusion and economic marginalisation.⁶² Meanwhile, it is granted for the poor to lay claim through public interest litigation⁶³ and the promise of social justice and fundamental rights guarantee that the fulfillment of these legitimate expectations is possible.⁶⁴ Thirdly, I assume that the guarantee to lay claim when the state or any of its organs fails in their socio-economic obligations allows victims the right to approach the courts in order to establish that a violation or threat has occurred.⁶⁵ Fundamental to this ambition to forge a better society is the hope to achieve redistributive justice.⁶⁶ The fourth assumption is that socio-economic rights litigation is dependent on a combination of determining and necessitating factors without which litigation would be practically impossible or irrelevant. Lastly, I assume that but for a few

⁵⁷ See 3.1.2.2 of chapter two; 3.1.3 of chapter four and also 3.1 and 3.2 of chapter five.

⁵⁸ See 3.3 and 3.4 of chapter five.

⁵⁹ Stellenbosch University Faculty of Law 'Strategic research and outreach initiative: Combating poverty, homelessness and socio-economic disadvantage' available at:

http://sun025.sun.ac.za/portal/page/portal/law/index.english/isp_project/Tab (accessed: 28 August 2012).

⁶⁰ Section 9(2) of the Constitution.

⁶¹ See Preamble of the Constitution.

⁶² Wilson S & Dugard J 'Taking poverty seriously: The South African Constitutional Courts and socio-economic rights' (2011) 3 *STELL LR* 664, 665.

⁶³ Wilson & Dugard (n 62 above) 665. See discussion in sect 1 of chapter two.

⁶⁴ See 3.4.1 of chapter five for a discussion on legitimate expectations.

⁶⁵ Jaichand V 'Public interest litigation strategies for advancing human rights in domestic systems of law' (2004) 1 *SUR – Int'l J Hum Rts* 127.

⁶⁶ Handler (n 23 above) 3.

challenges and constraints, socio-economic rights litigation demonstrates potential which if explored and developed holds great prospects for the achievement of envisaged social transformation.

6. Methodology

The methodology that I have used is typically socio-legal and qualitative in nature, motivated by the fact that the study is focused on the impact of legal processes on social phenomena. Viewpoints have been considered not only from legal writings but also from other related literature. I combine three methodological approaches: namely, theoretical analysis, case analysis and descriptive analysis. I adopted the theoretical approach in order to situate the perspective from which the subject is approached; provide context for explanation, give guidelines to inform understanding and also illustrate the context within which socio-economic rights litigation has evolved in South Africa.⁶⁷

However, there appears to be a non-correlation between theoretical claims about the potential of judicial enforcement of socio-economic rights and the empirical facts about what goes on in reality.⁶⁸ For this reason I used the case analysis to give empirical evidence to the theoretical claims about the potential of litigation to create social change. By this approach I illustrated how socio-economic rights litigation has manifested practically, I described the circumstances under which this has taken place and therefore, also provided understanding of the extent to which litigation has been used in the struggle to achieve social justice.⁶⁹

As a determinative study, I employed the descriptive approach to explain and to create a holistic understanding of socio-economic rights litigation in general and particularly its potential as a strategy in the struggle to achieve social justice.⁷⁰ Through this approach, I illustrated how litigation is designed to shape social transformation and ultimately the achievement of social justice. In all of this, I relied extensively on desktop internet sources as well as on the review of

⁶⁷ See generally chapter two.

⁶⁸ Landau D ‘The reality of social rights enforcement’ (2012) 53:1 *Harvard Int'l LJ* 402, 403.

⁶⁹ See 2.1, 2.2, 2.3 and 2.4 of chapter two.

⁷⁰ See particularly 2.3 of chapter two

primary and secondary data to strengthen the quality and value of the study. Having outlined the methodology, I proceed to make a synopsis of the theories that form the basis for the study.

7. Theory Base

7.1 Transformative Constitutionalism

The study is largely based on the creed of Karl Klare's seminal theory of *transformative constitutionalism*.⁷¹ The theory describes a process of unrelenting engagement intended to radically generate large-scale societal change through non-violent political processes guided by the law; a project which he conceives to be a little less than a 'revolution' but too vast to be simplified as 'reform'.⁷² The theory is premised on the assumption that sweeping egalitarian social change for post-apartheid South Africa is indispensable.⁷³ Marius Pieterse postulates a social democratic understanding of the concept as necessitating the achievement of substantive equality, social justice and the nurturing of a 'culture of justification' for every exercise of public power.⁷⁴

Other scholars hold contrary perspectives to Klare's line of thought. Theunis Roux for instance, differs on many accounts with Klare's formulation which he argues is conceptually flawed and therefore condemned to apparent failure because its success is conditional and dependent on a transformative legal culture.⁷⁵ Emphasising on the limits of law to deal with political issues Van Marle contends that transformative constitutionalism is utopian, unattainable and bound to fail.⁷⁶ Sanele Sibanda reasons that the prevailing understanding of transformative constitutionalism is essentially limiting and inappropriate to effectively achieve egalitarian outcomes and the

⁷¹ Klare (n 25 above) 150.

⁷² Klare (n 25 above) 150.

⁷³ Klare (n 25 above) 150 & 146.

⁷⁴ Pieterse M 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *SAPR/PL* 155, 156; see also Langa 2009 (n 33 below) 4.

⁷⁵ Roux (n 33 above) 270.

⁷⁶ Van Marle (n 33 above) 413.

eradication of poverty.⁷⁷ Van Marle further identifies that the problems with the South African constitutional arrangement are too complex to be reduced to a single formulation.⁷⁸ In a similar argument, Pieterse points out that to narrow down transformative constitutionalism to a uni-dimensional perception runs the risk of restraining the potential for transformation.⁷⁹ The late Chief Justice Langa also conceived of the project as a long-term ideal that creates the vision of a society that allows the possibility for genuine unrestricted conversation and debate – a society in which new ways of being and becoming are constantly explored and shaped – where the only phenomenon that is constant is unpredictable change.⁸⁰

The Bill of Rights entrenches justiciable socio-economic rights as one of the Constitution's features that underscore an overwhelming commitment to social justice. Jeff Radebe has stated that in seeking to redress the 300 years' legacy of inequality and deprivation implanted by colonialism and apartheid, these uniquely transformative features affirm the peoples' commitment to right the wrongs of the past and to establish a society based among others on social justice.⁸¹ In situating socio-economic rights litigation within the framework of transformative constitutionalism, I deduce from the theory; a 'normative function' and a 'pragmatic function', which I deal with more elaborately in chapter two. I argue that socio-economic rights litigation enables the deplorable circumstances of the poor to be redressed, translates constitutional promises into reality and therefore also guarantees social justice for the poor.⁸²

7.2 Civil Society Theory

Michael Edward conceives of *civil society* as the public forum – independent of the state and the economy - where deliberations take place and the logic of the common good or public interest is

⁷⁷ Sibanda S 'Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 3 *STELL LR* 482, 498.

⁷⁸ Van Marle K 'The spectacle of post-apartheid constitutionalism' (2007) 16 *Griffith L Rev* 411, 422.

⁷⁹ Pieterse 2005 (n 74 above) 156.

⁸⁰ Langa 2009 (n 33 above) 5.

⁸¹ DoJ & CD 'Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State' (2012) *Media Statement* ii.

⁸² See 2.3 of chapter two.

negotiated.⁸³ At the core of this thinking, Edward presents civil society from three angles. Firstly, he describes civil society as associational life – the vehicle by which change is conveyed through participatory processes.⁸⁴ Secondly, he sees civil society as the good society that focuses on addressing societal challenges.⁸⁵ Lastly, he portrays civil society as the public polity that is concerned with the common good and shared interests – where the public interest, sanctioned by the law constitutes the guiding principle.⁸⁶

Another account defines civil society as the sphere of action that is separate from the state and has the potential to stimulate resistance and to bring about change within a system.⁸⁷ In its oppositional nature, Bent Flyvbjerg argues that conflict forms an inevitable part of the formation and functioning of civil society.⁸⁸ He further argues that civil society should not be confused to mean ‘civilised’ society in the sense of well-mannered behaviour.⁸⁹ He sees civil society rather as a guarantee of constant tension resulting from the abuse by those in authority of the ideal standards of social justice that civil society advocates.⁹⁰ Another distinctive feature of civil society, especially pertaining to social movements according to Ashwin Desai, is the aspect of popular mobilisation as a primary source of social endorsement.⁹¹ In this instance each spontaneously constituted group aims at local liberation, where the art of politics is converted into the art of conflict and as Desai puts it, ‘to engage in the struggle and to take part in the politics’.⁹²

⁸³ Edwards M ‘Civil society’ (2005) *The Encyclopaedia of Informal Education* Available at: www.infed.org/association/civil_society.htm (accessed: 22 August 2012).

⁸⁴ Edwards (n 83 above).

⁸⁵ Edwards (n 83 above).

⁸⁶ Edwards (n 83 above).

⁸⁷ United Nations Economic and Social Council (ECOSOC) ‘Definition of basic concepts and terminologies in governance and public administration’ (2006) *Committee of Experts on Public Administration* 9.

⁸⁸ Flyvbjerg B ‘Habermas and Foucault: Civil society thinkers’ (1998) 49 *Brit J of Sociology* 210, 229.

⁸⁹ Flyvbjerg (n 88 above) 229.

⁹⁰ Flyvbjerg (n 88 above) 229.

⁹¹ Desai A ‘Neo-liberalism and its discontents: The rise of community movements in post-apartheid South Africa’ available at: <http://ccs.ukzn.ac.za/files/Ashwin%27s%20paper%20in%20pdf%20format.pdf> (accessed: 15 October 2012).

⁹² Desai (n 91 above).

Edward further describes civil society as ‘collective action’ and argues that it is simultaneously a goal to aim for, a means to achieve it and a framework for engaging with each other.⁹³ When these three facets combine the idea of civil society then shapes the course of politics and social change, provide a framework for organising resistance as well as for suggesting alternative solutions to social, economic and political problems.⁹⁴ According to Edward, lasting solutions to problems of poverty, discrimination and exclusion are impossible to comprehend without a full appreciation of the role of civil society.⁹⁵ Within the South African context characterised by a politics of exclusion and alienation, civil society has demonstrated a commitment to providing access to justice.⁹⁶ It constitutes the medium by which to engage meaningfully and the mechanism by which to articulate popular demands in the struggle for egalitarian redress, which the poor would otherwise not be able to achieve.⁹⁷ Having identified these applicable theories, it is important to consider what other scholars have written and the extent to which they have explored the subject under consideration.

8. Literature Review

Jackie Dugard’s study of the Phiri water metres (*Mazibuko*) case⁹⁸ brings to the limelight how a local social movement – the Anti-Privatisation Forum resorted to mobilising a township community into a resistance campaign around the right to water.⁹⁹ She illustrates how the campaign grew into an alliance of affiliate organisations.¹⁰⁰ She points out how, in spite of its initial aversion to rights and the law the coalition led by the Anti-Privatisation Forum resorted to rights-based litigation to challenge the City of Johannesburg’s water policy, which was alleged to deprive or infringe on the residents’ constitutional right to water.¹⁰¹ No matter that the lower courts’ judgments in favour of the residents were overturned by the Constitutional Court, Dugard

⁹³ Edwards (n 83 above).

⁹⁴ Edwards (n 83 above).

⁹⁵ Edwards (n 83 above).

⁹⁶ Jagwanth S ‘Democracy, civil society and the South African Constitution: some challenges’ (2003) *MOST – UNESCO* 15-16.

⁹⁷ Jagwanth (n 96 above) 15-16.

⁹⁸ See Dugard (n 27 above) - J Dugard (2010) ‘Civic action and legal mobilisation: The Phiri water meters case’.

⁹⁹ Dugard (n 27 above) 75.

¹⁰⁰ Dugard (n 27 above) 75

¹⁰¹ Dugard (n 27 above) 87-88.

argues that rights-based legal mobilisation had a huge constructive and empowering impact on the community as well as the social movements representing the disempowered groups. She argues that though litigation might be considered a last resort measure, it remains a useful one in a broader political struggle.¹⁰² Dugard's study thus illustrates the significance of litigation as part of the broader campaign to achieve social justice. She highlights the important role played by civil society in facilitating the quest for social change.

Marius Pieterse's enquiry focuses on finding out the extent to which rights-based litigation may improve quality of life for vulnerable and marginalised members of society such as prisoners.¹⁰³ He advances five arguments to illustrate the transformative potential of socio-economic rights litigation. Firstly, that the consistent enforcement of socio-economic rights is capable of accelerating the pursuit of social justice.¹⁰⁴ Secondly, that socio-economic rights litigation is capable of evoking public awareness and political consciousness to the plight of the poor.¹⁰⁵ Thirdly, that socio-economic rights litigation is a potential strategy for enhancing participatory democracy and for holding the state accountable.¹⁰⁶ Fourthly, that socio-economic rights litigation has a remedial potential that may substantially alleviate poverty and inequality.¹⁰⁷ Lastly, he argues that the consistent pursuit of socio-economic rights can in the long term result in more meaningful transformation.¹⁰⁸ He further acknowledges other ways by which social justice could be achieved, but argues that litigation is potentially indispensable for the construction of an ultimately just society.¹⁰⁹ Pieterse also underscores the significance of litigating socio-economic rights and shows how the strategy can lead to social transformation. Unlike Dugard, Pieterse's study does not explore the social mobilisation aspect and therefore comes short of illustrating the mechanisms through which litigation contributes in the struggle for social justice.

¹⁰² Dugard (n 27 above) 95; see also Gloppen S 'Public interest litigation, social rights and social policy' (2005) *Conference Paper, Arusha Conference on New Frontiers of Social Policy* 30.

¹⁰³ See Pieterse 2006 (n 27 above) - M Pieterse (2006) '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'.

¹⁰⁴ Pieterse 2006 (n 39 above) 118.

¹⁰⁵ Pieterse 2006 (n 39 above) 118.

¹⁰⁶ Pieterse 2006 (n 39 above) 118.

¹⁰⁷ Pieterse 2006 (n 39 above) 118.

¹⁰⁸ Pieterse 2006 (n 39 above) 119.

¹⁰⁹ Pieterse 2006 (n 39 above) 120.

Richard Ballard brings to perspective the resurgence of a new dimension of civil society and social movement activism in the South African political arena and examines the politics of their operations.¹¹⁰ By comparing the militancy that characterised the liberation struggle against apartheid and the social movements of present day, he formulates his discussion around the important role that these organisations play.¹¹¹ He goes further to explain that the current wave of struggles may be the building blocks of a new opposition to the state.¹¹² Ballard argues that with the absence of a strong opposition, civil society and more specifically social movements provide an inevitable alternative to articulating the voice and aspirations of the poor.¹¹³ He identifies the role of civil society as essentially to represent the interest of the vulnerable and to apply pressure on government to re-establish a measure of political balance in favour of the poor.¹¹⁴ He highlights the use of rights and litigation, particularly when combined with popular mobilisation as the most legitimate strategy by which marginalised people can challenge the state and thereby reverse power relations.¹¹⁵ Ballard's thesis accurately illustrates how, through the agency of civil society and more specifically through the activism of social movements, litigation is used in the pursuit of social justice.

Kate Tissington's case study of *Modderklip* examines the impact of public interest litigation with emphasis on the role played by civil society organisations.¹¹⁶ Her investigation shows the extent to which civil society organisations went in order to achieve social justice for the impoverished Gabon informal settlement.¹¹⁷ She identifies two important roles that these organisations played: firstly, as *amici curiae* during the litigation process and secondly, in carrying out research in the

¹¹⁰ See Ballard (n 8 above) - R Ballard (2005) 'Social movements in post-apartheid South Africa: An introduction'. Neil Stammers (*Hum Rts Qrtly* 1999:983) defines social movements as 'collective actors constituted by individuals who understand themselves to share some common interest and who identify with one another, at least to some extent. Social movements are chiefly concerned with defending or changing at least some aspect of society and rely on mass mobilization, or the threat of it, as their main political sanction.'

¹¹¹ Ballard (n 8 above) 79.

¹¹² Ballard (n 8 above) 83.

¹¹³ Ballard (n 8 above) 83.

¹¹⁴ Ballard (n 8 above) 94.

¹¹⁵ Ballard (n 8 above) 88.

¹¹⁶ See Tissington (n 40 above) - K Tissington (2011) 'Demolishing development at Gabon informal settlement: Public interest litigation beyond Modderklip?'

¹¹⁷ Tissington (n 40 above) 1.

community and monitoring enforcement of the judgment.¹¹⁸ She remarks that the *Modderklip* case helped to shift the parameters in public interest litigation from earlier socio-economic rights cases.¹¹⁹ In this regard, she advocates for a broader role for civil society in ensuring that social justice is established to the benefit of marginalised communities.¹²⁰ Tissington opens up a new dimension to the idea of litigating socio-economic rights not only by looking at judicial outcomes but most importantly by illustrating the instrumental role of civil society in translating the judgment of the court into social reality.

In a research to evaluate the practice of public interest litigation in South Africa Marcus and Budlender¹²¹ identified four key strategic approaches that they argue are relevant to be used concurrently in order to bring about social change. These strategies include information dissemination, advice and legal assistance, social mobilisation, advocacy campaigns and litigation.¹²² Notwithstanding a few challenges, they establish that when properly conceptualised and combined with other forms of mobilisation, litigation has greater potential to engender social change.¹²³ They also identify the pivotal role of civil society organisations in effectively combining these approaches and directing them towards the achievement of transformative social justice.¹²⁴ Given the scale of poverty and inequality that needs to be addressed, they express concerns that achievements made in transforming society may be eroded if public interest litigation organisations are not adequately supported.¹²⁵ Their evaluation of public interest litigation however focuses narrowly only on how victory can be achieved. Meanwhile, litigation of this nature does not need to be mindful only about winning in court but also about the broader impact that the entire litigation process creates. Their analysis fails to take into consideration a broad range of other determinants that can enable litigation to contribute to social change without necessarily obtaining a positive judgment.

¹¹⁸ Tissington (n 40 above) 198-199.

¹¹⁹ Tissington (n 40 above) 204.

¹²⁰ Tissington (n 40 above) 205.

¹²¹ See Marcus & Budlender (n 6 above) - G Marcus & S Budlender (2008) ‘A strategic evaluation of public interest litigation in South Africa’.

¹²² Marcus & Budlender (n 6 above) 149-150.

¹²³ Marcus & Budlender (n 6 above) 150-151.

¹²⁴ Marcus & Budlender (n 6 above) 150-151.

¹²⁵ Marcus & Budlender (n 6 above) 149.

I purposefully structure the literature review to address different principal aspects of socio-economic rights litigation. The review generally highlights that litigation is in fact a potential strategy by which to achieve the constitutional goal that seeks to address the complex challenges of poverty, deprivation, inequality and exclusion. A more comprehensive understanding of litigation as a potential strategy in the struggle for social justice therefore requires sketching its proper contours as well as detailing out a holistic perspective of the whole phenomenon. Thus, I move on to outline how the entire study is structured.

9. Structure of the Study – Outline of Chapters

The study is structured in five chapters, which can briefly be summarised as follows: This introductory chapter and four others. In chapter two, I present socio-economic rights litigation from a theoretical perspective and illustrate its relevance in addressing the challenges of poverty and inequality. In spite of claims that aim at discrediting litigation for social change, I argue that socio-economic rights litigation demonstrates potential which has not adequately been explored. In examining the principal components of litigation, the path through which it has evolved as well as the outcomes and impact it produces I establish that rights litigation has potential for social transformation. Therefore, its relevance in addressing the magnitude of poverty and social injustices in South Africa cannot be contested. In chapter three I provide empirical evidence through the case analyses of *Mazibuko*, *Modderklip*, *Abahlali baseMjondolo* and *Schubart Park* to support the theoretical claims. I illustrate how and the extent to which socio-economic rights litigation has manifested in practical ways in the pursuit of social justice. I argue that litigation is not indispensable but the realisation of socio-economic rights through litigation demonstrates potential to shape social action in ways that advance the struggle for social justice.

In chapter four I illustrate how the potential of socio-economic rights litigation is influenced by certain determining or necessitating factors. I point out how these factors apply in either hindering or in advancing the use of litigation in the quest for social justice. In the fifth and concluding chapter; I look at the challenges and constraints as well as prospects for the future of socio-economic rights litigation. I argue that without the challenges and constraints, litigation demonstrates greater potential to be used in advancing the struggle for social justice and therefore needs to be explored and developed. The future of socio-economic rights litigation remains

promising and therefore I identify the need for an integrated monitoring system that would be able to measure the actual potential of litigation for social change. I also identify the need for enforcement co-operation to ensure that litigation becomes effective as a pragmatic strategy in the quest for social justice. I conclude by reiterating the central argument that socio-economic rights litigation has potential to produce livelihood transformation, which implies that it is capable of creating meaningful impact in the lives of the poor. On the basis of this argument I suggest that the potential of litigation needs to be developed and used for the cause of social justice.

CHAPTER TWO

Theoretical Analysis – Conceptual and Contextual Frameworks

1. Introduction

The extent to which litigation can be expected to contribute to social change and the achievement of social justice has most often been submerged or misconceived. As such, its relevance as a potential strategy in the commitment to social transformation has not adequately been explored because of divergent opinions as to what it actually seeks to achieve. Tension and mistrust has built up between the political organs of state and the judiciary since the advent of constitutional democracy in South Africa. This has been triggered on the one hand by allegations of judicial usurpation of the political function of policy formulation and on the other hand by claims that political opponents are using the courts as a means to ‘co-govern’ the country.¹ These assertions stem from the fact that civil society organisations have on behalf of marginalised constituencies progressively pressured and taken the state to court. In their actions they articulate popular demands for change. They challenge political conduct, contest the constitutionality of legislation and policies and demand the fulfillment of futile political promises. In response the courts have handed down controversial judgments that the ‘political branches do not always like’ because they have too frequently left the state on the losing side of the scale of justice.² In the midst of this it is contended that litigation lacks potential to change the socio-economic conditions that poor people contest.³

My purpose in this chapter is to construct, at least in principle an in-depth understanding of socio-economic rights litigation and to illustrate its relevance as a potential strategy in the struggle to achieve social justice. Thus, from a theoretical perspective, I situate the angle from which the subject is approached; provide context for explanation, provide guidelines to inform

¹ O'Regan K ‘A forum for reason: Reflections on the role and work of the Constitutional Court’ (2011) *Helen Suzman Memorial Lecture, Johannesburg* 2.

² Roux T ‘Principle and pragmatism on the Constitutional Court of South Africa’ (2009) 7 *I.CON* 106, 136.

³ Gloppe S ‘Public interest litigation, social rights and social policy.’ (2005) *Conference Paper - Arusha Conference on New Frontiers of Social Policy* 1.

understanding and also illustrate how litigation for social change has developed over time. Guided by McCann's socio-legal model, I formulate and profile a comprehensive understanding of how and the extent to which social change and the achievement of social justice are possible through socio-economic rights litigation.

Cummings and Rhodes have argued that though public interest litigation has played an essential role in the American struggle for social justice, its potential to change social policy is unreliable because though indispensable, it is an imperfect strategy.⁴ On the other hand, Ginsberg and Shefter think it inappropriate for opponent groups to seek to control government through court cases.⁵ Critical Legal Studies critics argue that collective political struggle is the only effective way to challenge social injustice and structural inequality.⁶ The supposition is that it is more logical to exploit more overtly political approaches in the quest for social justice than to rely on litigation, which might not produce any direct benefits.⁷ I argue that the aim of litigation is not to substitute democratic approaches to social change but should rather be seen as a strategy that has potential to advance the struggle to achieve social justice.

The South African Constitution promises to 'free the potential of each person' and also provides for relaxed access to justice in the event of a contravention of or threat to any of the entrenched constitutional rights.⁸ However, millions of South Africans remain caught up in the heightening challenges of poverty, increasing inequality and the inability to access livelihood opportunities.⁹ Further to its transformative orientation the Constitution suggests litigation as one mechanism by which to seek justice on matters that can be resolved by the application of law.¹⁰ It also generously grants access to everyone in claiming constitutional rights; individually or collectively through representational, associational or public interest action on behalf of those who cannot act

⁴ Cumming S & Rhodes E 'Public interest litigation: Insights from theory and practice' (2009) 36 *Fordham Urb L J* 603, 604.

⁵ Ginsberg B & Shefter M *Politics by Other Means: The Declining Importance of Elections in America* (1990) 148.

⁶ See Cumming & Rhodes (n 4 above) 608.

⁷ Wilson S 'Litigating housing rights in Johannesburg's inner-city: 2004-2008' (2011) 27 *S Afr J Hum Rts* 27, 137.

⁸ See Preamble and sects 34 & 38 of the Constitution.

⁹ Kathree F 'Public interest law: Its continuing role in South Africa (2002) *Johannesburg Bar Advocate Forum* 33.

¹⁰ Sect 34 of the Constitution.

in their own capacity.¹¹ There is a common scepticism on the one hand, as to the effectiveness of litigation to drive social change.¹² On the other hand, optimism about the strategy is growing, in which case the concern is not about ‘whether’ but about ‘how’ litigation should be pursued in order to achieve social justice.¹³

I proceed with the chapter in the following manner: In section 2 I put together a conceptual framework by crafting a working meaning of what socio-economic rights litigation represents as well as its relevance in relation to the magnitude of socio-economic rights challenges facing South Africa. I draw attention to public interest litigation as a generic concept and therefore direct my enquiry specifically on socio-economic litigation. In a fair analysis I examine some critique of socio-economic rights litigation as a strategy that is expected to engineer social change as well as explore its transformative potential. I go further in section 3 to make an enquiry of the contextual framework in which I examine the principal components of socio-economic rights litigation. I move on to trace how litigation for social change has evolved in present day South Africa and by so doing I point out some important trends that have influenced its potential. I then wrap up the chapter in section 4 with a summary conclusion in which I highlight some of the major issues.

2. Conceptual Framework

2.1. Making Sense of Socio-Economic Rights Litigation

2.1.1. Generic conception

Litigation for social change has generally been qualified under the generic concept of public interest litigation, which is broadly allocated varied contextual meanings. As defined by Blacks Law Dictionary ‘public interest litigation’ refers to ‘a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.’¹⁴ The repertoire of literature that I have examined defines public interest litigation in

¹¹ Sect 38 of the Constitution.

¹² Gloppen 2005 (n 3 above) 2.

¹³ Klaaren J *et al* ‘Public interest litigation in South Africa: Special issue introduction’ (2011) 27 *S Afr J Hum Rts* 1.

¹⁴ Black HC & Bryan AG (ed) *Black’s Law Dictionary* (2006) 9th edition.

very generic terms as a litigation strategy that responds to an extensive range of societal issues. In trying to make sense of the idea of socio-economic rights litigation, I examine public interest litigation as a generic concept and then proceed to emphasise another dimension that deals specifically with socio-economic rights.

I point out the aspects of public interest litigation that specifically deal with issues of a socio-economic rights nature and I illustrate how and the extent to which the process of litigating socio-economic rights is used as a strategy in the struggle to transform society. I argue that in its generic form the extent to which public interest litigation can be expected to produce an accurate empirical assessment of social transformation is practically difficult to measure. For this reason I chose to concentrate on litigation that deals specifically with socio-economic rights. The motivation for focusing on this form of litigation is to establish a clear understanding of how and the extent to which, by having the courts to adjudicate on social issues such as poverty, inequality and exclusion, litigation can be seen to contribute in transforming society from deprivation and inequality to a society constructed on the pillar of social justice.

2.1.2. Distinction without difference

Public interest litigation originated in the United States in the mid-70s.¹⁵ Today other jurisdictions around the world have adopted more localised strategies of the practice in efforts to enforce human rights, broaden public participation, improve socio-economic conditions, empower local communities, reform laws and legal systems, and also foster government accountability.¹⁶ In this regard I look at the jurisdictions of the United States, India and South Africa where the practice has developed considerably but differently.

Originally coined in the United States as ‘public law litigation’, Abram Chayes used the expression to refer to the practice of American lawyers seeking to precipitate social change through the courts with the aim to reform legal rules, enforce existing laws and uphold public standards.¹⁷ Helen Hershkoff has described the practice as a ‘new social movement’ in which

¹⁵ Hershkoff H ‘Public interest litigation: Selected issues and examples’ Available at: <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation%5B1%5D.pdf> (accessed: 6 December 2012) 1-3.

¹⁶ Hershkoff (n 15 above) 2-3.

¹⁷ Hershkoff (n 15 above) 1.

participants contest the terms of public meaning, where the act of litigation allows a legitimate space in which those who lack formal access to influence public policy become visible and find expression.¹⁸ Hershkoff argues that public interest litigation is characterised by collective action for a legitimate cause on public issues such as consumer as well as environmental protection on behalf of excluded groups that otherwise lack political influence.¹⁹

In India, public interest litigation is generally referred to as ‘social action litigation’.²⁰ Surya Deva portrays the practice as depicting the mechanism that offers access to justice to the socially disadvantaged.²¹ It provides an avenue for the enforcement of collective rights, creates public awareness on human rights, facilitates civic participation and enhances good governance and accountability.²² Vishnu as well as Dembowski has ascertained that public interest litigation in India is non-adversary and has been revolutionised through judicial activism.²³ By judicial activism, they mean a simplified process by which the poor can quickly and easily access the courts just by sending a letter or postcard to the judge in what has become known as ‘epistolary jurisdiction’.²⁴ This guarantees hope of remedial possibility to the multitudes of the Indian population that are said to be starving for a livelihood.²⁵ Though public interest litigation was initially developed to protect the rural poor against state oppression, Deva has observed that the opportunity has been grabbed by powerful individuals and interest groups to forge self-centered agendas.²⁶ As such, the practice is said to have been misused to achieve personal gains rather than seeking to protect the poor or to promote a public cause.²⁷ I discuss more on this in chapter five.

¹⁸ Hershkoff (n 15 above) 9.

¹⁹ Hershkoff (n 15 above) 14-15.

²⁰ Deva S ‘Public interest litigation in India: A critical review’ (2009) 28 *Civil Justice Qrtly* 19.

²¹ Deva (n 20 above) 19.

²² Deva (n 20 above) 19.

²³ Vishnu ‘Public interest litigation’ (2010) *Lawyers Club in India*, 3; Dembowski H *Taking the State to Court: Public Interest Litigation and the Public Sphere in Metropolitan India* (2001) Asia House 58; Deva (n 20 above) 24.

²⁴ Vishnu (n 23 above) 3; Dembowski H (n 23 above) 58; Deva (n 20 above) 24.

²⁵ Vishnu (n 23 above) 58; Deva (n 20 above) 24.

²⁶ Deva (n 20 above) 26, 32.

²⁷ Deva (n 20 above) 35.

In South Africa, the practice of public interest litigation has changed from the way it was carried out during the apartheid period.²⁸ It has taken new shape and dimension under the new constitutional dispensation – informed principally by the entrenchment of a full range of socio-economic rights. Prompted by widespread poverty and inequality, public interest litigation has shifted more towards vindicating socio-economic rights among other societal concerns.²⁹ Fayeeza Kathree has pointed out that public interest litigation in South Africa is strategically impact driven – using a combination of advanced tactics that aim at securing legal precedents with an impact bearing on large numbers of disadvantaged people.³⁰ She figures out litigation as a potential tool to combat poverty and therefore argues that poverty alleviation is largely dependent on the judicial enforcement of socio-economic rights.³¹

I have pointed out earlier that this study is designed to deal with the aspect of public interest litigation that has to do specifically with socio-economic rights issues. The subtle nuance lies in the fact, as I argue that public interest litigation might not necessarily deal with a socio-economic issue, and also socio-economic rights litigation might not necessarily be pursued as a public interest litigation.³² Octavio Ferraz has illustrated this point by stating that unlike in the Brazilian jurisprudence, which recognises social rights, especially the right to health care as individually claimable entitlements, the South African jurisprudence makes clear that socio-economic entitlements do not accrue to individuals.³³ He notes that most of the judgments passed by Brazilian courts relating to individual claims benefit only the individuals involved in the litigation

²⁸ Kathree (n 9 above) 33.

²⁹ Kathree (n 9 above) 33.

³⁰ Kathree (n 9 above) 33.

³¹ Kathree (n 9 above) 33.

³² Public interest litigation as a litigation strategy can apply to socio-economic rights cases in the same way as it can apply to civil and political rights cases. Socio-economic rights litigation on the other hand is generally but not necessarily of a public interest nature. For example, *Soobramoney v Minister of Health KwaZulu-Natal* 1998 (1) SA 765 (CC) was a socio-economic rights case that was more of an individualistic claim of the right of access to health care than of a public interest nature. Likewise, the case *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* (CCT11/98) [1998] ZACC 15 involved public interest litigation but was not of a socio-economic rights nature.

³³ Ferraz OLM ‘Between usurpation and abdication? The right to health in the courts of Brazil and South Africa’ (2009) Electronic copy available at: <http://ssrn.com/abstract=1458299> (accessed: 18 March 2013) 2.

and do not have any public interest impact.³⁴ He goes further to illustrate how, because of the ability to easily access the courts, a privileged few have exploited the advantages of social rights litigation to manipulate the state's limited resources for personal gains.³⁵ He argues that this has often been achieved at the detriment of the multitude of other needy persons who also depend on and compete for the same limited resources.³⁶ Public interest litigation in India is said to be intended for enforcement of fundamental rights of people who are poor, weak and ignorant of the opportunities available for legal redress or who otherwise are in a disadvantageous position due to their circumstances.³⁷ Deva has stated that such litigation can be initiated only for purposes of redressing a public injury, for the enforcement of a public duty or for vindicating interests of a public nature.³⁸

This shows that litigation has an inherent potential to engender social change but that potential has not sufficiently been explored. In this regard, I argue that socio-economic rights litigation needs to be developed, which entails developing a balanced jurisprudence that provides a forum for the prevalence of social justice to ensure that benefits accrue equitably to the poor. My argument is in favour of the form of litigation that addresses socio-economic rights and favours the public interest as well as the individual interest. This argument is based on the fact that policies and budgetary allocations for social programmes are normally planned to impact large numbers of peoples or communities and to ensure material entitlement to social goods and services. If litigation has to be effective in creating social change, it is important that it pursues an equitable goal to facilitate the attainment of social justice and to improve quality of life.

2.1.3. Pragmatic considerations

By exploring the pragmatic considerations of socio-economic rights litigation my purpose is to portray litigation as a reliable strategy for the transformation project. Van Marle has interrogated to what extent the ideals of transformative constitutionalism contributes to the lives of ordinary South Africans.³⁹ This concern is reiterated by Sanele Sibanda who has questioned the connection

³⁴ Ferraz (n 33 above) 7.

³⁵ Ferraz (n 33 above) 15-16.

³⁶ Ferraz (n 33 above) 15-16.

³⁷ Deva (n 20 above) 19.

³⁸ Deva (n 20 above) 19.

³⁹ Van Marle K 'The spectacle of post-apartheid constitutionalism' (2007) 16 *Griffith L Rev* 411, 412.

between constitutionalism and its ability to deliver on a ‘truly transformative project of poverty eradication.’⁴⁰ Similarly, Liebenberg has asked how the judicial interpretation and enforcement of socio-economic rights can be more responsive to the scale of poverty and inequality.⁴¹ It serves my purpose to attempt an answer to these questions. This entails constructing a comprehensive understanding of how transformative constitutionalism could adequately respond in empowering the poor. Van Marle has pointed out that the spectacle of constitutionalism has become so overpowering that the plight of ordinary people and their quest for social justice has simply been blurred.⁴² To figure out how transformative constitutionalism responds to the plight of the poor, I proceed to describe two functional components of the theory, namely: a ‘normative function’ and a ‘pragmatic function’. The intension is not to create any conceptual difference but simply to give an in depth understanding of the potential of litigation as a practical strategy for social transformation. In the following analysis I explore what each of these functions represents and how they interact to give relevance to socio-economic rights litigation.

The normative function represents transformative constitutionalism as an ‘explanatory tool’ for the courts’ interpretative duty with regards to the transformation project. Marcus and Budlender have ascertained that a major difficulty that came along with the adoption of the post-apartheid constitutions was the problem of uncertainty in relation to the new constitutional developments.⁴³ The constitutional project needs continuous interpretation or explanation to be able to establish proper understanding of what it entails and what it aims to achieve. It is this task of interpretation or explanation that I describe as the normative function. It represents the project managerial decision making obligation invested in the courts to determine effectiveness and the ultimate success of the transformation project.⁴⁴ Thus, the task of interpreting and applying the Bill of Rights forms part of the obligation imposed on the judiciary by sections 8(1) and 39 of the Constitution. Klare has stated that the judiciary must be held to account if it fails in its duty to

⁴⁰ Sibanda S ‘Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty’ (2011) 3 *STELL L R* 482, 486.

⁴¹ Liebenberg L *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) xxi.

⁴² Van Marle (n 39 above) 417.

⁴³ Marcus G & Budlender S A *Strategic Evaluation of Public Interest Litigation in South Africa* (2008) 9.

⁴⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 39; Christiansen 2011 (n 68 below) 613.

advance social justice.⁴⁵ The normative function is therefore not only relevant for interpreting what socio-economic rights are but also for determining the purpose of each of the rights in order to establish what they intend to accomplish. Thus, section 39 stipulates that when interpreting the Bill of Rights a court must promote the values that underlie an open and democratic society and most importantly, what the Bill of Rights aims to achieve. The normative function however, cannot exclusively give practical effect to the transformation project. It can only do so when balanced with the pragmatic function that I describe below.

The pragmatic function embodies transformative constitutionalism as the ‘transformation project’ proper. The project is designed to eliminate social injustices and to accomplish the vision of a society established on social justice and fundamental human rights.⁴⁶ It further guarantees to make life better and promising to every single individual.⁴⁷ Thus, it identifies with the lived realities under which the millions of impoverished South Africans manage to survive.⁴⁸ According to this understanding of the pragmatic function, social injustices must be eradicated for social transformation to be accomplished. According to Langa, it requires tackling the socio-economic conditions in which the poor live.⁴⁹ This is definitely an enormous task that cannot be accomplished simply by interpreting the Bill of Rights. The constitutional promises need to be concretised and therefore, interpretation needs to be accompanied by some form of action. Thus, the pragmatic function focuses on achieving transformation, which entails translating the abstract constitutional vision into practical reality. It requires participatory, meaningful and reasonable action from every active force in society, as the Constitution provides in section 8(1) that the Bill of Rights ‘binds the legislature, the executive, the judiciary and all organs of state’.

I portray socio-economic rights litigation as a combination of these two basic functions. Suffice to admit that the normative as well as the pragmatic functions, in principle cannot operate in isolation. In actual terms both functions are interrelated and complementary and therefore must operate as a whole if they are to deliver on the project of livelihood transformation. Thus, realisation of the transformation project requires implementation mechanisms, of which Pius

⁴⁵ Klare K ‘Legal culture and transformative constitutionalism’ (1998) 14 *S Afr J Hum Rts* 146, 150-172.

⁴⁶ Preamble of the Constitution.

⁴⁷ Preamble of the Constitution.

⁴⁸ Langa P ‘The role of the constitution in the struggle against poverty’ (2011) 3 *STELL LR* 446, 447.

⁴⁹ Langa (n 48 above) 447.

Langa has stated that the instrument available to the judiciary is the law.⁵⁰ In this regard, I argue that socio-economic rights litigation constitutes a potential implementation strategy for the transformation project and therefore can effectively be used in the struggle for social justice.

As a strategy that aims at social justice socio-economic rights litigation seeks to ‘right the wrongs of the past and to bridge the gap between the poor and the most affluent’.⁵¹ As such, I argue that socio-economic rights litigation is endowed with certain unique features that are capable of guaranteeing the attainment of social justice, which overtly democratic strategies cannot. Late Chief Justice Mohammed has suggested that litigation should aim at a ‘decisive break from, and a ringing rejection of, that part of the past which was disgracefully racist, authoritarian, insular, and repressive’.⁵² Anne Skelton has proposed that as far as possible, litigation should be linked with concrete changes in the lives of ordinary people.⁵³ This is backed up by the fact that socio-economic rights litigation is driven by the constitutional promises for the attainment of a better life for all and also by the ultimate goal to achieve social justice, which the poor generally strive for. For litigation to contribute towards envisaged transformation it needs to demonstrate an overwhelming commitment to substantive and not just formal conceptions of equality.⁵⁴ Moreover, it needs to focus not just on wealth and resource redistribution⁵⁵ but also on social inclusion and empowerment. According to Amartya Sen’s ‘capability model’, inclusion and empowerment implies that the aptitude of the poor and their craving to get out of poverty cannot be ignored.⁵⁶

According to Klare, the process of social transformation must be guided by law.⁵⁷ In effect, Justice van der Westhuisen has established that for that process to be accomplished it needs to be

⁵⁰ Langa (n 48 above) 446.

⁵¹ Langa (n 48 above) 448-449.

⁵² *State v Makwanyane*, 1995 (6) BCLR 665 (CC) para 262.

⁵³ Skelton A ‘Public interest litigation: The South African experience’ (2010) *Presentation - Public Interest Litigation Conference, Belfast* 16.

⁵⁴ Klare (n 45 above) 154; Albertyn C & Goldblatt B ‘Facing the challenge of transformation: Difficulties in the development of an independent jurisprudence of equality’ (1998) 14 *S Afr J Hum Rts* 148, 250.

⁵⁵ Khoza S *Socio-Economic Rights in South Africa* (2007) 2nd edition CLC-UWC 21.

⁵⁶ See Sen A *Development as Freedom* (1999); Prada (n 106 below) 15.

⁵⁷ Klare (n 45 above) 150.

facilitated by civil society.⁵⁸ Social transformation thus entails legal justification in the exercise of state power which according to Davis, allows for contestation of the constitutionality of state action or inaction through engagement in popular struggles for change.⁵⁹ These struggles sometimes cannot completely be ‘nonviolent’ as suggested by Klare, for they are struggles for self-determination, for the preservation of human dignity – born out of anger of injustice, of cruelty and of humiliation.⁶⁰

In the preceding analysis I have identified and tried to justify in principle that socio-economic rights litigation has potential as a pragmatic strategy in the quest for social justice. However, the strategy has been critiqued on the basis that its potential to create social change is in effect not absolute. Before moving on to actually explore the transformative potential of litigation it is important to examine two main streams of critique. The essence is not to discredit litigation but to present a balanced view and to point out those aspects that hold back socio-economic rights litigation from manifesting its full potential.

2.2. Some Critique

2.2.1. Weak socio-economic rights jurisprudence

One of the streams of critique that have been leveled against litigation for social change relates to the weak jurisprudence on socio-economic rights. The manner in which transformative constitutionalism is formulated requires socio-economic rights litigation to be radical.⁶¹ However, the causal relationship between litigation and social change has been contested on grounds that litigation on its own cannot lead to social transformation.⁶² This has been blamed on the fact that the socio-economic rights jurisprudence of the Constitutional Court has been exceptionally and unnecessarily weak both in the interpretation of rights provisions as well as in the granting of

⁵⁸ Van der Westhuisen J ‘A few reflections on the role of courts, government, the legal profession, universities, the media and civil society in a constitutional democracy’ (2008) 8 *Afr Hum Rts LJ* 251, 257; Langa (n 48 above) 448.

⁵⁹ Davis D ‘Democracy and integrity: Making sense of the constitution’ (1998) 14 *S Afr J Hum Rts* 127, 145.

⁶⁰ Sachs A *Advancing Human Rights in South Africa* (1992) vii-viii. As indicated, law as mechanism for realisation of the transformation project is narrowly available to the judiciary and probably to public interest litigation organisations and therefore cannot override other political instruments and channels by which transformation can be achieved.

⁶¹ Klare (n 45 above) 150.

⁶² Gloppe 2005 (n 3 above) 1.

remedies. Wilson and Dugard have stated that socio-economic rights are not defined by the Constitution and therefore, it is the duty of the Court to identify them through interpretation.⁶³ Yet the Court has not been able to provide socio-economic rights with such interpretive insight.⁶⁴ This suggests that part of the actual problem for which litigation has been critiqued lies in the flawed manner of interpretation of socio-economic rights.⁶⁵ For instance, the Court has in a number of cases interpreted socio-economic rights as not giving rise to enforceable individual entitlements.⁶⁶ Meanwhile, the rights are conceived as human rights and therefore are individualistic and can be claimed on an individual basis.⁶⁷ This interpretative shortcoming is not only a weakness on its own but it also impacts on the kind of remedies granted by the Court.

Christiansen has contended that the modest remedies issued by the Court do not have the tendency to translate adjudicated rights into individual entitlements.⁶⁸ It is reported for instance, that in spite of the ground-breaking victory on the right of access to housing achieved in honour of Irene Grootboom, she died without shelter of her own.⁶⁹ In this regard, Albie Sachs has pointed out that despite its seminal significance the *Grootboom* case ‘hasn’t solved the housing problem....hasn’t even got close to doing that’.⁷⁰ He expresses doubt that ‘it has even made a

⁶³ Wilson S & Dugard J ‘Taking poverty seriously: The South African Constitutional Court and socio-economic rights’ (2011) 3 *STELL L R* 664, 669.

⁶⁴ Wilson & Dugard 2011 (n 63 above) 671.

⁶⁵ Wilson & Dugard 2011 (n 63 above) 671.

⁶⁶ See *Government of the Republic of South Africa v Grootboom & Others* 2000 11 BCLR 1169 (CC); *Minister of Health & Others v Treatment Action Campaign & Others* (1) 2002 10 BCLR 1033 (CC); *Mazibuko & Others v City of Johannesburg & Others* 2010 (3) BCLR 239 (CC).

⁶⁷ See the socio-economic rights provisions in sects 26, 27, 29 of the Constitution which all state that ‘everyone has the right....’ Sect 28 states that ‘every child has the right’.

⁶⁸ Christiansen E ‘Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice’ (2010) 13 *J of Gender, Race & Justice* 575, 590. See also Mbazira (n 173 below) 4; Pieterse M ‘Resuscitating socio-economic rights: Constitutional entitlement to health services’ (2006) 22 *S Afr J Hum Rts* 473, 483; Wiles E ‘Aspirational principles or enforceable rights? The future for socio-economic rights in national law’ (2006) 22:1 *AM U INT'L L REV* 35, 55-56.

⁶⁹ De Vos P ‘Irene Grootboom died, homeless, forgotten, no C-class Mercedes in sight’ available at: <http://constitutionallyspeaking.co.za/irene-grootboom-died-homeless-forgotten-no-c-class-mercedes-in-sight/> (accessed: 28 December 2012).

⁷⁰ Sachs A ‘Concluding comments on the panel discussion’ (2007) 8 *ESR Review* 1, 19.

dramatic change or improvement to the housing problem in South Africa.⁷¹ Kameshni Pillay also holds the view that while the *Grootboom* judgment has provided the foundation for a series of subsequent cases, the orders remain largely unimplemented in terms of the development of emergency housing relief programmes.⁷² Also directly related to the problem of remedies is the question of supervisory jurisdiction for which litigation has been criticised. It is argued that courts are ill-equipped to handle issues relating to the enforcement of socio-economic rights due to lack of appropriate jurisdiction to ensure that their orders are enforced.⁷³ Besides the weak socio-economic rights jurisprudence, there is the problem of the attitude of the courts for which litigation has also been criticised. In what follows I examine how the Court has been criticised for increasingly restraining its role as an agent of social change.

2.2.2. Judicial restraint

Another aspect for which socio-economic rights litigation has been critiqued relates to the restraining manner in which the Court has dealt with litigation for social change. In terms of judicial authority in the enforcement of socio-economic rights, Christiansen has argued that the Court is endowed with incredibly unregulated authority and the liberty to set its own limits or work without them – essentially with little or no political influence.⁷⁴ However, the Court has been observed to retreat from its crucial role in the adjudication of socio-economic rights as well as in the pursuit of social justice.⁷⁵ Generally as Klare has noted, judges have been reticent and hesitant in assuming the wide range of powers invested in them.⁷⁶ This has been manifested through the Court's adoption and inconsistent use of the reasonableness review standard, which has been more deferential to the state than it has actually responded to the plight of the poor. Roux has reasoned that the Court has often found expedience in aligning jurisprudence with the

⁷¹ Sachs (n 70 above) 19.

⁷² Pillay A 'Implementing Grootboom: Supervision needed' (2009) 3:1 *Law, Democracy & Dev't* 255.

⁷³ Davis D 'Socio-economic rights in South Africa: The record after ten years' (2004) 2 *New Zea J Pub Int'l L* 61-63.

⁷⁴ Christiansen 2010 (n 68 above) 594.

⁷⁵ Kende M 'Update on South Africa's socio-economic rights jurisprudence' (2012) *ConstitutionMaking.Org* available at: <http://www.comparativeconstitutions.org/2012/03/update-on-south-african-socio-economic.html> (accessed: 25 March 2013).

⁷⁶ Klare (n 45 above) 165.

policy preferences of the state,⁷⁷ even when such deferential approach has proved to be fundamentally detrimental to poor litigants.

The *Mazibuko* case, which aimed at establishing social justice on the right to water, is illustrative of this stream of critique. Social justice was denied the residents of Phiri not because they were not entitled to the right to sufficient water but because of the deferential approach the Court adopted in deciding the case. The Court's shifting attitude embedded in 'reasonableness',⁷⁸ it has been argued lacks jurisprudential force to drive pro-poor transformation.⁷⁹ Instead of acting as agent of transformation the Court in *Mazibuko* generally abdicated the duty to give content to the right to sufficient water.⁸⁰ This restraining attitude undermined the guarantee of transformative justice⁸¹ and therefore, frustrated the opportunity for litigation to be used in the struggle to achieve social justice. Karin Lehmann has stated that the Court has had many opportunities to forge a more effective role as agent of social change – to 'fast-track' transformation but has consistently failed to do so.⁸²

In this light, recourse to the courts as a means to drive livelihood transformation has been viewed with skepticism, criticised for being anti-democratic and basically disempowering to the poor, who it is said could use more potentially productive strategies such as strike actions, protests or rights advocacy to vindicate political demands for change.⁸³ Liebenberg has cautioned that while socio-economic rights adjudication can enhance democratic participation, its likelihood to

⁷⁷ Roux T 'Tactical adjudication: How the Constitutional Court of South Africa survived its first decade' in Jenkins C et al (eds) *Law, Nation-building and Transformation* (2008) 13.

⁷⁸ See generally Brand D 'The proceduralisation of South African socio-economic rights jurisprudence, or "What are socio-economic rights for?"' in Botha et al (eds) *Rights and Democracy in a Transformative Constitution* (2003); Bilchitz 2003 (n 178 below) 1-30.

⁷⁹ Dugard J 'Court of first instance? Towards a pro-poor jurisdiction for the South African Constitutional Court' (2006) 22 *S Afr J Hum Rts* 261, 282.

⁸⁰ Dugard J 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24 *S Afr J Hum Rts* 214, 232-238; Dugard 2012 (n 81 below) 13.

⁸¹ Dugard J 'Courts and structural poverty in South Africa: To what extent has the Constitutional Court expanded access and remedies to the poor?' (2012) *Conference Paper Fordham Law School* 13.

⁸² Lehmann K 'In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum Core' (2006) 22 *AM U INT'L L REV* 163, 165 & 181.

⁸³ Wilson S 'Litigating housing rights in Johannesburg's inner-city: 2004-2008' (2011) 27 *S Afr J Hum Rts* 127, 137; Liebenberg 2007 (n 84 below) 6.

undermine transformation through democratic processes cannot be ignored.⁸⁴ She argues that the courts may unintentionally deprive claimants and by the rulings that they make, exclude certain groups from access to socio-economic rights.⁸⁵ In McCann's view, legal systems serve primarily to protect the *status quo* and to enforce order.⁸⁶ As such legal strategies are considered inadequate to advance transformative policy goals, which it is argued can only be achieved through the interplay of extra-legal contextual factors.⁸⁷ By the Constitutional Court's restraining attitude the potential for using litigation in the struggle to achieve social justice has also increasingly been limited. This notwithstanding, conditions remain favourable, especially when litigation becomes an integral component in the broader commitment to transform South African society.

I assume that the rationale behind the critiques that I have examined rather barely demonstrate recognition of the potential of socio-economic rights litigation to achieve social change but that potential has not adequately been explored. Thus it is fair to also look at the transformative potential of socio-economic rights litigation.

2.3. Litigation's Transformative Potential

Socio-economic rights litigation generally aims at improving livelihood – ultimately for a broader community of persons in similar situations.⁸⁸ The value of litigation can therefore not be viewed only in terms of how successfully a case does in court or in terms of the ‘immediate impact’ of a favourable judgment.⁸⁹ Litigation for social transformation should rather be assessed in terms of how the entire litigation process impacts on social policy – directly or indirectly through influencing public consciousness and the development of jurisprudence.⁹⁰ Winning a socio-economic rights case remains a core motivating factor but Handler has pointed out that for a

⁸⁴ Liebenberg S ‘Socio-economic rights under a transformative Constitution: The role of the academic community and NGOs’ (2007) 8 *ESR Review* 1, 6.

⁸⁵ Liebenberg (n 84 above) 6.

⁸⁶ McCann M *Law and Social Movements* (2006) 77.

⁸⁷ McCann (n 86 above) 77.

⁸⁸ Gloppe 2005 (n 3 above) 4.

⁸⁹ Gloppe 2005 (n 3 above) 4.

⁹⁰ Gloppe 2005 (n 3 above) 5.

variety of reasons a judicial remedy may not always be satisfactory.⁹¹ This means that litigation may serve an indirect purpose that may include raising consciousness or dramatizing a cause.⁹² Therefore, to anticipate a systemic impact may be more strategic for achieving social justice than aiming at instant victory.⁹³ This is strategically important if the potential and use of litigation as a strategy in the struggle for social justice is to be understood and appreciated.

The mobilisation process may indirectly produce the same effect like a court victory would do.⁹⁴ The social mobilisation component can alter public perceptions and lead to profound social change.⁹⁵ This however, does not mean that litigation should be converted into a mechanism by which to solve political problems but should rather be seen as a strategy by which to challenge political failure.⁹⁶ In effect, litigation is essentially a reaction to realities of social injustice and a means of policing government action.⁹⁷ It is more or less a complementary strategy to the achievement of social justice, which in reality cannot substitute the inevitability of political obligation.⁹⁸ Van Huyssteen has argued that legal strategies rally around the necessity to encourage the simultaneous pursuit of alternative strategies for the achievement of egalitarian social justice, particularly in the context of huge challenges where the law on its own cannot guarantee anticipated transformation.⁹⁹ In this regard, I argue that socio-economic rights litigation has the potential to enable the deplorable circumstances of the poor to be redressed or to translate constitutional promises into reality and therefore also guarantees social justice for the poor.

Thus, in spite of the above mentioned critiques, I have endeavoured to illustrate that socio-economic rights litigation has potential to create social transformation and therefore can effectively be used as a strategy in the struggle for social justice. This transformative potential can

⁹¹ Handler J *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (1978) xi & 24.

⁹² Handler (n 91 above) 24.

⁹³ Handler (n 91 above) 24.

⁹⁴ Gloppe 2005 (n 3 above) 5.

⁹⁵ Dugard J & Langford M ‘Art or science? Synthesising lessons from public interest litigation and the dangers of legal determinism’ (2011) 27 *S Afr J Hum Rts* 39, 64.

⁹⁶ Christiansen 2010 (n 68 above) 611.

⁹⁷ Christiansen 2010 (n 68 above) 611.

⁹⁸ Christiansen 2010 (n 68 above) 611.

⁹⁹ Van Huyssteen E ‘The Constitutional Court and the redistribution of power in South Africa: Towards transformative constitutionalism’ (2000) 59:2 *African Studies* 245, 259.

however only become effective when litigation is conceived as an integral part of the broader political commitment to establish a society based on social justice. To explain this further, an understanding of context is important to be able to give a comprehensive appreciation of socio-economic rights litigation. In the section that follows, I explore the context within which litigation for social change takes effect. In this instance I describe the practicalities relating to litigation, which includes the components, mechanisms, processes and actors involved.

3. Contextual Framework

3.1 Principal Components

In examining the principal components that make up socio-economic rights litigation I shed light on how these components work together in advancing litigation for social change. Desai and Muralihdar have declared that public interest litigation marks a significant departure from traditional litigation processes.¹⁰⁰ It implies that litigation of this nature is composed of certain key components that are not common in ordinary litigation processes. My purpose therefore, is to examine the key components that distinguish litigation for social change and also to show how they combine to demonstrate the potential of litigation as a strategy in the struggle for social justice. Gloppen has asserted that the outcome of each stage in the litigation process determines the next stage.¹⁰¹ She explains that out-of-court mobilisation may influence the adjudication and implementation processes and that claims may be triggered by social outcomes and implementation gaps or influenced by previous adjudication.¹⁰² In what follows I examine the aspect of social and legal mobilisation and I explain how it adds up to advancing the potential of litigation for social transformation.

3.1.1. Social and legal mobilisation

¹⁰⁰ Desai AH & Muralihdar S ‘Public interest litigation: potential and problems’ in Kirpal *et al Supreme but Not Infallible – Essays in Honour of the Supreme Court of India* (2000) 159.

¹⁰¹ Gloppen S ‘Litigation as a strategy to hold governments accountable for implementing the right to health’ (2008) 10:2 *Health & Hum Rts* 21, 25.

¹⁰² Gloppen 2008 (n 101 above) 25.

Mass mobilisation amongst communities of the poor is reported as becoming almost a daily phenomenon in post-apartheid South Africa.¹⁰³ It is interesting to interrogate the causes of these popular uprisings and what they aim to achieve. An African proverb says that when rocks begin to roll from the top of a mountain something must have caused them to roll. Peter McInnes uses the metaphor of ‘making the kettle boil’ to illustrate how the poor are stirred into action by the circumstances in which they live.¹⁰⁴ The aspect of social and legal mobilisation is important to consider not only because it gives litigants the opportunity to formulate their claims but for the fact that victory in the streets may be essential for determining winning in court, for influencing policy and also for informing implementation of court orders.¹⁰⁵ The magnitude of social and legal mobilisation is often determined by the nature of the problem that triggers litigation.

3.1.1.1 Nature of the problem

Poverty constitutes one of the principal causes that provoke social mobilisation and in most cases leads to litigation. The Committee on Economic, Social and Cultural Rights defines poverty as ‘a human condition characterised by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living’.¹⁰⁶ The international community under the auspices of the United Nations has pointed out that extreme poverty is a deterrent to the full and effective enjoyment of human rights.¹⁰⁷ Framing poverty in human rights terms makes it as much a legal problem as it is a political problem.¹⁰⁸ The argument, at least from a human rights perspective is that poverty is a ‘violation of human rights’, which

¹⁰³ Alexander P ‘Rebellion of the poor: South Africa’s service delivery protests – a preliminary analysis’ (2010) 37 *Review of African Political Economy* 25-40; Khumalo S ‘Rebellion of the poor’ *The Mercury* <http://www.iol.co.za/mercury/rebellion-of-the-poor-1.1390950#.URJXiaDEMUI> (accessed: 06 February 2013).

¹⁰⁴ McInnes P ‘Making the kettle boil: Rights talk and political mobilisation around electricity and water services in Soweto’ (2005) *unpublished LLM dissertation, University of Witwatersrand* 10.

¹⁰⁵ Heywood M ‘Preventing mother-to-child HIV transmission in SA: Background, strategies and outcomes of the TAC case against the Minister of Health’ (2003) 19:2 *S Afr J Hum Rts* 278–315; Gloppeen S ‘Social rights litigation as transformation: South African perspectives’ in Jones P & Stokke K (eds), *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 153–180; Christiansen E ‘Adjudicating non-justiciable rights: Socio-economic rights and the South African Constitutional Court’ (2007) 38:2 *Columbia Hum Rts L Rev*; Gloppeen 2008 (n 101 above) 25.

¹⁰⁶ Prada MF *Empowering the Poor through Human Rights Litigation* (2011) 18.

¹⁰⁷ Prada (n 106 above) 17.

¹⁰⁸ Sibanda (n 40 above) 483.

makes it unlawful and therefore necessitates legal enforcement.¹⁰⁹ Peter McInnes has figured out that converting political demands into the language of rights amplifies the gravity of government's failure to fulfill its obligations.¹¹⁰ Consequently claims to a right as he explains, can radically change the way the problem of poverty is perceived.¹¹¹ Prada also thinks that the language of rights provides a normative framework in which vulnerable groups are perceived not as victims but are empowered and recognised as principal actors and subjects of law.¹¹² Dugard and Langford have also reasoned that legal empowerment enables the poor to turn part of their struggle into legal mobilisation – where aspirations are translated into assertions of rights.¹¹³ Thus, labeling poverty in terms of socio-economic rights provides a platform to resort to litigation.

The challenge in South Africa, as Pius Langa has pointed out, is that enough attention has not been paid to the subject of poverty, let alone to talk of its eradication.¹¹⁴ This is apparently because in formulating the transformation project, as Sibanda has explained, poverty eradication never got to be prioritised as a constitutional imperative.¹¹⁵ In the absence of such a distinct recognition of poverty as a major problem to be addressed, a number of scholars have suggested that the adjudication of socio-economic rights should translate into poverty eradication.¹¹⁶ The scale of poverty is said to be declining as a result of the provision of social grants and the extension of social services to poor households.¹¹⁷ However, the structural patterns of poverty remain a disturbing factor. Since the inception of democracy in South Africa only few previously disadvantaged blacks have enjoyed the privilege of sharing in the country's wealth through the

¹⁰⁹ Prada (n 106 above) 17.

¹¹⁰ McInnes (n 104 above) 3.

¹¹¹ McInnes (n 104 above) 3.

¹¹² Prada (n 106 above) 17.

¹¹³ Dugard & Langford (n 95 above) 43.

¹¹⁴ Langa (n 48 above) 446.

¹¹⁵ Sibanda (n 40 above) 482.

¹¹⁶ Dugard 2012 (n 81 above) 2; Langa (n 48 above) 447; *Grootboom* (n 70 above) paras 23-25; *Soobramoney v Minister of Health KwaZulu-Natal 1998* 1 SA 765 (CC) para 11.

¹¹⁷ Dugard 2012 (n 81 above) 4; see also Leibbrandt M *et al* 'Trends in South African income distribution and poverty since the fall of apartheid' (2010) *OECD Social, Employment and Migration Working Papers*, No 101.

capitalist rite of ‘Black Economic Empowerment’.¹¹⁸ Meanwhile, the rippling effects of poverty have continued to impact adversely on the poor majority. Raj Patel has thus established that while the introduction of constitutional democracy benefited a few, unemployment sky-rocketed, the provision of basic services staggered¹¹⁹ and the gap between the affluent and the destitute widened.¹²⁰ The economy is reported to have flourished during the decade from 1995 to 2005 but during the same period the level of human development plunged from 58th to 121st position.¹²¹ Proceeds of the economic boom failed to trickle down to the poor because wealth, according to capitalist thinking is not shareable, and so the poor were left to battle for survival.¹²² This could in part explain the wave of social uprisings and mass protests that have hit the country in recent years and in some instances have led to litigation.

Poverty in South Africa is multi-dimensional – relating more to ‘deprivation of capabilities or lack of empowerment,’ – essentially a denial of the opportunity to get out of poverty rather than just the lack of income or resources.¹²³ It alienates the poor from ‘civilised’ society as has been echoed by S’bu Zikode who has declared that:

We have not only been sentenced to permanent physical exclusion from society and its cities, schools, electricity, refuse removal and sewerage systems. Our life sentence has also removed us from the discussions that take place in society.¹²⁴

The condition of being poor disempowers and deprives the poor of the capacity to secure guaranteed socio-economic rights.¹²⁵ According to Patel, exclusion stems from and is legitimised by confinement to the state’s ‘authoritarian project and rituals of democratic tyranny’ based on the

¹¹⁸ Patel R ‘Cities without citizens: A perspective on the struggle of Abahlali baseMjondolo, the Durban Shackdweller Movement’ in McMichael P (ed) *Contesting Development: Critical Struggles for Social Change* (2010) 34.

¹¹⁹ Christodoulidis E ‘De-politicising poverty: Arendt in South Africa’ (2011) 3 *STELL L R* 501, 502.

¹²⁰ Patel (n 118 above) 34.

¹²¹ Patel (n 118 above) 34.

¹²² Patel (n 118 above) 34.

¹²³ Prada (n 106 above) 7.

¹²⁴ Zikode S & Nsibande Z ‘Serving our life sentences in the shacks’ (2010) available at: <http://www.abahlali.org/node/7187> (accessed: 31 December 2012).

¹²⁵ Prada (n 106 above) 18.

assumption that the only opinions that matter have been heard through the ballot box.¹²⁶ This condition compels the poor to the politics of protest and litigation that have become the main features of socio-economic contestation.¹²⁷ In 2005 alone over 6,000 protests and demonstrations were reported involving hundreds of thousands of participants.¹²⁸ In principle, this category of persons has virtually been banished into the ‘wilderness of democratic South Africa’ by the simple reason that they are poor.¹²⁹

Meanwhile, deserving of the constitutional rights guaranteed to all South Africans, ‘these South Africans’ are often compelled by the circumstances of their poverty to take to the streets in order to claim equal access to socio-economic entitlements. Sometimes they do so with force and violence. They claim not only the right to be protected but also the right to be recognised and they use this strategy as their only ticket to gain access to the same benefits and opportunities that are available to the ‘other South Africans’. They refuse to accept to be expelled as ‘obnoxious social nuisances’ from the country that ‘belongs to all who live in it’.¹³⁰ And so Albie Sachs has cautioned that the poor should not be regarded as helpless victims lacking the possibilities to take moral action.¹³¹ Due to the restraining nature of poverty a majority of the poor have in essence been unable to bring their legitimate claims to the courts.¹³² As such, they have devised different tactics by which they organise around their common problems.

3.1.1.2 Forms of organising around the problem

By examining the manner in which the poor organise themselves to deal with common challenges, I illustrate how the process of social mobilisation contributes to the advancement of litigation as a strategy in the struggle for social justice. When the tide of political goodwill turns against disempowered people, they are compelled by the circumstances to resort to alternative tactics.¹³³ They do so in order to challenge the failures of the political machinery, to thwart power

¹²⁶ Patel (n 118 above) 46.

¹²⁷ Dugard 2012 (n 81 above) 5.

¹²⁸ Patel (n 118 above) 39.

¹²⁹ Zikode & Nsibande (n 124 above).

¹³⁰ *Port Elizabeth Municipality* (n 44 above) para 41; see also preamble of the Constitution.

¹³¹ *Port Elizabeth Municipality* (n 44 above) para 41.

¹³² Budlender G ‘Access to courts’ (2004) 121 *S Afr L J* 339, 342.

¹³³ Handler (n 91 above) 22.

excesses or insufficiencies and to fast-track political promises. Communities of the poor have often used these tactics as a means of giving local meaning to the transformation project.

Where they have desperately wanted housing and shelter, they have gone the extra mile to make that possible even when it has meant invading state owned or privately own property, and the Court has judged that they cannot be evicted unless alternative accommodation is provided.¹³⁴ Where they have faced apartheid-style evictions to give way to government ‘priority’ projects, they have resisted and the Court has found their actions logical.¹³⁵ Where they have unjustly been excluded from state sponsored social programmes, they have claimed the right to inclusion and have been granted equitable access to the programmes.¹³⁶ Where they have been deprived of the enjoyment of basic municipal services, they have contested and the Court has in one instance ordered the restoration of such services.¹³⁷ Where also their peace and security as squatters of informal settlements have been threatened by legislation that allows for arbitrary evictions, they have taken the challenge to the Court, which has declared the said legislation unconstitutional.¹³⁸ With this stream of legal victories, it is important to look at the mechanisms through which they organise and mobilise around the common denominators of poverty and livelihood circumstances.

Social movements

Ashwin Desai has given an insightful account of the formation and operation of social movements and their struggle for social justice. He alleges that community movements, which he describes as the ‘magma of conflicting wills’ have confronted mainstream political organisation by deliberately engaging in actions that pose a challenge to conventional politics.¹³⁹ He says that the poor are not just concerned about recognition but also about challenging the *status quo*.¹⁴⁰

¹³⁴ See generally *Grootboom* (n 66 above); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

¹³⁵ See generally *Occupiers of 51 Olivia Road & Others v City of Johannesburg & Others* 2008 (5) BCLR 475 (CC); *Schubart Park & Others v City of Tshwane & Another* CCT 23/12 [2012] ZACC 26.

¹³⁶ See generally *Treatment Action Campaign* (n 66 above); *Khosa & Others v Minister of Social Development* 2004 (6) SA 505 (CC).

¹³⁷ See *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC).

¹³⁸ *Abahlali baseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC).

¹³⁹ Desai A ‘Neo-liberalism and its discontents: The rise of community movements in post-apartheid South Africa’ <http://ccs.ukzn.ac.za/files/Ashwin%27s%20paper%20in%20pdf%20format.pdf> (accessed: 15 October 2012) 10.

¹⁴⁰ Desai (n 139 above) 10-11.

Social movements represent a distinctive feature that has quite instrumentally changed the nature of socio-economic rights litigation in South Africa.¹⁴¹ They stimulate the ability of communities to organise in an associational capacity; uniting forces, engaging members actively, generating local expertise and resources, and sustaining collective action in vindicating rights.¹⁴² They function on a *modus operandi* characterised by the ability to organise community support to contest social injustices.¹⁴³ McCann has indicated that social movements tend to develop from the lowest levels of society, whose social status reflects fairly ‘low degrees of wealth, prestige or political clout’.¹⁴⁴ Generally they aim for a ‘broader scope of social and political transformation’ and are motivated by radical aspirations for a transformed society, which they sometimes achieve through combining ‘disruptive forms of political expression’ and ‘litigation’.¹⁴⁵

Circumstance and living conditions usually shape the ways in which social movements construct and articulate interest – primarily informing the types of issues around which they come together.¹⁴⁶ They tend to mobilise around issue-specific demands and they keep their vibrancy and radical impulse through responsiveness to the interests of their members.¹⁴⁷ State policies often form the prime target for contestation and demands are often formulated in a manner that logically drags the state directly into confrontation.¹⁴⁸ The state has in reaction scornfully dismissed social movement struggles for social justice as mere ‘service delivery protests’.¹⁴⁹ In some instances it has branded the membership of these movements as ‘criminals’ and therefore find the opportunity to heavy-handedly cracked down on their activities.¹⁵⁰ In other instances, when the official narrative has failed to brand the poor as ‘wolves’, they have been portrayed as

¹⁴¹ Gloppeen 2005 (n 3 above) 10.

¹⁴² Gloppeen 2005 (n 3 above) 10.

¹⁴³ Pieterse E & Oldfield S ‘Political opportunity structures of the urban social movements in South Africa’ (2002) *Isandla Institute* 9.

¹⁴⁴ McCann (n 86 above) xiv.

¹⁴⁵ McCann (n 86 above) xiv.

¹⁴⁶ Pieterse & Oldfield (n 143 above) 5-8.

¹⁴⁷ Pieterse & Oldfield (n 143 above) 5-8.

¹⁴⁸ Patel (n 118 above) 42; Desai (n 139 above) 7.

¹⁴⁹ Patel (n 118 above) 40.

¹⁵⁰ Patel (n 118 above) 40.

‘sheep’ that are being led and manipulated by a ‘third force’.¹⁵¹ The third force concept, as Patel explains, suggests that the poor are ‘too stupid, incapable, or politically immature’ to communicate their own grievances; much less organise to demand them.¹⁵²

As to moral agency, Desai contends that the ‘poors’ who form the membership base of social movements are not a miserable lot but people whose legitimate expectations for a better life as promised by the Constitution have suddenly been frustrated.¹⁵³ Therefore, with radical determination they refuse to take the ‘neo-liberal assault on their lives lying down.’¹⁵⁴ Structured outside of the framework of anti-apartheid ‘liberation movements’ the new formation of social movements have tended to represent an oppositional front to institutional politics.¹⁵⁵ This may account for the tension and confrontational manner in which they have functioned alongside the ANC-led government’s ideology of community organisation.¹⁵⁶ They challenge the ‘third force’ propaganda by their resolve to ‘reassert not merely their demands, but their right to have those demands heard’.¹⁵⁷ They claim the right to equality as South Africans; sometimes forcefully and intentionally confrontational – ‘forging new kinds of political community, which “citizenship” cannot explain.’¹⁵⁸ In this way, they define social justice in their own terms as part of their exercise of self-determination, thereby practically giving local meaning to the transformation project and apparently doing even better.¹⁵⁹

For strategic reasons, social movements with a common purpose often easily merge into networks or coalitions with a ‘high degree of popular participation’ to push forth a collective agenda.¹⁶⁰ Richard Ballard has stated that these collective agendas are usually expressed through mass rallies

¹⁵¹ Patel (n 118 above) 41.

¹⁵² Patel (n 118 above) 41.

¹⁵³ Desai (n 139 above) 11.

¹⁵⁴ Desai (n 139 above) 11.

¹⁵⁵ Pieterse & Oldfield (n 143 above) 4.

¹⁵⁶ Pieterse & Oldfield (n 143 above) 4.

¹⁵⁷ Patel (n 118 above) 41-45.

¹⁵⁸ Patel (n 118 above) 41-45.

¹⁵⁹ Welsh NA ‘Remembering the role of justice in resolution: Insights from procedural and social justice theories.’ (2004) *J Legal Educ* 49, 50.

¹⁶⁰ Ballard R *et al* ‘Globalisation, marginalisation and contemporary social movements in South Africa’ (2005) *African Affairs* 615, 617.

and defiance campaigns as well as the ‘shrewd use of the legal system’.¹⁶¹ This kind of associational practice provides a participatory platform that reassures the poor that their interests will not be overlooked.¹⁶² Socio-economic rights litigation has thus become the rallying forum where social movements have partnered with civil society organisations in the pursuit of social justice. With this, I move on to examine the agency of civil society and their role in advancing litigation as a potential strategy in the struggle for social justice.

Civil society

The late Chief Justice Pius Langa has asserted that the initiative to eradicate poverty and to improve the conditions of the poor through litigation ‘can only succeed if civil society gets involved in holding governments and relevant institutions accountable – exposing them when they fail to uphold the requirements’.¹⁶³ Civil society organisations fall among the category of ‘persons’ legally entitled to act in the public interest on behalf of those who cannot act in their own name or those who are ‘lacking in protective and assertive armour’.¹⁶⁴ Michael Edward’s conception of civil society asserts that lasting solutions to social problems cannot possibly be imagined, without the agency of civil society.¹⁶⁵ On this account, civil society organisations have undeniably demonstrated an on-going commitment to addressing the plight of the poor. They have shown this commitment by effectively combining the normative function as well as the pragmatic functions of transformative constitutionalism to push for pro-poor adjudication of socio-economic rights. I shall elaborate on this further below. Besides providing a platform for the marginalised to make their voices heard, civil society organisations also make access to justice possible for those who, because of their socio-economic circumstances are deprived of the means and the ability to do so.¹⁶⁶ I move on to look at the challenge that the poor face in accessing justice and I show the extent to which civil society has been instrumental in facilitating the process.

¹⁶¹ Ballard (n 160 above) 617.

¹⁶² Rosa S ‘Transformative constitutionalism in a democratic developmental state’ (2011) 3 *STELL R L* 543.

¹⁶³ Langa (n 48 above) 448.

¹⁶⁴ Liebenberg 2010 (n 41 above) 89.

¹⁶⁵ Edwards M ‘Civil society’ (2005) *The Encyclopaedia of Informal Education* available at: www.infed.org/association/civil_society.htm (accessed: 16 January 2013).

¹⁶⁶ Gloppe 2005 (n 3 above) 6-7.

3.1.2 Access to justice

Access to justice poses a major challenge to vindicating socio-economic rights through litigation. Section 34 of the Constitution guarantees the right of access to courts when applicants have reason to believe that their constitutional rights are threatened or have been violated.¹⁶⁷ Retired Justice O'Regan has stated that the right to approach the courts is as much a constitutional right as are the powers vested in the President to govern.¹⁶⁸ This empowering guarantee notwithstanding, Marcus and Budlender have identified that inaccessibility of the courts and legal processes by victims of socio-economic rights deprivation constitutes a major reason that has limited the potential of litigation for social change.¹⁶⁹ According to Okogbule, the extent to which social and redistributive justice is feasible in any society is determined by the level and effectiveness of the social justice system, in the sense that without access to justice the realisation of fundamental rights becomes practically impossible.¹⁷⁰ In South Africa, the problem is compounded by prevailing levels of poverty and inequality, which implies in principle that many people simply cannot pursue the legal enforcement path to the realisation of socio-economic rights. This category of persons – sometimes without adequate social protection, without resources or the assertive armour to engage in lengthy legal processes – are often constrained by the very circumstances of their vulnerability to seek the arm of justice with the hope to change their livelihood conditions.¹⁷¹

However, the generous procedural measures granted by section 38 of the Constitution make it possible for representative or public interest actions to be instituted on behalf of persons who are unable to access the courts because they are poor.¹⁷² On these grounds disadvantaged groups; who otherwise would be deprived of the opportunity of access to legal services due to financial or practical constraints, have progressively taken advantage of the opportunity to bring legal action

¹⁶⁷ O'Regan 2011 (n 1 above) 8.

¹⁶⁸ O'Regan 2011 (n 1 above) 8.

¹⁶⁹ Marcus & Budlender (n 43 above) 12-13; Bond P & Dugard J 'Water, human rights and social conflict: South African experiences' (2008) 1 *Law, Social Justice & Global Dev't* 4.

¹⁷⁰ Okogbule NS 'Access to justice and human rights protection in Nigeria: Problems and prospects' (2005) 3 *SUR-INT'L J HUM RTS* 94, 95-97.

¹⁷¹ Gloppe 2005 (n 3 above) 11-12.

¹⁷² Sita van Wyk J 'The needs and requirements for class action in South African law with specific reference to the pre-requisites for *locus standi in iudicio*' (2010) *unpublished LLM dissertation, University of Pretoria* 17; see also *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (4) SA 1131A-B (SCA).

against the state, through which systemic violations of socio-economic rights have been challenged.¹⁷³ This leads us to the next principal component which involves the actual process of litigating socio-economic rights that I engage with below.

3.1.3 Litigation

By looking at the actual process of socio-economic rights litigation I illustrate how it has contributed as a pragmatic strategy in the pursuit of social justice. In this regard I look at the purpose of litigation, the adjudication approaches used by the courts, the role of the courts as agents of social change and the representative actions provided by civil society organisations.

3.1.3.1 Purpose of litigation

Mbazira has observed that the decision to lodge socio-economic rights in the Constitution speaks of the commitment to transform society from one based on socio-economic deprivation to one based on equitable distribution of resources with the aim to advance the welfare of the poor.¹⁷⁴ O'Regan established in the *Mazibuko* judgment that the main purpose for the entrenchment of socio-economic rights is to ensure that government becomes responsive and accountable to citizens, not only through the ballot box but also through litigation.¹⁷⁵ She argues that the purpose of litigation concerning the positive obligations imposed by socio-economic rights should be to hold the democratic arms of government to account.¹⁷⁶ I argue that if litigation can achieve these objectives, which are inherently political in nature then it is logical to acknowledge litigation's potential to achieve social justice. For this reason, recourse is had to the courts on socio-economic rights matters to enable the courts to clarify the nature and content of the rights.¹⁷⁷

¹⁷³ Liebenberg 2010 (n 41 above) 38.

¹⁷⁴ Mbazira C *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 1.

¹⁷⁵ *Mazibuko* (n 66 above) para 98.

¹⁷⁶ *Mazibuko* (n 66 above) para 160.

¹⁷⁷ Jaichand V 'Public interest litigation strategies for advancing human rights in domestic systems of law' (2004) 1 *SUR-INT'L J HUM RTS* 126.

The courts have therefore, been urged to define the content of socio-economic rights in order to set an invariable standard for adjudication.¹⁷⁸ Lehmann has estimated that such a standard would provide a sense of direction to policy makers as a threshold measurement for progressive realisation.¹⁷⁹ She further argues that such an invariable standard would provide the basis on which claims could be framed in the event that the state fails to deliver according to the predetermined standards.¹⁸⁰ Thus, I argue that litigation for social change does not only aim at producing judicial outcomes but also to achieve far-reaching social impact, especially relating to the attainment of social justice. Thus, the Constitutional Court has adopted different adjudication approaches in order to achieve this goal, which I examine in the proceeding discussion.

3.1.3.2 Adjudication approaches

In examining the adjudication approaches in socio-economic rights litigation I illustrate how and the extent to which the Court has used its power of adjudication to advance litigation as a pragmatic strategy in the quest for social justice. Generally, the courts' socio-economic rights jurisprudence cannot as yet be credited with any unique or consistent adjudication approach. It has experienced a shifting application of approaches ranging from reasonableness to meaningful engagement. Some of the approaches have been useful in advancing litigation while others have instead frustrated the possibility of using litigation to achieve social justice. The dilemma that has shaped the courts' adjudication approaches has on the one hand, been determined by a commitment to reasoned adjudication.¹⁸¹ On the other hand, it has been influenced by a commitment to institutional integrity dictated by the question of separation of powers, which has in some instances constrained the Court to abandon its ethic of reasoned judgment.¹⁸² In order that the potential of socio-economic rights litigation may be developed, I argue in favour of a balanced adjudication approach that provides a forum for social justice to prevail and ensure that benefits accrue equitably to the poor. In my conviction, this would justify the potential of litigation as a pragmatic strategy and therefore guarantee the attainment of social justice.

¹⁷⁸ Bilchitz B 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *S Afr J Hum Rts* 1, 2.

¹⁷⁹ Lehmann (n 82 above) 165.

¹⁸⁰ Lehmann (n 82 above) 165.

¹⁸¹ Roux 2008 (n 77 above) 6; Ferraz 2009 (n 33 above) 9.

¹⁸² Roux 2008 (n 77 above) 6; Ferraz 2009 (n 33 above) 9.

Theunis Roux has stated that the Constitutional Court has so far applied at least five different adjudication strategies, which has enabled it to endure in the business of litigating socio-economic rights.¹⁸³ The approaches have varied strategically. In the test cases of *Soobramoney* and *Grootboom* the Court applied the reasonableness approach but with a lot of caution. *Soobramoney* produced no positive outcome; meanwhile *Grootboom* produced a timid positive outcome that never actually got to establish social justice for the litigants. The Court applied reasonableness characterised by a certain degree of assertiveness in *Treatment Action Campaign* and *Khosa* and the outcomes were to a large extent transformative. The Court however retreated in *Mazibuko*, in which instance its reasonableness approach was characterised by deference. Thus, the litigation did not yield any direct positive outcome in terms of transformative justice. The adjudication approaches in *Modderklip*, *Abahlali baseMjondolo* and *Joseph* were more assertive and robust, thus establishing a fair measure of transformative justice to the poor. In more recent cases, especially relating to housing rights the predominant approach has been one of meaningful engagement.¹⁸⁴ The outcomes in these cases have demonstrated that social justice in favour of the poor can be achieved through litigation, thus justifying my argument that litigation has potential and therefore can be used as a pragmatic strategy in the quest for social justice.

3.1.3.3 The courts as agents of social change

The justiciable nature of socio-economic rights bestows obligation on the courts to investigate the impact of legislation and policies or the absence of it on the lives of the poor and therefore, mandates the courts to craft transformative remedies if a violation is established.¹⁸⁵ The Court is enjoined as a decisive ‘political actor’¹⁸⁶ that is mandated to play ‘a meaningful role in the realisation of a better life for all.’¹⁸⁷ John Mubangizi has stated that the Constitutional Court has played a significant role in transformative adjudication but the question remains to what extent

¹⁸³ Roux 2008 (n 77 above) 3.

¹⁸⁴ *Port Elizabeth Municipality* (n 44 above) para 39; *Olivia Road* (n 135 above) paras 9-30; *Schubart Park* (n 135 above) para 42-51.

¹⁸⁵ Liebenberg 2010 (n 41 above) 37.

¹⁸⁶ Roux 2008 (n 77 above) 8.

¹⁸⁷ DoJ & CD ‘Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African state’ (2012) *Media Statement* 4-5.

this has translated into improved livelihood for the poor.¹⁸⁸ The Court has indeed assured that it cannot be so insensitive as to ignore the plight and interest of the poor.¹⁸⁹ As mentioned earlier, realisation of the transformation project is dependent on the Court's agency or activism in the process of transformative adjudication. How far it has achieved this remains a cause for concern.

It requires a 'pro-activist judicial offensive' to be able to establish the Brazilian model of adjudication alluded to by Vanice Lírio do Valle who has pointed out that when it comes to enforcing constitutional commitments the Brazilian judiciary is allowed to formulate public policy.¹⁹⁰ This is still a bone of contention in South Africa where the courts have been coerced by government to back down from functioning as prescribed by the Constitution.¹⁹¹ Through a demagogic propaganda the judiciary has been accused and branded as 'counter-revolutionary' to the political agenda.¹⁹² This has had a negative effect on the potential and use of litigation in pursuing social justice. In the discussion that follows I examine how civil society has used the adjudication space to advance the struggle for social justice on behalf of the poor.

3.1.3.4 Representative actions

Socio-economic rights actions have more often than not been instituted by social movements and civil society organisations acting in representative capacities on behalf of the poor. Such actions have mostly taken the form of legal representation and *amicus curiae* interventions. An *amicus curiae* is a friend of the court that joins a matter not as a party thereto, but to assist the court with

¹⁸⁸ Mubangizi J 'The constitutional protection of socio-economic rights in selected African countries: A comparative evaluation' (2006) 2 *Afr J Legal Study* 1, 7.

¹⁸⁹ Dugard 2008 (n 80 above) 232; Sachs 2007 (n 70 above) 18.

¹⁹⁰ Ginsburg T 'South Africa to "review" Constitutional Court' *Constitutionmaking.org*: <http://www.comparativeconstitutions.org/2012/03/south-africa-to-review-constitutional.html> (accessed: 22 January 2013). The reference is a blog message posted by Vanice Lírio do Valle in response to Ginsburg's online article. Vanice Lírio do Valle is professor at Universida de Estacio de Sá Rio de Janeiro, Brazil. See also Elias de Oliveira V & Noronha LNT 'Judiciary-executive relations in policy making: The case of drug distribution in the State of Sao Paulo' (2011) 5(2) *BPSR* 10-38; Taylor 'The judiciary and policy making in Brazil' (2008) 4 *DADOS* 1-17.

¹⁹¹ O'Regan 2011 (n 1 above) 1.

¹⁹² O'Regan 2011 (n 1 above) 2. 'Certain public figures have recently made comments about the appropriateness of the Constitution as a framework for our democracy. Some have gone as far as to suggest that the judiciary or at least some judges are "counter-revolutionary" and, more recently, that South Africa is in danger of becoming a "judicial dictatorship.'(Excerpt from O'Regan's lecture article).

information and argument about issues with respect to which it has special knowledge or expertise.¹⁹³ Civil society organisations have been welcome to act as *amici curiae* in socio-economic rights cases, to draw the attention of the court to relevant matters of law and facts to which attention would not otherwise be drawn.¹⁹⁴ In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to provide convincing and helpful submissions to assist the court in determining the case.¹⁹⁵ It might be questionable whether such intervention is in the interest of the court or of the litigants. A few practical examples will help to illustrate the extent to which these interventions have manifested in the interest of poor litigants.

It is stated that the intervention of the Legal Resources Centre in the *Grootboom* case had complex repercussions. It was seen on the one hand as detrimental to the case because it diverted from seeking relief for the litigants to enquiring instead about the government's housing programme.¹⁹⁶ On the other hand as Marcus and Budlender have argued, the case might not have produced any binding precedent in favour of the right to housing without the critical role of the *amicus* intervention.¹⁹⁷ Albie Sachs is quoted to have remarked that:

The amicus intervention swung the debate dramatically. Most of the preceding arguments had failed to really look socio-economic rights in the eye. There had been technical arguments and attempts to frame the case in terms of children's rights, but [the amicus intervention] forced us to consider what the nature of the obligations imposed by these rights was.... What was important was the nature of the discourse. It was placing socio-economic rights at the centre of our thinking and doctrine.¹⁹⁸

Alongside the Legal Resources Centre, the *amicus* intervention of the Community Law Centre also facilitated interpretation of relevant provisions, which the Court acknowledged, was detailed, helpful and creative in approaching the difficult and sensitive issues involved in the case.¹⁹⁹ *Amici*

¹⁹³ Khoza (n 55 above) 9.

¹⁹⁴ *In Re: Certain Amicus Curiae Applications; Minister of Health v Treatment Action Campaign* (CCT8/02) [2002] ZACC para13.

¹⁹⁵ *Certain Amicus Curiae Applications* (n 193 above) para 13.

¹⁹⁶ Marcus & Budlender (n 43 above) 58.

¹⁹⁷ Marcus & Budlender (n 43 above) 59.

¹⁹⁸ Sachs 2007 (n 70 above) 18.

¹⁹⁹ *Grootboom* (n 66 above) para 17.

in *Treatment Action Campaign* included the Institute for Democracy in South Africa and the Community Law Centre which presented eloquent submissions urging the Court to take into consideration the minimum core in adjudicating the right of access to health care.²⁰⁰ Though the submissions failed to convince the Court to adjust its approach it at least assisted in evoking the necessity of the minimum core obligation as a prerequisite for a transformative approach to socio-economic rights litigation.²⁰¹ Appearing as *amicus* in the *Mazibuko* case was the Centre on Housing Rights and Evictions. Peter Danchin has remarked that of particular interest is how the Centre on Housing Rights and Evictions was able to partner with a local non-governmental organisation and a social movement to use strategic litigation in conjunction with strong social mobilisation and advocacy to secure recognition of the right to water.²⁰² Legal representation was provided by the Centre for Applied Legal Studies. A contributing factor to the success of legal representation is the extent of legal literacy and legal advice that civil society organisations provide to the communities they represent.

Legal representation in the *Schubart Park* litigation was provided by Lawyers for Human Rights while the Socio-Economic Rights Institute played the role of *amicus*. Their roles were a major determinant of the success of the case. Thus, through legal representation and *amici curiae* interventions civil society organisations have assisted in interpreting socio-economic rights and thereby also secured transformative outcomes in favour of poor litigants. The Court took cognisance of this in *Mazibuko* when Justice O'Regan remarked:

The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation.... South Africa is fortunate to have a range of non-governmental organisations working in the legal arena seeking improvement in the lives of poor South Africans.... These organisations have developed an expertise in litigating in the interests of the poor to the great benefit of our society.... The challenges posed by social and economic rights litigation are significant, but given the benefits that it can offer, it should be pursued.²⁰³

²⁰⁰ Bilchitz 2003 (n 178 above) 1.

²⁰¹ Bilchitz 2003 (n 178 above) 1.

²⁰² Danchin P 'A human right to water? The South African Constitutional Court's decision in the *Mazibuko* case' (2010) *Electronic J Int'l L.*

²⁰³ *Mazibuko* (n 66 above) paras 160 &165.

Michelle O’Sullivan has argued that the role of the *amicus*, though critical, is to a certain extent limited by the fact that the *amicus* has no control over the approach the court may adopt in adjudicating the rights in question.²⁰⁴ This however, does not refute the particularly important role that representative actions have played in leveraging litigation for social change. I argue that the intervention of civil society organisations illustrates that the issues raised by socio-economic rights litigation are not just the concern of the litigants but involves issues of public interest. In this regard, it would be illogical to discredit socio-economic rights litigation, especially as it can effectively be employed by a cross section of society in the quest for social justice.

3.1.4 Judicial outcomes and social impact

For the potential of socio-economic rights litigation to be appreciated, it must be seen to produce outcomes that contribute to the achievement of social justice. For this reason I look at the judicial outcomes and social impact that emanate from the entire litigation process. These outcomes and impact depend partly on the nature of the judgments handed down by the courts.²⁰⁵ It has been stated earlier in this chapter that socio-economic rights litigation in South Africa is purposefully designed to leverage legal precedents with long term and far-reaching impact.²⁰⁶ Solange Rosa has acknowledged the increasing use of socio-economic rights litigation as a practical tool for monitoring compliance and for holding the state accountable for the progressive realisation of its constitutional obligations to the poor.²⁰⁷ She advocates that government must be held to its abdicated responsibility to redistribute social and economic resources in an equitable manner.²⁰⁸

Nevertheless, litigation may sometimes generate false anticipations that victory in court would immediately make life better.²⁰⁹ This may incite poor litigants to imagine socio-economic rights as translating directly into individual entitlements or the instant amelioration of their livelihood

²⁰⁴ Foundation for Human Rights ‘Celebrating a decade of democracy: A review of public interest law’ (2004) *Conference Report 20*.

²⁰⁵ Gloppe 2008 (n 101 above) 24.

²⁰⁶ Kathree (n 9 above) 33.

²⁰⁷ Rosa (n 162 above) 545.

²⁰⁸ Rosa (n 162 above) 545.

²⁰⁹ Pieterse R ‘Resuscitating socio-economic rights: Constitutional entitlement to health services’ (2006) 22 *S Afr J Hum Rts* 473, 483; Roux T ‘Understanding *Grootboom* – A response to Cass Sunstein’ (2002) *Constitutional Forum* 41, 42; Bilchitz D ‘Giving socio-economic rights teeth: The minimum core and its importance’ (2002) 119 *S Afr L J* 484, 485; Dugard 2012 (n 81 above) 14; Bilchitz 2003 (n 178 above) 2.

conditions.²¹⁰ Mbazira has argued that this may not always be the case, as court victories may either be followed by very minimal improvement or no immediate direct improvement at all.²¹¹

In considering broader scale social impact Skelton has cautioned that it is prudent to ‘watch out for individual litigants’²¹² because they might constitute a potential constraint to the essence of the public interest and ultimately to the struggle for social justice. I take watching out of individual litigants in this sense not to mean discarding the legitimate socio-economic claims of such individuals but to guard against redistributing huge resources to the selfish benefit of single person. If the prevailing levels of poverty, inequality and social exclusion in South Africa are to be surmounted, litigation should aim at securing judgments that have the tendency to progressively establish an egalitarian society. Thus, I re-iterate the argument that an impartial socio-economic rights jurisprudence is necessary to accomplish this goal. This would help to free the potential of the poor to explore opportunities and possibilities to ensure ‘the continuous improvement of living conditions’.²¹³

The Court has also held that socio-economic rights, particularly relating to the right of access to housing must be made more accessible not only to a larger number of people but progressively to a broader community.²¹⁴ The *Grootboom* litigants failed to reap any direct personal benefits from the landmark judgment they secured but the judgment has unquestionably impacted positively on subsequent housing and eviction cases.²¹⁵ The judgment established that the litigants could not instantly claim shelter or housing as individual entitlements but could only require the state to act reasonably to ensure that shelter and housing becomes available to those in desperate need.²¹⁶ The kind of impartial jurisprudence that I advocate for in socio-economic rights litigation is such that it would have enabled the Court in *Grootboom* as a matter of social justice to consider the entire community that was affected and to adjudicate in such a manner as to enable the litigants reap

²¹⁰ Pieterse (n 209 above) 483; Roux 2002 (n 209 above) 42; Bilchitz 2002 (n 209 above) 485; Dugard 2012 (n 81 above) 14.

²¹¹ Mbazira (n 174 above) 3.

²¹² Skelton (n 53 above) 16; Dugard & Langford (n 95 above) 47.

²¹³ UN ICESCR art 11.1; see also Preamble of the Constitution.

²¹⁴ *Grootboom* (n 66 above) para 45.

²¹⁵ Donald A & Mottershaw E ‘Evaluating the impact of human rights litigation on policy and practice: A case study of the UK’ (2009) 1:3 *J Hum Rts Practice* 339, 341.

²¹⁶ *Grootboom* (n 66 above) para 95.

material entitlements to their claims. According to Mbazira the Constitutional Court has come short of guaranteeing substantive outcomes through its failure to utilise structural interdicts or to provide supervision over the enforcement of its socio-economic rights judgments.²¹⁷ If the courts were to adjust and orient their approaches in adjudication and in granting remedy to focus more on the attainment of social justice they would to a large extent develop the potential of litigation for social change.

I have so far explained the principal components that socio-economic rights litigation is composed of. By so doing, I have shown how and the extent to which the different components contribute in advancing litigation in the pursuit of social justice. I now go further to look at how socio-economic rights litigation has evolved over the past couple of decades.

3.2 Trajectory of Socio-Economic Rights Litigation

The forgoing analysis gives evidence of a well-established practice of socio-economic rights litigation in South Africa. I proceed therefore to trace the path through which litigation for social change has developed. This can be identified in three periods, involving a period of contestation, a first decade of litigation and a second decade of litigation. By looking at the evolution of socio-economic rights litigation in these three phases, I point out some important trends and milestones and I show how they contributed in promoting the use of litigation to achieve social justice.

3.2.1 Period of contestation

Before South Africa's phenomenal transition to democracy became reality Albie Sachs foresaw that things would be the way they are in the new dispensation. He predicted as follows:

The danger exists in our country as in any other that a new elite will emerge which will use its official position to accumulate wealth, power and status for itself. The poor will remain poor and oppressed. The only difference would be that the poor and powerless will no longer be disenfranchised, that they will only be poor and powerless and that instead of a racial oppression we will have nonracial oppression.²¹⁸

²¹⁷ Mbazira (n 174 above) 3.

²¹⁸ Sachs 1992 (n 60 above) xi.

With this imminent worry Sachs advocated for an ‘orderly and fair redistribution’ by means of the establishment of a minimum standard of rights of a social and economic nature to safeguard the democratic interest of the disempowered poor.²¹⁹ When it came to drawing up a new constitution the question of inclusion of socio-economic rights was strongly contested. Objections bordered around principles of justiciability, ambiguity, budgetary implications, the dangers of jeopardising the separation of powers doctrine and concerns about the courts’ capacity to enforce socio-economic rights.²²⁰ However, a vigorous civil society pushed for and secured the constitutional protection of socio-economic rights.²²¹ They anticipated that justiciability of the rights would enable persons marginalised by poverty to challenge state policies that impact negatively on their livelihood.²²² Consequently, the objections failed the constitutional certification test.²²³ The question then became not whether but how socio-economic rights should be enforced.²²⁴

3.2.2 First decade of litigation

When the first challenge to the judicial enforcement of socio-economic rights cropped up in *Soobramoney*, framed as a claim to emergency medical treatment under section 27(3), the Constitutional Court charted its course cautiously.²²⁵ The claim was basically individualistic in nature and was the first case to bring to the limelight the justiciability of a socio-economic right. It is important to consider whether it could have produced a different outcome had the case been approached otherwise. What if the claim had been instituted as one of public interest on behalf of all persons requiring dialysis treatment? This could possibly have rallied other affected persons into a social movement to present the problem as a collective public injury. Possibly, the approach to the litigation could have changed from claiming ‘emergency medical treatment’ to challenging the Department of Health’s policy on dialysis treatment. Perhaps also, an *amicus curiae* intervention could have influenced the course and the judicial outcome of the case. From the stand point of precedence Ngwena and Cook have argued that *Soobramoney* neither contributed

²¹⁹ Davis D ‘Adjudicating the socio-economic rights in the South African Constitution: Towards “deference lite”?’ (2006) 22 *S Afr J Hum Rts* 301, 302.

²²⁰ Mubangizi (n 188 above) 3-4; Mbazira (n 174 above) 5-6.

²²¹ Liebenberg 2010 (n 41 above) 21-22.

²²² Liebenberg 2010 (n 41 above) 21-22.

²²³ *In Re Certification of the Constitution of the Republic of South Africa, 1996* (4) SA 744 (CC) paras 76-78.

²²⁴ Stewart L ‘Adjudicating socio-economic rights under a transformative constitution’ (2010) 20 *PENN STATE INT'L L REV* 487, 489.

²²⁵ Davis 2006 (n 219 above) 305.

much in shedding light on the understanding of socio-economic rights litigation nor did it lay down any guidelines that could be followed to develop jurisprudence on socio-economic rights.²²⁶ This is primarily because it was the first case that the Court, with virtually no institutional experience was called upon to chart new territory.²²⁷

Grootboom is the landmark judgment that established the framework for the courts' socio-economic rights jurisprudence as well as set the pace for socio-economic rights litigation.²²⁸ The Court developed a new form of relief, which Mark Tushnet refers to as 'dialogic remedy' – a form of communication mechanism between the Court and government by which enforcement of the Court's ruling could be monitored.²²⁹ Tushnet explains the dialogic nature of the remedy in the sense that it created the possibility for litigants to return to the Court to challenge the plan that government was ordered to establish.²³⁰ The Court would then have had to determine whether the plan met the reasonableness requirement; otherwise, the Court could require government to develop a plan and present it to the Court for approval.²³¹ In the same line of reasoning Wesson has stated that the Court's approach was basically 'collaborative'.²³² He argues that the Court could have performed better in producing a transformative outcome as it later did in *Treatment Action Campaign and Khosa*.²³³

²²⁶ Ngwena C & Cook RJ 'Rights concerning health' in Brand & Heyns (eds) *Socio-Economic Rights in South Africa* (2005) PULP 135-137; Ngwena 'Adjudicating socio-economic rights - transforming South African society: A response to Linda Jansen Van Rensburg's paper' (2003) 6 *Potchefstroom Elec L J* 2; Wesson (n 232 below) 284; Mubangizi (n 188 above) 6.

²²⁷ Ngwena & Cook (n 226 above) 137; Ngwena (n 226 above) 2; Wesson (n 232 below) 284; Mubangizi (n 188 above) 6.

²²⁸ Davis 2006 (n 219 above) 306, Mubangizi (n 188 above) 3.

²²⁹ Tushnet M 'Reflections on the enforcement of social and economic rights in the twenty-first century' (2011) 4 *NUJS L Rev* 177, 183.

²³⁰ Tushnet (n 229 above) 184.

²³¹ Tushnet (n 229 above) 184.

²³² Wesson M '*Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *S Afr J Hum Rts* 284, 295.

²³³ Wesson (n 232 above) 295.

Thought the judgment failed to provide individual direct relief to the litigants, its broader impact on the development of jurisprudence has widely been acclaimed.²³⁴ Here lies the lacuna with socio-economic rights litigation.²³⁵ It does not serve the purpose of social justice if litigation only contributes in developing the law and does less in way of improving the livelihood of the poor. The *Grootboom* case no doubt, has been commended for paving the way for subsequent socio-economic rights cases, which shows that socio-economic rights litigation has potential to be used as a strategy in the struggle for social justice but that potential has not adequately been explored.

The pace of litigation gathered momentum in *Treatment Action Campaign*. Of interest about *Treatment Action Campaign* is the massive mobilisation strategy which, combined with litigation resulted in the expansion of the state's antiretroviral programme to all HIV-positive pregnant mothers to claim as a matter of right, a single dose of Nevirapine at any public health facility that could administer the therapy.²³⁶ The strategy used in the litigation is said to have influenced the Court's assertive approach in the enforcement of the right to health care.²³⁷ Theunis Roux however, argues that the outcome of the litigation was caused more by the political circumstances surrounding the case.²³⁸ According to Davis, the outcome in *Treatment Action Campaign* was largely determined by the ability to exert political pressure, while litigation was used just as one among a series of strategies.²³⁹ This is unlike in *Grootboom* where the squatters possessed little or no political influence. The *Treatment Action Campaign* approach suggests that liberating strategies are more important in litigating socio-economic rights than mere reliance on the law, which provides less protective shield.²⁴⁰ It spite of its overwhelming success the *Treatment Action Campaign* model has largely been considered more as a utopian strategy that may not always be 'affordable, practical, necessary or even desirable' in other instances.²⁴¹ Nevertheless, the judgment made a huge contribution to the development of socio-economic rights litigation. It emphasised the Court's inclination to the public interest nature of litigation by establishing that

²³⁴ Pillay (n 72 above) 256.

²³⁵ See section 1 of chapter one.

²³⁶ Wesson (n 232 above) 296.

²³⁷ Wesson (n 232 above) 296.

²³⁸ Roux 2009 (n 2 above) 137.

²³⁹ Davis 2006 (n 219 above) 326.

²⁴⁰ Davis 2006 (n 219 above) 326.

²⁴¹ Dugard & Langford (n 95 above) 61.

socio-economic rights do not ‘give rise to a self-standing and independent positive right’ enforceable independently.²⁴²

In *Khosa* like in *Treatment Action Campaign*, the Court established the redistributive social justice factor by demonstrating a greater motivation to impose far-reaching financial obligations upon the state where its policy programmes were found not to satisfy the reasonableness test.²⁴³ The record of the Court in *Soobramoney*, *Grootboom* and *Treatment Action Campaign* was one of calculated prudence founded upon an apparent consciousness to stay within defined operational boundaries.²⁴⁴ *Grootboom*, *Treatment Action Campaign* and *Khosa* highlight the social justice factor that the Court had to deal with, in giving recognition and inclusion to vulnerable and unfairly excluded groups with a legitimate claim to the state’s socio-economic programmes from which others already benefited. These groups included those in desperate need of shelter in the *Grootboom* case, HIV-positive pregnant mothers in the *Treatment Action Campaign* case and permanent residents in the *Khosa* case.

3.2.3 Second decade of litigation

The second decade of litigating socio-economic rights has been more progressive than the previous. The Court has with a bit more openness pro-actively forged a vigorous role for itself, which has helped to shape and to advance the potential of litigation for social change.²⁴⁵ The Court’s strategy has shifted from being utterly prudent during the first decade to become more tactfully flexible, which Roux has described as ‘tactical adjudication’.²⁴⁶ In this decade, most of the litigation has dealt with the right of access to municipal services such as water and electricity and predominantly with housing and evictions.

The Court’s unstructured and inconsistent pattern of reasonableness, which it has chosen to sustain more or less, in deference to state policy than in preference to the lived realities of the poor is unlikely to change any time soon as Stuart and Dugard have ascertained.²⁴⁷ They argue

²⁴² *Treatment Action Campaign* (n 136 above) para 39; Wilson & Dugard 2010 (n 245 below) 11.

²⁴³ Wesson (n 232 above) 296; Mubangizi (n 188 above) 7.

²⁴⁴ Davis 2006 (n 219 above) 314.

²⁴⁵ Wilson S & Dugard J ‘Constitutional jurisprudence: First and second waves’ (2010) SERI 2.

²⁴⁶ Wilson & Dugard 2010 (n 245 above) 24.

²⁴⁷ Wilson & Dugard 2010 (n 245 above) 11.

that the Court made an unprecedented shift in *Mazibuko*, which rendered the reasonableness benchmark virtually meaningless.²⁴⁸ Lucy Williams has stated that by failing to hold the City of Johannesburg accountable in any meaningful way as the Court has established that it is the purpose of litigation to do, the Court provided minimal direction upon which enquiries on socio-economic rights litigation could be based.²⁴⁹ *Mazibuko* presented opportunity but the Court failed to utilise it to advance the potential of litigation as a strategy to achieve social justice for the poor who were deprived of water, which the Court rightly recognised as the essence of life.²⁵⁰

In another surprise twist the Court in the *Joseph* case pro-actively created a new socio-economic right to municipal services, which is not implicitly guaranteed by the Constitution.²⁵¹ Wilson and Dugard have reasoned that this significant development has opened up a range of new possibilities that has resulted in the reconnection of electricity to a large number of impoverished households in Soweto.²⁵² The Court's role in *Mazibuko* and in *Joseph* is noted to be quite contradictory. However, the cases provide important lessons to enable understanding of the dimensions of litigation in the struggle to achieve social justice. *Mazibuko* and *Joseph* each bring a unique dimension to the development of socio-economic rights litigation. In spite of the unfavourable judgment *Mazibuko* produced impact in creating public awareness on the right to water. Meanwhile, the positive judgment in *Joseph* has remained practically unenforceable due to technical constraints but has also recorded significant social impact.²⁵³ Both judgments to a certain extent therefore, have contributed to the development of socio-economic rights litigation.

Litigation relating to housing and evictions has constituted the load of socio-economic rights cases that the Court has adjudicated during this second decade. Successful litigation in these instances has inspired a series of decisions in which poor litigants have successfully resisted evictions and claimed alternative shelter from the state.²⁵⁴ In *Olivia Road* the Court fashioned the

²⁴⁸ Wilson & Dugard 2010 (n 245 above) 20-24; Liebenberg 2010 (n 41 above) xxii & 470.

²⁴⁹ Williams LA 'The role of courts in the quantitative-implementation of social and economic rights: A comparative study' (2010) 3 *Constitutional Court Review* 141, 189.

²⁵⁰ *Mazibuko* (n 66 above) para 1-2.

²⁵¹ *Joseph* (n 137 above) paras 34-40; Dugard & Langford (n 95 above) 46.

²⁵² Wilson & Dugard 2010 (n 245 above) 19; Dugard & Langford (n 95 above) 46 & 60.

²⁵³ Dugard & Langford (n 95 above) 60.

²⁵⁴ Wilson & Dugard 2010 (n 245 above) 7.

principle of ‘meaningful engagement’ that has turned out to be an innovative mechanism by which the state and aggrieved litigants must ‘talk to each other meaningfully’ in order to bargain a compromise.²⁵⁵ Christiansen has stated that this requirement is meant to be satisfied through a reconciliatory type endeavour with the aim to find common ground of understanding.²⁵⁶ Meaningful engagement has thus become a ‘major pre-condition for eviction’.²⁵⁷ Through this mechanism, the challenge to balance competing claims is partly resolved by getting the litigating parties to find functional solutions according to their respective needs and interests.²⁵⁸ However, the difficulty arises when eviction has already taken place and the parties are ordered by the courts to engage meaningfully.²⁵⁹

I have been able to show how socio-economic rights litigation has evolved through the three phases that I have just examined. In examining these stages I have illustrated the relevance and potential of litigation for social change by highlighting its major tendencies and significant milestones as well as how litigation has progressively been used as a strategy in the struggle for social justice. The analysis shows that jurisprudence on socio-economic rights is still evolving and the indicators point to the fact that litigation may become even better and more transformative in the near future. On the basis of this analysis I argue that socio-economic rights litigation has potential to be used as a strategy in the struggle for social justice and therefore needs to be explored and developed.

4 Conclusion

The link between litigation and social transformation, which embodies the attainment of social justice, is apparently not straightforward. From the analysis in this chapter, I have endeavoured to establish, at least in theory that litigation has potential to facilitate or to engineer social transformation and therefore, can be used as a pragmatic strategy in the pursuit of social justice. This is possible when transformation is understood to go beyond structural and institutional change to incorporate improvement in livelihood and the empowerment of the impoverished and

²⁵⁵ *Olivia Road* (n 135 above) para 14, Christiansen 2010 (n 68 above) 601-602.

²⁵⁶ Christiansen 2010 (n 68 above) 562.

²⁵⁷ Christiansen 2010 (n 68 above) 562.

²⁵⁸ Christiansen 2010 (n 68 above) 562.

²⁵⁹ See 2.4.2 of chapter three.

socially excluded. It is also possible to conceive of litigation as a potential strategy in the struggle for social justice when litigation is understood to include not only the action that takes place in court but most importantly the course of events that happen outside of the courtroom before and after adjudication. These together constitute the means by which the impact of litigation on livelihood as well as on the broader society can effectively be measured.

The framework for understanding how this is feasibly possible necessitated an in depth description of socio-economic rights litigation as a pragmatic strategy that responds exclusively to issues of a socio-economic rights nature and aims at satisfying the public interest. I further examined how transformative constitutionalism could translate into improving livelihood for the poor by describing two functional components of the concept. I illustrated how these components work together in determining the extent to which socio-economic rights litigation functions in the struggle for social justice.²⁶⁰ Generally, the nature of claims has increasingly taken a public interest dimension orchestrated by the collective agency of civil society and social movements, predominantly targeting state policy.²⁶¹ In spite of the Constitutional Court's inconsistent adjudication approach, here is optimism that socio-economic rights litigation can achieve transformative impact and continue to have some potential to achieve pro-poor outcomes.²⁶²

According to Danie Brand it is more likely for the courts to give consideration to statutory entitlements than they would by enforcing a broadly phrased constitutional right to which they have to give content, which often conflicts with questions of separation of powers.²⁶³ With regard to identifying the most pragmatic litigation model to drive social transformation Dugard and Langford have argued against the mechanistic reasoning established by Marcus and Budlender. They contend that public impact litigation is generally too unpredictable to be assessed through a set of laid down criteria.²⁶⁴ They propose a more dynamic approach for formulating and analysing the impact of litigation – one that is open to varied legal possibilities in unpredictable

²⁶⁰ See 2.1.2 above

²⁶¹ Wilson & Dugard 2010 (n 245 above) 11.

²⁶² Wilson & Dugard 2010 (n 245 above) 25-26.

²⁶³ Brand D 'Introduction to socio-economic rights in the South African Constitution' in Brand D & Heyns C (eds) *Socio-Economic Rights in South Africa* (2005) 1, 14.

²⁶⁴ Dugard & Langford (n 95 above) 39.

situations.²⁶⁵ In other words, there is no mathematically accurate model to socio-economic rights litigation. I have generally examined the different dimensions of socio-economic rights litigation and argue that it has potential which has not adequately been explored.²⁶⁶ For the potential of socio-economic rights litigation to be appreciated it is important that litigation pursues an equitable goal to improve quality of life and to facilitate the attainment of social justice. Thus, I further argued that to develop the potential of litigation entails developing a balanced socio-economic rights jurisprudence that provides a forum for the prevalence of social justice to ensure equitable benefits to the poor.²⁶⁷

The reality about litigating socio-economic rights is central to the realisation of the social transformation project where the courts and civil society are noted to play a crucial role in determining the extent to which litigation can become beneficial to the poor and also how social justice can be achieved in the process. Litigants' expectations are usually highly ambitious but outcomes may not always satisfy those expectations wholly. Individual aspirations may sometimes be frustrated, in which case it becomes more strategic to anticipate impact on a broader scale and in the long term, with the understanding that social transformation is a progressive enterprise.

The path that I traced in the development of socio-economic rights reveals three distinct periods through which litigation has evolved. Originating from controversy and contestation during moments of uncertainty, I illustrated how litigation has cautiously paved its path in a politically sensitive environment.²⁶⁸ The development has been gradual but progressively it gives assurance to become more transformative in future. The trajectory that it has taken reveals important tendencies upon which I round up this chapter on a constructive note in favour of the potential of litigation as a pragmatic strategy for the transformation project.²⁶⁹ This assertion holds the assurance that litigation is capable of creating meaningful impact in the lives of the poor and the wider society.

²⁶⁵ Dugard & Langford (n 95 above) 41.

²⁶⁶ See 2.1.2; 2.2.2 and 3.1.7 above.

²⁶⁷ See 3.1.2.2; 3.1.4 and 3.1.7 above.

²⁶⁸ Klare (n 45 above) 166.

²⁶⁹ Wilson & Dugard 2010 (n 245 above) 25-26.

This does not mean that litigation is the most appropriate strategy in the fulfillment of socio-economic rights nor does it mean that litigation necessarily contributes positively.²⁷⁰ It can only be effective when used as a complementary strategy and as an integral part of the broader commitment to address the magnitude of socio-economic challenges. In this regard, I suggest that socio-economic rights litigation needs to be developed further and increasingly explored to advance the cause for social justice.²⁷¹ In the next chapter I shall provide some evidence from jurisprudence of the Constitutional Court to illustrate the practicalities of socio-economic rights litigation in the pursuit of social justice as it is envisaged by the transformation project.

²⁷⁰ Gloppe 2008 (n 101 above) 21-36.

²⁷¹ See 2.1.2; 2.1.3; 2.3; and 3.1.2.4 above

CHAPTER THREE

Case Analyses on Litigating Socio-Economic Rights

1. Introduction

The rights enshrined in the Constitution constitute the building blocks to the country's constitutional democracy.¹ The application of these provisions imposes obligations on the legislature, the executive, the judiciary and other organs of state to translate the rights effectively into tangible entitlements.² In the words of Karl Klare the Bill of Rights 'imposes positive or affirmative duties on the state to combat poverty and promote social welfare, to assist people in authentically exercising and enjoying their constitutional rights, and to facilitate and support individual self-realization.'³ The state bears the major responsibility to ensure the progressive realisation of socio-economic rights.⁴ However, it is equally granted for enforcement of the rights to happen through the courts – when contestation is raised challenging democratic or politically grounded strategies.⁵ In this instance, Linda Stewart has ascertained that courts are mandated to make use of their 'quasi law-making' powers to translate entrenched socio-economic rights into enforceable legal claims.⁶ How and to what extent this has been actualised remains a major academic concern.

It has been argued that the enforcement of socio-economic rights blurs the separation of powers distinction and therefore threatens the essence and survival of democracy.⁷ It implies that the realisation of socio-economic rights falls exclusively within the jurisdiction of the people's

¹ Sect 7 of the Constitution of the Republic of South Africa 1996.

² Sect 8(1) of the Constitution.

³ Klare K 'Legal culture and transformative constitutionalism' (1998) 14 *S Afr J Hum Rts* 146, 154.

⁴ Sects 7(2), 25(5), 26(2) & 27(2) of the Constitution.

⁵ Sects 34 & 38 the Constitution.

⁶ Stewart L 'Adjudicating socio-economic rights under a transformative constitution' (2010) 20:3 *PENN STATE INT'L L REV* 487, 506.

⁷ Brennan M 'To adjudicate and enforce socio-economic rights: South Africa proves that domestic courts are a viable option' (2009) 9:1 *QUTLJ* 64, 72; Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 13.

elected representatives and not that of unelected and politically unaccountable judges.⁸ On account of this, the impact of socio-economic rights jurisprudence in transforming society has been contested.⁹ The main argument that I developed in the previous chapter is to the effect that socio-economic rights litigation has potential, at least in principle to advance the social transformation agenda and therefore contribute to the broader commitment to establish social justice in South Africa. Moving from theory to practice, I sustain and substantiate that argument with evidence based in part on the judgments of the Constitutional Court.

My purpose is to create understanding and to illustrate how socio-economic rights have in reality translated into litigation and the extent to which litigation has manifested in practical terms in the pursuit of social justice. With evidence drawn from analysis of the *Mazibuko*, *Modderklip*, *Abahlali baseMjondolo* and *Schubart Park* judgments, I illustrate how turning to the courts for remedy on issues of a political dimension has helped to advance livelihood and social transformation. I base my analysis on the assumption that the guarantee to lay claim to socio-economic rights through litigation requires claimants to approach the courts with a legitimate claim.¹⁰ This usually goes with litigants' anticipation to achieve redistributive justice and the aspiration that an egalitarian and better society would be established as a result.¹¹ However, Eric Christiansen has claimed that while the Court has recorded significant accomplishments, the impact it has created on the seemingly intractable problems of socio-economic injustices has been minimal.¹² The question that I pose and try to answer in this chapter is: How effectively has socio-economic rights litigation been used as a strategy in the struggle for social justice and what impact has it produced?

For Donald and Mottershaw, a fair assessment of the role of the courts and the impact of socio-economic rights jurisprudence in social transformation would require looking not exclusively

⁸ Mbazira C *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 17.

⁹ DoJ & CD 'Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State' (2012) *Media Statement* ii.

¹⁰ Jaichand V 'Public interest litigation strategies for advancing human rights in domestic systems of law' (2004) 1 *SUR – INT'L J HUM RTS* 126, 127.

¹¹ Handler J *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (1978) 3.

¹² Christiansen E 'Transformative constitutionalism in South Africa: Creative uses of constitutional court authority to advance substantive justice' (2010) 13 *J of Gender, Race & Justice* 575, 577.

from a political angle or from a purely legal perspective but rather to cast the net more extensively.¹³ They argue that the impact of litigation ‘may be seen in resulting changes to public policy’ as much as it ‘may also be evident in outcomes in the form of...empirical social realities’ that are connected to the judgment – not just what the impact is but how it happens.¹⁴ Accordingly, Karin Lehman thinks that a proper understanding of the courts’ socio-economic rights jurisprudence requires an insightful appreciation of the facts of each case and the socio-economic circumstances against which each decision is taken.¹⁵ An understanding of the reasons why litigation may or may not translate into social change requires identifying potential as well as limitations, which should then be stretched beyond the particular cases and factored into future processes of using the law as a tool for social transformation.¹⁶ It is in this light that I devote this chapter to a study of the cases mentioned above. The cases are selected with no exceptional consideration other than to give ample breadth and depth to the analysis of the facts, circumstances and impact of each. In so doing the cases bear relevance beyond their specific instances such that conclusions are not drawn on a shallow basis.¹⁷

In section 2 that follows, I make a comprehensive analysis of the selected cases – highlighting the facts, the legal issues dealt with, the decisions that the Court arrived at and how it came to such conclusions. I discuss *Mazibuko* principally with the purpose to portray the imperfections of socio-economic rights litigation. I point out how the potential of litigation could have been explored as a strategy in the pursuit of social justice. I go further to examine the transformative potential of litigation in the *Modderklip*, *Abahlali baseMjondolo* and *Schubart Park* cases. In analysing the cases I examine the circumstances that generate contestation and how they combine with the law to trigger the motivation to litigate. By so doing, I illustrate the significant role that litigation plays as part of the commitment to establish a transformed society. In the concluding section 3, I summarise the findings captured in this chapter. I establish how and the extent to

¹³ Donald A & Mottershaw E ‘Evaluating the impact of human rights litigation on policy and practice: A case study of the UK’ (2009) 1:3 *J Hum Rts Practice* 339, 341.

¹⁴ Donald & Mottershaw (n 13 above) 342.

¹⁵ Lehmann K ‘In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum Core’ (2006) 22 *AM U INT'L L REV* 163, 166.

¹⁶ Donald & Mottershaw (n 13 above) 339.

¹⁷ Donald & Mottershaw (n 13 above) 344.

which the different cases provide empirical evidence of the potential of litigation in the quest to achieve social justice.

2. Analysis of the Cases

2.1 *Mazibuko v City of Johannesburg*

2.1.1 Socio-legal mobilisation around the right to water

In this section I examine how the impoverished community of Phiri joined forces with a coalition of local social movements and civil society organisations, combining social mobilisation with litigation to claim the right to water. Lindiwe Mazibuko and four others representing the community of Phiri in Soweto were extremely poor when they launched their action in the public interest, challenging the City of Johannesburg's water policy.¹⁸ They claimed that the quantity of water provided by the City as free basic water was not sufficient to enable them live a life with dignity.¹⁹ The promises of post-apartheid South Africa guarantee an abundance of opportunities that simply require freeing the potential of every person to improve quality of life.²⁰ As part of the plan to fulfill this promise, Jackie Dugard submits that the government recognised the need to 'redistribute water resources and services more equitably'.²¹ In accordance a 'progressive legislative framework for water services' comprising *inter alia* a national Free Basic Water policy was passed, which aimed at ensuring the provision of a sustenance quantity of water per household per month.²² Dugard observes that these aspirations were however, gradually eroded by the emergent neo-liberal obsession with cost-recovery through imposition of a pay-as-you-go metering system that resulted in the mechanical disconnection of the water supply.²³ As a result of the massive disconnections partly because some of the residents could not afford to pay for any extra consumption, large numbers of households were completely deprived of access to water.²⁴

¹⁸ *Mazibuko & Others v City of Johannesburg & Others* CCT 39/09 (2009) ZACC 28 para 44.

¹⁹ *Mazibuko* (n 18 above) para 44.

²⁰ See Preamble of the Constitution.

²¹ Dugard J 'Civic action and the legal mobilisation: The Phiri water meters case' in Handmaker J & Berkhouw R (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 73.

²² Dugard 2010 (n 21 above) 73.

²³ Dugard 2010 (n 21 above) 74, 77.

²⁴ *Mazibuko* (n 18 above) para 166.

Frustrated by such betrayal, the aggrieved residents rallied support from the Anti-Privatisation Forum, which helped to mobilise the community into a resistance campaign against the installation of pre-paid metres.²⁵ Dugard has reported that when community resistance proved futile the Anti-Privatisation Forum took a strategic decision to resort to litigation in spite of its initial skepticism about the idea of rights and the law.²⁶ The campaign grew into an alliance of affiliate organisations including the Soweto Electricity Crisis Committee and the Coalition Against Water Privatisation.²⁷ Legal representation was provided by the Freedom of Expression Institute and the Centre for Applied Legal Studies.²⁸ The coalition resorted to litigation as a strategic option to challenge the City of Johannesburg's water policy and the installation of pre-paid metres, which they claimed deprived the community of the constitutional right to sufficient water.²⁹ The first instance victory at the Johannesburg High Court is reported to have provided the movement a motivational force to advance the struggle for the right of access to water.³⁰

2.1.2 Facts and legal issues involved

The *Mazibuko* case dealt with the section 27(1)(b) right to have access to sufficient water. The litigation originated from the City of Johannesburg's plan to save water through what it called Operation *Gcin'amanzi*, the pilot phase of which took place in the Phiri neighbourhood in Soweto.³¹ The operation was formulated with the aim to redress the general problem of acute water losses and non-payment for water services in the whole of Soweto.³² Implementation of the programme entailed changing from the old system of a fix rate payment per month to a cost recovery system regulated by pre-payment metres whereby residents had to pay according to consumption.³³ Dugard has pointed out that by the old system most of the residents defaulted in

²⁵ Dugard 2010 (n 21 above) 74.

²⁶ Dugard 2010 (n 21 above) 74.

²⁷ Dugard 2010 (n 21 above) 87-88.

²⁸ Dugard 2010 (n 21 above) 87-88.

²⁹ Dugard 2010 (n 21 above) 87-88.

³⁰ Dugard 2010 (n 21 above) 74.

³¹ *Mazibuko* (n 18 above) para 166.

³² Dugard 2010 (n 21 above) 73; *Mazibuko* (n 18 above) para 13.

³³ Quinot G 'Substantive reasoning in administrative law adjudication' (2010) 3 *Constitutional Court Review* 111, 124.

payment but still enjoyed the luxury of uninterrupted access to water.³⁴ The Court noted that as a result of such a practice the municipality suffered enormous deficit in revenue.³⁵ The new water policy seemed good-intentioned but it created problems to the impoverished residents in the sense that the pre-paid metres automatically disconnected the water supply once the 6 kilolitres free basic water granted per household was exhausted.³⁶

The residents found this new policy as infringing on their right of access to sufficient water and therefore mobilised to challenge it.³⁷ The contentious issue that the Court was seized to adjudicate upon centred on the constitutionality of the Free Basic Water policy as well as the lawfulness of the installation of pre-paid water metres.³⁸ The residents contested on the one hand the 6 kilolitres monthly basic water allowance as not amounting to ‘sufficient water’.³⁹ On the other hand they argued that the installation of pre-paid metres was unlawful, unreasonable, unfair and discriminatory.⁴⁰ They urged the Court to define the content of the right to water by quantifying the amount of water that is sufficient to guarantee a right to life with dignity, which in their argument should amount to 50 litres per person per day.⁴¹

In dealing with the constitutionality of the water policy the Court relied on two statutory texts, including section 27 of the Constitution and section 3 of the Water Services Act.⁴² Restricting its interpretative reasoning predominantly on section 27(1)(b) and 27(2) the Court stated that the nature of a right can only be understood within the context of the obligations imposed by it.⁴³ It further declared that the obligation imposed on government is one to take reasonable legislative and other measures to ensure progressive realisation.⁴⁴ In a deferential manner, the Court held that

³⁴ Dugard 2010 (n 21 above) 82.

³⁵ *Mazibuko* (n 18 above) para 12

³⁶ *Mazibuko* (n 18 above) para 6, Quinot (n 33 above) 124.

³⁷ Quinot (n 33 above) 124.

³⁸ *Mazibuko* (n 18 above) para 8 & 25.

³⁹ Constitutional Court of South Africa *Mazibuko and Others v City of Johannesburg and Others* CCT 39/09 [2009] ZACC 28 (2009) *Media Summary* 2.

⁴⁰ *Media summary* (n 39 above) 2.

⁴¹ *Mazibuko* (n 18 above) para 51.

⁴² *Mazibuko* (n 18 above) paras 19 & 20.

⁴³ Stewart (n 6 above) 504.

⁴⁴ Stewart (n 6 above) 504; *Mazibuko* (n 18 above) para 67.

it is inappropriate for a court to give a quantified content to what constitutes sufficient water because it is the prerogative of government to do so.⁴⁵ The judgment thus established that the City's water policy was constitutionally reasonable and that the installation of pre-paid meters was lawful and compliant.⁴⁶ The orders made by the Supreme Court of Appeal and the High Court granting victory to the litigants were thus reversed.⁴⁷ Thus, the Court squandered the opportunity to advance the potential of litigation as a strategy in the quest for social justice.

2.1.2.1 Missed opportunity

I question the manner in which the Court arrived at its conclusions in *Mazibuko*. I argue that the judgment was restrictive of the Court's agency in the accomplishment of the transformation project and therefore also restrictive of the potential of litigation to achieve social change. I examine how the Court compromised its established reasonableness standard and how this impacted in limiting the potential of litigation to advance the cause for social justice in the distribution of water. In the introductory paragraphs of the judgment, O'Regan presented an elaborate account of the indispensability of water as a basic necessity for human existence, which she noted is scarce and inequitably distributed.⁴⁸ She went on to underline that the constitutional value of equality will not be accomplished where 'water is abundantly available to the wealthy, but not to the poor'.⁴⁹ She went further to acknowledge that the constitutional project demands that a lot be done to improve the quality of life of all citizens.⁵⁰ That notwithstanding, judgment was pronounced in favour of the City of Johannesburg.⁵¹

I ask whether in the light of the Court's verdict the reasonableness test was sufficiently applied. By stating that the case needed to be understood in the context of the challenges facing Johannesburg as a City,⁵² I argue that the Court's angle of approach to the case appeared *prima facie* biased and one-sided. Geo Quinot rightfully also observed that the approach was

⁴⁵ *Mazibuko* (n 18 above) para 61.

⁴⁶ *Mazibuko* (n 18 above) paras 9 & 169; Quinot (n 33 above) 126.

⁴⁷ *Mazibuko* (n 18 above) para 169.

⁴⁸ *Mazibuko* (n 18 above) para 1.

⁴⁹ *Mazibuko* (n 18 above) para 2.

⁵⁰ *Mazibuko* (n 18 above) para 7.

⁵¹ *Mazibuko* (n 18 above) para 9, 169; Quinot (n 33 above) 126.

⁵² *Mazibuko* (n 18 above) para 7.

conspicuously lacking of the same kind of consideration for the dismal personal circumstances of many of the residents and the effect of the inadequacy of water imposed on their lives.⁵³ Quinot thinks that the Court showed more sympathy to the City of Johannesburg by emphasising the hardship that it had suffered as a result of significant water losses and the problem of non-payment.⁵⁴ Thus, the aspect of requiring government to justify its use of public power was ignored. According to Mureinik's conception of a culture of justification⁵⁵ the city of Johannesburg should have been required to provide substantive justification for its action, which amounted to refusing the litigants the quantity of water that they estimated constitutes sufficient water to meet their livelihood needs. By a culture of justification Mureinik refers to a 'culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command.'⁵⁶ Cohen-Eliya and Porat's account of a culture of justification requires government to provide 'substantive justification' for its actions in terms of the 'rationality and reasonableness of every action and the trade-offs that every action necessarily involves'.⁵⁷

The City of Johannesburg was not called upon to justify its refusal to provide sufficient water to the poor. Quinot has thus queried how the Court came to the conclusion that the City's water policy was reasonable.⁵⁸ He argues that alternative interpretations seemed possible and wonders why the Court did not explain its preference for reasonableness.⁵⁹ I return to this in a while with a suggestion as to the sort of alternative interpretation that the Court could have exploited. In Lehmann's view, *Mazibuko* presented occasion for the Court to articulate its role as an 'effective agent of social change' and a custodian of the transformation project but it failed to utilise the opportunity.⁶⁰ This portrays the courts' detachment from the realities of daily life which has been

⁵³ Quinot (n 33 above) 126.

⁵⁴ Quinot (n 33 above) 126; *Mazibuko* (n 18 above) para 12, 18, 40.

⁵⁵ Mureinik E 'Bridge to where?: Introducing the Interim Bill of Rights' (1994) 10 *S Afr J Hum Rts* 31, 32.

⁵⁶ Mureinik (n 55 above) 32.

⁵⁷ Cohen-Eliya & Porat 'Proportionality and the culture of justification' (2011) 59 *AM J COM L* 463, 466.

⁵⁸ Quinot (n 33 above) 128.

⁵⁹ Quinot (n 33 above) 129.

⁶⁰ Lehmann (n 15 above) 165.

captured in O'Regan's assertion that the courts have avoided a 'jurisprudence of exasperation'.⁶¹ I argue that by so doing the courts have distanced themselves from probing into the dire circumstances that cause the poor to litigate and therefore limited the potential of litigation to be used as a strategy in the struggle to achieve social justice. The enforcement of socio-economic rights cannot amount to improved quality of life if the livelihood circumstances of the poor cannot be interrogated during adjudication. If the Court approached the case from this angle it would probably have been moved to undertake an empirical scrutiny of the livelihood circumstances of the litigants, which it recognised was marginalised.⁶² This may have enabled the Court to come to a more robust and probably more transformative conclusion. By compromising the reasonableness standard in adjudicating the case, the Court significantly limited litigation's potential to advance the struggle for social justice.

The litigants' claim was not just about the right to water but about having access to *sufficient* water to meet livelihood needs and to improve quality of life. The problem arose because the City would not agree to provide the quantity of water that the litigants were claiming. The point of my argument is that the Court could have arrived at a different conclusion – obviously more pro-poor without offending the separation of powers doctrine that it tried to safeguard. I suggest that the Court could have achieved this by adopting a balanced adjudication approach that provides a forum for the prevalence of social justice as well as ensures that the benefits of litigation accrue to the litigants. One way by which the Court could have produced a more transformative outcome could have been by alerting the City of its constitutional obligation to take 'other measures',⁶³ at least with the anticipation to create a jurisprudential precedent on the very essential socio-economic right to water. This could have advanced the potential of litigation in the struggle to achieve social justice. I explain below what I mean by the obligation to take other measures.

2.1.2.2 Exploring the obligation to take other measures

I raise this argument to illustrate that the litigants or the civil society organisations acting on their behalf could have framed the claim for sufficient water on the basis of requiring the City to take

⁶¹ O'Regan K 'A Forum for reason: Reflections on the role and work of the Constitutional Court' (2011) *Helen Suzman Memorial Lecture, Johannesburg* 9. By jurisprudence of exasperation, she means the situation where judges' decisions may be influenced by exasperation with the deplorable conditions in the country.

⁶² *Mazibuko* (n 18 above) para 10.

⁶³ Sects 25(5), 26(2) & 27(2) of the Constitution

other measures besides the policy measures that it had taken. The obligation imposed by section 27(2) of the Constitution requires the state to ‘take reasonable legislative AND other measures,’ to achieve the progressive realisation of the socio-economic rights contained in the provision. I place emphasis on *and* to illustrate that it is not a matter of simply taking legislative measures and reviewing them constantly as the Court erred to think.⁶⁴ There is clearly an obligation, besides taking legislative measures to also take other measures to ensure progressive realisation. This means that when the legislative measures taken are challenged as unreasonable the state is obliged to take other measures in order to achieve progressive realisation. Following O'Regan's assertion that the courts have opted to pursue a ‘jurisprudence of accountability’,⁶⁵ I argue that the Court should have applied the reasonableness standard with a bit more forthrightness and should have ventured a little further into holding the City of Johannesburg to stringent accountability.

The litigants' legal representatives also missed the opportunity to press on the Court to enquire into the City's obligation to take ‘other measures’ with regards to its water policy, considering that the Phiri residents were acutely poor and could not afford to pay for additional consumption of water?⁶⁶ This could have led the Court to reach a different – apparently more pro-poor conclusion. It could have enabled the Court to produce a more transformative outcome to ensure access to sufficient water for the impoverished community. The Court could have also, after analysing the inevitability of water to life and the consequences that denying access to sufficient water could have on livelihood, proceeded to consider the matter not only as a socio-economic right but as a ‘right-to-life’ case.⁶⁷ I support this argument with the fact that the Court has the capacity to have crafted a more transformative outcome, at least for the sake of translating the constitutional vision that promises improve quality of life for all, but it wasted the opportunity.

2.1.3 Outcomes and impact of the case

By looking at the judicial outcomes and social impact of the *Mazibuko* case, I examine the extent to which litigation manifested as a strategy in the struggle for social justice. In this analysis I look at the adverse effect that the judgment had, especially on the livelihood of the litigants as well as

⁶⁴ *Mazibuko* (n 18 above) para 40.

⁶⁵ O'Regan (n 61 above) 9.

⁶⁶ *Mazibuko* (n 18 above) para 31.

⁶⁷ See Langford M *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*, Centre on Housing Rights & Evictions (2003) 14.

the positive impact on the broader society. From a scholarly perspective positive impact can be deduced by focusing more on the broader societal bearing and how the judgment resonates beyond direct expected outcomes.⁶⁸ In this light, Dugard has reasoned that in spite of defeat in court *Mazibuko* produced remarkable material impact, where the legal mobilisation factor ensured approximately the same gains as a favourable judgment would have granted.⁶⁹ Her argument holds that the water campaign helped to point out the commercial unfairness of municipal water supply.⁷⁰ The Court noted too that as a consequence of the litigation ‘the City had continually amended its policies during the course of the litigation’, which it acknowledged was beneficial to the community.⁷¹ I share in Geo Quinot’s view that the *Mazibuko* judgment constituted a setback to the potential of litigation because it failed to make any significant contribution to the project of transformative constitutionalism.⁷²

I hold a contrary opinion to Dugard’s view about the impact of the judgment. I argue that the judgment might have had a broader societal impact or a legal impact in advancing jurisprudence but has not directly translated into the right of access to sufficient water for the poor. I have pointed out in chapter one that this study is intended to deal more closely with livelihood transformation than with institutional or structural change. As such, I argue that social justice should not only aim to develop the law or to institute structural changes in society but must be seen to improve the lives of the marginalised. On the impact of the judgment on the litigants, I agree with Wilson and Dugard in their assertion that claimants approach the courts because they have a particular interest to vindicate.⁷³ They argue that ‘when the court issues a favourable ruling, it is because the law recognises that their interests are worthy of protection.’⁷⁴ I suppose that when Lindiwe Mazibuko and the four others led the rest of the aggrieved residents of Phiri into litigation against the City of Johannesburg, their aim was not to create headline news in the

⁶⁸ Dugard J & Langford M ‘Art or science? Synthesising lessons from public interest litigation and the dangers of legal determinism’ (2011) 27 *S Afr J Hum Rts* 39, 40-41.

⁶⁹ Dugard 2010 (n 21 above) 76.

⁷⁰ Dugard J ‘The Phiri water case (*Mazibuko and Others v City of Johannesburg and Others*): Can human rights traverse the commercialization of water in South Africa?’ (2008) *Conference Paper* 3.

⁷¹ *Mazibuko* (n 18 above) para 163.

⁷² Quinot (n 33 above) 136.

⁷³ Wilson S & Dugard J ‘Taking poverty seriously: The South African Constitutional Court and socio-economic rights’ (2011) 3 *STELL LR* 664, 672.

⁷⁴ Wilson & Dugard (n 73 above) 672.

media or to become the subject of legal and academic discourse. They simply were asking to have additional water – a fundamental necessity for survival – to be able to live a life with dignity.

The Court basically turned down their demand and consequently affected their livelihood, thereby also exacerbated the circumstances of their poverty. A straightforward conclusion from the Court's ruling was that the residents of Phiri would not get any additional amount of water than the City of Johannesburg had legislated to provide. From the Court's recognition of the value of water when it stated that water is life and without it, we will die,⁷⁵ I argue that to deny the poor access to sufficient water therefore means to strip them off the fundamental right to human dignity and basically to deprive them of the right to life.⁷⁶ With the litigants' expectations turned down, the Court's verdict meant the end of the episode of a lengthy struggle to give meaning to social justice. Life was to return to normal for the litigants and all the excitement about constitutional democracy and the promises of a better life simply collapsed into the daily realities of having to continue the struggle for survival without sufficient water.

As I have argued a while earlier, the dire hardship caused to the litigants as a result of the negative judgment could have been averted and their livelihood could at least have been ameliorated. It was the responsibility of the organisations litigating on behalf of the residents to press for, and also the duty of the Court to have exercised a little more discretion to hold the City of Johannesburg accountable for its water policy. Like I have mentioned earlier, it could have done so by requiring the City to take other measures to ensure that the litigants have access to sufficient water, especially considering their desperate circumstances. By this argument I am saying that litigation holds great potential to engineer livelihood transformation but that potential has not adequately been explored. It therefore demands that socio-economic rights litigation be developed as a pragmatic strategy by which to address the magnitude of socio-economic challenges. To develop the potential of litigation requires the courts to adopt a balanced socio-economic rights jurisprudence that provides a forum for social justice to prevail so that the benefits of litigation may accrue equitably to the poor.

⁷⁵ *Mazibuko* (n 18 above) para 1.

⁷⁶ Sects 10 & 11 of the Constitution.

The Court in *Mazibuko* as well as the civil society organisations involved had the occasion to advance litigation's transformative potential but simply wasted the opportunity. I have used this analysis to highlight on the one hand the fact that litigation has potential to create social change and to point out on the other hand that it is not an absolute remedy to socio-economic rights problems. I argue that in spite of the broader and long term impact that the case is said to have produced, the litigants remained largely disfavoured and adversely affected by the judgment. However, this could have been averted and a transformative outcome could have been reached if the Court took the initiative to explore the inherent potential of the case a little more extensively in order that social justice may be seen to be done. I presume that the gates remain open if another litigation relating to the right to water comes up again, for the Court to right the wrongs that it made in *Mazibuko*. By this, I am advancing the argument that the precedent laid down in *Mazibuko* does not foreclose further litigation on the right to water.

2.2 *President of the Republic of South Africa v Modderklip Boerdery*

2.2.1 Legal action against unlawful occupiers

The *Modderklip*⁷⁷ litigation began with eviction proceedings instituted by a private land owner against a group of settlers who unlawfully invaded and occupied his land.⁷⁸ The case dealt with the section 25 property right of the landowner and the section 26 right of access to adequate housing, which incorporates the right not to be evicted without proper court proceedings.⁷⁹ For the purpose of this study, I deal only with the aspect of the litigation that has to do with the right to housing for the unlawful occupiers. The matter started when a group of squatters invaded farmland belonging to Modderklip Boerdery (Modderklip) in the Benoni locality.⁸⁰ Occupation of the land happened as a result of a spill-over of population from the nearby overcrowded township community of Daveyton.⁸¹ Initially they occupied a strip of land at the edge of the township

⁷⁷ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

⁷⁸ Tissington K 'Demolishing development at Gabon Informal Settlement: Public interest litigation beyond Modderklip' (2011) 27 *S Afr J Hum Rts* 192.

⁷⁹ Wilson S 'Judicial enforcement of the right to protection from arbitrary evictions: Lessons from Mandelaville' (2006) 22 *S Afr J Hum Rts* 535; Tissington 2011 (n 78 above) 192.

⁸⁰ Wilson S 'Breaking the tie: Evictions from private land, homelessness and a new normality' (2009) *S Afr L J* 270, 276; *Modderklip* (n 77 above) para 3.

⁸¹ *Modderklip* (n 77 above) para 3.

belonging to the municipality from which they were instantly and forcefully evicted.⁸² They found alternative accommodation in the Modderklip farmland, which they increasingly occupied and established what became known as the ‘Gabon Informal Settlement’.⁸³ Modderklip obtained an eviction order from the Johannesburg High Court, which never got to be executed because all the relevant state authorities from whom Modderklip requested assistance failed to collaborate.⁸⁴

Modderklip then launched action requesting the Pretoria High Court to compel the state to enforce the eviction order.⁸⁵ Finding the state in contravention of the obligations imposed by sections 26(1) and (2) of the Constitution, the Pretoria High Court issued a structural interdict requiring the state to present a comprehensive plan on how it intended to implement the eviction order.⁸⁶ Not comfortable with the ruling, the state petitioned the Supreme Court of Appeal which substantively upheld the decision of the lower court but changed the order against the state. Instead of simply requiring the state to make a plan on how it would enforce the eviction order, the Supreme Court of Appeal ordered the state to pay compensation to Modderklip for damages incurred as a result of the unlawful occupation.⁸⁷ The state proceeded with the appeal to the Constitutional Court, which also found the state in breach of its constitutional obligation to enforce the eviction order and therefore dismissed the state’s appeal with cost.⁸⁸

In its ruling the Constitutional Court held the state to a double obligation to protect Modderklip’s right to property that had been infringed by unlawful occupiers and at the same time upheld the right of the squatters to have access to adequate housing.⁸⁹ The orders required the state to pay compensation to Modderklip for the entire duration of the unlawful occupation.⁹⁰ The illegal occupiers were granted entitlement to remain on the land until the state had made alternative

⁸² *Modderklip* (n 77 above) para 3.

⁸³ *Modderklip* (n 77 above) para 7-8.

⁸⁴ *Modderklip* (n 77 above) para 8.

⁸⁵ *Modderklip* (n 77 above) para 11.

⁸⁶ *Modderklip* (n 77 above) para 8.

⁸⁷ *Modderklip* (n 77 above) para 16.

⁸⁸ *Modderklip* (n 77 above) para 68(3)(a) & (4).

⁸⁹ Brand JFD ‘Courts, socio-economic rights and transformative politics (2009) *unpublished LLD thesis, Stellenbosch University* 109.

⁹⁰ *Modderklip* (n 77 above) para 68(3)(b).

arrangement for their resettlement.⁹¹ In essence, as Danie Brand has noted, the order required the state to pay tenancy for the land so that the squatters could be guaranteed shelter, without further infringing on Modderklip's property rights.⁹² In contrast with *Mazibuko*, the Court in *Modderklip* was more sympathetic towards the poor and therefore delved into greater length to make particularly robust findings.⁹³ I move on then to examine the circumstances that necessitated the Court to come to such conclusions – granting remedies that were quite interfering into policy issues and having huge budgetary implications.

2.2.2 Nowhere to go

One of the challenges for the poor to survive in democratic South Africa is the acute problem of homelessness that has often given rise to socio-economic rights litigation.⁹⁴ According to Brand, this poses 'questions of major political concern'.⁹⁵ The Constitutional Court held that:

The frustration and helplessness suffered by many who still struggle against heavy odds to meet the challenge merely to survive and to have shelter can never be underestimated. The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved (footnote omitted).⁹⁶

An understanding of circumstances such as is described in the text quoted above is important not only for emphasising the plight of the poor but also for exposing the betrayal of political promises to marginalise constituencies. Context sensitivity constitutes an essential tool not only for bridging the gap between government and the governed but most importantly, for determining pro-poor remedies and for framing transformative strategies.⁹⁷ Difficulties arise when litigation involves engaging with issues that have to do with policy formulation and the budget. Within this scenario the political organs of state have often parted ways with the judiciary over jurisdiction on socio-economic rights questions that have a political dimension. Time and again the poor have

⁹¹ *Modderklip* (n 77 above) para 68(3)(c).

⁹² Brand (n 89 above) 109.

⁹³ Brand (n 89 above) 249-250.

⁹⁴ *Modderklip* (n 77 above) para 36.

⁹⁵ Brand (n 89 above) 61.

⁹⁶ *Modderklip* (n 77 above) para 36.

⁹⁷ See Brand (n 89 above) 240.

been trapped in the confusion and their legitimate expectations for social justice have been frustrated.

The eviction of the squatters from state-owned land, coupled with the reluctance of state organs to cooperate in finding alternative shelter⁹⁸ exposed the callousness of political will to address the plight of the poor. Left with nowhere to go after being convicted on criminal charges for trespass, the squatters simply returned to continue their illegal occupation of the same farmland from which they were haunted with eviction.⁹⁹ Not minding the consequences of their actions they went further to defy an eviction order issued by the court.¹⁰⁰ As their numbers swelled, the squatters went ahead with full consciousness of their illegal occupation of the farmland, to establish the Gabon Informal Settlement, which the Court noted was lined with streets, fenced and numbered homes, commercial activities and a functional civic structure.¹⁰¹

This illustrates how a desperate but resolute people, frustrated by the failures of political will, have forged their own living space within the South Africa that ‘belongs to all who live in it’.¹⁰² Through defiance and litigation they have given practical meaning to the constitutional provision that says, ‘everyone has the right to have access to adequate housing.’¹⁰³ The squatter’s steadfastness to stay played an instrumental part in regulating the vigour of the Court’s scrutiny of the facts of the case. This led the Court to the conclusion that though the occupation of the farmland was unlawful the occupiers could not be evicted unless suitable alternative land or accommodation was made available by the state.¹⁰⁴ According to Brand, the squatters had moved into the Modderklip land not with a mind to compel the state to provide them with alternative accommodation but simply because they had previously been evicted from state-owned land and therefore had nowhere else to go.¹⁰⁵ If the municipality made provision for alternative accommodation after evicting the squatters from the Chris Hani settlement, the *Modderklip*

⁹⁸ *Modderklip* (n 77 above) para 3, 6.

⁹⁹ *Modderklip* (n 77 above) para 5.

¹⁰⁰ *Modderklip* (n 77 above) para 7.

¹⁰¹ *Modderklip* (n 77 above) para 8.

¹⁰² See Preamble of the Constitution.

¹⁰³ Sect 26(1) of the Constitution.

¹⁰⁴ Brand (n 89 above) 157.

¹⁰⁵ Brand (n 89 above) 250.

situation might not have arisen. The decision in *Grootboom* for instance, required that the state must have a housing policy which responds reasonably to the needs of the most desperate and that it must provide at least temporary shelter for those with no access to land.¹⁰⁶

Five years after *Grootboom* the state found itself in the *Modderklip* case unable to respond to the urgent housing needs of desperate squatters but instead perpetuated apartheid-style forced eviction of the unlawful occupiers from its land and encouraged Modderklip to do the same.¹⁰⁷ Stuart Wilson has stated that forced removals under the apartheid system served as a tool for the implementation of segregationist laws that gave effect to the project of systematic dispossession and marginalisation.¹⁰⁸ I argue that such a practice can no longer be conceivable under a constitutional democracy that undertakes to pursue social justice. To justify this argument, Wilson has ascertained that the post-apartheid legal order seeks among other things to reverse and to replace that old order, by mandating the courts to lead the cause for social justice.¹⁰⁹ In this regard, he suggests that judges must exercise the extensive authority assigned to them with profound sensitivity to the particular needs of the large number of destitute people who often are confronted with threats of arbitrary eviction.¹¹⁰ It requires the courts to determine, usually through enquiry into the relevant social and legal circumstances whether or not an eviction is reasonable and whether it is just and equitable to order the removal of people from their homes.¹¹¹ In dealing with situations of this nature the courts are required to develop an adjudication approach that enables social justice to prevail in such a manner that poor litigants can be able to reap equitable benefits from litigation.

With nowhere else to go, the Modderklip squatters simply exercised their constitutional right not to be evicted without an order of court after all relevant circumstances must have been looked into.¹¹² Through litigation the Court granted the squatters the right to be heard in resisting their

¹⁰⁶ *Government of the Republic of South Africa v Grootboom & Others* 2000 11 BCLR 1169 (CC) paras 42, 44 & 99; Wilson 2009 (n 80 above) 272 & 277.

¹⁰⁷ *Modderklip* (n 77 above) para 3-4.

¹⁰⁸ Wilson 2006 (n 79 above) 535.

¹⁰⁹ Wilson 2006 (n 79 above) 536.

¹¹⁰ Wilson 2006 (n 79 above) 535-536.

¹¹¹ Wilson 2006 (n 79 above) 536.

¹¹² Sect 26(3) of the Constitution.

exclusion from the processes of determining social justice with regard to living space and the right to belong, which recognises the legitimate claim of the poor to engage in mainstream life in South Africa.¹¹³ The state's insensible conduct revealed a failure to take cognisance of the desperate need and vulnerability of the squatters, who were rather seen as social nuisances to be expelled than right bearers with a legitimate claim to a place within democratic South Africa.¹¹⁴ This allowed the informal settlers to take the law into their hands and of course, the leeway was created for the courts to determine their destiny through application of the law.¹¹⁵

Where the state went negligently wrong in providing a political solution to the housing problem in *Modderklip* the Court rescued the situation by providing a judicial solution, thus justifying the potential of litigation as a strategy in the pursuit of social justice. The Court established a fair measure of social justice by balancing the conflicting interests of the squatters and the land owner against the constitutional obligations of the state.¹¹⁶ The state failed or refused to engage when Modderklip sought its cooperation in a number of instances with reasonable suggestions to finding a solution to the resettlement problem of the squatters.¹¹⁷ Had the state taken 'other measures', by purchasing the invaded land as proposed by Modderklip, litigation and its cost

¹¹³ Wilson S 'Planning for inclusion in South Africa: The state's duty to prevent homelessness and the potential of "meaningful engagement"' (2011) *Urban Forum* 17.

¹¹⁴ See Wilson 2006 (n 79 above) 556 & 560. After forcefully evicting the unlawful occupiers from land owned by the municipality, the municipality went further to notify and to instruct Modderklip to engage eviction proceedings against the same group of persons when they moved into Modderklip's farm land. See *Modderklip* (n 77 above) para 4 & 5.

¹¹⁵ Sect 34 of the Constitution.

¹¹⁶ See *Modderklip* (n 77 above) at para 20. 'Ordering the State to pay damages to Modderklip has the advantage that the Gabon occupiers can remain where they are while Modderklip will be recompensed for that which it has lost and the State has gained by not having to provide alternative land. The State may, obviously, expropriate the land, in which event Modderklip will no longer suffer any loss and compensation will not be payable (except for the past use of the land).'

¹¹⁷ In the first instance, Modderklip indicated full cooperation if the municipality took steps to evict the invaders of its land, which of course was the municipality's responsibility to ensure that the eviction is accompanied by the provision of alternative accommodation but the municipality failed to respond. Secondly, Modderklip sought the assistance of state organs, including the police and the municipality to no avail. Thirdly, Modderklip offered to sell the occupied portion of land to the municipality but the latter responded with indifference. Armed with an eviction order that it could not enforce because of an exorbitant cost charged by the sheriff, Modderklip further sought the assistance of the state but in vain.

implications would have been avoided.¹¹⁸ The relevance of political approaches in the progressive realisation of socio-economic rights notwithstanding, the practical evidence of the potential of litigation in the struggle to achieve social justice cannot be contested, especially where overtly political strategies proved inefficient.

However, on their own initiative the unlawful occupiers, hampered by poverty might not have been able to make it through the legal process. It has often happened that marginalised constituencies have been mobilised, organised and led by civil society organisations to lay claim on their socio-economic rights. In the instance of the *Modderklip* litigation, I examine how civil society helped in shaping the outcomes of the case and the extent to which they ensured enforcement of the Court's orders.

2.2.3 The role of civil society

My purpose in investigating the role of civil society in the *Modderklip* case is to highlight the extent to which they facilitated the struggle for social justice through litigation. Civil society organisations have claimed a watchdog role in the post-apartheid political arrangement to ensure that popular demands are met by government.¹¹⁹ Moses Mayekiso is quoted to have said that it is often easy for government to make extravagant promises but to deliver on those promises remains problematic.¹²⁰ He portrays civil society organisations as playing a watchdog role in monitoring government's action in terms of whether it delivers on its promises or not.¹²¹ Thus, conspicuously present in the *Modderklip* case was an influential category of civil society organisations including the Nkuzi Development Association, the Community Law Centre and the Programme for Land and Agrarian Studies acting jointly as *amici curiae*.¹²² The Legal Resources Centre appeared in a representational capacity on behalf of the Gabon community.¹²³ For Annette Christmas, the

¹¹⁸ Modderklip offered to sell the occupied portion of land at the cost of R10,000 per hectare, which would have amounted to R1,040,000 in total for 104 hectare of land that had been occupied. It is reported (Tissington, 2011: 197) that the by 2007 the Ekurhuleni Metropolitan Municipality had paid the owner of the Modderklip land almost R3 million for the 104 hectares of land, not including 5 years' worth of rents for the 50 hectares of land occupied.

¹¹⁹ Thomas G 'Taking socio-economic rights seriously in South Africa' in Thomas CG *The Discourses on the Right to Housing in Gauteng Province 1994-2008* (2010) 155, 186-188.

¹²⁰ Thomas (n 119 above) 187.

¹²¹ Thomas (n 119 above) 187.

¹²² Tissington (n 78 above) 192, 195 & 197.

¹²³ Tissington (n 78 above) 192, 195 & 197.

intervention of the *amici* stemmed from a ‘common concern about the continued vulnerability of unlawful occupiers facing eviction, and the need to, at least, guard the protection extended to such occupiers’ as was established in *Grootboom*.¹²⁴

The submissions they advanced drew the courts’ attention to the plight of the unlawful occupiers, which according to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act as they argued, must become the primary consideration before any eviction could take place.¹²⁵ The *amici* submissions also pointed to the fact that because of the desperate circumstances of the squatters their right of access to housing should take preference over Modderklip’s property rights.¹²⁶ The *amici* further evoked the obligation of the state in providing alternative accommodation to the vulnerable squatters, notwithstanding the fact that eviction is carried out at the instance of the state or a non-state actor.¹²⁷ In pronouncing judgment late Justice Lang acknowledged the *amici* submissions as pertinent in influencing the determination of the relief that the Court granted in favour of the squatters.¹²⁸

An interesting feature of the *amici* intervention in *Modderklip* as Tissington has highlighted is the fact that they did not only intervene during the court proceedings but most importantly assumed the commitment to monitor enforcement of the Court’s ruling after the judgment.¹²⁹ Given the uncompromising attitude of the state in the events leading up to the litigation and having regard to *Grootboom* in which a near similar declaratory order was made, it is logical that Mia Swart expressed curiosity about what would happen if the state failed to comply with the orders in the judgment.¹³⁰ In this regard, Tissington reports that the Community Law Centre and Nkuzi Development Association carried out research in the Gabon community in the course of the litigation and after the court action proceeded with monitoring enforcement of the judgment.¹³¹

¹²⁴ Christmas A ‘The Modderklip case: The state’s obligations in evictions instituted by private landowners’ (2005) 6:2 *ESR Review* 6; Tissington (n 80 above) 197.

¹²⁵ Tissington (n 78 above) 197-198.

¹²⁶ Tissington (n 78 above) 198.

¹²⁷ Tissington (n 78 above) 192 & 198.

¹²⁸ *Modderklip* (n 77 above) para 54-55.

¹²⁹ Tissington (n 78 above) 198-200.

¹³⁰ Swart M ‘Left out in the cold? Crafting constitutional remedies for the poorest of the poor’ (2005) 21 *S Afr J Hum Rts* 215, 230.

¹³¹ Tissington (n 78 above) 198.

She indicates that following media reports alleging that the Modderklip land was unsuitable for residential development due to underground mining activities and the imminent relocation of the Gabon community to alternative land as a result, it became absolutely necessary to embark on the investigation in order to protect the interest of the squatters.¹³²

The investigation revealed a lack of genuine consultation, community participation and no reliable relay or a complete stifling of information relating to the logistical arrangements and timeframes for relocation, coupled with corruption and improper administration of the process.¹³³ In spite of the Court's judgment that had not fully been complied with, it is reported that in May 2010 the municipality unlawfully carried out wanton destruction of informal dwellings at the Gabon settlement, causing enormous damage to the squatters' personal possessions.¹³⁴ Without the monitoring role of these civil society organisations these important outcomes relating to the judgment, which had the potential of compromising the entitlements granted to the litigants as well as the benefits of successful litigation would otherwise have gone unaccounted for. Consequently, Tissington has advocated for a much expanded role for civil society in assuring that supervision is provided on behalf of the court when it hands down structural interdicts and also that orders handed down meet with compliance.¹³⁵ This is evident of the important role played by civil society organisations in advancing the potential of litigation as a strategy in the pursuit of social justice. I now turn to examine the outcomes and impact of the case.

2.2.4 Outcomes and impact of the litigation

In looking at the outcomes and impact of the *Modderklip* case I illustrate the extent to which litigation contributed in the struggle to establish social justice within the Gabon community and beyond. The development of the Chief Albert Luthuli Extension 6 Township located some 3.5 kilometres away from the Modderklip site, intended for 'the resettlement of the Gabon informal settlement' is reported to be a direct outcome of the *Modderklip* judgment.¹³⁶ A source document of the local municipality states that completion of the project would 'conclude on delivery for the

¹³² Tissington (n 78 above) 198.

¹³³ Tissington (n 78 above) 199, 203.

¹³⁴ Tissington (n 78 above) 201.

¹³⁵ Tissington (n 78 above) 192-193.

¹³⁶ Tissington (n 78 above) 200 & 204.

Gabon settlement' and finalise compliance with the court orders.¹³⁷ In principle the judgment not only granted the squatters entitlement to remain on the Modderklip land but in the event of an unavoidable eviction to be provided suitable alternative accommodation.¹³⁸ Tissington has argued that given the corrupt practices in housing delivery, compliance to the *Modderklip* orders cannot be measured by simply looking at the state developing a housing project nearby and stating that Gabon residents would be beneficiaries.¹³⁹ Her argument underlines the fact that for litigation to be effective there is need for creative remedies that incorporate supervisory and reporting mechanisms'.¹⁴⁰ I agree with Tissington on the basis that such a mechanism would facilitate monitoring and the enforcement of court orders as well as the assessment of impact of judgments.¹⁴¹ In this way, the benefits of successful litigation could be expected to translate directly to the litigants and also potentially to others in similar situation and therefore guarantee social justice.

Further to granting direct entitlement to the unlawful occupiers and the subsequent provision of alternative resettlement by the state, the *Modderklip* judgment deserves to be commended for its extended reach to other similarly situated impoverished squatters. The relocation planned by the municipality was intended to also benefit informal settlers from Emandleni, Chris Hani and informal settlements home seekers from other parts of the municipality.¹⁴² Thus, I argue that by ruling in favour of the unlawful occupiers the Court demonstrated that litigation has potential to be used as a pragmatic strategy in the pursuit of social justice. From the angle of jurisprudence, the litigation has also contributed significantly in advancing the constitutional right of access to housing. Wilson has reiterated that the *Grootboom* judgment required government to develop a reasonable housing policy that responds to the urgent needs of the most desperate members of society.¹⁴³ It is apparent as Gerald Thomas has stated that simply having a progressive housing policy that may only materialise in the long run is not enough, as increasing claims by the

¹³⁷ Tissington 2011 (n 78 above) 200; 'Ekurhuleni Metropolitan Municipality IDP, Budget & SDBIP 2009/10 – 2011/12' (2009) 71 available at: www.ekurhuleni.gov.za/your-council/.../doc.../245-budget-2009201... 8 (accessed: 4 March 2013).

¹³⁸ *Modderklip* (n 77 above) para 68(3)(c).

¹³⁹ Tissington (n 78 above) 200.

¹⁴⁰ Tissington (n 78 above) 201.

¹⁴¹ Tissington (n 78 above) 204.

¹⁴² Tissington (n 78 above) 200.

¹⁴³ Wilson 2009 (n 80 above) 272.

homeless continuously threaten, to the extent of encroaching on the private property ownership rights of others.¹⁴⁴ In relation to this Wilson has argued that;

Even though *Grootboom* and the Emergency Housing Policy had the potential to revolutionize the way in which the courts responded to private eviction applications which may lead to homelessness, the consequences of *Grootboom* for eviction applications were not immediately seized on by the courts. It appears that the courts needed another exceptional case to take the next logical step in securing the right to housing for people facing eviction. This step was to be taken in the *Modderklip* case.¹⁴⁵

The *Grootboom* judgment held that the homeless cannot claim ‘shelter or housing’ from the state ‘immediately upon demand’.¹⁴⁶ On the contrary Wilson has established that *Modderklip* formed a ‘new normality’ according to which, ‘the state is compelled to act positively to give effect to the right of access to adequate housing and to provide suitable alternative shelter in the event that an eviction order would lead to homelessness.¹⁴⁷ This radical approach to litigation concurs with Klare’s conception of transformative constitutionalism,¹⁴⁸ which I argue is relevant in complementing the weaknesses of political approaches to transforming South African society. Otherwise, it would be inconceivable to talk of a break away from the injustices of the past by relying solely on reformist strategies where the state may always find reasons to argue that socio-economic rights cannot be realised immediately or that progressive realisation will be slow because of limited resources.¹⁴⁹

The down side to litigation however, is that when victory is achieved more demands probably follow and may therefore exert unbearable pressure on the state’s limited or strained budget. It might then result in having to re-allocate budgets, adjust policies or formulate new ones, which has been the area of contention between political action and litigation.¹⁵⁰ However, by the increasing resort to litigation as a potential strategy by which social justice could be accomplished, Tissington has noted that the ‘goalposts have shifted in public interest litigation

¹⁴⁴ Thomas (n 119 above) 174.

¹⁴⁵ Wilson 2009 (n 80 above) 276.

¹⁴⁶ *Grootboom* (n 106 above) para 95.

¹⁴⁷ Wilson 2009 (n 80 above) 289.

¹⁴⁸ See Klare (n 3 above) 150.

¹⁴⁹ See Thomas (n 119 above).

¹⁵⁰ See Langford (n 67 above) 96.

involving informal settlements, land, housing and evictions from those in earlier socio-economic rights test cases'.¹⁵¹ This is evident in more recent cases such as *Abahlali baseMjondolo*, which I examine next.

2.3 *Abahlali baseMjondolo v Premier of KwaZulu-Natal*

2.3.1 People's movement against a coercive legislation

I engage with the *Abahlali baseMjondolo* case to illustrate how it has quite practically demonstrated the potential of litigation as a strategy in the struggle for social justice. It is one of the landmark judgments that provide empirical evidence on the extent to which litigation has been used effectively to achieve social justice. Margaret Scott recounts that narratives on informal settlements have mostly focused on numerous astounding issues but quite negligibly on the rights and agency of the poor who live in these disputed and often highly politicised locations and more so, know best how the communities operate.¹⁵² In this regard I look at why and how, besides its usual protest activism the Abahlali movement took up litigation as an ultimate strategy to assert not only the right to a place in the city but also the right to be allowed to define who they are, to articulate their voice and to be heard in their own terms.¹⁵³

The litigation resulted from the controversial KwaZulu-Natal Elimination and Prevention of Reemergence of Slums Act (Slums Act). Just like the name suggests, the provincial legislation aimed at 'cleansing' the cities and to prevent re-emergence of disgusting urban dwellings from defacing the beauty of the cities. With the largest number of its membership consisting of unlawful shack dwellers living in about seventeen informal settlements in KwaZulu-Natal alone, Abahlali became apprehensive of the imminent threat of widespread arbitrary evictions and possible homelessness posed by the Slums Act.¹⁵⁴ Meanwhile, section 26(3) of the Constitution

¹⁵¹ Tissington (n 78 above) 204. Malcolm Langford (2003: 19) defines test cases to be those that set groundbreaking legal precedents, but lacked proper implementation. Yet, the decisions often acted as a catalyst for subsequent and more successful cases.

¹⁵² Scott M 'Shackdweller citizenship: Advocating the right to the city in Durban, South Africa' (2010) 2:1 *Cities in the 21st Century – Berkeley Press* 7.

¹⁵³ See generally Scott (n 152 above); *Abahlali baseMjondolo* (n 154 below).

¹⁵⁴ *Abahlali baseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC) para 3.

prohibits any legislation that may permit arbitrary evictions. Driven by these concerns the movement filed an application to the KwaZulu-Natal High Court, challenging the validity of the Act, which application was dismissed.¹⁵⁵ They then approached the Constitutional Court seeking appropriate relief.¹⁵⁶

The contentions they raised and requested the Court to adjudicate upon were on the one hand with regard to the competence of the provincial legislature to enact the Slums Act. According to their claim the elimination of slums was a land tenure matter, which they argued, falls within the competence of the national legislature and not the provincial.¹⁵⁷ On the other hand they challenged section 16 of the Act, which empowered the provincial executive organs with arbitrary powers to order evictions, claiming that it contravened section 26(2) of the Constitution and other national housing legislation.¹⁵⁸ On the first contention, the Court found that the Slums Act actually had to do with housing and not land tenure as argued by the applicants.¹⁵⁹ The contention thus failed as the Court held that the provincial legislature had the concurrent power alongside the national legislature to pass the Act.¹⁶⁰ As to the second contention the Court, after a thorough interpretative analysis of section 16 of the Act came to the conclusion that the Act was indeed in conflict with section 26(2) of the Constitution.¹⁶¹ It was therefore declared unconstitutional and invalid.¹⁶² The judgment was a resounding victory for Abahlali but one without any direct entitlement. For what purpose therefore, did the movement of shack dwellers take up litigation to nullify the Slums Act enacted by a democratic legislature?

2.3.2 In the public interest

In an attempt to answer the preceding question I point out how pursuing the public interest in litigation can more easily facilitate the use of socio-economic rights litigation in the quest for social justice. A cursory survey of available literature on the activities of Abahlali reveals scanty

¹⁵⁵ *Abahlali baseMjondolo* (n 154 above) para 1.

¹⁵⁶ *Abahlali baseMjondolo* (n 154 above) para 1; *Abahlali baseMjondolo* (n 201 below).

¹⁵⁷ KwaZulu-Natal Elimination and Prevention of Reemergence of Slums Act, 2007 Act No. 6 of 2007.

¹⁵⁸ *Abahlali baseMjondolo* (n 154 above) para 9.

¹⁵⁹ *Abahlali baseMjondolo* (n 154 above) para 97-101, Huchzermeyer (n 163 below) 9.

¹⁶⁰ Constitutional Court of South Africa ‘Media summary’ *Abahlali baseMjondolo Movement of South Africa & Another v Premier of the Province of Kwa-Zulu Natal & Others* CCT 12/09 [2009] ZACC 31, 2.

¹⁶¹ *Abahlali baseMjondolo* (n 154 above) para 92, 127-129.

¹⁶² *Abahlali baseMjondolo* (n 154 above) para 129.

knowledge about the significance of the Court's decision annulling the Slums Act. The relevance of the judgment to the millions of slum dwellers across the country whose lives would have been adversely affected in the event of implementation of the Act has not sufficiently been explored. Marie Huchzermeyer has expressed worry that the judgment has not been of any real significance because living conditions for shack dwellers has remained unchanged as they continue to face arbitrary evictions, severe intimidation and victimisation.¹⁶³ In spite of these sentiments, it cannot be contested that the judgment provided legal protection not only to the shack dwellers in KwaZulu-Natal who were directly threatened by the Act but to the millions of poor people living in shack settlements across the country.¹⁶⁴

Justice Froneman has stated that 'the harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violation are highly parochial.'¹⁶⁵ As the Court found that section 16 of the Slums Act was in violation of section 26(2) of the Constitution it therefore constituted, according to this argument harm to the South African society as a whole. The Court acknowledged that the Slums Act was enacted as 'experimental pilot legislation' which, if it became applicable after the provincial demonstration, would then eventually be replicated in other provinces.¹⁶⁶ Margaret Scott has estimated that such an action would have affected the lives of over 12 million poor people.¹⁶⁷ It meant also that other informal squatters throughout the country would have been exposed to arbitrary eviction and possible homelessness which, but for the provisions of section 16 of the Act, would not occur.¹⁶⁸ The Act might have been good-intentioned, reflected by the objective to improve housing conditions for the poor by eliminating slums, which the Court noted are 'not fit for human habitation'.¹⁶⁹ The contentious issue however, resided in the coercive manner by which section 16 mandated property owners and municipalities to evict unlawful occupiers.¹⁷⁰ In essence, if the Act became

¹⁶³ Huchzermeyer M 'Ruling in Abahlali case lays solid foundation to build on' (2009) available at: <http://wiredspace.wits.ac.za/bitstream/handle/10539/11773/HuchzermeyerM%20Ruling%20in%20Abahlali%20case%204-11-2009KMBT35020120816160849.pdf?sequence=1> (accessed: 15 March 2013) 10; Scott (n 152 above) 30.

¹⁶⁴ Scott (n 152 above) 2.

¹⁶⁵ See *Schubart Park & Others v City of Tshwane & Another* CCT 23/12 [2012] ZACC 26 para 26.

¹⁶⁶ *Abahlali baseMjondolo* (n 154 above) para 16.

¹⁶⁷ Scott (n 152 above) 26.

¹⁶⁸ *Abahlali baseMjondolo* (n 154 above) para 12.

¹⁶⁹ *Abahlali baseMjondolo* (n 154 above) para 32, 40, 46.

¹⁷⁰ *Abahlali baseMjondolo* (n 154 above) para 36, 41-44, 99, 112, 212.

enforceable, it would have stripped off and considerably undermined the protection granted to unlawful occupiers by section 26 of the Constitution and other housing legislations.¹⁷¹

By engaging in litigation to challenge the Slums Act, Abahlali obviously was not praying the courts to declare housing available to every shack or slum dweller despite their precarious living conditions. The Court identified the shack dwellers as ‘poor people who have no access either to secure tenure or adequate housing’.¹⁷² It further stated that shack dwellers are principally unlawful occupiers of the land on which they live and are urgently in need of permanent housing and therefore entitled to the essential protection guaranteed by law.¹⁷³ With a perceived threat of widespread evictions posed by the Slums Act Abahlali’s purpose was to provide protection to its members as well as the multitude of other slum dwellers by preventing enforcement of the Act. Denying the shack dwellers such protection as the Court noted posed a threat to their constitutional right to housing and therefore potentially damaging to their livelihood.¹⁷⁴ In spite of not having any direct impact in improving living conditions, the question to ask is whether the litigation was of any significance?

I argue that the judgment scored a major victory in the struggle by the poor to secure a place and a voice and also recognition in democratic South Africa, which the ballot box or other democratic strategies could not have achieved. Thus, the judgment demonstrated not only the potential of litigation but also how effectively it has been used as a pragmatic strategy for the attainment of social justice. It appears, as Machivet and Buckingham have pointed out that the motive behind the Slums Act was to forge the neo-liberal policies adopted by the government, according to which the poor are considered unproductive and so need to be excluded from mainstream society.¹⁷⁵ Miloon Kothari puts it this way, ‘[i]f you are poor, you are out. You are put into marginal areas of the city and essentially denied what everyone else has. This is very often the result of government

¹⁷¹ *Abahlali baseMjondolo* (n 154 above) para 112, 212.

¹⁷² *Abahlali baseMjondolo* (n 154 above) para 2.

¹⁷³ *Abahlali baseMjondolo* (n 154 above) para 14.

¹⁷⁴ *Abahlali baseMjondolo* (n 154 above) para 14.

¹⁷⁵ Machivet C & Buckingham S ‘The Abahlali baseMjondolo Shack Dwellers Movement and the right to the city in South Africa’ (2009) available at: <http://base.d-p-h.info/es/fiches/dph/fiche-dph-8059.html> (accessed: 15 March 2013), *Abahlali baseMjondolo* (n 194 below).

policies.¹⁷⁶ The same view is articulated by S'bu Zikode who reiterates the fact that forced evictions of shack dwellers is driven by neo-liberal forces, ‘to make sure there is no space for poor people who can't make profits.’¹⁷⁷ Kothari is also quoted to have said that more people are being displaced from large development projects sites because of the market and often without compensation or consultation.¹⁷⁸ Policies and practices as such are what the peoples’ movement stood up to contest; believing that free market capitalism as Zikode explains, does not have to mean relegating the poor to the back scene.¹⁷⁹

If the Slums Act came into force – assuming it a product of democratic popular choice, it would have legitimised arbitrary forced evictions against unlawful occupiers. Other provinces would then have taken the relay to enact similar coercive legislations. Imraan Buccus submits that invalidating the Act implies that ‘it would no longer be reproduced in the other provinces.’¹⁸⁰ As to how the Slums Act came about, Buccus explains that in 2004 the government introduced the progressive ‘Breaking New Ground’ housing policy as a thoughtful strategy to move away from replicating apartheid-style social planning.¹⁸¹ The policy allowed for on-site upgrading of informal settlements through participatory approaches in order to avoid forced removals but as he says, the policy never got to be implemented.¹⁸² He argues that the state simply ignored the policy and reverted to the apartheid expression of ‘slum eradication’, which allowed for mandatory removal of shack dwellers to peripheral transit camps.¹⁸³ Huchzermeyer also articulates a similar view, which states that the controversial section 16 of the Act was reminiscent of a ‘provision in the 1951 Prevention of Illegal Squatting Act, which mandated landowners to evict illegal

¹⁷⁶ Johal A ‘International housing activist Miloon Kothari’ (2007) Interview available at: <http://www.worldpress.org/Americas/2979.cfm#down> (accessed: 11 March 2013). Miloon Kothari is former UN Special Rapporteur for Housing.

¹⁷⁷ Subways S ‘Abahlali baseMjondolo – The South African shack dwellers movement’ (2008) *Solidarity Project Newsletter May/June 2008* 10.

¹⁷⁸ Johal (n 176 above).

¹⁷⁹ Subways (n 177 above); Abahlali baseMjondolo (n 200 below); In Zikode’s own words he says, ‘[t]he poor people of the world must defend very strongly against evictions and against this idea that we have no right to the city’.

¹⁸⁰ Buccus I ‘Time is perfect for rethink on housing policy’ (2009) available at: <http://abahlali.org/node/5929> (accessed: 8 March 2013); *Abahlali baseMjondolo* (n 154 above) para 85.

¹⁸¹ Buccus (n 180 above).

¹⁸² Buccus (n 180 above).

¹⁸³ Buccus (n 180 above).

occupants irrespective of their desperation'.¹⁸⁴ To her such a replication of apartheid legislation was a disturbing regression in law that needed to be challenged.¹⁸⁵

The Court pointed out that the provincial government required urgent resolution of the dispute concerning the constitutional validity of the Act because the decision of the Court would determine the way forward for the provincial government in discharging its constitutional obligations concerning housing.¹⁸⁶ In fact, by annulling the Act the judgment did impact significantly on the housing policy of the KwaZulu-Natal provincial government. Besides, the judgment also had the public interest effect of protecting informal dwellers across South Africa from the threat of forceful removals from their dwellings and possibly rendered homeless or without appropriate alternative accommodation. With regard to impending worries and ambiguities Justice Yacoob, on behalf of the unanimous court reasoned that;

...the lack of specificity and clarity in the Act gave rise to serious fears and concerns on the part of the applicants who were justified in starting these proceedings. This judgment has resolved ambiguities and averted consequences that might have followed from an over-literal interpretation of the Act. The adjudication of this case was in the interests not only of the Kwa-Zulu Natal provincial government but in the public interest.¹⁸⁷

2.3.3 The force behind the litigation

By looking at the force behind the *Abahlali baseMjondolo* litigation I illustrate to what extent social movement activities constitute a driving force behind socio-economic rights litigation that aims to achieve social justice. Socio-economic rights litigation has more often than not been invigorated through the agency of civil society organisations, which have demonstrated a reputation for organising and mobilising marginalised constituencies to claim socio-economic rights. Abahlali has attracted much attention as to the force behind its activism. Born in 2005 as a result of the utter betrayal by the state, the Abahlali movement became so influential that it posed

¹⁸⁴ Huchzermeyer (n 163 above) 9.

¹⁸⁵ Huchzermeyer (n 163 above) 9.

¹⁸⁶ *Abahlali baseMjondolo* (n 154 above) para 15.

¹⁸⁷ *Abahlali baseMjondolo* (n 154 above) para 84.

a threat to the functioning of government.¹⁸⁸ Raj Patel has hinted that government narrative has frequently attributed the vibrancy and militancy of the movement as being politically manipulated by a ‘third force’.¹⁸⁹ The pejorative ‘third force’ concept, as Patel has explained, suggests that the shack dwellers are incapable of expressing their opinions or of taking action to claim their rights.¹⁹⁰

A high pitch reaction by S’bu Zikode to the third force accusation illustrates that the supposed ‘third force’ is nothing other than the hardship and poverty that has enabled the shack dwellers to mature in their suffering.¹⁹¹ The third force, according to Zikode is the ‘collectivism’ that has enabled the poor to stand together as one indomitable community of people whose ‘life sentence’ in the shacks has meant not only ‘permanent physical exclusion’ but also removal from the ‘discussions that take place in society’.¹⁹² The ‘living politic’ of the Abahlali movement as they claim stresses that they ‘don’t struggle for communities but with communities’¹⁹³ According to Scott, Abahlali baseMjondolo represents an unrivalled political voice for the poor – a constituency that the government and the general public have often ignored.¹⁹⁴ The movement is currently considered to be the ‘largest organization of militant poor in post-apartheid South Africa.’¹⁹⁵ It brands itself as a ‘radically democratic, grassroots and entirely non-professionalized movement of shack dwellers’, which combines a variety of strategies in its struggles for social justice.¹⁹⁶

¹⁸⁸ Patel R ‘Cities without citizens: A perspective on the struggle of Abahlali baseMjondolo, the Durban Shackdweller Movement’ in McMichael (ed) *Contesting Development: Critical Struggles for Social Change* (2010) 41.

¹⁸⁹ Patel (n 188 above) 41.

¹⁹⁰ Patel (n 188 above) 41.

¹⁹¹ Zikode S ‘We are the third force’ (2006) available at: <http://www.abahlali.org/node/17> (accessed: 15 March 2013).

¹⁹² Zikode S & Nsibande Z ‘Serving our life sentences in the shacks’ (2010) available at: <http://www.abahlali.org/node/7187> (accessed: 31 December 2012).

¹⁹³ ‘Collectivism vs. individualism’ (2012) *Abahlali baseMjondolo Movement Press Statement* available at: <http://www.abahlali.org/node/8726> (accessed: 18 March 2013).

¹⁹⁴ Scott (n 152 above) 23.

¹⁹⁵ Machivet & Buckingham (n 175 above).

¹⁹⁶ Machivet & Buckingham (n 175 above).

Huchzermeyer has also ascertained that Abahlali's approach to engaging the state is first of all to exhaust other democratic avenues such as peaceful protest before resorting to legal action.¹⁹⁷ Thus, the once under-estimated movement of people who live in shacks proved itself as Scott has stated, capable of organising on a different scale to confront a level of governance through litigation far beyond what they have ever achieved through activism.¹⁹⁸ The force behind the *Abahlali baseMjondolo* litigation consisted of the social movement of shack dwellers whose desperate circumstances has built in them the endurance and determination to confront political authority in such a manner that they have never done through political activism alone.¹⁹⁹ Their might was summed up in the determination to fight the Slums Act in the streets and in the courts and as they put it, to fight it in the way they live their ordinary lives, which entailed resisting being driven out of the cities as if they were rubbish.²⁰⁰

Abahlali baseMjondolo demonstrated how and the extent to which litigation can be used in the struggle to achieve social justice. The community of shack dwellers engaged in the litigation not in order to demand adequate housing but to prevent government action that would otherwise render them homeless. Victory would not have been apparent without the kind of coordinated activism exerted by the movement. The case demonstrated that the struggle for social justice against power excesses perpetrated by the state on the poor can be fought and won through litigation. It also warned that the neo-liberal attack that launched by the state against the poor could be challenged not only in the City of Durban but in every other city. Thus, after *Abahlali baseMjondolo* the relay in the struggle for social justice relating to the rights to have access to adequate housing was taken up by residents of Schubart Park against the City of Tshwane.

2.4 *Schubart Park Residents v City of Tshwane*

2.4.1 Political disengagement – genesis of the litigation

¹⁹⁷ Huchzermeyer (n 163 above).

¹⁹⁸ Scott (n 152 above) 27.

¹⁹⁹ See Scott (n 152 above) 27.

²⁰⁰ Abahlali baseMjondolo 'Operation murambatsvina comes to KZN: The notorious Elimination & Prevention of Re-emergence of Slums Bill' (2007) *Abahlali baseMjondolo Press Statement Thursday 21 June 2007* available at: <http://www.abahlali.org/node/1629> (accessed: 22 March 2013).

The *Schubart Park* case is not only significant because of its victory at the Constitutional Court but also because it demonstrates the potential of litigation as a strategy in the pursuit of social justice. In analysing the case I illustrate how political disengagement between the City of Tshwane and residents of Schubart Park degenerated into confrontation and how litigation became a useful strategy for resolving the conflict. The litigation arose from a build-up crisis at the Schubart Park residential complex, which erupted into a dramatic hostile confrontation between the residents and City authorities. It is important to highlight the genesis of the problem in order to shed some light on the causes of the litigation as well as on how the Constitutional Court came to handing down judgment against the City.

The Schubart Park complex in downtown Pretoria is said to have been constructed in the 1970s as a social housing facility.²⁰¹ At the commencement of the events that led to the legal battle, the complex is reported to have run into advance depreciation as a result of increased urbanisation and decay.²⁰² The buildings became infiltrated by several unlawful occupants that the municipality had no account of.²⁰³ Angered by the abrupt disconnection of water and electricity supplies and sanitation services from the buildings, the residents organised a protest action which quickly turned into violent and deeply antagonistic confrontation with the police.²⁰⁴ It is reported that the antagonism emanated from the manner in which the residents of the complex were treated by City authorities, resulting in ‘ugly showdowns between residents and the police and eventually culminating in the eviction of over 1,000 residents.’²⁰⁵

The City municipality is said to have repeatedly treated the Schubart Park residents with disdain, often categorising the complex as a breeding place for crime, lawlessness and social vices and the residents as social nuisances that deserved to be thrown out into the streets.²⁰⁶ It is alleged that the City used the tactic of victimisation as a means to get the residents out of the complex, probably

²⁰¹ *Schubart Park* (n 165 above) para 2.

²⁰² *Schubart Park* (n 165 above) para 2.

²⁰³ *Schubart Park* (n 165 above) para 2.

²⁰⁴ *Schubart Park* (n 165 above) para 3.

²⁰⁵ Municipal IQ ‘Eviction lessons from Schubart Park’ (2012) *Municipal IQ Briefing No 399* available at: <http://www.municipaliq.co.za/publications/briefings/201210181651374484.pdf> (accessed: 15 March 2013).

²⁰⁶ *Schubart Park* (n 165 above) para 50.

to utilise the space for some mega business venture.²⁰⁷ By this, the Court found reason to believe the residents' claim that the municipality merely took advantage of the crisis that erupted to evict them without a court order.²⁰⁸ The City portrayed itself uncompromising to propositions for engagement and negotiation put forth by the legal representatives of the residents.²⁰⁹ As such the evicted residents were denied re-occupation of the complex.²¹⁰ The legal representatives then filed an urgent application requesting the Pretoria High Court to order the residents to be allowed to repossess their homes.²¹¹ The application was dismissed. Wrongfully acting upon the dismissal decision as an eviction order, the municipality proceeded to forcefully evict the rest of the residents who were still in the complex.²¹²

Having failed to secure leave to appeal against the High Court ruling, the Schubart Park residents approached the Constitutional Court to challenge the lawfulness of their evictions as well as the nature of relief granted by the High Court, which they claimed was not appropriate.²¹³ As to the first contention the Court found that the dismissal order made by the High Court could neither serve as justification nor constitute an eviction order as envisaged by section 26(3) of the Constitution.²¹⁴ Thus the eviction was an overwhelmingly illegal operation on the basis that it was executed without a proper court order.²¹⁵ On the second contention, The Constitutional Court judged that the High Court overlooked the unlawfulness of the evictions and also disregarded the rights of the residents not to be evicted without a court order.²¹⁶ Therefore, the orders it granted could not be construed to constitute appropriate relief.²¹⁷ Appropriate relief as the Court reasoned should aim to 'instill recognition on the part of the governmental agencies that participated in the unlawful operation that the occupiers, too, are bearers of constitutional rights, and that official

²⁰⁷ Municipal IQ (n 205 above).

²⁰⁸ *Schubart Park* (n 165 above) para 39.

²⁰⁹ *Schubart Park* (n 165 above) para 4.

²¹⁰ *Schubart Park* (n 165 above) para 4.

²¹¹ *Schubart Park* (n 165 above) para 5-7.

²¹² *Schubart Park* (n 165 above) para 8.

²¹³ *Schubart Park* (n 165 above) para 10, 1 & 18.

²¹⁴ *Schubart Park* (n 165 above) para 30.

²¹⁵ *Schubart Park* (n 165 above) para 34, 41.

²¹⁶ *Schubart Park* (n 165 above) para 34.

²¹⁷ *Schubart Park* (n 165 above) para 34.

conduct violating those rights tramples not only on them but on all'.²¹⁸ Admitted to the litigation as *amicus curiae*, the Socio-Economic Rights Institute argued in favour of the residents, with submissions that the eviction was unlawful. They argued that carrying out the eviction the City did not provide alternative accommodation as constitutionally mandated.²¹⁹

The Constitutional Court thus set aside the High Court ruling, declared the Schubart Park evictions unlawful and granted entitlement to the residents to be re-instated to their homes as soon as reasonably possible.²²⁰ In addition, the Court ruled that the City must engage meaningfully with the evicted residents in order to find a compromise solution to ensure return of the latter to the Schubart Park complex.²²¹ It needed litigation of the sort to compel the City to engage with the residents on the basis of their right to housing – a process which it initially backed away from. Thus, it can rightfully be argued that the *Schubart Park* case justifies the use of litigation as a potential strategy in the pursuit of social justice. In what follows I examine what meaningful engagement entails and its significance in advancing litigation as a strategy for the achievement of social justice.

2.4.2 Meaningful Engagement

Meaningful engagement has become a prevalent principle pertaining to socio-economic rights litigation involving evictions. Through meaningful engagement state actors have been compelled to adopt a conversational approach with those they want to evict before carrying out the actual force removal.²²² The principle was established in *Olivia Road* as an innovative mechanism by which the state and aggrieved litigants must ‘talk to each other meaningfully’ in order to bargain a compromise solution to the contested issue.²²³ I agree with Benjamin Bradlow’s argument that

²¹⁸ *Schubart Park* (n 165 above) para 26.

²¹⁹ ‘Schubart Park residents win ConCourt battle’ available at: <http://www.timeslive.co.za/local/2012/10/09/schubart-park-residents-win-concourt-battle> (accessed: 18 March 2013).

²²⁰ *Schubart Park* (n 165 above) para 53.

²²¹ *Schubart Park* (n 165 above) para 53.

²²² Bradlow B ‘Beyond a legal framework for “meaningful engagement” in South Africa’ (2010) *SDI Bulletin* available at: <http://www.sdinet.org/blog/2010/03/11/sdi-bulletin-beyond-a-legal-fr/> (accessed: 14 March 2013).

²²³ *Occupiers of 51 Olivia Road & Others v City of Johannesburg & Others* 2008 (5) BCLR 475 (CC) para 14; *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC) para 39; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* [2011] ZACC 33; 2012 (2) SA 104 (CC) paras 34-41; Christensen (n 12 above) 601-602.

meaningful engagement is a ‘political process’, in which the law plays but a limited role.²²⁴ Albeit that the role of the law is limited in the engagement process it also cannot be underestimated. I argue that meaningful engagement, as a political process has actually been made effective through litigation, where victims of eviction have been protected by law and their needs and interests addressed in such manner that the political process alone could not achieve.²²⁵

The *Schubart Park* instance draws attention to the fact that when the political process failed, litigation became inevitable to bring the state and the victims to the negotiating table and compelled to talk in order to address specific concerns. Bradlow has also rightfully suggested that meaningful engagement should not happen only when the law commits the state to follow specific interventions as directed by the courts in order to implement its own policies.²²⁶ S’bu Zikode thinks that it should be a process of ‘sustained dialogue, negotiation and learning’.²²⁷ If the City of Tshwane had opened up to negotiations, litigation might have been averted and probably an amicable solution could have been found. Initially, Lawyers for Human Rights acting as legal representatives of the Schubart Park residents made advances for engagement in view of negotiating a compromise solution to the plight of the evicted residents.²²⁸ The municipality refused to compromise and proceeded with the evictions.²²⁹ With the mistrust that had built up it required the application of the law to establish and to get the state to recognise that the residents are bearers of constitutional rights, and that official conduct violating those rights tramples not only on the victims but also threatens the public interest.²³⁰

The principle of meaningful engagement, in my argument, gives the impression that the state has consistently distanced itself from the people it is supposed to represent and to protect. Tshwane Municipal Councillor, Philip van Staden is quoted to have said that the Court’s ‘verdict pointed to the fact that the metro had failed its citizens’.²³¹ However, through litigation the municipality was

²²⁴ Bradlow (n 222 above).

²²⁵ *Olivia Road* (n 223) para 14.

²²⁶ Bradlow (n 222 above).

²²⁷ Bradlow (n 222 above).

²²⁸ *Schubart Park* (n 165 above) para 4.

²²⁹ *Schubart Park* (n 165 above) para 4.

²³⁰ *Schubart Park* (n 165 above) para 26.

²³¹ Sibiya R ‘Schubart Park residents win court battle’ (2012) *Rekord Central of Friday 12 October 2012* 3.

compelled to get to the negotiating table – to engage meaningfully with the evicted residents that it had looked down upon as a social problem. Nathaniah Jacobs, speaking particularly with regard to the *Schubart Park* case thinks that meaningful engagement is better applicable when residents are still in possession of their homes.²³² She pointed out that meaningful engagement becomes problematic when residents have already been evicted because it places them in a disadvantaged position *vis-à-vis* the state.²³³ Nevertheless, meaningful engagement has proved to be a useful tool in litigation for social change. The point I am trying to illustrate is that social transformation may not only be accomplished through political processes but that litigation could also effectively be used to achieve social justice as a step in the transformation process.

The Court has pointed out that it is a constitutional endorsement for the functional involvement and engagement of people in decisions that may affect their lives.²³⁴ The City of Tshwane and the police were judged to have acted wrongfully in carrying out the evictions without engaging with the residents to balance competing interests and to find practical solutions.²³⁵ The judgment therefore required the municipality to engage meaningfully with the evicted residents – to trace their whereabouts, refurbish the complex and ensure their re-occupation and also to report to the High Court on the progress of the engagement process as well as the actions taken.²³⁶ Jacobs has stated that the engagement process is on-going and she estimates that over 300 housing units have already been allocated to some of the evicted residents in the form of alternative accommodation while refurbishment of the Schubart Park buildings is pending.²³⁷ She explained that the City of Tshwane was adamant on demolishing the buildings, notwithstanding the Courts' ruling but as a result of the engagement process the City has resolved to refurbish the buildings and to retain them as a social housing facility.²³⁸ Asked if a political solution could have resolved the Schubart Park crisis, Jacobs responded that the evicted residents would have been abandoned on the streets

²³² Interview with Nathaniah Jacobs, Attorney of the Land and Housing Unit, Lawyers for Human Rights – the legal representatives of the Schubart Park residents (interviewed on: 12 August 2013).

²³³ Jacobs (n 232 above).

²³⁴ *Schubart Park* (n 165 above) para 43-44; *Port Elizabeth Municipality* (n 223 above) para 39; *Blue Moonlight Properties* (n 223 above) paras 34-41.

²³⁵ See Christiansen 2010 (n 12 above) 562.

²³⁶ *Schubart Park* (n 165 above) para 53.

²³⁷ Jacobs (n 232 above).

²³⁸ Jacobs (n 232 above), see Du P Martins 'Billions for regeneration: Schubart Park is the first step forward' (2013) *Pretoria Central Rekord* of 16 August 2013 2.

without any consideration for alternative accommodation.²³⁹ She acknowledged that litigation has been a powerful strategy by which social justice has been achieved for the Schubart Park residents. I can rightly say therefore that through litigation, the evicted Schubart Park residents have been provided adequate protection, which demonstrates the extent to which litigation can be used in the pursuit of social justice.

3. Conclusion

With regard to questions relating to whether litigation accomplishes its purpose in the struggle for social justice and whether litigants reap any benefits from legal action,²⁴⁰ Liebenberg has stated that the evolving jurisprudence is not only significant for structuring future litigation but also in guiding the adoption and implementation of policies and legislation in order to facilitate access to the range of socio-economic rights.²⁴¹ I have in this chapter substantiated with empirical evidence through analysis of some of the cases that the Court has adjudicated. I have described how litigation has actualised and also illustrated its potential to engineer social transformation.

Generally, my analysis of *Mazibuko* exposed the weaknesses and imperfections of using socio-economic rights litigation as a strategy in the struggle for social justice. In spite of the broader and long term impact that the litigation is said to have produced I concluded that the litigants were fundamentally disfavoured and adversely affected by the judgment. I illustrated how the Court significantly compromised its reasonableness standard in adjudication and therefore limited litigation's potential to be used as a strategy in the quest for social justice. I identified that occasion presented itself for the Court to craft a more transformative outcome to advance socio-economic rights litigation but it wasted the opportunity and therefore failed to explore litigation's potential in the pursuit of social justice. I supported my argument with the fact that the Court has the capacity as custodian of the Constitution to ensure social justice. I argued that it required the Court in *Mazibuko* to have developed a balanced adjudication approach that would have provided a forum for social justice to prevail and also ensure that the litigants reap the benefits of litigation.

²³⁹ Jacobs (n 232 above).

²⁴⁰ Langford (n 67 above) 17.

²⁴¹ Liebenberg S 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty' (2009) *Law, Democracy and Development* 160.

I proceeded to examine the transformative potential of litigation in the three other cases. In the analyses on *Modderklip* I illustrated the effectiveness of using litigation as a pragmatic strategy by which social justice, especially relating to the right not to be evicted has been accomplished. I examined the litigation process and established that the Constitutional court was more pro-active in adjudication the facts of the case than it did in *Mazibuko*. I argued that in dealing with desperate situations of the kind in which the Gabon residents found themselves, the courts are required to develop an adjudication approach that would facilitate the prevalence of social justice in such a manner that the poor may be able to reap equitable benefits from litigation. I established that contrary to *Mazibuko*, the *Modderklip* judgment formed a new precedent that required the state to act positively to give effect to the right of access to adequate housing and to provide suitable alternative shelter in the event that an eviction order would lead to homelessness.²⁴²

The *Abahlali baseMjondolo* case took a different dimension. Instead of claiming the right to housing, the community of informal shack dwellers rather sought protection against the provincial legislation that threaten their survival as slum dwellers with imminent widespread arbitrary evictions and possible homelessness. Relying on the strategic potential of litigation to change the course of the political motive, I described how the movement of shack dwellers took their contestation of the provincial legislation to the Constitutional Court. I established how, by declaring the legislation unconstitutional the Court demonstrated the potential of litigation to facilitate the achievement of social justice. I showed how litigation portrayed its potential in the struggle by the shack dwellers to secure a place and a voice and also recognition in democratic South Africa, which the ballot box or other democratic strategies could not have achieved. Thus, the judgment demonstrated not only the potential of litigation but also how effectively it has been used as a pragmatic strategy for the attainment of social justice. The case demonstrated that the struggle for social justice, especially against the exercise of power excesses by the state can be fought and won through litigation.

The precedent on housing rights established in *Modderklip* was also to be tested in the *Schubart Park* litigation. I illustrated how the intransigence of the City of Tshwane and the utter lack of political will to fulfill its socio-economic rights obligation resulted in confrontation and unlawful eviction of the Schubart Park residents. I explained the circumstances that caused the evicted

²⁴² Wilson 2009 (n 80 above) 289.

residents to resort to litigation in the quest for social justice, which they were deprived of by the political decision that caused their eviction and virtually rendered them homeless. I argued that where the City of Tshwane failed to provide a political solution to the Schubart Park crisis the Constitutional Court provided a legal solution, which though not absolute, has proved more effective in providing legal protection to the evicted residents. Through litigation, the City was compelled to engage meaningfully with the residents as a constitutional requirement and also as a means to ensure effectiveness of the re-occupation process. This has so far resulted in the provision of alternative accommodation, at least to some of the residents.²⁴³ Thus, I argued that the judgment not only scored a legal victory on housing rights but most importantly demonstrated potential as a pragmatic strategy in the pursuit of social justice to the benefit of the evicted residents.

It is clear from analysis of the cases that litigation not only plays a crucial role but that it is fundamental as part of the broader commitment to social transformation.²⁴⁴ I have shown how litigation affirms the legal nature of socio-economic rights and provides in practice, the right to an effective remedy²⁴⁵ which I argued, overtly political strategies may sometimes ignore. I explored different aspects of socio-economic rights litigation and my analysis revealed divergent characteristics inherent in each of the cases. A common trait that runs through all four cases however, is the fact that litigation forms part of a broader political strategy and represents a direct or indirect public interest factor in preventing social exclusion as well as in facilitating social transformation.²⁴⁶

Generally, I have stated that litigation is not the one indispensable strategy by which to achieve social transformation. I argued that the realisation of socio-economic rights through litigation has great potential to shape social relations and social actions in ways that further the struggle for social transformation.²⁴⁷ Geraldine Van Bueren has stressed that the realisation of socio-economic rights cannot be said to be achievable exclusively through the courts, but rather that the ‘courts are able to act as a constitutional safety net when other mechanisms have failed specific groups in

²⁴³ *Schubart Park* (n 165 above) para 43, 51 & 53; Jacobs (n 232 above)

²⁴⁴ Langford (n 67 above) 26.

²⁴⁵ Langford (n 67 above) 26.

²⁴⁶ Langford (n 67 above) 17.

²⁴⁷ Thomas (n 119 above) 194.

the community.²⁴⁸ If the constitutional framework that shapes the discourse on socio-economic rights in South Africa has to be fully understood and exploited in ways that give urgency to social transformation,²⁴⁹ I argue that there is need to explore the strategy even further. In this regard, I suggest that it would be important to do some more investigation about the strategy. Having explored the jurisprudence of the Constitutional Court and illustrated with evidence the significance and potential of litigation, it would serve greater purpose to also consider the factors that determine and necessitate the use of socio-economic rights litigation as a strategy in the struggle to achieve social justice as part of the entire social transformation process.

²⁴⁸ Butt D ‘Transformative constitutionalism and socio-economic rights: Courts and the making of public policy and the social contract revisited’ (2008) *The Centre for Socio-Legal Studies, University of Oxford* 5.

²⁴⁹ Thomas (n 119 above) 194.

CHAPTER FOUR

Factors that Determine or Necessitate the use of Socio-Economic Rights

Litigation in the Struggle for Social Justice

1. Introduction

South Africa remains a leading example in the constitutional protection and judicial enforcement of socio-economic rights.¹ Richardson has articulated the view that South Africa has raised itself to a judicial leadership position that is yet unrivalled globally in the justiciability and enforcement of socio-economic rights.² Its socio-economic rights jurisprudence therefore, provides a model of competence for courts elsewhere to emulate in protecting socio-economic rights as justiciable rights.³ As my analysis in the previous chapters has shown, socio-economic rights are not just a matter of principle; they have formally and quite practically been legitimised through litigation.⁴ However, in spite of the proliferation of socio-economic rights litigation it has been argued that formally affirming the rights does not necessarily translate into material change.⁵ The potential of litigation also still remains submerged in controversy. For instance, the political organs of state have misconceived socio-economic rights litigation as a means by which political adversaries are using the courts to co-govern the country.⁶

The central argument that I have tried to sustain so far is that litigation has potential to be used as a strategy in the struggle for social justice. To say that something has potential means that it is

¹ Iles K ‘Limiting socio-economic rights: Beyond the internal limitations clauses’ (2004) 20 *S Afr J Hum Rts* 448, 449.

² Richardson III H ‘Patrolling the Resource Transfer Frontier: Economic Rights and the South African Constitutional Court’s Contributions to International Justice’ (2007) 9:4 *Afr Studies Qrtly* 81.

³ Richardson III (n 2 above) 82.

⁴ Yusuf S ‘The rise of judicially enforced economic, social and cultural rights: Refocusing perspectives’ (2012) 10:2 *Seattle J Soc Justice* 753, 782.

⁵ Gloppe S ‘Litigation as a strategy to hold governments accountable for implementing the right to health’ (2008) 10:2 *Health Hum Rts J* 21, 22.

⁶ O’Regan K ‘A forum for reason: Reflections on the role and work of the Constitutional Court’ (2011) *Helen Suzman Memorial Lecture, Johannesburg* 4.

capable of being developed into something or that it has possibility of being used.⁷ It means that litigation's transformative potential has not sufficiently been explored to advance the cause for social justice. It also means that those whose livelihood might be ameliorated through socio-economic rights litigation are unfairly or unnecessarily deprived of the opportunity. The enquiry that I engage with in this chapter is to find out what the factors are that determine or necessitate the use of socio-economic rights litigation in the quest for social justice?

My purpose is not only to identify these factors but also to examine how and to what extent they influence litigation for social change. In fulfilling this purpose, I further determine the pragmatic potential of socio-economic rights litigation and its relevance in accomplishing the commitment to social transformation. The enquiry looks beyond the narrow factors that focus simply on ensuring victory in court. The motivation to explore more extensively is informed by Gloppen's thesis, which states that a positive judgment does not in itself guarantee that anticipated transformation will take place.⁸ She argues that what happens in court is only one aspect of the litigation process.⁹ Drawing evidence from the judgments that I have examined in chapter three, the factors that I envisage actually have to do with the contributing and intervening forces that combine in a holistic manner to influence litigation as well as its broader social impact. The chapter thus has a twofold purpose.

The first purpose is to establish groundwork knowledge for better understanding of the underlying as well as the contextual factors that dictate the potential and effectiveness of litigation as a strategy by which to strive for social justice. Cumming and Rhodes have figured out that litigation is in essence, an imperfect but indispensable strategy to create social change.¹⁰ It is obvious that socio-economic rights litigation is not absolute and cannot effectively work independently or in isolation from other political, socio-economic and institutional considerations.¹¹ It also cannot be

⁷ Hornby AS *Oxford Advanced Learner's Dictionary* (2005) 7th edition 1134.

⁸ Gloppen S 'Public interest litigation, social rights and social policy.' (2005) *Conference Paper, Arusha Conference on New Frontiers of Social Policy* 22.

⁹ Gloppen 2005 (n 8 above) 22.

¹⁰ Cumming E & Rhodes D 'Public interest litigation: Insights from theory and practice' (2009) 36 *Fordham Urb L J* 603, 604.

¹¹ Cumming & Rhodes (n 10 above) 605,609.

detached from the broader social impact it is intended to create.¹² It is therefore necessary to take into account the combination of independent elements as a basis for determining the extent to which litigation may or may not translate into social change. By examining these factors I illustrate how they could increasingly be explored to ensure that litigation becomes more effective in seeking to achieve social justice.

Secondly, the purpose is to provide a framework to guide assessment that aims at determining the potential of litigation as a strategy by which social justice may be established.¹³ Cumming and Rhodes have also ascertained that only through a more reflective assessment of the impact of litigation can its full potential in the pursuit of social justice be accomplished.¹⁴ It therefore requires a strategic analysis of not only the litigation process but most importantly the significant aspects that shape the process and the outcome.¹⁵ Understanding these factors is important in enabling orderly thinking on key questions relating to the deep-rooted issues that motivate litigation, the structural or institutional aspects that facilitate the process and the incidence of change that litigation may convey to society.

Studies have indicated that litigation is neither the primary nor necessarily the preferred mechanism by which to achieve full realisation of socio-economic rights.¹⁶ Generally, the political arms of government are in a better position to provide the framework for the realisation of socio-economic rights than the judiciary.¹⁷ Nonetheless, it happens some times that the political structure becomes practically deficient in adequately translating constitutional socio-economic rights guarantees into real entitlements, thereby adversely affecting those whom the rights are meant to empower and to protect.¹⁸ Given the commitment for social transformation envisaged by the Constitution, it becomes legitimately requisite that political approaches and processes for the

¹² Cumming & Rhodes (n 10 above) 605,609.

¹³ Cumming & Rhodes (n 10 above) 609.

¹⁴ Cumming & Rhodes (n 10 above) 605.

¹⁵ Cumming & Rhodes (n 10 above) 615.

¹⁶ Pieterse M ‘Legislative and executive translation of the right to have access to health care services’ (2010) 14 *Law, Democracy and Development* 3; Cumming & Rhodes (n 10 above) 612; Gloppe 2008 (n 5 above) 24.

¹⁷ Pieterse (n 16 above) 1-2.

¹⁸ Pieterse (n 16 above) 2.

realisation of socio-economic rights be subject to judicial scrutiny.¹⁹ Consequently, courts have practically demonstrated through litigation, the ability to identify failures in translating guaranteed socio-economic rights and to insist that the failures be redressed.²⁰ The potential of litigation to create social transformation depends on a range of factors that interact to shape the way it is carried out as well as the impact that it creates on society.²¹ I also determine how the factors have effectively been explored to improve the context for strategic impact litigation²² as well as advance socio-economic rights litigation as a useful strategy in the broader commitment to achieve social justice.

A number of academic accounts have given comprehensive analyses of factors, mostly internal to the litigation process, which generally focus on ensuring that litigation succeeds and achieves utmost social change.²³ Marcus and Budlender for instance, have identified seven factors which they claim are pre-requisite for public interest litigation to be successful and to achieve maximum social impact.²⁴ Using a socio-legal model in analysing the determining factors Dugard and Langford have pointed out that litigation for social change consists of ‘enabling’ and ‘material’ factors.²⁵ While the set of factors suggested by Marcus and Budlender as well as Dugard and Langford are relevant, the former focuses narrowly on the litigation process while the later focuses primarily on the impact of litigation. Both analyses are inherently short-sighted in the sense that they fail to take into consideration the decisive factors that ignite and are critical in shaping the process and the outcomes of litigation. In this chapter, I look rather broadly at the range of complex factors that generally influence socio-economic rights litigation. For the sake of

¹⁹ Pieterse (n 16 above) 2.

²⁰ Pieterse (n 16 above) 17.

²¹ Cumming & Rhodes (n 10 above) 613-615.

²² ESCR-Net ‘Africa regional social rights litigation workshop’ (2012) *Workshop Report, Economic, Social and Cultural Rights-Net* 11.

²³ See Gloppen 2005 (n 8 above); Marcus G & Budlender S *A Strategic Evaluation of Public Interest Litigation in South Africa* (2008) 119; Cote D & van Garderen J ‘Challenges to public interest litigation in South Africa: External and internal challenges to determining the public interest’ (2011) 27 *S Afr J Hum Rts* 167-182; Dugard J & Langford M ‘Art or science? Synthesising lessons from public interest litigation and the dangers of legal determinism’ (2011) 27 *S Afr J Hum Rts* 39-64.

²⁴ Marcus & Budlender (n 23 above) 119-147.

²⁵ Dugard & Langford (n 23 above) 54-64.

clarity, I cluster the factors into three broad categories namely; fundamental factors, enabling factors and impact factors.

In section 2 I look at the deep-rooted fundamental factors that instigate or cause litigation to happen. Generally, the fundamental factors explain the reasons why people resort to the courts with socio-economic rights claims. I go further to examine in section 3 the enabling factors that practically facilitate the process of litigating socio-economic rights with the aim to protect and to empower the poor. I examine in section 4 the impact factors with a focus on the incidence of change conveyed by litigation upon society. In this instance, I look at how litigation seeks to satisfy the public interest and most importantly how it aims at the ultimate goal to achieve social justice. In the concluding section 5 I establish that an understanding of these factors is important to the range of actors involved in or are broadly or narrowly affected by litigation.

2. Fundamental Factors

2.1 Socio-Economic Circumstances

The use of litigation as a strategy to achieve social justice cannot fully be understood without recognition of the underlying factors that lie at the basis as to why litigation happens. By looking at the socio-economic circumstances my purpose is to create understanding of the root causes of litigation for social change and to explain how they determine the use of litigation in the struggle for social change. It is important to understand for example, what caused the Phiri residents in the *Mazibuko* case to resort to the courts to claim the right to water? What prompted the Gabon informal settlers to invade privately own land that gave rise to the *Modderklip* litigation? Why the shackdwellers in *Abahlali baseMjondolo* took to the courts to challenge a provincial legislation duly enacted by a democratically elected legislature? And for what reason residents of residential property belonging to the City of Tshwane opted to go to court to contest their eviction in the *Schubart Park* litigation?

To a large extent the root causes of all four cases hinge on the dismal socio-economic circumstances of the litigants. This is partly as a result of the persistent legacy of impoverishment bequeathed by apartheid and also partly as a result of the on-going social injustices that the

present regime has sustained.²⁶ These are often not only root causes but constitute the purpose for which litigation is taken up, which essentially aims to redress the same appalling conditions that are often contested in litigation. I argue that these socio-economic circumstances, characterised by impoverishment and social injustice normally have a political dimension and are usually within the domain of the political branches of government to deal with. However, because of the shortcomings of political approaches in dealing with the challenges as evidence from jurisprudence has shown, litigation has become a potential option that has proved effective.

2.1.1 Impoverishment

Poverty and the multiple interconnecting forms of inequality profoundly affect not only people's survival, health and well-being but also their ability to participate on equal terms in the shaping of society.²⁷ Impoverishment is one of those problematic realities that have been a root cause of socio-economic rights litigation. The poor are generally excluded from mainstream society and their place has often been associated with squatting in urban and peri-urban spaces, overcrowding and squalor conditions in informal settlements, forced homelessness as a result of arbitrary evictions and the daily struggles for survival.²⁸ In their struggles for livelihood and claims to habitation as a matter of right, these disadvantaged groups have often transgressed the austere principles of legality established by the constitutional order.²⁹

It is in this regard that the shack dwellers in *Abahlali baseMjondolo*, threatened by the Slums Act, employed the strategy of litigation ultimately to seek the arm of justice for protection from being rendered more destitute and possibly homeless.³⁰ The court identified the living conditions of the shack dwellers as normally not fit for human habitation but established that the slums are indeed

²⁶ See Terreblanche S A *History of Inequality in South Africa 1652-2002* (2002) 20 & 27; Ballard R 'Social movements in post-apartheid South Africa: An introduction' in Jones P & Stokke K (eds) *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 77, 86.

²⁷ Liebenberg S *Socio-Economic Rights: Adjudicating under a Transformative Constitution* (2010) Juta 27.

²⁸ Chenwi L 'Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions' (2008) 8:1 *Hum Rts L Rev* 105, 114; Greenstein (n 29 below) 425.

²⁹ Greenstein R 'Social rights, essential services, and political mobilization in post-apartheid South Africa' (2006) 29 *Journal Consumer Policy* 417, 418; Chatterjee P *The Politics of the Governed: Reflections on Popular Politics in most of the World* (2004) 40.

³⁰ *Abahlali baseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99(CC).

home to the litigants.³¹ For this reason, the litigants were determined to confront the Slums Act in court with the aim to protect their poverty-stricken condition from being made worst. Thus the Court came to the conclusion to invalidate the Act because it exposed the litigants to greater vulnerability and possible homelessness, which is a worst condition of impoverishment than living in the slums.³²

The deplorable circumstances in which the poor find themselves is undeniable still evident in present day South Africa. Over a decade ago the late Chief Justice Chaskalson identified that:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.³³

The level of impoverishment represented by a 40% unemployment rate, 30% inadequate housing or access to piped water and about 50% income levels below R500 per month as Karin Lehmann has figured out, moved her to the conclusion that ‘life, for the majority of South Africans, remains appallingly hard, despite the socio-economic promises of the Constitution’.³⁴ I argue that the strategy of progressive realisation has not been able to redress the bleak situation of poverty and deprivation in the light of the transformative vision. Thus, litigation has aimed to balance the scales of social justice that have tilted unfavourably against the poor. I agree with Salma Yusuf’s opinion that litigation cannot be considered a panacea to the socio-economic hardship suffered by disadvantaged and marginalised sections of society but that it can play a role in alleviating poverty.³⁵ So it happened in *Abahlali baseMjondolo* that the litigation actually did not bring about any improvement in the living conditions of slum dwellers but at least it provided legal protection against potential evictions, homelessness and destitution.

³¹ *Abahlali baseMjondolo* (n 30 above) paras 46, 29, 32, 101.

³² *Abahlali baseMjondolo* (n 30 above) paras 126-129.

³³ *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) para 8.

³⁴ Lehmann K ‘In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core’ (2006) 22 *Am U Int’l L Rev* 163, 164.

³⁵ Yusuf (n 4 above) 756.

2.1.2 Social injustice

Social injustice remains a major challenge to South Africa. In spite of the constitutional promises of a better life, fairness and equality of opportunity as well as equal protection of the law, life continues to be favourable to some of the people and not to others. The deep-seated injustices have become so overwhelming that they cannot reconcile with the constitutional guarantees. Retired Justice O'Regan has underscored this fact in *Mazibuko* when she stated that;

This inequality is evident in South Africa. While piped water is plentifully available to mines, industries, some large farms and wealthy families, millions of people, especially women, spend hours laboriously collecting their daily supply of water from streams, pools and distant taps.... The achievement of equality, one of the founding values of our Constitution, will not be accomplished while water is abundantly available to the wealthy, but not to the poor.³⁶

Not only is water abundantly available to the rich and not to the poor, the commercialising of water entailed transforming its value as a natural common to an economic good.³⁷ This was largely disadvantageous to the Phiri residents who could not afford to pay. Besides, the manner in which the free basic water was allocated was grossly unjust. The City of Johannesburg's water policy did not take into account the number of persons living on a stand for which the stipulated six kilolitres of free water was allocated. For instance, the stand on which Lindiwe Mazibuko lived is said to have been inhabited by some 20 people altogether.³⁸ All of them were entitled to the same six kilolitres that was equally available to other households that hosted fewer numbers of persons. It is because of injustices of this type that the *Mazibuko* litigants, after exhausting the avenues of protest campaign took their case to the courts with the aim to obtain a fair measure of social justice.

Not only is the factor of social injustice evident in the area of access to water but also in the area of access to adequate housing. Octavio Ferraz has expressed concern why Irene Grootboom died homeless about eight years after the groundbreaking *Grootboom* judgment was passed if there is a

³⁶ *Mazibuko & Others v City of Johannesburg & Others* CCT 39/09 (2009) ZACC 28 para 2.

³⁷ Dugard J 'Civic action and legal mobilization: The Phiri water meters case' in Handmaker J & Berkout R (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 78.

³⁸ *Mazibuko* (n 36 above) para 4.

right to housing in South Africa.³⁹ Ferraz's worry signals just a fraction of the myriad of unanswered questions relating to socio-economic rights and the lived experiences that a huge proportion of the population is subjected to. Liebenberg has stated that by placing a constitutional obligation on the state to ensure that everyone has access to a variety of socio-economic rights, the realisation of the rights become a matter of public concern.⁴⁰ While the poor wait expectantly for entitlement to the material things guaranteed by socio-economic rights, these guarantees often cannot readily be fulfilled because sometimes the interval for progressive realisation becomes unreasonably lengthy. This often stretches the ability of the poor to endure, to the point that, in the case of housing for example, they have frequently resorted to invasion or refusal to be evicted from state owned or privately owned property.⁴¹ *Modderklip* is illustrative of this fact.

If there is a right to housing guaranteed by the Constitution, it obviously was incomprehensible and of course, a manifestation of gross social injustice for the informal settlers in *Modderklip*. It does not make sense that they should be haunted with eviction from vacant land that was abundantly available to a single individual meanwhile; in their large numbers they had nowhere else to go. This led to their resolve not to move from the land, which resulted in the litigation. The reaction of the state when they initially invaded state own land was to forcefully evict them and went further to encouraged *Modderklip* to do the same when they later invaded the latter's land.⁴² The political solution that the state applied to the situation rather created the problem of homelessness than address the constitutional guarantee of the right of access to adequate housing. However, through litigation the constitutional promise to establish social justice in the area of access to adequate housing was accomplished. The Court ruled that the informal settlers could not be evicted without alternative resettlement at the expense of the state as stipulated by section 26(3) of the Constitution.⁴³ The argument I am making here is that litigation can work effectively

³⁹ Ferraz OLM 'Between usurpation and abdication? The right to health in the courts of Brazil and South Africa' (2009) electronic copy: <http://ssrn.com/abstract=1458299> (accessed: 18 March 2013) 10.

⁴⁰ Liebenberg S 'Needs, rights and transformation: Adjudicating socio-economic rights' (2005) *CHRGJ Working Paper No. 8* 13.

⁴¹ Chenwi (n 28 above) 120. Chenwi quotes the case of *City of Cape Town v Rudolph and Others* 2003 (11) BCLR 1236 (C) where residents of Valhalla Park in the City of Cape Town who were placed on the waiting list, after 10 years of waiting decided to invade and occupy vacant land belonging to the City municipality.

⁴² *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) paras 3-4.

⁴³ *Modderklip* (n 42 above) para 68(c).

as a strategy in the struggle to achieve social justice and therefore deserves to be explored in order to address the socio-economic challenges facing South Africa.

Present day South Africa is still characterised by wide discrepancies in resource distribution. The following observation points out the effect of such engrained inequality in relation to the vision to transform the society to one based on social justice:

The legacy of inequality inherited from the past means that the constitutional commitment to equality cannot simply be understood as a commitment to formal equality. It is not sufficient simply to remove racist laws from the books and to ensure that similar laws cannot be enacted in future. That will result in a society that is formally equal but that is radically unequal in every other way. The need to confront this legacy is recognised in the equality clause, particularly in s 9(2) which permits measures ‘designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination’.⁴⁴

Disadvantaged by unfair discrimination by the social injustice of inequality, victims of socio-economic rights violation have found recourse to litigation as a means to legitimately lay claim to the full and equal enjoyment of the socio-economic rights guaranteed by the constitution.⁴⁵ This has been possible under the constitutional dispensation where adjudication forms an integral component of the fundamental governance structures, which includes the commitment to translate rights into questions of material entitlement.⁴⁶ On the contrary a weak socio-economic rights realisation strategy can have the effect of frustrating the interests of the poor and thereby compromise the goal to achieve social justice.⁴⁷ I argue that as long as the aspirations of a better life for the poor remain frustrated as a result of the heightening challenges of social injustice, litigation will remain relevant as a pragmatic strategy by which to strive for the envisaged South African society that is built on social justice.⁴⁸ The Constitutional Court has ascertained that the judiciary cannot absolutely eradicate the adverse socio-economic conditions in society but it can at least moderate and diminish the degree of injustice and inequality.⁴⁹

⁴⁴ De Waal J et al *The Bill of Rights Handbook* (2001) 4th edition 199-200.

⁴⁵ See sect 9(2) of the Constitution.

⁴⁶ Liebenberg 2005 (n 27 above) 13.

⁴⁷ Liebenberg 2005 (n 27 above) 14.

⁴⁸ Kathree F ‘Public interest law: Its continuing role in South Africa’ (2002) *Johannesburg Bar Advocate Forum* 33.

⁴⁹ *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC) para 38; Liebenberg 2005 (n 27 above) 29.

An important factor that I move on to examine in what follows is whether government has the political will to transform the current socio-economic circumstances or to recognise the role of litigation to do so.

2.2 Political Will

In this section I illustrate how the exercise of political will or the absence thereof in the realisation of socio-economic rights contributes in determining the use of litigation in the struggle for social justice. Liebenberg has argued that if poverty is not a natural phenomenon but a result of political, legal and social choices then it can be redressed through political will combined with appropriate social and legal re-organisation.⁵⁰ Before I proceed it is important to understand what political will entails. The concept of political will is complex. For the purpose of this study, I elect to rely on Carmen Malena's definition, which refers to political will as the 'demonstrated credible intent of political actors'.⁵¹ From another viewpoint, political will can be understood to mean the commitment of political actors to undertake actions to achieve a set of objectives.⁵² In this instance I refer to the credible intent or the commitment of the state to ensure realisation of socio-economic rights. Indicators such as statutory provisions, legislation, policy measures and political promises would normally imply the presence of political will to translate socio-economic rights into material entitlements.⁵³ It has been stated that without some form of concrete action statutes, legislations, policies and political promises are insufficient signals to determine political will.⁵⁴ In the proceeding discussion, I look at the extent of government willingness to fulfill its socio-economic rights obligations.

2.2.1 Willingness to fulfill socio-economic rights

⁵⁰ Liebenberg 2005 (n 27 above) 8.

⁵¹ Malena C 'Building political will for participatory governance: An introduction' in Malena (ed) *From Political Won't to Political Will: Building Support for Participatory Governance* (2009) 18.

⁵² Malena (n 51 above) 18; see also Chr. Michelsen Institute 'Unpacking the concept of political will to confront corruption' (2010) 1 *U4 Brief* 1.

⁵³ See Chr. Michelsen Institute (n 52 above) 1.

⁵⁴ See Chr. Michelsen Institute (n 52 above) 1.

It is mandated on government to ensure progressive realisation of socio-economic rights by default, through democratic and politically grounded strategies and processes. This mandate has not proved to be absolute or even effective. Disadvantaged groups have continually demonstrated lack of confidence and have expressed growing disillusionment with government – citing lack of service delivery, lack of responsiveness and lack of accountability as major problems.⁵⁵ This has often adversely affected the coping capacity of the poor. Malena has established that situations of this kind have led to unbearable suffering, lost livelihood improvement opportunities, social injustices and have also imposed barriers to the realisation socio-economic needs.⁵⁶

Mzukisi Qobo has described South Africa's political orientation as facing a crisis of purpose, largely due to poor political leadership as well as how it is institutionally structured.⁵⁷ For a majority of South Africans the promise of democracy has not brought about expected social benefits, leading to disappointment and dissatisfaction with the government's inability to eradicate the huge socio-economic challenges.⁵⁸ Time and again, this has stretched to such extent that recourse to litigation becomes the preferred alternative to democratic and political avenues of claiming socio-economic rights. I argue that housing policies, for example as well as enforcement of court orders like the one handed down in *Grootboom* depends entirely on the willingness of the government to implement them. Political will therefore determines the extent to which fundamental rights are acknowledged and respected. Lack of political will commonly results in the exclusion of ordinary people from governance processes and the unilateral making of decisions that directly affect their lives, including decisions relating to the enforcement of socio-economic rights.⁵⁹ In many instances this has constituted a fundamental factor that has determined recourse to litigation.

⁵⁵ Malena (n 51 above) 5.

⁵⁶ Malena (n 51 above) 3, 6.

⁵⁷ Qobo M 'Opinion: How to re-engineer government so it works' (2013) *Business Day* of 12 April 2013.

⁵⁸ Cote & van Garderen (n 23 above) 167.

⁵⁹ Malena (n 51 above) 5; see also Zikode and Nsibande 'Serving our Life Sentences in the Shacks' (2010) available at: <http://www.abahlali.org/node/7187> (accessed: 31 December 2012).

In *Schubart Park*, the state demonstrated an unconcealed lack of political will to fulfill its constitutional obligation towards the poor.⁶⁰ The state deliberately overlooked its obligation to the residents with regard to the right not to be evicted without due process of law. Besides depriving the residents of essential utility services, the state went further in arbitrarily evicting them without making provision for alternative accommodation.⁶¹ The lack of willingness to abide by its constitutional obligation became even more obvious when the state refused propositions for negotiation advanced by the residents' legal representatives.⁶² If the state had exercised the willingness to fulfill its obligations towards the Schubart Park residents, a political solution could probably have resolved the problem. However, because of the lack of such willingness the matter was forced to take the path of litigation. The Court in fact pointed out that the Constitution requires the substantive involvement and engagement of people in decisions that may affect their lives.⁶³ Thus, litigation helped to re-emphasise the state's obligation to engage meaningfully with the evicted residents in order to fulfill their right to adequate housing.⁶⁴

The political will to enforce socio-economic rights is pre-determined by three essential elements. Malena has referred to these elements as the 'political want', the 'political can' and the 'political must'.⁶⁵ It means that political actors, in order to show commitment to socio-economic obligations need to demonstrate the *willingness* to take action; they need to demonstrate confidence in the *capacity* to undertake the action, as well as demonstrate acknowledgment of the *obligation* to undertake the action.⁶⁶ The last element is usually activated by citizen engagement

⁶⁰ *Schubart Park & Others v City of Tshwane & Another* CCT 23/12 [2012] ZACC 26 para 17; sects 26(1) & (3) of the Constitution.

⁶¹ *Schubart Park* (n 60 above) paras 2-3.

⁶² *Schubart Park* (n 60 above) paras 4.

⁶³ *Schubart Park* (n 60 above) paras 42; see also *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC); *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); *Modderklip* (n 42 above); *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 (5) BCLR 475 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* [2009] ZACC 16; 2010 (3) SA 454 (CC); *Abahlali baseMjondolo* (n 30 above); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* 2012 (2) SA 104 (CC); and *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality & Another* [2012] ZACC 9

⁶⁴ *Schubart Park* (n 60 above) paras 42-51.

⁶⁵ Malena (n 51 above) 19.

⁶⁶ Malena (n 51 above) 19.

and the activism of civil society to pressure government to fulfill its obligations with regard to socio-economic rights.⁶⁷ Where all three elements can be established to be lacking, litigation logically fills in the gap as an appropriate option to complement the political strategies.⁶⁸

Elizabeth Wickeri has for example, illustrated that in spite of the African National Congress' post-apartheid political campaigns ran on the platform of 'housing for all'; little change has actually taken place after electoral victories.⁶⁹ The false show of political will represented by the campaign rhetoric to improve the housing conditions of the poor has practically been void of the credible intent and the commitment to deliver according to the electoral promises.⁷⁰ Wickeri has argued that this led to a marked increase in land invasions and eventually to series of eviction litigation.⁷¹ As a result of the inadequate manifestation of the willingness to ensure progressive realisation of socio-economic rights, marginalised groups have increasingly turned to the courts to seek protection.⁷² The *Grootboom* case, as Wickeri has highlighted resulted from political failure embodied in the unfulfilled promise to deliver housing to all.⁷³ Though the judgment required government to develop a housing policy to cater for the urgent needs of those in desperate situations, the mass of the population has continued to face housing crises, with a huge proportion still living in squalor conditions.⁷⁴ The *Grootboom* community particularly did not experience much improvement in spite of the judgment. It took several years for housing policy and subsequent housing rights litigation to reap significant positive benefits from the precedent laid down by the judgment.⁷⁵ Thus, I argue that without the important role of litigation the situation of

⁶⁷ Chr. Michelsen Institute (n 52 above) 1-2.

⁶⁸ See Cote & van Garderen (n 23 above) 170 [With the apparent lack of political support for this system and the Department of Home Affairs' increasing unwillingness to engage with civil society, litigation soon became the only option open to NGOs working in the field of refugee protection].

⁶⁹ Wickeri E 'Grootboom's legacy: Securing the right to access to adequate housing in South Africa' (2004) *CHRGJ Working Paper No. 5* 11-12.

⁷⁰ Wickeri (n 69 above) 13.

⁷¹ Wickeri (n 69 above) 13; see eviction cases such as *Grootboom* (n 63 above); *Modderklip Boerdery* (n 42 above); *Port Elizabeth Municipality* (n 63 above); *Joe Slovo* (n 63 above); *Olivia Road* (n 63 above); *Schubart Park* (n 60 above); *City of Cape Town v Rudolph and Others* 2003 (11) BCLR 1236 (C).

⁷² Liebenberg 2005 (n 27 above) 11.

⁷³ Wickeri (n 69 above) 6.

⁷⁴ Wickeri (n 69 above) 5-6.

⁷⁵ Wickeri (n 69 above) 6, 21.

the poor might become worst off. However, as I have endeavoured to illustrate, litigation has and is likely to continue to play a valuable part in the struggle by the poor to achieve social justice.

It is important when constructing socio-economic rights litigation to take into consideration the fundamental factor relating to political will. This may enable prior determination of the probability of government's commitment to fulfill socio-economic rights, create the opportunity to anticipate government's reaction to the litigation process and also the possibility to estimate government's capacity to enforce the orders of the court in the case of a positive judgment. It must however be acknowledged that the adversarial nature of litigation may sometimes cause it to be hostile to the political will to ensure progressive realisation. Tension may thus arise and therefore ruin the potential of litigation to be used as a strategy in the pursuit of social justice.

2.2.2 Capacity to fulfill socio-economic rights

The capacity to fulfill socio-economic rights constitutes another determining fundamental factor to socio-economic rights litigation. The extent to which government may actually be expected to exercise the will to ensure the realisation of socio-economic rights is limited to what it can reasonably accomplish within its available resources. The capacity of government to fulfill its socio-economic rights obligation is therefore limited. Determination of what constitutes political will confronts the ability to distinguish between will and capacity. I argue that inaction, which may be characterised by failure to pass legislation, to implement policies or to allocate resources appropriately, for example, would generally be interpreted as an indication of lack of political will. Meanwhile, what may look like failure or lack of political will, could in reality be a result of insufficient capacity to act because of resource constraints.⁷⁶ It is in this light that O'Regan has stated that litigation permits citizens to hold government to account, but does not require government 'to be held to an impossible standard of perfection'.⁷⁷

The *Modderklip* judgment, for instance was passed in 2005 but it was not until five years later in 2010 as Tissington found out that the first attempts at resettling the Gabon community in an

⁷⁶ See Chr. Michelsen Institute (n 51 above) 1.

⁷⁷ O'Regan (n 6 above) 35; *Mazibuko* (n 36 above) para 161; DoJ & CD 'Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State' (2012) *Media Statement* iv.

alternative location began to materialise.⁷⁸ At the moment of reporting on the state of enforcement of the judgment, Tissington observes that only 670 houses had been constructed.⁷⁹ Whereas, the Gabon community earmarked for relocation numbered approximately 40,000 residents.⁸⁰ Justice delayed as it is generally said, means justice denied. Not only has enforcement of the *Modderklip* judgment delayed, Tissington has also identified that the relocation process has been marked by corruption and lack of proper engagement with the community members.⁸¹ The lack of capacity to effectively enforce the orders of the court limits the potential of litigation and therefore, hinders the possibility of using it as a strategy in the struggle to achieve social justice.

Gerald Erasmus has stated that the capacity to respond to socio-economic demands entails more than availability of resources; it is also about effective governance, the rule of law, legitimacy, stability, and predictability about the outcomes of legal actions.⁸² This is because socio-economic rights obligations do not necessarily prevail over other obligations of the state as Tomasevski has argued.⁸³ It may happen that in reality government lacks the capacity to give effect to socio-economic claims because of other equally important obligations. In such instances, litigation may instead turn out to be an inhibiting factor to progressive strategies to achieve social transformation. Without the necessary capacity government cannot adequately meet its socio-economic rights obligations.⁸⁴ An understanding of this dimension in the litigation process is important. This may enable preliminary assessments as to whether there is sufficient capacity for government to give effect to socio-economic demands, before engaging in litigation. In this way litigation can then strategically be planned and carried out so that it produces maximum impact in terms of seeking to achieve social justice.

⁷⁸ Tissington K ‘Demolishing development at Gabon Informal Settlement: Public interest litigation beyond *Modderklip*’ (2011) 27 *S Afr J Hum Rts* 192-205.

⁷⁹ Tissington (n 78 above) 204.

⁸⁰ *Modderklip* (n 42 above) para 8.

⁸¹ Tissington (n 78 above) 203.

⁸² Eramus G ‘Socio-economic rights and their implementation: The impact of domestic and international instruments’ (2004) 32 *Int'l J Legal Info* 243, 257.

⁸³ Tomasevski K ‘Strengthening pro-poor law: Legal enforcement of economic and social rights’ (2005) *ODI – Rights in Action* 7.

⁸⁴ Eramus (n 82 above) 257.

Besides the fundamental factors that I have examined, which I argue determine the potential of litigation, there are other factors that can be considered as enabling the use of litigation in the struggle for social justice. These factors create an enabling environment as well as facilitate the course of litigation.

3. Enabling Factors

3.1 Political Context - Constitutional Dispensation

In this section, I illustrate how South Africa's political context, marked by constitutional democracy necessitates the use of socio-economic rights litigation in the pursuit of social justice. I argue that without such an enabling environment the use of litigation to create social change would arguably be impossible to conceive of. The advent of constitutional democracy changed the country's political landscape to the extent that conditions became favourable for using litigation as strategy to achieve social transformation. A crucial feature to note is the way in which conventional conceptions of the doctrine of separation of powers have been altered. Retired Justice O'Regan has made known that separation of powers is not absolute under a constitutional democracy.⁸⁵ Following the traditional conception of separation of powers the courts would normally be barred from adjudicating socio-economic rights for reasons that they would encroach on policy and budgetary issues, which according to this logic is not within the province of the judiciary. However, case law has in deed proved that the courts can in effect make decisions that have huge political impact.

In *Modderklip*, the Court ordered the state to pay huge sums of money to the owner of the Modderklip land for the entire duration that the land was unlawfully occupied, coupled with having to provide alternative accommodation in the event that the informal settlers would unavoidably be evicted.⁸⁶ This certainly had a massive impact on the state's budget. In the same vein, the decision of the Court in *Abahlali baseMjondolo* to nullify the Slums Act passed by an elected provincial parliament also had a heavy impact on government policy. This is especially so, considering the fact that the Act adopted by the KwaZulu-Natal legislature was enacted as a

⁸⁵ O'Regan (n 6 above) 6.

⁸⁶ *Modderklip* (n 42 above) para 68(3); Tissington (n 78 above) 203.

pilot legislation intended to inform the enactment of similar legislation in the other provinces.⁸⁷ By nullifying the Act the Court was as a result making a political decision with far reaching impact, to the effect that the legislation will not be replicated.

The extent to which the Court went in making the robust decisions in these two judgments could not have been possible without such an enabling environment determined by transformative constitutionalism. With the commitment to provide legal protection to vulnerable groups that lack political influence or the voice to articulate their demands, the courts have been bestowed with a rather fulfilling role to the democratic mandate.⁸⁸ The supremacy of the Constitution as a statutory framework, a wide range of legal mechanisms, relaxed standing provisions and extensive remedial powers granted to the courts has helped to shape and to stabilise the democratic arrangement, making it conducive for effective socio-economic rights litigation.⁸⁹ This has allowed a reconceived, albeit minimal role for the judiciary and consequently for litigation. Speaking at the conference to celebrate the first decade of democracy, which aimed at exploring strategies – particularly the role of public interest litigation for the achievement of social transformation, Dr. Ginwala expressed the view that;

The Constitution can only provide a framework for the organisation and conduct of society on the basis of particular values and principles. Constitutions do not themselves create the society, or the order envisaged. Citizens acting in the political domain and others, acting through political parties, civil society organisations, civil movements, social movements, need to put forward policies and programmes which will further the achievement of the values and objectives they seek to achieve. Constitutions are not self-executing socio-economic programmes.⁹⁰

Because the Constitution is not self-executing it has needed mechanisms and strategies to actualise the promises contained therein. As a result, judicial enforcement has come to be acknowledged as one of the strategies by which to ensure that socio-economic rights are translated into reality. The judiciary thus provides space for the participation of vulnerable and marginalised groups to challenge injustices that result from a violation of rights, as opposed to

⁸⁷ *Abahlali baseMjondolo* (n 30 above) paras 16, 85.

⁸⁸ Yusuf (n 4 above) 762.

⁸⁹ Marcus & Budlender (n 23 above) 9.

⁹⁰ FHR & SAHRC ‘Celebrating a decade of democracy: A review of public interest law – In pursuit of justice’ (2004) *Conference Report* 9.

being seen as an institution that makes substantive political decisions.⁹¹ Looking at the judicial role from this angle helps to strengthen the legitimacy of the courts, without which they would be deterred from taking the initiative to develop the potential and the capacity for effective enforcement of socio-economic rights.⁹² Salma Yusuf has argued that the debate relating to judicial enforcement has now focused more on the extent to which the judiciary may intervene in the fulfillment of socio-economic rights.⁹³ The specific enabling factors would include relaxed standing provisions, extensive remedial powers as well as the jurisprudence of the courts. I proceed to look at these factors from the standpoint that without them, socio-economic rights litigation would virtually not be possible.

3.1.1 Relaxed standing provisions

Socio-economic rights litigation often involves large numbers of people or entire communities, some of whom might not meet the common law criteria for approaching a court with a claim. Access to justice, which is inextricably linked to the rights of access to courts and equality before the law depends largely on the economic strength of individuals and groups in society.⁹⁴ Without access to justice it is impossible for people to enjoy the material entitlements guaranteed by socio-economic rights.⁹⁵ Marcus and Budlender have pointed out that inaccessibility to the courts and legal processes by victims of rights violation constitutes a major reason that has retarded socio-economic rights litigation.⁹⁶ I argue that the prevailing levels of poverty coupled with ignorance of the law and legal procedures means that a large number of poor people are simply unable to successfully bring their claims before the courts. This is in spite of the fact that the Constitution grants everyone the right to approach a court for adjudication of any disputed claim that can be resolved by application of the law.⁹⁷ The rule of standing as a means of gaining access to the courts therefore becomes a crucial factor in ensuring that the multitude of people who are affected by rights violation can find the forum to effectively vindicate their demands.

⁹¹ Yusuf (n 4 above) 762.

⁹² Yusuf (n 4 above) 762-764.

⁹³ Yusuf (n 4 above) 764.

⁹⁴ Gutto SBO ‘Beyond justiciability: Challenges of implementing/enforcing socio-economic rights in South Africa’ (1998) 4 *Buff Hum Rts L Rev* 97.

⁹⁵ Okogbule NS ‘Access to justice and human rights protection in Nigeria: Problems and prospects’ (2005) 3:2 *SUR-INT'L J HUM RTS* 94, 95-97.

⁹⁶ Marcus & Budlender (n 23 above) 12-13.

⁹⁷ Sect 34 of the Constitution.

The traditional legal formalities for approaching a court with a claim require that the rules of *locus standi* be satisfied. In accordance with common law, standing of prospective litigants to obtain legal relief may only accrue to persons who have personally suffered or are likely to suffer injury as a result of the violation or threatened violation of a legally enforceable right.⁹⁸ A notable feature of the constitutional dispensation, where courts have become an important arena for the pursuit of socio-economic rights is the relaxed criteria for standing.⁹⁹ This has given way to public interest litigation whereby an organisation or institutional applicant, without having a direct self interest to protect, is allowed to take legal action on behalf of others.¹⁰⁰ In principle persons who are directly affected by an unlawful action or violation of a right do not need to find the resources to bring a matter to court.¹⁰¹ This is because the procedural measures provided for by section 38 of the Constitution allow for representative action on behalf of adversely affected persons where the litigant is neither necessarily the violated party nor the direct beneficiary.¹⁰² In the *Ngxuza* judgment the court established that the purpose for the relaxed rules of standing is to give consideration to the large number of people who are unable to individually pursue their claims because they are prejudiced by poverty and do not have sufficient access to the legal system.¹⁰³ The Constitution further makes provision for direct access whereby anyone acting in the interest of justice is allowed to bring a matter of first instance directly or to appeal directly from any of the lower courts to the Constitutional Court.¹⁰⁴

These are not only theoretical claims but have practically manifested in litigation as can be justified by three of the cases that I examined in chapter three. *Mazibuko* involved public interest action on behalf of a community of people who were so poor that they could not afford to pay for extra consumption of water lest to talk of having the means to engage in legal battle against the

⁹⁸ Sita van Wyk J ‘The needs and requirements for class action in South African law with specific reference to the pre-requisites for *locus standi in iudicio*’ (2010) *unpublished LLM dissertation, University of Pretoria* i.

⁹⁹ Gloppen 2005 (n 8 above) 9.

¹⁰⁰ Cote & van Garderen (n 23 above) 171.

¹⁰¹ Cote & van Garderen (n 23 above) 171.

¹⁰² Sita van Wyk (n 98 above) i.

¹⁰³ Sita van Wyk (n 98 above) 17. See also *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape and another* 2001 (4) SA 1131A-B (SCA). *Ngxuza* is a leading case in the use of the concept of class action.

¹⁰⁴ Sect 167(6) of the Constitution.

state. However, their right to have access to sufficient water and ultimately their struggle to achieve social justice for all those in a similar situation could not be hampered by their inability to seek justice. Thus representative action was instituted by Lindiwe Mazibuko and four others, supported by a host of social movements and public interest organisations on behalf of the entire community.¹⁰⁵ Action in *Abahlali baseMjondolo* was instituted by the social movement of shack dwellers on behalf of the millions of desperately poor occupiers of informal settlements.¹⁰⁶ It is evident that without such representation the shack dwellers would not have been able to access justice on their own account. As an additional measure of the relaxed rules of standing as provided for by section 167(6) of the Constitution *Abahlali baseMjondolo* was allowed leave to appeal directly from the Durban High Court to the Constitutional Court.¹⁰⁷ In *Schubart Park* the litigants also sought and were granted leave to appeal directly from the Pretoria High Court to the Constitutional Court after leave to appeal was denied by the High Court and the Supreme Court of Appeal.¹⁰⁸ These are practical evidences that justify my argument with regard to the potential of socio-economic rights litigation as a strategy in the pursuit of social justice.

Jackie Dugard is right to argue that the Constitutional Court may not be able to alter the balance of economic forces that sustain structural poverty but by promoting access to justice could contribute not only to material change but also to socio-economic justice.¹⁰⁹ Under ordinary circumstances the manner in which socio-economic rights are vindicated, for example through land invasion may be considered technically as violating the law and therefore a criminal offence.¹¹⁰ Greenstein as well as Ballard have however, argued that in the instance where victims of socio-economic rights violation are morally justified in such action for the mere fact of claiming their rights, the relaxed rules of standing has given them legitimacy to vindicate such claims as civic actions.¹¹¹ Despite the Court's continuous reluctance to grant direct access to the

¹⁰⁵ *Mazibuko* (n 36 above) para 4; Dugard 2010 (n 27 above) 74-75.

¹⁰⁶ *Abahlali baseMjondolo* (n 30 above) para 2.

¹⁰⁷ *Abahlali baseMjondolo* (n 30 above) para 8, 10-11.

¹⁰⁸ *Schubart Park* (n 60 above) para 10.

¹⁰⁹ Dugard J 'Courts and structural poverty in South Africa: To what extent has the Constitutional Court expanded access and remedies to the poor?' (2012) *Conference Paper, Fordham Law School* 6.

¹¹⁰ Ballard (n 26 above) 88.

¹¹¹ Greenstein (n 29 above) 430; Ballard (n 26 above) 88.

poor,¹¹² there is need to acknowledge that the relaxed and expanded rules of standing has enabled tens of thousands of poor people to approach the courts with their demands, which otherwise they would not have the opportunity to do so. Direct access may give the added advantage of shortening the litigation process and possibly advance the potential of litigation in the pursuit of social justice.

3.1.2 Extensive remedial powers

Another important necessitating factor that has enabled the development of litigation for social change is the extensive possibility for the process to provide remedies to democratic insufficiencies.¹¹³ Mbazira has illustrated that the constitutionalisation of socio-economic rights underscores the transformative mandate which looks beyond merely guaranteeing abstract equality to a commitment to transform society from socio-economic deprivation to equitable distribution of resources.¹¹⁴ During the apartheid era, segregationist laws allowed a small fraction of the population to enjoy access to better amenities while the predominantly poor majority was deprived of such opportunities.¹¹⁵ However, the current political context provides the courts wide remedial powers to ensure that distributive justice is meted out especially to vulnerable and minority groups. The Constitution gives the courts a wide discretion to provide appropriate relief where an infringement of a right is established.¹¹⁶ The Court held in *Hoffman v South African Airways* that section 38 must be read in light of the provisions of section 172(1)(b) of the Constitution, which enables a court deciding a constitutional matter to make any order that is just and equitable in the circumstances.¹¹⁷ It so happened therefore, that in *Modderklip* the Court handed down a robust judgment with huge budgetary and policy repercussions on the state.¹¹⁸ The ruling was the most appropriate the Court could make in the circumstance, considering the need to balance the property rights of the land owner and the rights of the unlawful occupants not to be

¹¹² Dugard 2012 (n 109 above) 3.

¹¹³ Nijar GS ‘Public interest litigation: A matter of justice an Asian perspective’ (2006) Law Faculty, University of Malaya Kuala Lumpur.

¹¹⁴ Mbazira C *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 1.

¹¹⁵ Mbazira (n 114 above) 1.

¹¹⁶ Sect 38 of the Constitution.

¹¹⁷ *Hoffman v South Africa Airways* 2001 1 SA (1) (CC) para 42.

¹¹⁸ *Modderklip* (n 42 above) para 68.

evicted.¹¹⁹ Thus by its remedial powers the Court in *Modderklip* demonstrated the ability to use the kind of balanced jurisprudence that I have argued for. In applying such balanced jurisprudence, the courts would increasingly justify the potential of litigation as a strategy by which to achieve social justice.

In respect of socio-economic rights, the remedial provisions of the Constitution confer a wide margin of discretion on the courts to craft appropriate and innovative remedies to meet the needs of the impoverished and marginalised members of society.¹²⁰ Consequently, the purpose of litigation as Gauri has established forms part of the courts' commitment to address poverty, social exclusion and subjection that the majority of people continue to face.¹²¹ Thus, victims of rights violation or deprivation often approach the courts with expectations to achieve some form of distributive justice that would amount to amelioration of their livelihood circumstances.¹²² This may not always be the case due to the weak remedies that the courts have at times provided in some of the socio-economic rights cases.¹²³ The courts are sometimes restrained in exercising full remedial discretion because of the inability to overstep the bounds of separation of powers.¹²⁴ This has to a certain extent impacted adversely on the development of socio-economic rights litigation, bordering around the contention that it is not within the jurisdiction of the courts to grant remedies that have a resource re-distribution effect.

Socio-economic rights litigation has however, shown to be in favour of distributive justice. Mbazira has argued that the context demands that socio-economic rights be enforced in accordance with the theory of distributive justice.¹²⁵ Case law has illustrated how the courts have been able to tactically juggle with socio-economic rights to ensure that resources are re-allocated

¹¹⁹ *Modderklip* (n 42 above) para 66-67.

¹²⁰ Pillay K 'Implementing Grootboom: Supervision needed' (2009) 3:1 *Law, Democracy and Development* 258; Yusuf (n 4 above) 785.

¹²¹ Gauri V 'Public interest litigation in India: Overreaching or underachieving?' (2009) *Policy Research Working Paper 5109* 8.

¹²² Mbazira (n 114 above) 2.

¹²³ Mbazira (n 114 above) 2.

¹²⁴ Pillay (n 120 above) 258.

¹²⁵ Mbazira (n 114 above) 10.

to deprived groups.¹²⁶ In this way, I argue that the state has been constrained or precipitated to respond to socio-economic claims where it has failed to do so progressively through democratic or political processes. The remedial factor thus, in effect enables and advances the potential of litigation as a strategy in the ultimate commitment to establish a South African society based on social justice.

3.1.3 Jurisprudence of the courts

I discuss the socio-economic rights jurisprudence of the courts to illustrate how it helps in facilitating the litigation process. Gerald Erasmus has established that an independent judiciary is a pre-requisite for adjudicating on rights violations and for providing appropriate remedy.¹²⁷ He identifies that it often becomes complicated however, when the judicial function has to do with the enforcement of socio-economic rights.¹²⁸ The ability of the courts to deliver socio-economic rights judgments depends on their independence from the state and dominant social interests.¹²⁹ I share Mubangizi's view that it is difficult to envisage the enforcement of socio-economic rights without an institution as instrumental as the Constitutional Court.¹³⁰ In enforcing socio-economic rights, the courts need to formulate jurisprudence that defines the nature of state obligations in relation to the rights, the conditions under which the rights can be claimed, and the nature of the relief that victims of violation can expect.¹³¹

I acknowledged in chapter two the range of critiques against socio-economic rights litigation, one of which relates to the courts' jurisprudence which is generally considered weak.¹³² While the

¹²⁶ See for example *Leon Joseph v City of Johannesburg* 2010 (4) SA 55 (CC); *Khosa & others v Minister of Social Development* 2004 (6) SA 505 (CC); *Minister of Health v Treatment Action Campaign* (1) 2002 10 BLCR 1033 (CC); *Modderklip* (n 42 above); *Olivia Road* (n 63 above).

¹²⁷ Erasmus (n 82 above) 244.

¹²⁸ Erasmus (n 82 above) 244.

¹²⁹ Gloppe S 'Social rights litigation as transformation: South African perspectives' in Jones P & Stokke K *Democratising Development; The Politics of Socio-Economic Rights in South Africa* (2005) 153, 162.

¹³⁰ Mubangizi J 'Prospects and challenges in the protection and enforcement of socio-economic rights: Lessons from the South African experience' (2007) *Conference Paper – Athens* 14.

¹³¹ Liebenberg S 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty' (2009) *Law, Democracy and Dev't* 160.

¹³² Bilchitz D 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 9 *S Afr J Hum Rts*; Liebenberg 2009 (n 131 above) 174 – relating to the

Court has demonstrated commitment to the enforcement of socio-economic rights, it has on the other hand been cautious in developing jurisprudence in this regard.¹³³ Liebenberg thinks that this has had enormous practical implications for poor individuals or communities who may want to use litigation as a tool to protect their socio-economic interests.¹³⁴

The pro-activeness with which the Court has dealt with jurisprudence around socio-economic rights, commencing from the way it handled the question of justiciability in the *Certification* judgment and how it has subsequently adjudicated socio-economic rights cases is commendable. By affirming that ‘the purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account’, the Court has helped to advance participatory constitutional democracy.¹³⁵ By so doing litigation has been portrayed as part of that broader commitment, which aims at establishing social justice. On another dimension, the court’s employment of the ‘meaningful engagement’ principle, especially in eviction cases has methodically established a point of convergence between judicial decisions and policy making to advance the cause of social transformation.¹³⁶ Thus the current socio-economic rights jurisprudence has been acknowledged as an important factor that has facilitated efforts to advance access to socio-economic rights.¹³⁷ It has created the opportunity to advance the significant role that litigation plays in the struggle for social justice. Sometimes it has effectively been used to compel government to take positive action to ensure that adjudicated socio-economic rights literally translate into material entitlements. It has therefore performed a dual function,

Court’s unconvincing refusal to define the content of socio-economic rights as carrying a minimum core obligation; Swart M ‘Left out in the cold? Grafting constitutional remedies for the poorest of the poor’ (2005) 21 *S Afr J Hum Rts* 215 & Liebenberg S ‘Basic rights claims: How responsive is “reasonableness review”?’ (2005) 5 *ESR Review* 7 – relating to the Court’s failure to develop a jurisprudence that is pro-poor; Dugard 2012 (n 109 above) – relating to the Court’s insistent refusal to grant direct access jurisdiction to the poor; Quinot G ‘Substantive reasoning in administrative law adjudication’ (2010) 3 *Constitutional Court Review* 111-139; Brand D ‘Judicial deference and democracy in socio-economic rights cases in South Africa’ (2011) 3 *STELL LR* 614 – relating to the Court’s reasonableness review standard that has been contested for being exceedingly deferential.

¹³³ Davis D ‘Socio-economic rights in South Africa: The record after ten years’ (2004) 2 *New Zealand J Pub Int'l L* 47; Iles (n 1 above) 449.

¹³⁴ Liebenberg 2009 (n 136 above) 175.

¹³⁵ *Mazibuko* (n 36 above) para 160.

¹³⁶ Albretch H ‘Beyond justiciability: Economic, social and cultural rights on the advance as exponents of a dignified humanity’ 1 *Wmin Law Rev* 5, 15.

¹³⁷ Liebenberg 2001 (n 136 above) 187.

including on the one hand, alerting the government of its socio-economic rights obligations and on the other hand, practically enabling the state to accomplish that obligation.

However, I argue that the courts have not done enough in developing jurisprudence around socio-economic rights in such a way that it may guarantee equitable justice to the poor. In its present state jurisprudence is predominantly still lacking of the potential to translate socio-economic rights into entitlements in favour of the poor such that social justice can be seen to be done. Liebenberg has contended that without a solid jurisprudence socio-economic rights would be interpreted and adjudicated as imposing weak obligations and this may significantly jeopardise the potential of litigation for social change.¹³⁸ I agree with her argument that a pro-poor and transformative jurisprudence is likely to ensure that litigation provides direct beneficial effect to disadvantaged groups.¹³⁹ In this regard, I re-iterate the suggestion that the courts need to develop a balanced socio-economic rights jurisprudence that provides forum for the prevalence of social justice and ensures that benefits accrue equitably to the poor.

This is because, as Liebenberg has underscored, South Africa's evolving jurisprudence on socio-economic rights is not only significant for future litigation; it also guides government in the adoption and implementation of policies and legislation to facilitate access to the full range of socio-economic rights.¹⁴⁰ As an enabling factor a developed jurisprudence would help to advance the potential of litigation for social change and in essence facilitate its use as a strategy in the struggle to establish a socially just society. The resulting task is to identify the means and mechanisms by which the current jurisprudential margins could be developed to ensure that they become more responsive to the needs and interests of the poor. This would ensure that litigation accomplishes the aim to try and balance the socio-economic injustices that exist in society.¹⁴¹ One of such mechanisms is the activism of civil society whose role in the litigation process is indispensable.

3.2 Civil Society Activism

¹³⁸ Liebenberg 2009 (n 131 above) 160.

¹³⁹ Liebenberg 2009 (n 131 above) 176.

¹⁴⁰ Liebenberg 2009 (n 131 above) 160, 180 & 189.

¹⁴¹ Liebenberg 2009 (n 131 above) 161.

In this section, I examine how and the extent to which civil society activism facilitates and determines the use of socio-economic rights litigation. I conjecture that it is one thing to grant constitutional protection to socio-economic rights and endow the courts with review powers to enforce the rights. It is yet another thing to ensure that the rights become practically relevant to the poverty stricken groups that the rights are intended to protect and to empower. I argue that judicial enforcement of socio-economic rights in South Africa is unlikely to have attained the level it has reached without the activism of civil society. Most victims of socio-economic rights violation are simply vulnerable, usually do not know their rights and are generally ignorant of the law or suspicious of the complicated legal processes.¹⁴² Also because they are disadvantaged by poverty, they usually cannot easily access the courts.¹⁴³ Understandably, the depths of poverty and inequality affecting a greater part of the population necessitated constitutional provision for representative action on behalf of those who cannot act on their own behalf.¹⁴⁴ In this regard; the activism of civil society, mostly involving public interest human rights organisations and social movements has been very instrumental in bringing socio-economic rights actions to the courts on behalf of the poor.

Mazibuko for example, was initiated by five poverty stricken applicants.¹⁴⁵ Legal action was primarily driven by activism of the coalition of social movements and civil society organisations on behalf of the community of Phiri and other persons in a similar situation.¹⁴⁶ Bond and Dugard have established that the purpose of these progressive civil society activists, whom they refer to as ‘water warriors’ was to fight for the decommercialisation of water in order to ensure access by the poor to sufficient water.¹⁴⁷ I argue that without such activism the litigants by themselves might not have been able to engage the legal battle. Thus the activism of civil society has to a great extent added value to socio-economic rights litigation in a number of practical ways.

¹⁴² Tomasevski (n 83 above) 8.

¹⁴³ Tomasevski (n 83 above) 8.

¹⁴⁴ Sect 38 of the Constitution.

¹⁴⁵ Dugard & Langford (n 23 above) 42.

¹⁴⁶ Dugard 2010 (n 27 above) 87-88; Danchin P ‘A human right to water? The South African Constitutional Court’s decision in the *Mazibuko* case’ (2010) *EJIL*; Bond & Dugard (n 147 below) 13.

¹⁴⁷ Bond P & Dugard J ‘Water, human rights and social conflict: South African experiences’ (2008) 1 *Law, Social Justice & Global Development* 12.

The *Abahlali baseMjondolo* Constitutional Court victory was essentially the effort of the Abahlali baseMjondolo Movement of South Africa whose membership base is composed of tens of thousands of shack dwellers.¹⁴⁸ In engaging litigation, the movement aimed to protect the interest not only of its members in KwaZulu-Natal who faced immediate threat of eviction if the Slums Act came into force but also the millions of other slum dwellers across the country who would eventually have been affected. Similarly, action in *Schubart Park* was brought by the Schubart Park Residents Association on behalf of its members. The Association was supported by Lawyers for Human Rights as legal representative and the Socio-Economic Rights Institution of South Africa intervening as *amicus curiae*. The intervention of these civil society organisations does not only aim at representing the litigants but also to join hands with them in combating social injustices and most importantly contribute in the development of jurisprudence to that effect.

Civil society activism has played an indispensable role in socio-economic rights litigation. The Constitutional Court's adjudication approach for instance, creates a number of difficulties for poor litigants, in the sense that they are required to marshal a considerable amount of expertise in order to convince the courts that a government social policy is unreasonable.¹⁴⁹ Most often these poor litigants might not be able to avail such onus without the assistance or intervention of public interest organisations either as legal representatives or as *amicus curiae*.¹⁵⁰ With a few exceptions, the socio-economic rights cases that have been adjudicated by the courts have invariably been facilitated by some form of civil society activism. No matter that the political arms of government may misconceive this as an oppositional tactic exploited by political adversaries;¹⁵¹ civil society activism remains a strategic enabling factor in socio-economic rights litigation.¹⁵² Generally, the strategies they employ include not only representation in court; they also devote much attention to public education on rights awareness.¹⁵³ Cumming and Rhodes have stated that they strive to put a 'human face on social problems' and to showcase 'real life stories' of socio-economic injustices.¹⁵⁴ This illustrates how not only victims of rights deprivation but also how other active

¹⁴⁸ *Abahlali baseMjondolo* (n 30 above) para 2.

¹⁴⁹ *Chenwi* (n 28 above) 122.

¹⁵⁰ *Chenwi* (n 28 above) 122.

¹⁵¹ See O'Regan (n 6 above) 4.

¹⁵² *Mazibuko* (n 36 above) 165.

¹⁵³ Cumming & Rhodes (n 10 above) 649.

¹⁵⁴ Cumming & Rhodes (n 10 above) 649.

forces in society demonstrate commitment to engage in litigation in order to pave the way for the attainment of social justice

Haven thus examined the factors that enable or facilitate litigation, I turn now to look at those that define what litigation actually aims to achieve.

4. Impact Factors

4.1 Public Interest

In this section I show how and to what extent pursuit of the public interest impacts on the use of socio-economic rights litigation. I argue that what results from litigation in the form of judicial outcomes or social impact has a huge effect on the extent to which litigation can be qualified as a potential strategy in the struggle to achieve social justice. The pursuit of the public interest can be considered one of those impact factors that can effectively shape the contours of litigation for social change. A generalised meaning of the notion of the public interest is usually difficult to discern. It is used in different contexts to embody different things. In this context, I use it simply to denote the purpose of socio-economic rights litigation that seeks to benefit not an individual but a broader community of people in a similar situation or of society at large.

As a starting point to this narrative on the idea of the public interest I would borrow from Greenstein's analysis of how individuals become 'citizens' – defined as 'members of a national collective with associated rights and duties'.¹⁵⁵ He explains how groups of people become 'communities' – defined as 'bounded collectives with a clear identity and associated rights'.¹⁵⁶ And indeed, how the needs and concerns of these collectives become 'rights' – 'codified and imbued with moral power'.¹⁵⁷ Greenstein argues that it is crucial to understand this processes through which rights-bearing agents come into being, which entails examining the political state of affairs and the social contexts of their emergence.¹⁵⁸ Corresponding individual socio-economic needs and concerns tend to converge, typically involving collective claims that have a greater

¹⁵⁵ Greenstein (n 29 above) 419.

¹⁵⁶ Greenstein (n 29 above) 419.

¹⁵⁷ Greenstein (n 29 above) 419.

¹⁵⁸ Greenstein (n 29 above) 419.

likelihood of generalising benefits to an entire class of persons in similar situations.¹⁵⁹ These associated rights are then pursued and vindicated, usually not in the interest of the individuals that constitute the collective but in the interest of the collective as an entity.

As I illustrated in chapter three, the pursuit of the public interest formed one of the principal motives and the main driving force behind the *Abahlali baseMjondolo* litigation. The action was instituted with the aim to move the Constitutional Court to nullify the Slums Act, which posed a potential threat of massive arbitrary evictions and possible homelessness. The Court figured out that the Slums Act was actually enacted as a pilot legislation intended to inspire the enactment of similar legislations in the other provinces.¹⁶⁰ By nullifying the Act, it meant that the project would not be replicated and therefore the millions of slum dwellers throughout South Africa that would have been adversely affected were thus protected from arbitrary evictions. Thus, through litigation the litigants scored a major political victory that was not only to their own interest but also of public interest. The other cases that I have analysed also underscored the public interest factor generally through drawing attention to the socio-economic rights in question. *Mazibuko* for instance, brought public attention to focus on the right to have access to sufficient water. In the same way, litigation helped to protect the interest of the over 40,000 informal settlers in *Modderklip*¹⁶¹ and the 700 families, comprising in absolute numbers over 1,000 persons involved in the *Schubart Park* case.¹⁶² Besides guaranteeing legal protection the cases drew attention as well to the fact that nobody; not even unlawful occupiers, may be evicted from their homes without an appropriate order of court and not without the provision of alternative accommodation.¹⁶³

These examples justify the meaning of the public interest as it is understood in socio-economic rights litigation. I suppose that it is by this line of reasoning that political organs of state are able to make legislation and to formulate policies that respond not to individual needs and concerns but to the interest of the collective. In this way policy programmes that aim to meet socio-economic needs are planned in such a manner as to address collective public interest – impacting

¹⁵⁹ Gauri (n 121 above) 9.

¹⁶⁰ *Abahlali baseMjondolo* (n 30 above) para 16.

¹⁶¹ *Modderklip* (n 42 above) para 8.

¹⁶² *Schubart Park* (n 60 above) para 2.

¹⁶³ *Modderklip* (n 42 above) para 68(3); *Schubart Park* (n 60 above) para 53(5).

particular communities or the broader society. A key element worth taking note of is the manner in which the courts have shifted the focus of socio-economic rights from a human rights or individualistic orientation to a public interest or communal orientation.¹⁶⁴ This implies that though socio-economic rights are acknowledged to pertain to ‘everyone’ on an individual basis the likelihood is greater for a claim to succeed when brought in the interest of a collective than in the interest of an individual. In *Soobramoney*, as well as in *Treatment Action Campaign* the Court held that at times it would be required ‘to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals’.¹⁶⁵ This sets the parameters of litigation in line with political goals, which in turn makes decisions of the courts appear to have the force of public policy; ultimately impacting the lives and welfare and in some instances fulfilling the tangible needs of large numbers of people.

The pursuit of the public interest has also been the primary litigation strategy of organisations that are constitutionally mandated to litigate on behalf of those who cannot bring an action in their own name. With a public interest focus, civil society organisations have recorded enormous gains for particular communities and for the broader society as a whole. This however, does not imply that all litigation that is pursued in the public interest is guaranteed to succeed in court or to create a positive impact.¹⁶⁶ The probable reason why *Soobramoney* failed to secure the right of access to health care is because the action was brought on the basis of individual interest.¹⁶⁷ Gerald Erasmus has identified that government is often confronted with numerous socio-economic demands and as such is constrained to make difficult policy decisions when allocating scarce resources.¹⁶⁸ In this regard, he argues that it would be unreasonable for a court of law to intervene and impose a ruling that will only benefit a particular applicant or small group of people.¹⁶⁹ This does not imply that the individual interest should be ignored or frustrated in the litigation process.

¹⁶⁴ Liebenberg 2009 (n 136 above) 187 - the socio-economic rights in the Bill of Rights bestow a freestanding right to ‘everyone’ to have access to the relevant rights.

¹⁶⁵ *Soobramoney* (n 33 above) para 31; *Treatment Action Campaign* (n 126 above) para 37; Liebenberg 2009 (n 136 above) 187.

¹⁶⁶ See Dugard & Langford (n 23 above) for a general analysis of *Mazibuko*, which was instituted in the public interest but failed to secure victory in court and *Joseph*, which had very little or no public interest focus but succeeded in court.

¹⁶⁷ *Soobramoney* (n 33 above) para 31.

¹⁶⁸ Eramus (n 82 above) 249.

¹⁶⁹ Eramus (n 82 above) 249.

I argue that when the focus of litigation consistently tilts towards satisfying the individual interest as part of a collective that are afflicted by the same social prejudice the public interest will progressively be achieved and therefore give greater significance to the pursuit of social justice.

The Constitutional Court has declared that ‘a holistic approach to the larger needs of society’ may often prevail over individual rights.¹⁷⁰ Following this avowed position it may be easy to predict that victory in a socio-economic rights action on the basis of individual interest is unlikely to become possible in South African courts anytime in the foreseeable future. However, the possibility that the individual interest may in future overtake the public interest in socio-economic rights litigation can also not be overruled. It has happened in other jurisdictions as I shall discuss in chapter five. I argue that it is not unlikely to happen in South Africa. When litigating socio-economic rights, there is the general tendency to hope for the satisfaction of the individual interest over the public interest. Litigants normally engage in litigation with the expectation to achieve some form of material entitlement as guaranteed by the rights in question. Therefore, it becomes problematic to practically dissociate the public interest from the individual interest. Deva has argued that it is not always easy to differentiate the public interest from individual interest arguably because the courts have not rigorously enforced the requirements of public interest litigation which aims at promoting some public cause.¹⁷¹

To pursue the public interest in socio-economic rights litigation has a number of advantages, especially if litigation has to be seen as a strategy in the struggle to achieve social justice. First, it encourages social inclusion in an otherwise disproportionate and segregated society. Secondly, it facilitates wealth and resource redistribution in an egalitarian manner. Thirdly, it encourages policy formulation and can significantly influence existing policies impacting entire communities to the extent of re-shaping power relations beyond the specific rights at stake.¹⁷² Fourthly, it is strategic for litigation – to overcome possible objections or arguments that may arise in the course of adjudication on grounds of resource constraint. Lastly, the pursuit of the public interest advances the potential of socio-economic rights litigation as a means by which to construct a more egalitarian and equitable society.

¹⁷⁰ *Treatment Action Campaign* (n 126 above) para 37; Tomasevski (n 83 above) 8.

¹⁷¹ Deva S ‘Public interest litigation in India: A critical review’ (2009) 28 *Civil Justice Qrtly* 35.

¹⁷² See Greenstein (n 29 above) 422.

While the pursuit of the public interest constitutes an important factor in socio-economic rights litigation the problem it creates is that it often suppresses the individual interest to the extent that individual entitlement becomes a little difficult to achieve. I argue that this constitutes the more reason why socio-economic rights litigation must strive to achieve social justice.

4.2 Social Justice

At the inception of democracy in South Africa, it was feared that the depths of poverty and social injustice that prevailed would undermine the new constitutional order.¹⁷³ Therefore, it became imperative to facilitate access to justice for the poor and the vulnerable to ensure that the constitutional goal to redress societal injustices is accomplished.¹⁷⁴ Ngcukaitobi has argued that having a Constitution that entrenches fundamental rights alongside other guarantees, does not resolve the problems confronting society.¹⁷⁵ Because no right can exist without a remedy, the Bill of Rights was accompanied by the establishment of the Constitutional Court and the empowerment of other courts to provide remedies for socio-economic rights violations.¹⁷⁶ The Court has stated that the fundamental objective that lies at the core of the constitutional order is the need to eradicate poverty.¹⁷⁷ It is in this regard that the courts are commissioned to ensure the administration of justice.¹⁷⁸

The social justice factor therefore indicates how the law could be made to work in favour of impoverished groups.¹⁷⁹ This is done through the review powers that enable the courts to identify unconstitutionality of legislations that may adversely affect the poor,¹⁸⁰ like it happened in *Abahlali baseMjondolo*. The achievement of social justice is also made effective through the

¹⁷³ Ngcukaitobi TN ‘Judicial enforcement of socio-economic rights under the 1996 Constitution: Realising the vision of social justice’ (2002) *unpublished LLM dissertation, Rhodes University* 5.

¹⁷⁴ Ngcukaitobi (n 173 above) 5.

¹⁷⁵ Ngcukaitobi (n 173 above) 5.

¹⁷⁶ Tomasevski (n 83 above) 9; see also CESCR ‘The domestic application of the Covenant: 12/03/1998. E/C.12/1998/24, CESCR General Comment 9’ (1998) *General Comment*. The CESCR encourages the strengthening of the capacity of the judiciary ‘to protect the rights of the most vulnerable and disadvantaged groups in society’.

¹⁷⁷ Soobramoney (n 33 above) para 8.

¹⁷⁸ Sects 165 to 180 of the Constitution .

¹⁷⁹ Tomasevski (n 84 above) 1-2.

¹⁸⁰ Tomasevski (n 84 above) 1-2.

review powers that enable the courts to identify impediments to the realisation of socio-economic rights.¹⁸¹ The rule of law mandates that the rights bestowed upon people by law be legally enforced and when an infringement is established, the assumption of equal rights mandates the courts to provide those who are disempowered with legal entitlement.¹⁸² Tomasevski has posited that the most important thing about socio-economic rights litigation is that government is already morally bound by the constitution and therefore, the law requires no more of the state but also no less than to translate its commitments into reality.¹⁸³ Yet the state has often had to be compelled through litigation to comply otherwise, room is created for socio-economic rights to be infringed and for the law to be transgressed with impunity.¹⁸⁴ This often happens when the victims of rights violations are poor.¹⁸⁵ It is often in pursuit of social justice that recourse is had to socio-economic rights litigation with the aim to improve quality of life and to free the potential of each person. By ensuring that social justice is administered, the courts are able to accomplish this constitutional commitment thus, legitimising the potential of socio-economic rights litigation.

Striving to achieve social justice means, as I have argued before, exploring the potential of litigation for social transformation. Exploring that potential entails developing a balanced jurisprudence that provides forum for the prevalence of social justice to ensure that benefits are conveyed equitably to the poor. This is the goal that the transformation project envisages to achieve – a society constructed on the pillars of democratic values, *social justice* and fundamental human rights. The afflictions of poverty and inequality have often generally perpetuated exclusion of majority groups on grounds of inferiority complex.¹⁸⁶ This has often been exacerbated by neo-liberal policies that generally also conceive of the poor as a social problem to be discarded.¹⁸⁷ Neo-liberal policies disregard the plight of the poor in favour of a free market economy where the only priorities that matter are the drive for capital accumulation and the survival of the

¹⁸¹ Tomasevski (n 83 above) 1-2.

¹⁸² Tomasevski (n 83 above) 8.

¹⁸³ Tomasevski (n 83 above) 1.

¹⁸⁴ Tomasevski (n 83 above) 1.

¹⁸⁵ Tomasevski (n 84 above) 1.

¹⁸⁶ Jones P & Stokke K ‘Introduction – Democratising development: The politics of socio-economic rights’ in Jones P & Stokke K (eds) *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 21.

¹⁸⁷ Schubart Park (n 60 above) paras 50.

economy.¹⁸⁸ S'bu Zikode is quoted to have observed that the exclusion of the poor in post-apartheid South African results from the neo-liberal policies that the government embraced ‘to make sure there is no space for poor people who can’t make profits’.¹⁸⁹ In effect, how can the poor be expected to live with the reality that opportunities are increasingly available to a few privileged ones when there is an unequivocal promise to free the potential of every person with a guarantee of rights to have equal access to the country’s resources and opportunities?

To respond to this question, it may be interesting to interrogate why the impoverished Phiri residents decided to engage in legal battle with the City of Johannesburg in the *Mazibuko* case? For what reason did the unlawful occupiers invade privately owned land, which resulted in the *Modderklip* litigation? What motivated the *Abahlali baseMjondolo* litigation and of course, what did the Schubart Park residents aim to achieve in the *Schubart Park* litigation? I argue that besides the specific interests that each of the cases aimed for, all four cases fundamentally sought to achieve some form of social justice. If there is a socio-economic right to water, which formed the basis of the action in *Mazibuko*, I argue that the litigants were justified to believe that they were entitled to that right. They hoped that through litigation they would achieve a certain measure of social justice, which in my view they did not actually achieve. Therefore, I have used the case to illustrate the imperfections and weaknesses of socio-economic rights litigation as a strategy in the struggle for social justice.

The *Modderklip* litigation was more pragmatic in terms of the achievement of social justice. The Gabon community’s recalcitrance to move from the Modderklip land explained the fact that they would not understand why they should be evicted from land that was abundantly available to a single individual while tens of thousands of them had nowhere to go.¹⁹⁰ In its commissioned duty to administer justice the Court made an effort to balance the social justice equation. Thus, the state was compelled to fulfill its constitutional obligations, while the Gabon community secured

¹⁸⁸ Papadakis K *Civil Society, Participatory Governance and Decent Work Objectives: The Case of South Africa* (2006) 112, 31-34.

¹⁸⁹ Subways S ‘Abahlali baseMjondolo – The South African shack dwellers movement’ (2008) *Solidarity Project Newsletter May/June 2008* 10.

¹⁹⁰ *Modderklip* (n 42 above) para 25.

the right not to be evicted without alternative accommodation and Modderklip was granted fair compensation for the illegal occupation of its farmland.¹⁹¹

In the same way, the *Schubart Park* litigation enabled the litigants to obtain a fair measure of social justice as the Court not only ordered the City of Tshwane to reinstate the evicted residents to their homes but also required the City to engage with them meaningfully in the process of doing so.¹⁹² It is established that the engagement process is on-going and in effect some of the evicted residents have actually been allocated alternative accommodation, which I think is a significant achievement in terms of the pursuit of social justice.

Litigation reached its high point as a pragmatic strategy in the struggle for social justice in *Abahlali baseMjondolo*. Threatened by possible mass evictions as a result of the enacted Slums Act, the litigants took to the courts and had the piece of legislation nullified.¹⁹³ It is particularly interesting that through litigation a group of shack dwellers could effectively have an act enacted by a democratically elected legislature nullified. By invalidating the legislation social justice was achieved in the sense that legal protection was provided to the millions of slum dwellers across the country from arbitrary eviction and possible homelessness against arbitrary evictions.

Generally, the factors that I have examined may serve as indicators not only to the determinants of success in litigation but also to anticipations of what could potentially happen in a given situation. They also indicate possible hurdles and challenges that may be encountered and how they could be addressed in order to advance the potential of litigation for social change. I argue that knowledge of these factors is essential, especially for purposes of conceptualising litigation or developing assessment criteria and indicators for measuring outcomes and impact.

5. Conclusion

As long as the prevailing discourse about the politics of rights and needs in the context of deep-rooted inequalities and overwhelming socio-economic injustices persist the potential of litigation

¹⁹¹ *Modderklip* (n 42 above) para 68(3); *Tissington* (n 79 above) 203.

¹⁹² *Schubart Park* (n 60 above) para 53(5).

¹⁹³ *Abahlali baseMjondolo* (n 30 above) para 129.

to create social transformation would not cease to be relevant. Without at least some system of accountability checks on government action and a channel to enable citizens to articulate their concerns the realisation of socio-economic rights is likely to be flawed.¹⁹⁴ In essence, attainment of the constitutional vision to establish a society based on social justice may become frustrated. Some scholars believe that rights-based litigation can be a relevant and effective resource in struggles to forge a more equal society.¹⁹⁵ Litigation however, takes place within a social and political space. Therefore, litigation has complex dimensions, considering that it does not in the strict sense represent just the legal process to obtain a judgment from the courts.

In this chapter, I have endeavoured to sustain the argument that litigation has potential to be used as a strategy in the struggle for social justice. I figured out that when something is said to have potential it means that it has the capacity to be developed into something or that it has possibility of being used. From the look of things I have argued that the transformative potential of litigation has not adequately been explored to advance the cause for social justice. Therefore, those whose livelihood might be ameliorated through litigation have remained unfairly or unnecessarily disadvantaged. In this regard I identified and examined the determining and the necessitating factors that influence litigation for social change than narrowly looking only at those factors that determine winning a claim in court.

Among the several factors that I identified as determining or necessitating the use of litigation in the struggle for social justice are those that are fundamental and generally include the lived experiences of the poor as well as the political will of government in the realisation of socio-economic rights. Therefore, as a means of establishing social justice litigation has largely been directed at seeking to restore or to ameliorate the livelihood of the poor in line with the constitutional promises to free the potential of each person and to improve quality of life for all. I argue that the strategy of progressive realisation has not been able to redress the bleak situation of poverty and deprivation in the light of the transformative vision and therefore, litigation has aimed to balance the scales of social justice that have tilted unfavourably against the poor.

¹⁹⁴ See Chr. Michelsen Institute (n 52 above) 2.

¹⁹⁵ Dugard & Langford (n 23 above) 63.

Some of the factors actually facilitate the litigation process and as such create an enabling environment for advancing the potential of socio-economic rights. I argued that without the enabling factors, which include the relaxed standing rules and wide remedial powers, coupled with the socio-economic rights jurisprudence of the courts, which have contributed enormously in facilitating litigation it, would not practically be possible to conceive of the potential of litigation to achieve social justice. I went further to argue that the prevailing levels of poverty as well as ignorance of the law and legal procedures means that a large number of poor people are simply unable to successfully bring their claims before the courts. Also crucial therefore, as an enabling factor to socio-economic rights litigation is the activism of civil society, without which access to justice for the impoverished members of society would not be possible. I illustrated that a vibrant civil society, particularly involving human rights organisations, public interest non-governmental organisations and social movements have been very instrumental in making access to justice possible for the disadvantaged members of society. I argued that without the activism of these organisations the promises of a better life may remain illusory for the millions of South Africans whose socio-economic rights are constantly being infringed with impunity.

Lastly, I examined the impact factors of litigation as the goal that litigation seeks to achieve within the framework of the transformation project. I figured out that to be able to achieve its end as a strategy in the struggle for social justice litigation has by and large taken a public interest orientation, seeking to benefit a wider community or society at large. In this way, I pointed out how litigation fits into the broader political commitment to achieve social justice much more than when individual interests are pursued. However, I argued that in pursuing the public interest there is need to also factor in the individual interest. Given the high levels of inequality and the severe burden of deprivation, I argued that without the vision to achieve social justice the aim of litigation to contribute to envisaged social transformation would arguably be difficult to achieve.

This does not mean that litigation is the best approach to advance socio-economic rights or that it necessarily contributes positively to social transformation. It rather provides latitude to accommodate and to take seriously criticisms against court-centred approaches to socio-economic rights and, more generally, against litigation as a means to effect social change.¹⁹⁶ No matter how progressive litigation may turn out, it can only play a marginal role in the achievement of social

¹⁹⁶ Gloppen 2005 (n 8 above) 24.

transformation.¹⁹⁷ Thus, acknowledgement is given to the fact that excessive reliance on the courts for the enforcement of socio-economic rights may pose a threat to democratic control and therefore weaken the democratic institutions by exposing them as irrelevant in core political matters.

The range of factors that I have examined in this chapter, when put together emphasise the need to understand socio-economic rights litigation from a more extended and holistic point of view.¹⁹⁸ It is noted however that the factors cannot always be replicated elsewhere and might also not be able to sustain in South Africa in the future.¹⁹⁹ Knowledge of these factors is essential, especially for purposes of conceptualising future litigation or for developing assessment criteria and strategies for measuring judicial outcomes and social impact as well as the extent to which they combine to determine the course and motive of litigation. In order to maximise litigation's potential it is crucial – looking at the interrelatedness of the factors – for litigation to take a complementary rather than adversarial or confrontational nature. Some scholars have in this regard suggested a form of cooperative constitutionalism or constitutional dialogue.²⁰⁰ I pointed out that to strive for social justice means exploring the potential of litigation to achieve social transformation, which I argued also entails developing a balanced jurisprudence that provides a forum for the prevalence of social justice and ensures that benefits are conveyed equitably to the poor.

The discussion in the next and concluding chapter will focus on the challenges and constraints to socio-economic rights litigation as well as the prospects for future socio-economic rights litigation.

¹⁹⁷ Gutto (n 94 above) 100.

¹⁹⁸ Cumming & Rhodes (n 10 above) 651.

¹⁹⁹ Dugard 2012 (n 109 above) 177.

²⁰⁰ Dixon R 'Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited' (2007) 5 *I.CON* 391, 393; Yusuf (n 4 above) 782-784.

CHAPTER FIVE

Challenges and Constraints on the Prospects for Future Socio-Economic Rights Litigation

1. Introduction

My aim in this concluding chapter is to identify on the one hand, the challenges and constraints that inhibit the potential of socio-economic rights litigation as a potential strategy in the struggle for social justice. On the other hand, I explore the prospects for the future of socio-economic rights litigation. On the basis of the restraining elements I examine the extent to which litigation, based on its inherent potential may or may not contribute to the achievement of social justice. Generally, the difficulties that courts face when adjudicating socio-economic rights are first of all, in having to define the content of the rights and secondly, in having to determine that violation of the rights have occurred.¹ A recollection of the factors that I have examined in the previous chapter may indicate future trends in socio-economic rights litigation as well as point to grey areas that may require improvement.² By highlighting the challenges and constraints on the prospects of future socio-economic rights litigation, the purpose is not to discredit litigation but to discuss the extent to which the difficulties, being the limits within which litigation can influence social change could be developed to advance the cause for social justice. I argue that but for the challenges and constraints, socio-economic rights litigation has more transformative potential to be used as part of the broader commitment to establish an egalitarian society than has actually been explored.

The chapter is structured in two main parts. In the proceeding section 2, I look at the challenges and constraints in which I identify constraints on the justiciability of socio-economic rights, concerns relating to the doctrine of separation of powers in relation to the courts' involvement in the

¹ Ferraz OLM 'Between usurpation and abdication? The right to health in the courts of Brazil and South Africa' (2009) electronic copy available at: <http://ssrn.com/abstract=1458299> 4; *Minister of Health v Treatment Action Campaign* (1) 2002 10 BLCR 1033 (CC) para 23.

² Gloppe S 'Social rights litigation as transformation: South African perspectives' in Jones P & Stokke K (eds) *Democratising Development; The Politics of Socio-Economic Rights in South Africa* (2005) 153, 156-157.

enforcement of socio-economic rights. As a result the courts have increasingly restrained their role, thus creating difficulties in the development of litigation as a strategy to achieve social justice. I go on to look at the problem of implementation of court orders, without which the purpose of socio-economic rights litigation becomes defeated. I further look at the competing interests that come into play in limiting the potential of litigation in the struggle to achieve social justice.

In section 3 I look at prospects for the future of socio-economic rights litigation in South Africa. In making the prediction I first of all examine the jurisdictions of Columbia, Brazil and India where I describe the nature of socio-economic rights litigation in these jurisdictions. I then go on to look at the future of socio-economic rights litigation in South Africa and on the basis of the analysis I argue that South Africa needs a balanced socio-economic rights jurisprudence if litigation has to accomplish the goal to achieve social justice. I argue that in spite of the difficulties the future of socio-economic rights litigation remains promising and therefore, needs to be developed and used for the cause of social justice. I then draw a general conclusion in section 4, in which I reiterate my central argument that socio-economic rights litigation has potential that has not adequately been explored in the pursuit of social justice. I suggest that socio-economic rights litigation needs to be developed, which also entails developing a balanced jurisprudence that provides forum for the prevalence of social justice and ensures that benefits accrue equitably to the poor.

2. Challenges and Constraints

2.1 Constraints on Justiciability

This discussion aims to demonstrate that the justiciability of socio-economic rights is practically constrained and therefore inhibits the advancement of litigation as a potential strategy in the struggle for social justice. Justiciable socio-economic rights create difficulties to the courts in giving them legal force.³ Langford has observed that the obligation to fulfill socio-economic rights progressively and within available resources is difficult to litigate because the policy and programmatic measures needed to ensure effective realisation require the balancing of many

³ Ferraz (n 1 above) 3; Gutto SBO ‘Beyond justiciability: Challenges of implementing/enforcing socio-economic rights in South Africa’ (1998) 4 *Buff Hum Rts L Rev* 97, 101.

complex variables that are beyond the expertise of the courts.⁴ It is more so, said to be a difficult task for the state to fulfill its socio-economic rights obligations under the prevailing conditions in the country.⁵ Thus the enforcement of socio-economic rights can only be determined by the reasonableness of measures, availability of resources and progressivity in realisation.⁶

These are the qualifications that the Court applied in *Mazibuko*. Of course, the direct outcome of the judgment turned out to frustrate the litigants' expectations and the opportunity to advance litigation as a potential strategy in the pursuit of social justice. The Court made clear that the nature and content of the right to water can only be determined by the qualifications spelled out in section 27(2) of the Constitution.⁷ It established that victims of deprivation or violation cannot expect the state to do more than take legislative and other measures.⁸ The Court declined its powers to decide on the quantity of water that the litigants' were claiming and therefore also declined the duty to define the content of the right to water.⁹ It acknowledged the state's capacity to adopt a wide range of measures to meet its socio-economic rights obligations but emphasised that in considering reasonableness it will not enquire whether other measures could have been taken.¹⁰ Thus, even though the latitude of 'other measures' that the state is obliged to take is quite broad, the Court underscored that its duty is simply to test whether the measures undertaken are reasonable.¹¹ This is problematic in the sense that legislative and other measures alone are unlikely to establish compliance with the obligations to ensure improve livelihood.¹²

In order to fulfil socio-economic rights the state is called upon in the midst of competing claims to become involved in a positive way.¹³ Sunstein has ascertained that socio-economic claims can

⁴ Langford M *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*, Centre on Housing Rights & Evictions (2003) 13.

⁵ *Government of the Republic of South Africa v Grootboom* 2000 11 BLCR 1169 (CC) para 94.

⁶ *Grootboom* (n 5 above) para 38.

⁷ *Mazibuko & Others v City of Johannesburg & Others* CCT 39/09 (2009) ZACC 28 paras 49-50.

⁸ *Mazibuko* (n 7 above) para 48-61.

⁹ *Mazibuko* (n 7 above) paras 52-56.

¹⁰ *Grootboom* (n 5 above) paras 41-42.

¹¹ *Grootboom* (n 5 above) paras 41.

¹² *Grootboom* (n 5 above) paras 42.

¹³ Eramus G 'Socio-economic rights and their implementation: The impact of domestic and international instruments' (2004) 32 *Int'l J Legal Info* 243, 244.

only be possible to the extent that available resources can allow.¹⁴ The challenge arises because; as the Court held in *Mazibuko*, government alone has the mandate to determine the availability of resources for the fulfillment of socio-economic rights.¹⁵ Closely related to concerns about resource availability is the problem of progressive realisation. The Court stated that the progressive realisation requirement simply imposes a duty on the state to constantly review its policies to ensure that socio-economic rights, particularly the right to water are progressively achieved.¹⁶ It further noted that socio-economic rights were not conceived to ‘furnish citizens immediately with all the basic necessities of life’.¹⁷ It held that such necessities could only be achieved progressively.¹⁸ The Court reasoned that justiciability of the right to water is in effect restricted and therefore, ‘does not confer a right to claim “sufficient water” from the state immediately’.¹⁹ Progressive realisation thus implies that in the instance where a court makes a favourable ruling, the result of positive adjudication cannot immediately be enforced. This also poses a challenge to the potential of litigation to be used as a strategy in the struggle for social justice. It may be sensible to interrogate the time frame for progressive realisation because sometimes people have waited in vain for several years for the fulfillment of legitimate expectations.²⁰

Constraints on justiciability imply that socio-economic rights are not absolute.²¹ I argue that socio-economic rights are by their very nature restricted in what they can achieve. By this therefore, the potential of litigating socio-economic rights as a strategy in the struggle for social justice becomes limited. In spite of the constraints that practically manifested in *Mazibuko*, I agree with Dugard

¹⁴ Sunstein CR ‘Social and economic rights? Lessons from South Africa’ (2001) *SSRN Electronic Paper Collection* 14.

¹⁵ *Mazibuko* (n 7 above) para 61.

¹⁶ *Mazibuko* (n 7 above) para 40 & 67.

¹⁷ *Mazibuko* (n 7 above) paras 59.

¹⁸ *Mazibuko* (n 7 above) paras 59.

¹⁹ *Mazibuko* (n 7 above) paras 57-58.

²⁰ *Grootboom* (n 5 above) para 8; Chenwi L ‘Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions’ (2008) 8:1 *Human Rts L Rev* 105, 122; *City of Cape Town v Rudolph and Others* 2003 (11) BCLR 1236 (C) unreported case quoted in Chenwi, 120. This has been evident in eviction cases where destitute people after legitimately waiting for lengthy periods for the progressive realisation of housing policy have exhausted their patience and resorted to land invasion, which eventually led to litigation.

²¹ Sunstein (n 14 above) 14.

that the case was still able to create meaningful social impact.²² It means that if socio-economic rights litigation is properly planned and pursued, there is greater likelihood for it to achieve social justice. If the full potential of litigation was explored in *Mazibuko* it would have contributed in advancing the struggle for social justice, at least in the area of access to water. As a justification to this argument it is evident that the courts have gone beyond these constraints to pass particularly robust and transformative judgments.²³ As is noted below, such interventions have often invited objections to the judicial role in matters of socio-economic rights enforcement on the grounds that it transgresses the doctrine of separation of powers.²⁴

2.2 Separation of Powers Objection

My purpose in looking at the separation of powers objection is to show how it limits the potential of litigation as a strategy to achieve social justice. I illustrate how the question of separation of powers constrained *Mazibuko* from advancing the potential of litigation in the pursuit of social justice.²⁵ Separation of powers entails division of state functions between the executive, the legislature and the judiciary as a means to curb power excesses by any one of the organs.²⁶ For Pieterse, the purpose of separation of powers is to enhance democracy, increase accountability and efficiency, and to protect the fundamental rights of citizens against oppression by the state.²⁷ Charles Fombad has argued that the doctrine of separation of powers was never conceived as a dogmatic principle that utterly prevents one organ of state from performing the functions of the

²² Dugard J ‘Civic action and legal mobilisation: The Phiri water meters case’ (2010) 71, 75.

²³ See for example *Treatment Action Campaign & Others* (n 1 above); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC); *Khosa and Others v Minister of Social Development* 2004 (6) SA 505 (CC); *Abahlali baseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99(CC).

²⁴ Eramus (n 13 above) 244.

²⁵ *Mazibuko* (n 7 above) paras 61 & 65; Wilson S & Dugard J ‘Taking poverty seriously: The South African Constitutional Court and socio-economic rights’ (2011) 3 *STELL LR* 664.

²⁶ Fombad CM ‘The separation of powers and constitutionalism in Africa; The case of Botswana’ (2005) 25:2 *Boston College Third World Law Journal* 301.

²⁷ Pieterse M ‘Coming to terms with judicial enforcement of socio-economic rights’ (2004) 20 *S Afr J Hum Rts* 383, 386; Kurland PB ‘The rise and fall of the “doctrine” of separation of powers’ (1986) 85 *Michigan L Rev* 592, 600-603; Ackerman B ‘The new separation of powers’ (2000) 113 *Harvard L Rev* 634, 640.

others.²⁸ Michael Taylor has also argued that separation of powers is not distinctly compartmentalised into clear-cut ‘institutional boxes’.²⁹ Relating to South African, it has been made clear that there is no absolute separation of powers under its constitutional democracy.³⁰ I agree with Ferraz’s argument that judicial enforcement of socio-economic rights is in principle a legitimate practice. This implies that the doctrine of separation of powers cannot be said to be at stake when litigating socio-economic rights.³¹

Influenced by the question of separation of powers, the Court in *Mazibuko* was challenged by how to enforce the positive obligations imposed by the right to water, while at the same time trying to stay within functional limits.³² Faced with this dilemma it was forced to compromise on principle by shifting the decision making to the state.³³ Thus the Court not only squandered the opportunity to set a legal precedent on the right to water, it also frustrated the opportunity to advance litigation as a potential strategy in the accomplishment of social justice.³⁴ Some commentators have argued that it is ‘futile to rely on the judiciary to provide basic welfare to the poor if the political branches are unwilling to do so.’³⁵ This is disadvantageous to the poor who may find the courts as the only platform and litigation as the only option in voicing their socio-economic claims.³⁶ In this regard, I argue that it is illogical for the courts to hold back on litigating socio-economic rights on the basis of separation of powers, which only helps to inhibit the potential of litigation for social change.

²⁸ Fombad (n 26 above) 309.

²⁹ Taylor MM ‘The judiciary and policy making in Brazil’ (2008) 4 *DADOS* 14.

³⁰ O'Regan ‘A forum for reason: Reflections on the role and work of the Constitutional Court’ (2011) *Helen Suzman Memorial Lecture, Johannesburg* 22; O'Regan C ‘From form to substance: The constitutional jurisprudence of Laurie Ackermann’ in Barnard-Naudé AJ *et al* *Dignity, Freedom and the Post-Apartheid Legal Order: The Critical Jurisprudence of Laurie Ackermann* (2008) 10; Pieterse 2004 (n 27 above) 386.

³¹ Ferraz (n 1 above) 1.

³² Coomans F ‘Reviewing implementation of social and economic rights: An assessment of the “reasonableness” test as developed by the South African Constitutional Court’ (2005) 65 *ZaöRV* 167, 174.

³³ Roux T ‘Tactical adjudication: How the Constitutional Court of South Africa survived its first decade’ <http://www.saifac.org.za/docs/2007/Tactical%20Adjudication.pdf> (accessed: 14 March 2013) 13, Roux T ‘Principle and Pragmatism on the Constitutional Court of South Africa’ (2009) 7 *I.CON* 106, 108 & 111.

³⁴ Lehmann K ‘In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum Core’ (2006) 22 *AM U INT'L L REV* 163, 165.

³⁵ Landau D ‘The reality of social rights enforcement’ (2012) 53:1 *Harvard Int'l LJ* 402, 407.

³⁶ Gloppe 2005 (n 2 above) 175.

2.3 Judicial Restraint

It has been stated that the justiciability of socio-economic rights depends very much on the authority of the adjudicating body.³⁷ However, the character that the Court portrayed in *Mazibuko* was not one of lack of judicial authority but excessive judicial restraint or reluctance to enforce socio-economic rights.³⁸ Judicial restraint involves a conscious or unconscious holdback from exercising full authority, which may turn out to frustrate the proper functioning of the courts. The Court has therefore, by its jurisprudence discouraged litigation and alienated potential litigants from using the courts as a means to lay claim to socio-economic rights.³⁹ Evidence of this, as Dugard has argued is the fact that the Court has not functioned as an institutional voice for the poor, therefore consciously failing to break down the barriers that inhibit the advancement of transformative justice.⁴⁰

There is a cautious perception among legal scholars as Pillay has noted, as to the role of judges and the courts in matters of enforcement of socio-economic rights.⁴¹ This negative perception about the role of judges is sometimes reflected in the Court's conservative interpretations of its role in the enforcement of socio-economic rights.⁴² As previously declared in *Treatment Action Campaign*, the Court in *Mazibuko* re-iterated the fact that courts are 'ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community'.⁴³ Thus, Klare has observed that judges have been reticent and hesitant in assuming the wide range of authority invested in them.⁴⁴

³⁷ Langford 2003 (n 4 above) 11.

³⁸ Langford 2003 (n 4 above) 11.

³⁹ Bond P & Dugard J 'Water, human rights and social conflict: South African experiences' (2008) 1 *Law, Social Justice & Global Dev't* 4.

⁴⁰ Dugard J 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24 *S Afr J Hum Rts* 214, 232-235; Dugard J 'Court of first instance? Towards a pro-poor jurisdiction for the South African Constitutional Court' (2006) 22 *S Afr J Hum Rts* 261.

⁴¹ Pillay A 'Accessing Justice in South Africa' (2005) 17 *Fla J Int'l L* 463, 470.

⁴² Langford 2003 (n 4 above) 11.

⁴³ *Mazibuko* (n 7 above) para 55

⁴⁴ Klare K 'Legal culture and transformative constitutionalism' (1998) 14 *S Afr J Hum Rts* 146, 165.

Carol Steinberg has also stated that the courts have increasingly abridged the extensive powers granted to them and condensed it to the ‘lowest standard of reasonableness’.⁴⁵ According to Richardson, this places the courts in a tight spot in safeguarding socio-economic rights.⁴⁶ This restraining attitude drove the Court in *Mazibuko* to define a limited role for itself by stating that:

[O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.⁴⁷

The purpose of litigation as well as its potential to be used as a strategy in the pursuit of social justice is therefore thwarted when the Court as agent of transformation purposely limits its ability to regulate government action or to require government to take such actions that are necessary for the fulfillment of socio-economic rights.⁴⁸ I differ with the opinion held by some scholars as highlighted by Pillay that the role of a judge is not transformative but simply to implement the law.⁴⁹ I argue that what happens in the courtroom has an impact on society. When the court implements the law, the ruling it makes is applicable in society and if such a judgment gets to change the way society functions, there is no way to argue that the role of the judge is not transformative. I use this to support my argument about the transformative potential of socio-economic rights litigation. This raises the question of implementation of court orders which I move on to examine.

2.4 Implementation of Court Orders

⁴⁵ Steinberg C ‘Can reasonableness protect the poor? A review of South Africa’s socio-economic rights jurisprudence’ (2006) 2 *S Afr L J* 264, 281.

⁴⁶ Richardson III H ‘Patrolling the resource transfer frontier: Economic rights and the South African Constitutional Court’s contributions to international justice’ (2007) 9:4 *Afr Studies Qrtly* 81, 96.

⁴⁷ *Mazibuko* (n 17 above) para 61; Wilson & Dugard (n 25 above) 664.

⁴⁸ Langford 2003 (n 4 above) 11.

⁴⁹ Pillay (n 41 above) 470.

Modderklip constitutes one of the precedent-setting judgments on the right to adequate housing.⁵⁰ However, implementation of the orders experienced some real challenges. The judgment required the Gabon residents to remain on the Modderklip land until alternative resettlement was made by the state.⁵¹ Contrary to the Court's ruling the municipality is reported to have later embarked on an illegal eviction and demolition of some 350 informal dwellings within the Gabon community, causing damage to personal belongings.⁵² Though the government is recognised to have accepted in good faith judgments handed down by the courts, lack of capacity or political will has often led to partial and irregular compliance with rulings.⁵³ It means that successful litigants might not necessarily experience any improvement in livelihood or reap any benefits from the efforts of litigation.⁵⁴ Thus as Landau has stated, courts can aggressively enforce socio-economic rights and yet do little to affect social transformation.⁵⁵

In my understanding, the realisation of socio-economic rights through political strategies is designed to translate into material entitlement to the things guaranteed by the rights. Therefore, I argue that when the violation of a right is challenged in court, the result of positive adjudication should equally translate into entitlement to the same material things guaranteed by the adjudicated right. In effect, a positive judgment implies that the adjudicated right has matured for immediate realisation. By immediate realisation, I mean taking at least the first steps to ensure that the entitlement can then progressively be hoped for. The right to have access to adequate housing can certainly be realised immediately because it requires more than just 'bricks and mortar'.⁵⁶ Nonetheless, I argue that after a court has granted a favourable judgment as was the case in *Modderklip*, immediate steps should be seen to be taken to ensure that the adjudicated right will then be fulfilled progressively. The *Grootboom* judgment, for instance established the principle

⁵⁰ Tissington K 'Demolishing development at Gabon Informal Settlement: Public interest litigation beyond Modderklip?' (2011) 27 *S Afr J Hum Rts* 192.

⁵¹ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 68(3)(c).

⁵² Tissington (n 50 above) 201.

⁵³ Langford 2003 (n 4 above) 17; Gloppe 2005 (n 2 above) 174-175.

⁵⁴ Kearney-Grieve B 'Public interest litigation: Challenges faced in undertaking public interest litigation' (2011) *Meeting Report, Atlantic Philanthropies* 5.

⁵⁵ Landau (n 35 above) 403.

⁵⁶ *Grootboom* (n 5 above) para 35; Chenwi (n 20 above) 115; 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* (2008) 1, 7.

that immediate action be taken to provide the litigants with temporary shelter, pending the provision of permanent housing.⁵⁷ If litigation has to attain its full potential it is necessary to ensure that court orders are effectively complied with after judgment. This is however, not always possible as implementation often become problematic or utterly ineffective.

The problem is likely to discourage prospective litigants from bringing actions to the courts – a likely reason why the socio-economic rights case load has remained low.⁵⁸ Slowly but surely, I argue that socio-economic rights litigation, if adequately explored has potential to be used as a pragmatic strategy in the struggle to achieve social justice. Another challenge in litigating socio-economic rights may also arise from competing interests, which I now turn to examine.

2.5 Competing Interests

A subtle challenge or constraint that confronts public interest litigation in South Africa is the level of competing interests involved in litigating socio-economic rights. This includes the obligation to uphold socio-economic rights against the need to pursue economic growth aspirations and the aspiration of litigants to reap individual entitlements from adjudication against the need to pursue the public interest.

2.5.1 Rights culture against economic growth aspirations

The manifestation of this conflicting interest between rights culture and growth aspirations has been most evident in *Mazibuko*. In promoting a ‘culture of water rights’ as an indispensable common element for human survival the litigants clashed with the liberal capitalist ideology of water commercialisation by which water is seen as a commodity to be sold.⁵⁹ By this neo-liberal obsession with cost-recovery water became a source of revenue rather than an inevitable public utility.⁶⁰ Thus, the Court was confronted with the challenge of having to deal with the fundamental right to a basic quantity of water supply and the government’s duty to manage water

⁵⁷ Wilson & Dugard (n 25 above) 669; *Grootboom* (n 5 above) 99.

⁵⁸ Dugard 2008 (n 40 above) 236.

⁵⁹ Bond P ‘South Africa’s “rights culture” of water consumption’ in Johnston B *et al* (eds) *Water, Cultural Diversity & Global Environmental Change: Emerging Trends, Sustainable Futures?* (2011) 1.

⁶⁰ Dugard 2008 (n 40 above) 77.

services sustainably.⁶¹ In the backdrop of the human rights atrocities perpetrated by the apartheid system, the constitutionalisation of socio-economic rights aimed to protect the poor from continuous exploitation.⁶² Besides upholding human rights the state also endorsed a strong commitment to economic growth and development, which Rosa has argued is necessary to be able to achieve equitable socio-economic transformation.⁶³ However, the government's commitment tilted more towards free market capitalism, where the role of the law in regulating the process appears restrained.⁶⁴ And so Wilson and Dugard have argued that:

The interests poor people seek to vindicate through litigation have not been meaningfully addressed in the Court's socio-economic rights jurisprudence. It seems that these interests are, for the moment, to be defined and enforced through "democratic popular choice" and not through adjudication. Yet it is precisely in the supposedly "democratic" arena that poor peoples' claims for better access to social and economic goods are marginalised and diminished. This is achieved in no small measure by bureaucratic processes which systemically exclude them and a dominant economic paradigm which tolerates high levels of structural unemployment (footnote omitted).⁶⁵

Confronted with the interest of the poor to secure the right to an essential amount of water necessary for guaranteeing life with dignity and the City of Johannesburg's interest to provide the contested amount of water only at a cost, forced the Court to adopt a deferential attitude in the adjudication. Overtaken therefore by capitalist orientation, the Court ruled in favour of the state's cost recovery programme and therefore frustrated the struggle for the right of access to sufficient water. Closely related to this problem is the question of individual interest against the public interest that I discuss next.

2.5.2 Public interest against individual interest

⁶¹ *Mazibuko* (n 7 above) para 3.

⁶² Graham PM 'Socio-economic rights: Cornerstone or capstone of democracy?' in Jones P & Stokke K *Democratising Development; The Politics of Socio-Economic Rights in South Africa* (2005) 271, 283.

⁶³ Rosa S 'Transformative constitutionalism in a democratic developmental state' (2011) 3 *STELL LR* 452, 543.

⁶⁴ Rosa (n 63 above) 543.

⁶⁵ Wilson & Dugard (n 25 above) 665.

The courts have declined to acknowledge that socio-economic rights embody immediately enforceable individual claims.⁶⁶ The Court emphasised in *Mazibuko* that the Constitution does not confer a right to claim sufficient water from the state.⁶⁷ It went further to declare that socio-economic rights only empower citizens to demand of the state to act reasonably and progressively to ensure enjoyment of the basic necessities of life.⁶⁸ Meanwhile, the socio-economic rights enshrined in the Constitution are conceived as human rights, represented by the clause ‘everyone has the right’. This means that the rights have the tendency to be claimed on an individual basis. Wilson and Dugard have stated that the ‘rights, at minimum, assign legal recognition to specific human interests’, which need to be upheld and weighed against the ‘arguments based on general welfare’ that are commonly advanced.⁶⁹ They further argue that litigants come to court to ‘vindicate their interests’ and they are motivated by the legitimate expectation that the court will provide some form of legal protection.⁷⁰ With such prospects the courts are expected ‘to identify the purposes underlying the specific rights in the form of the interests they seek to protect and advance’.⁷¹ The courts have however, paid little regard to those particular interests and have given less consideration to the purpose of litigation and the circumstances under which claimants turn to the courts for redress.⁷²

It has been suggested that individual interests must be defined and taken seriously in order to give justification to the ‘vindictory purpose’ of litigating socio-economic rights.⁷³ It has also been argued that litigants are more concerned about improving their livelihood than they would bother knowing whether government policy is reasonable or not, which is what the courts have instead often sought to interrogate.⁷⁴ The weakness with the pursuit of individual interests is that it has the effect of demanding the reallocation of huge amounts of state resources to the satisfaction of

⁶⁶ Pieterse M ‘Eating socio-economic rights: The usefulness of rights talk in alleviating social hardship revisited’ (2007) 29 *Hum Rts Qrtly* 798, 798.

⁶⁷ *Mazibuko* (n 7 above) para 57.

⁶⁸ *Mazibuko* (n 7 above) para 59.

⁶⁹ Wilson & Dugard (n 25 above) 666.

⁷⁰ Wilson & Dugard (n 25 above) 672.

⁷¹ Wilson & Dugard (n 25 above) 670, 681.

⁷² Wilson & Dugard (n 25 above) 670, 681.

⁷³ Wilson & Dugard (n 25 above) 678.

⁷⁴ Wilson & Dugard (n 25 above) 673.

few individuals but to the disadvantage of others who may find themselves in similar situations.⁷⁵ The result of positive adjudication on the basis of individual claims may also not make any significant contribution to the realisation of the broad objective of achieving social justice.

Socio-economic rights litigation in South Africa has undoubtedly taken a public interest dimension.⁷⁶ I partially agree with the Constitutional Court's opinion on socio-economic right litigation as essentially a democratic process that allows minority voices to engage and participate in politics and governance and in the shaping of public policy around the rights.⁷⁷ I argue that such participation can only be meaningful if the poor are able to reap substantial benefits from the process; otherwise simple political participation is meaningless. Following the public interest dimension the Court in *Abahlali baseMjondolo* proceeded on the claim of the Shack Dwellers Movement to strike down the Slums Act in order to protect the interest of all slum dwellers that might have been affected if the legislation came into force.⁷⁸ I have in chapter three and portions of chapter four generally analysed how and why the Constitutional Court has commonly directed socio-economic rights litigation towards achieving broader outcomes that respond to the public interest and the advantages of doing so.

In a synopsis, I argue that prioritising the public interest has the benefit of responding to a wider community of people in similar circumstances.⁷⁹ However, I suggest that in order to advance the potential of litigation in the struggle for social justice it is important for litigation to be seen to contribute in advancing the public interest but most importantly it must aim to satisfy individual interests. The point I am advancing is that the public interest, which derives from the collective identity is composed of individuals and therefore, pursuit of the public interest must invariably seek to satisfy the fundamental interests of the individuals that make up the collective.⁸⁰ I argue

⁷⁵ Ferraz (n 1 above) 8.

⁷⁶ See *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) para 31; *Treatment Action Campaign* (n 1 above) para 37; Liebenberg S 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty' (2009) *Law, Democracy & Dev't* 159, 187.

⁷⁷ Wilson & Dugard (n 25 above) 670-672.

⁷⁸ *Abahlali baseMjondolo* (n 23 above) para 85-86.

⁷⁹ See Mbazira C *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 23; Adewoye OM 'Socio-economic rights as a means of engendering social change in South Africa: An introduction and context' (2011) *unpublished LLM dissertation, University of Pretoria* 11.

⁸⁰ See 4.1 of chapter four.

further that if litigation is geared only at the public interest, it may just end up in the construction of an enriched jurisprudence that can in reality not add up to making life better for the poor.⁸¹ The motivation to litigate may become dampened because; on the balance of probability litigants might end up not achieving any personal benefits. The practical difficulty lies in the ability to strike a balance between the public interest and the individual interest, which remains a major challenge to socio-economic rights litigation in South Africa.

The preceding analysis shows that the challenges and constraints are of such magnitude that they impose weaknesses and limitations and may threaten prospects of trying to use litigation as a strategy in the struggle for social justice. It implies that without these difficulties, litigation has greater potential to accomplish the pursuit of social justice. Thus, the challenges and constraints exist because the potential of socio-economic rights litigation has not properly been explored. Because of this inherent and obviously untapped potential I suggest that socio-economic rights litigation needs to be developed for the cause of social justice. As a jurisdiction that is unique in its socio-economic rights jurisprudence, coupled with the task to deal with the challenges of poverty and deprivation, South Africa is indebted to ensuring the sustainable practice of socio-economic rights litigation. These are the issues that I move on to deal with in the next section.

3. Prospects for the Future of Socio-Economic Rights Litigation

3.1 Lessons from other Jurisdictions

The justiciability of socio-economic rights as Landau has figured out supposes that enforcement entails ensuring that disadvantaged groups gain material entitlement to the basic things promised by the rights.⁸² Landau argues that there is a basic disconnect between academic claims about the enforcement of socio-economic rights and the empirical realities of what actually happens on the ground.⁸³ Frequently, the *bona fide* intentions of litigation gets hijacked by more powerful interest groups to satisfy selfish interests, such that even though the courts may be seen to enforce socio-economic rights the end result may actually not have any positive impact on social

⁸¹ Wilson & Dugard (n 25 above) 682.

⁸² Landau (n 35 above) 403; Gloppe 2005 (n 2 above) 163.

⁸³ Landau (n 35 above) 403.

transformation.⁸⁴ Evidence is drawn from the socio-economic rights jurisprudence of Colombia, Brazil and India to support this assertion. The purpose for this comparative analysis is to illustrate the nature of socio-economic rights litigation in other jurisdictions. Based on that information, I make a forecast into the future of socio-economic rights litigation in South Africa

3.1.1 Columbia

Research carried out by David Landau on the reality of socio-economic rights enforcement in Colombia reveals that the courts have struggled to target marginalised social groups despite a doctrinal and ideological commitment to do so.⁸⁵ He advances two major reasons to explain the Court's deviation. The first involves the nature of the judiciary, which he says is more pro-majoritarian and seeks to protect mainly middle class interests.⁸⁶ The second relates to the choice of remedies which he says often turn out to be particularly weak and ineffective at protecting or empowering the poor.⁸⁷ Other intervening forces might also account for this. For instance the enormity or complexity of poverty may be such that neither the courts nor the government, nor civil society can do anything about.

Landau has however, ascertained that privileged classes are much more likely to know their rights and be able to afford to go to court.⁸⁸ As such, he argues they have taken advantage of the system and initiated the bulk of socio-economic rights claims.⁸⁹ The problem with the Colombian litigation system is that it has become overwhelmed with individualised rights jurisprudence that is said to benefit primarily the wealthy more than it has been beneficial to the poor.⁹⁰ Landau argues that a transformative jurisprudence in Columbia is not impossible, but it does require considerable remedial creativity and commitment to depart from the current understanding of the

⁸⁴ Landau (n 35 above) 403.

⁸⁵ Landau (n 35 above) 403.

⁸⁶ Landau (n 35 above) 428. Landau explains that in judgments of the courts are designed to gain political support. It is said that the Courts decisions are usually a starting point for a political campaign by key actors involved as most of the judges are noted to have proceeded from the court to pursuing political ambitions within government. A significant number of the justices on the Court are said to have gone into politics after their terms have ended.

⁸⁷ Landau (n 35 above) 403.

⁸⁸ Landau (n 35 above) 426.

⁸⁹ Landau (n 35 above) 426.

⁹⁰ Landau (n 35 above) 415.

judicial role.⁹¹ If socio-economic rights are to be transformative, he suggests an aggressive remedial innovation with a stronger form of review, especially the judicious use of structural injunctions that can more effectively direct interventions towards the poor.⁹²

3.1.2 Brazil

Initially, the Brazilian judiciary is said to have turned down petitions for collective claims that came before the courts, explained by its unwillingness to assume the apparent policymaking role implied by the enforcement of socio-economic rights.⁹³ Ferraz has stated that after a preliminary period of persistent judicial deference, Brazilian courts shifted their approach to interpreting the constitution as giving rise to individually enforceable socio-economic rights.⁹⁴ The courts' positive response to individual claims eventually opened the gateway to an avalanche of court actions extending to other health sectors.⁹⁵ Thus, Brazilian courts are said to be extremely assertive, frequently issuing injunctions against the state to provide health benefits to individuals beyond the limits set by the state's health policy.⁹⁶

Brazilian legal instruments and processes are relatively complex and expensive; most often beyond the reach of the poor who either cannot afford or have a 'general lack of rights consciousness or confidence in the judiciary'.⁹⁷ As such, individualised socio-economic rights claims have primarily been brought by wealthy middle and upper class individuals or groups who are more likely to know their rights and to be able to afford the cost of legal processes than the poor. Having recognised that the right to health is an individually enforceable and immediately claimable right; the courts have gone to great lengths to issue robust injunctive orders, often under threat of contempt of court when they establish that the right has been violated.⁹⁸ Thus, the courts are said to award remedies indiscriminately, following the rule that the right of the individual

⁹¹ Landau (n 35 above) 415.

⁹² Landau (n 35 above) 404.

⁹³ Landau (n 35 above) 443.

⁹⁴ Ferraz (n 1 above) 2.

⁹⁵ Ferraz (n 1 above) 12.

⁹⁶ Ferraz(n 1 above) 6.

⁹⁷ Landau (n 35 above) 444.

⁹⁸ Ferraz (n 1 above) 12.

must always prevail, notwithstanding the costs involved.⁹⁹ In this way, the courts have actually been said to formulate policy that has had a heavy impact on the Brazilian society at large.¹⁰⁰

3.1.3 India

India has made quite a resourceful contribution to the development of public interest litigation jurisprudence in general.¹⁰¹ A major reason for facilitating public interest litigation was because of its perceived usefulness in serving the public interest.¹⁰² Public interest litigation in India is designed to curb the excesses of the state and also focuses primarily on protecting the rural poor.¹⁰³ Thus, the courts provided official recognition to the voices of the destitute, which otherwise would not have been possible.¹⁰⁴ Through its activism the Indian Supreme Court is said to have moved sweepingly in developing a socio-economic rights jurisprudence and is noted to have delivered judgments of far-reaching importance in favour of the poor and of marginalised groups.¹⁰⁵ The character and purpose of public interest litigation in India is said to have also diverted from espousing the interests of disadvantaged sections of society to protecting the private interest of members of the wealthy middle class.¹⁰⁶

The conclusion to draw from the three instances is that jurisprudence on socio-economic rights originally started off with good purpose to achieve social justice. The *bona fide* intentions however, got derailed and because of the attractions that it offers the strategy has been hijacked and exploited for ulterior motives – typically benefitting wealthy middle class groups and the self-centered interests of powerful individuals. I argue that it does not serve the purpose of social justice if only the interests of the privileged classes are served while those of the poor are largely

⁹⁹ Landau (n 35 above) 443.

¹⁰⁰ See generally Taylor MM *Judging Policy: Courts and Policy Reform in Democratic Brazil* (2008). Taylor illustrates in his book the crucial role that Brazilian courts play in shaping the country's policy framework. He sustains the key argument that it is unthinkable to understand policy decision making in Brazil without taking into consideration the interventions of the courts on key issues.

¹⁰¹ Deva S 'Public interest litigation in India: A critical review' (2009) 28:1 *Civil Justice Qrtly* 19, 21.

¹⁰² Deva (n 101 above) 27.

¹⁰³ Deva (n 101 above) 34.

¹⁰⁴ Deva (n 101 above) 26.

¹⁰⁵ Deva (n 101 above) 23.

¹⁰⁶ Deva (n 101 above) 27.

not catered for. If social justice is to be achieved through litigation my argument is in favour of a balanced socio-economic rights jurisprudence that creates opportunity for the interests of all sectors of society to be equally satisfied. An important determination to make is what lessons South Africa could learn from the other jurisdictions?

3.2 The future of socio-economic rights litigation in South Africa

To what extent has South Africa's socio-economic rights jurisprudence worked in the interest of the poor or is it likely to continue to benefit these groups of persons? It may be improper to assume that South Africa is faring excellently or to suppose that it has nothing to learn from other jurisdictions. Lessons may either be good practices that could be adapted to the domestic context or bad practices that may need to be avoided altogether. The courts have rather preferred to err on the compromising side of abdication and in so doing, have frustrated the legitimate expectations of the multitude of poor people who remain sidelined from mainstream society. I argue that if litigation has to accomplish the goal to benefit marginalised populations, then the courts need to be more technical in balancing the pursuit of the public interest with ensuring that the legitimate interests of individual litigants are also satisfied.

Barak-Erez has stated that the frustration of legitimate expectations causes 'anguish, destabilization, and demoralization'.¹⁰⁷ It breeds a disillusioned people that are either distrustful of government or cynical about the courts.¹⁰⁸ As much as it has been difficult to keep up the tempo of socio-economic rights litigation to the absolute benefit of the poor in other jurisdictions the practice might also become difficult to sustain in South Africa in the future.¹⁰⁹ Brinks and Gauri have stated that resource and procedural barriers prevent the great majority of poor people from bringing their claims to the courts.¹¹⁰ The risk is thus high that the purpose of socio-economic rights litigation, which generally seeks to protect the poor, may become hijacked by

¹⁰⁷ Barak-Erez D 'The doctrine of legitimate expectations and the distinction between the reliance and expectation interests' (2005) 11:4 *European Public Law* 583, 588.

¹⁰⁸ Graham (n 62 above) 283.

¹⁰⁹ Gloppen 2005 (n 2 above) 177.

¹¹⁰ Brinks DM & Gauri V 'The law's majestic equality? The distributive impact of litigating social and economic rights' (2012) *Working Paper, World Bank Development Research Group* 2.

powerful individuals or interest groups.¹¹¹ An extract from the *Mail & Guardian* newspaper, quoted in Gloppen states that;

...for whatever reasons, few cases have been heard [in the South African courts] that have had the potential to effect the lives of those millions who remain disadvantaged. The much-proclaimed range of socio-economic rights has [not often] been employed in litigation. The radical provision, which makes private legal relationships subject to the provisions of the Constitution, has been all but forgotten. Most cases involved crooks, corporations and other wealthy litigants (footnote omitted).¹¹²

Just like in other societies, ‘wealthy litigants’ are more likely to be rights-conscious, have the means to go to court and with sometimes accumulated experience, may have an influential advantage to be able to manipulate the legal system for self-centered motives.¹¹³ In other words, the socio-economically well-to-do are capable of using the law’s subtle impartiality to push forward personal agendas.¹¹⁴ It is tempting to be swayed by the tens of thousands of individual entitlements that have been granted in each of the three jurisdictions examined above. The tendency is that litigation that responds to individual claims of wealthy individuals or middle class groups may end up empowering few individuals to the detriment of the poor majority and therefore defeat the purpose of social justice.¹¹⁵

I re-emphasise Gloppen’s view that the rights to have access to housing, health care, food, water, social security and education were given constitutional protection with the aim to serve as ‘instrument for principled social transformation, and not a shield for protecting the *status quo* and the vested interest of the privileged’.¹¹⁶ Unlike in Colombia, Brazil and India, it is important for South African courts to stay focused on protecting and empowering the poor. This would guard against letting the potential of socio-economic rights litigation to be wasted. I estimate that South Africa is faced with the challenge to develop a balanced socio-economic rights jurisprudence that

¹¹¹ Landau (n 35 above) 426, Bond & Dugard (n 39 above) 4; Dugard J ‘Court of First Instance? Towards a pro-poor jurisdiction for the South African Constitutional Court’ (2006) 22 *S Afr J Hum Rts* 261, 266.

¹¹² Gloppen (n 2 above) 166; Mail & Guardian ‘Constitutional Court rates a mere pass’ (1999) *Mail & Guardian* of 25 February 1999.

¹¹³ Landau (n 35 above) 426; Brinks & Gauri (n 110 above) 2.

¹¹⁴ Brinks & Gauri (n 110 above) 2.

¹¹⁵ See Deva (n 101 above) 35.

¹¹⁶ Gloppen 2005 (n 2 above) 169.

aims at protecting the public interest as well as satisfying the individual interests of poor litigants. I argue that socio-economic rights litigation has the potential to ensure such a balanced jurisprudence. I explain how this is possible in 3.3 and 3.4 below.

I argue that in spite of the challenges and constraints the future of socio-economic rights litigation remains promising and therefore needs to be developed and used for good cause in order to guarantee the attainment of social justice. The question that has not adequately been answered or even considered is how the assumed potential of litigation for social change has been assessed. What instrument has been used in measuring the incidence of social transformation created by socio-economic rights litigation? Or better still, how effectively can socio-economic rights litigation be assessed to be able to give an accurate account of its potential as a strategy in the struggle for social justice?¹¹⁷ In what follows I make an attempt to answers these questions.

3.3 Monitoring Litigation for Social Change

I share Gloppen's argument that the potential of socio-economic rights litigation can only be measured by the incidence of change that actually happens to improve the circumstances of people who are affected by rights violation.¹¹⁸ The question is how do we measure such change? Gloppen has argued that without a monitoring mechanism to measure the 'ripple effects' of litigation, it is difficult to establish a direct connection between a particular legal action and the overall social development that happens within the scope of the socio-economic rights in question.¹¹⁹ Without the kind of monitoring that civil society organisations are reported to have provided in the *Modderklip* case for instance, it would not be possible to say with precision what the actual outcome of the litigation has been or its broader impact on society. Tissington's commentary gives an empirical account of the relevance of the monitoring component in the

¹¹⁷ See Rodríguez-Garavito C 'Assessing the impact and promoting the implementation of structural judgments: A comparative case study of ESCR rulings in Colombia' (2009) http://www.escr-net.org/usr_doc/Rodriguez_Colombia.pdf 2 (accessed: 31 May 2013). Rodríguez-Garavito has posed similar questions, asking: 'How do we evaluate the impact of a judicial decision?... [H]ow do we determine the effects of judicializing social problems? How do we measure the impact of transforming a political, economic or moral controversy into litigation?'

¹¹⁸ Gloppen 2005 (n 2 above) 163.

¹¹⁹ Gloppen 2005 (n 2 above) 163.

process of litigating socio-economic rights.¹²⁰ This indicates that a proper monitoring system is essential to be able to document the entire litigation process so that accurate analysis could be made in assessing the impact of litigation on individual litigants as well as the broader society. In this way assessment of the potential of litigation to be used as a strategy in the struggle for social justice could also most appropriately be determined.

Recognition needs to be given to the role assigned to the South African Human Rights Commission in monitoring and assessing implementation of human rights.¹²¹ However, I argue that monitoring by the Human Rights Commission is fundamentally not enough. The future of socio-economic rights litigation depends to a great extent on its ability to create sustained social transformation. It requires that the monitoring component be integrated in the litigation process. Considering particularly the problem of implementation of court orders, there is need when conceptualising litigation to focus not just on victory but to build into the strategy how a favourable judgment would be executed. Otherwise, legal victories become meaningless without implementation.¹²² It is even most important, before engaging in litigation to have the end goal in mind and to interrogate the purpose for engaging in litigation. In this regard, it would be relevant to consider Adewoye's question relating to '[w]hat can the enforcement of socio-economic rights mean for a society fraught with poverty and inequality?'.¹²³ In other words, what does socio-economic rights litigation aim to achieve?

If litigation aims to achieve social justice in order that the poor are equally empowered and protected to enjoy improved livelihood in an egalitarian society, then an effective monitoring mechanism that is capable of measuring such impact is unavoidable. This would require setting and defining measurable indicators, the collection of accurate and quantifiable data as well as the expertise necessary to compile and analyse such data.¹²⁴ Efficient monitoring will be able to produce accurate knowledge to inform the adjudication process as well as political decision making regarding the effectiveness of litigation as a strategy in the quest for social justice. With a proper and well established monitoring system it is possible to make more measureable

¹²⁰ Tissington (n 50 above) 200-204.

¹²¹ Sect 184 (1)(c) of the Constitution; *Grootboom* (n 5 above) para 97.

¹²² Kearney-Grieve (n 54 above) 10.

¹²³ Adewoye (n 79 above) 13.

¹²⁴ Van Bueren G 'Alleviating poverty through the Constitutional Court' (1999) 15 *S Afr J Hum Rts* 62.

assessment of future socio-economic rights interventions. I argue that this would help to advance the potential of litigation to be used as a strategy in the pursuit of social justice. However, it requires a great deal of cooperation between the various actors, which I discuss below.

3.4 Enforcement Co-operation

3.4.1 Obligation to fulfil legitimate expectations

I examine the obligation to fulfil legitimate expectations as a means by which the potential of socio-economic rights litigation may be developed and used as an appropriate strategy in the struggle for social justice. The South African constitutional order embodies a commitment to social justice, achievable in part through justiciable socio-economic rights.¹²⁵ The aspirations that this has raised, especially among the poor is underscored by the legitimate expectation that the culture of rights and the law can and must be used to eradicate gross inequalities, particularly in resource allocation.¹²⁶ Since legitimate expectations emanate from the law, people normally formulate expectations to the extent that they are recognised and protected by the law – in this instance, the Constitution.¹²⁷ Some scholars have suggested a rather moral delineation of socio-economic demands, arguing that their achievement would be more tangible and more beneficial when coined as ‘needs’ than as ‘rights’.¹²⁸ On the contrary, it has been argued that for society to be more responsive in addressing the socio-economic claims of those whose voices have been suppressed in the democratic process, it is necessary for the vindication of such demands to be framed into an ‘effective political tool’ through which denial or violation may be challenged.¹²⁹

Courts are faced with the task of ensuring that the obligations imposed by entrenched socio-economic rights must be fulfilled.¹³⁰ The obligations require that as ‘guardians of the constitution’, courts should be able to provide effective remedy for infringed rights.¹³¹ Graham

¹²⁵ Pieterse 2004 (n 27 above) 399; Pieterse 2007 (n 66 above) 797.

¹²⁶ Van Bueren (n 124 above) 52.

¹²⁷ Barak-Erez (n 107 above) 589.

¹²⁸ See Pieterse 2007 (n 66 above) 800–802; McLean K *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 104; Adewoye (n 79 above) 13.

¹²⁹ Pieterse 2007 (n 66 above) 801; Adewoye (n 79 above) 13.

¹³⁰ Ferraz (n 1 above) 3; see also sect 2 of the Constitution.

¹³¹ Ferraz (n 1 above) 3.

has argued that conditions of socio-economic deprivation such as poverty are not a trap from which it is impossible to break away.¹³² He explains that the problem lies in the space created by unfulfilled expectations and dashed aspirations.¹³³ Graham further argues that the escape from social injustices may not be easy but it is possible, partly through judicial enforcement.¹³⁴ As such, persons who are legitimately entitled to the socio-economic rights guaranteed by the Bill of Rights should be able to resort to litigation when necessary as a means of protecting their interests.¹³⁵ Otherwise, the role of the judicial mechanism which aims at rights protection in a constitutional democracy would become seriously undermined.¹³⁶

From this analysis I argue that advancing the potential of socio-economic rights litigation to be used as a strategy to achieve social justice entails designing litigation to accomplish the legitimate expectations of the poor to benefit from the material entitlements promised by socio-economic rights. I also argue that this is possible if the courts develop a balanced socio-economic rights jurisprudence that prioritises the public interest as well as the individual interest and also guarantees equitable benefits to all sections of society. The challenges and constraints that I have discussed earlier in this chapter are of such nature that they may discourage interest in using litigation to achieve social justice. Van Bueren has however, cautioned that to ignore the potential of litigation to achieve this goal is to shy away from the problem.¹³⁷ I argue that it is important to strengthen the weaknesses and limitations that constrain litigation and to build on its potential and strengths in order that it may become more transformative. As long as the promises of a better life remain guaranteed by the Constitution, I argue that litigation will remain appropriate as a potential strategy by which to accomplish envisaged transformation. In this regard I suggest that for the expectations raised by constitutional promises to be fulfilled, requires a holistic form of interaction among all actors that are generally involved in litigating socio-economic rights.

¹³² Graham (n 62 above) 273; see also Carothers T ‘The end of the transition paradigm’ (2002) 13:1 *Journal of Democracy*; Przeworski *et al* ‘What makes democracies endure’ in Diamond L & Plattner MF (eds) *The Global Divergence of Democracies* (2001).

¹³³ Graham (n 62 above) 273.

¹³⁴ Graham (n 62 above) 273.

¹³⁵ See Ferraz (n 1 above) 3.

¹³⁶ Ferraz (n 1 above) 3.

¹³⁷ Van Bueren (n 124 above) 53.

3.4.2 Holistic activism

In looking at holistic activism my purpose is to illustrate the need for a coordinated effort in socio-economic rights litigation in order to ensure that social justice is achieved and that benefits accrue to victims of rights deprivation. It is acknowledged that socio-economic rights litigation on its own would never be adequate in creating social transformation.¹³⁸ Even under the most favourable and enabling circumstances established by the constitutional order the certainty about socio-economic rights is that their fulfilment cannot solely depend on litigation.¹³⁹ The role that litigation plays in the process to achieve social justice is therefore, guaranteed to be a restricted one.¹⁴⁰ There is increasing empirical evidence of the extent to which the courts have played a role in ensuring that socio-economic entitlements are allocated to the people or are considered and protected in the policy making process.¹⁴¹ However, without the active support of government, implementation of pro-poor rulings may become practically ineffective.¹⁴²

To say too that socio-economic rights should only be realised through democratic strategies would fundamentally be incorrect.¹⁴³ Pieterse has argued that a democratic mandate does not necessarily guarantee a commitment to social justice, as majority interests may sometimes unfavourably affect the social welfare of those who cannot articulate their voices in the majoritarian system.¹⁴⁴ Van Bueren has argued that the obligations imposed on the state to realise socio-economic rights progressively does not exclude the role of litigation to contribute towards the fulfillment of the rights, particularly if litigation can be seen as assisting rather than confronting the government in executing its constitutional obligations.¹⁴⁵ It is also not left to the unfettered discretion of the executive alone to determine what constitutes progressive realisation.¹⁴⁶

¹³⁸ Kearney-Grieve (n 54 above) 10.

¹³⁹ Gloppe 2005 (n 2 above) 176.

¹⁴⁰ Gloppe 2005 (n 2 above) 177.

¹⁴¹ Brinks & Gauri (n 110 above) 4.

¹⁴² Brinks & Gauri (n 110 above) 3; Rosenberg G N *The Hollow Hope: Can Courts Bring About Social Change?* (1991).

¹⁴³ Pieterse 2004 (n 27 above) 386.

¹⁴⁴ Pieterse 2004 (n 27 above) 386.

¹⁴⁵ Van Bueren (n 124 above) 60.

¹⁴⁶ Van Bueren (n 124 above) 60.

Considering the disadvantaged position and the marginal voice that poor people represent, civil society organisations have been instrumental in ensuring that socio-economic rights are taken seriously.¹⁴⁷ By engaging in litigation on the diversity of issues of a socio-economic rights nature civil society organisations have ensured that ‘broad pro-poor agendas’ are achieved.¹⁴⁸ Perhaps because the courts are sometimes better placed to protect the vulnerable in the political system, they have provided the space for vindicating guaranteed socio-economic rights.¹⁴⁹ In some instances litigation has been the only available option to claiming socio-economic rights after all other avenues have been exhausted.¹⁵⁰ To strengthen the potential of litigation in the quest for social justice, there is need for a holistic co-operation between the judiciary, the government, civil society and the poor whose rights are often violated.¹⁵¹ Van Bueren has proposed a form of ‘judicial activism’, which for her entails the development of a culture of co-operation among the various actors in order to ensure the fulfilment of the rights of marginalised groups.¹⁵² In reality, such engagement increases participation in policy decision making and therefore needs to be acknowledged as a necessary strategy for advancing the process to achieve social justice.¹⁵³

The *Modderklip* litigation can be said to embrace the form of holistic activism that I refer to in this section. Prior to the judgment the Gabon residents’ steadfastness not to move from the occupied land demonstrated a determination to be heard in their own terms and to be taken seriously, which largely influenced the outcome of the case. Besides, civil society organisations are reported to have actively engaged in *amicus curiae* interventions during the adjudication process, in monitoring enforcement of the Court’s ruling and in carrying out research in the community to measure the impact of the judgment.¹⁵⁴ Most importantly, the state is also acknowledged to have complied in good faith with the judgment by providing alternative

¹⁴⁷ Brinks & Gauri (n 110 above) 3.

¹⁴⁸ Heywood M ‘South Africa’s Treatment Action Campaign: Combining law and social mobilization to realize the right to health’ (2009) 1:1 *J Hum Rts Practice* 14, 16-19; Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008).

¹⁴⁹ Langford 2003 (n 2 above) 18.

¹⁵⁰ Langford 2003 (n 2 above) 18.

¹⁵¹ See *Treatment Action Campaign* (n 23 above) para 126.

¹⁵² Van Bueren (n 124 above) 65.

¹⁵³ Van Bueren (n 124 above) 65.

¹⁵⁴ Tissington (n 50 above) 197-200.

settlement to the Modderklip residents.¹⁵⁵ The more holistic activism of this nature is promoted the clearer the jurisprudence on socio-economic rights becomes.¹⁵⁶ The richer the jurisprudence, the greater the benefits that would accrue to the poor in ensuring improve livelihood and the potential for socio-economic empowerment. The more this happens the greater the chances for litigation to contribute towards attainment of the constitutional vision of social justice.

4. Conclusion

Generally, my goal in conducting this study has been to make a modest but obviously significant contribution to the on-going discourse on socio-economic rights in South Africa. I have aimed particularly at examining socio-economic rights litigation as a strategy that demonstrates potential to facilitate the struggle for social justice.¹⁵⁷ I illustrated theoretically and through empirical evidence how litigation has demonstrated potential to be used as a pragmatic strategy in the pursuit of social justice. I illustrated how and the extent to which victims of socio-economic rights violations have claimed through litigation the legitimate entitlements guaranteed by socio-economic rights. I showed how, in spite of the constitutional framework that provides the logic of rights as a mechanism to curb the coercive powers of the state to protect the individual,¹⁵⁸ state conduct has repeatedly provoked recourse to litigation.¹⁵⁹ The disconnect between theoretical claims about the potential of socio-economic rights litigation to create social change and the empirical realities to ensure that rights promises actually translate into material entitlements continue to pose a challenging reality.¹⁶⁰ Thus, I argued that the potential of socio-economic rights litigation has not sufficiently been explored to improve livelihood for the poor.¹⁶¹ To create understanding of socio-economic rights litigation and how it could be explored to advance social transformation.¹⁶²

¹⁵⁵ Tissington (n 50 above) 200.

¹⁵⁶ McLean(n 128 above)104; Adewoye (n 79 above) 13

¹⁵⁷ Klaaren J *et al* ‘Public interest litigation in South Africa: Special issue introduction’ (2011) 27 *S Afr J Hum Rts* 7.

¹⁵⁸ Pieterse 2004 (n 27 above) 386; Rendel M *Whose Human Rights?* (1997) 23.

¹⁵⁹ Trispiotis I ‘Socio-economic rights: Legally enforceable or just aspirational?’ (2010) 8 *Opticon* 1826 1.

¹⁶⁰ Landau (n 35 above) 403.

¹⁶¹ Gloppe 2005 (n 2 above) 166. See chapters two, three and four.

¹⁶² See 2.1.2 of chapter two.

I illustrated that conditions created by the determining and necessitating factors remain favourable for the advancement of litigation as a potential strategy in the quest for social justice.¹⁶³ I pointed out that socio-economic rights litigation cannot be considered a universal remedy to the socio-economic hardship suffered by disadvantaged and marginalised sections of society but I argued that it can play a significant role in alleviating poverty.¹⁶⁴ I proceeded to explain how the prevailing levels of poverty coupled with ignorance of the law and legal procedures has restrained the large number of poor people from bringing their claims before the courts.¹⁶⁵ I then showed how coupled with the evolving socio-economic rights jurisprudence of the courts civil society has predominantly enabled marginalised and deprived sections of society to use litigation as a pragmatic strategy to seek social justice.¹⁶⁶

In spite of the advanced jurisprudence on socio-economic rights variations continue to manifest in the form of challenges and constraints, which I explored extensively in this concluding chapter. Some of these difficulties have caused limitations to the purpose of litigating socio-economic rights and have consequently contributed in retarding the constitutional vision for social justice. Thus, the relevance of socio-economic rights litigation has remained relatively insignificant in proportion to the scale of poverty, deprivation and inequality that South Africa as a nation has undertaken the commitment to eradicate.¹⁶⁷ I illustrated how this commitment has been marred by skepticism and mistrust about the role of the courts in matters of socio-economic rights enforcement and the potential of litigation in the execution of the transformation project.¹⁶⁸ I highlighted the challenges and constraints with the aim to point out the weaknesses and limitations they impose on litigation. I argued that without these difficulties, litigation has greater potential to be used as a pragmatic strategy in the struggle for social justice. I argued further that

¹⁶³ See chapter four.

¹⁶⁴ See 2.1.1 of chapter four.

¹⁶⁵ See 3.1.1 and 3.1.2 of chapter four.

¹⁶⁶ See 3.1.3, 3.2 and 4.2 of chapter four.

¹⁶⁷ Gloppe 2005 (n 2 above) 166.

¹⁶⁸ Roux (n 33 above) 136; Taylor 2008 (n 29 above) 15; Brennan M ‘To adjudicate and enforce socio-economic rights: South Africa proves that domestic courts are a viable option’ (2009) 9:1 *QUTLJJ* 72; O’Regan 2011 (n 30 above) 5; Christiansen E ‘Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice’ (2010) 13 *J of Gender, Race & Justice* 575, 577.

the challenges and constraints exist because the potential of socio-economic rights litigation has not adequately been explored as a strategy by which to empower and protect the poor.¹⁶⁹

Based on the conviction that litigation can effectively be used as a pragmatic strategy in the struggle for social justice, I endeavoured to make a projection on how litigation may acceptably be strengthened without undermining commitments to overall democratic responsiveness.¹⁷⁰ Following Brinks and Gauri I ascertained that if any area of the law has the potential to advance social justice it is socio-economic rights litigation because not only does it promise abstract benefits to the poor, it actually guarantees a place to live as well as essential livelihood needs and improved standards of living.¹⁷¹ In this regard, I suggested the need for a system specific monitoring mechanism within the litigation for social change framework. I argued that a well-established monitoring system would enable more measureable assessment of socio-economic rights litigation interventions so that informed conclusions could be drawn on the potential of litigation to generate social change based not on assumptions but on empirical knowledge.¹⁷²

Socio-economic rights litigation has served a useful purpose in subjecting government policies, practices and malpractices to careful scrutiny, where the state has been forced to justify its actions and omissions which otherwise might have been ignored.¹⁷³ Consequently, I argued that as long as legitimate expectations guaranteed by entrenched socio-economic rights and a commitment to social justice remain to be fulfilled, socio-economic rights litigation will remain a valuable and pragmatic strategy in accomplishing that goal. I acknowledged that it is the political duty of government to determine the policy framework for the progressive realisation of socio-economic rights. To enhance its potential, it is strategic that the practice of litigating socio-economic rights remains an integral part of the broader commitment to social transformation.

I explain that to acknowledge the potential of socio-economic rights litigation engendering livelihood transformation implies that it is capable of creating meaningful impact on the lives of

¹⁶⁹ Gloppen 2005 (n 2 above) 166.

¹⁷⁰ Dixon R ‘Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited’ (2007) 5 *I.CON* 391, 441.

¹⁷¹ Brinks & Gauri (n 110 above) 2.

¹⁷² See 3.3 above.

¹⁷³ Langford 2003 (n 4 above) 19.

the poor.¹⁷⁴ It also means that the inherent potential needs to be developed and used for good cause, probably as a heuristic model for the transformation project.¹⁷⁵ As such, it is important for a form of enforcement cooperation to be established, which entails close collaboration between the courts and relevant state agencies, social movements and credible civil society organisations.¹⁷⁶ Most importantly the cooperation of the affected populations is necessary in determining how particular socio-economic interest that often form the core of litigation could be placed into a broader context so that not only particular individuals but whole communities are protected and empowered.¹⁷⁷ The role of civil society remains indispensable with regards to providing a platform and a voice to vulnerable and marginalised groups to articulate their claims as well as in putting pressure on government to ensure enforcement of socio-economic rights. Conclusively, I re-iterate the principal argument that for socio-economic rights litigation to yield more beneficial and transformative effect its potential needs to be acknowledged, developed and explored for the ultimate goal to establish a society based on social justice. To accomplish this goal, it would require the courts to develop a balanced jurisprudence that provides a forum for social justice to prevail and consequently ensures that benefits accrue equitably to the poor.¹⁷⁸

¹⁷⁴ See 2.3 of chapter two.

¹⁷⁵ Gloppe S ‘Public interest litigation, social rights and social policy’ (2005) *Conference Paper 3*.

¹⁷⁶ Kearney-Grieve (n 54 above) 11.

¹⁷⁷ Kearney-Grieve (n 54 above) 11.

¹⁷⁸ See 2.1.2 of chapter two.

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