

Constitutional enforcement of Socio-economic rights:

South African case study.

* Hlako Choma

(University of Venda, South Africa)

Abstract

The entrenchment of socio-economic rights in the South African Constitution is a critique. It is submitted that a constitution that pretends to guarantee rights which cannot be judicially enforced should not be considered a serious legal document. In this paper, particular attention is paid to the far reaching judgment by the Constitutional Court in *Mazibuko and others v The City of Johannesburg*.¹ The questions posed and answered relate to issues such as the enforceability of socio-economic rights entrenched in the constitutions.

Key words: Socio-economic rights, protection, enforceability.

1. Introduction

The 1996 South African Constitution encapsulates an entirely new set of rights. These relate to housing rights, food, water and social security in section 27 of the Constitution.² This paper presents a fascinating discussion concerning availability of resources to achieve the progressive realization of the rights entrenched in section 27 of the Constitution.

The Constitutional Court grappled with some issues while it was requested to certify the draft text of the 1996 Constitution. The issues were, whether socio-economic rights are generally enforceable and justiciable. The critics of the inclusion of socio-economic rights in the constitutions contend that such provisions may invite, or require, judicial activity verging on legislation and it is likely to offend the

* Hlako Choma, LLM (Howard University) LLM (Georgetown University). Senior lecturer of Law School, University of Venda. Research field: Public Law

¹ High Court of South Africa (Witwatersrand Local Division) Case No: 06/13865

² GE Devenish *A Commentary on the South African Bill of Rights* at 357

doctrine of separation of powers.³ It is submitted in this paper that these rights are capable of enforcement. In certifying the draft text of the 1996 Constitution, the Constitutional Court stressed that the socio-economic rights contained in the Constitution are justiciable, even though the inclusion of the rights may have direct financial and budgetary implication.⁴

2. *Soobramoney v Minister of Health, Kwa Zulu-Natal*⁶

This case was the first concerning socio-economic rights to be taken to the Constitutional Court. In this case the position was that *Soobramoney* was suffering from both ischaemic heart and cerebrovascular disease and this constituted in itself a terminal condition. He was also in the final stages of chronic renal failure and as a result required dialysis two or three times a week in order to remain alive.

The renal unit at Addington Hospital had at its disposal only 20 dialysis machines. Medical criteria had therefore been established to determine who would receive dialysis and who would not. It was decided that patients suffering from acute renal failure, which can be remedied by dialysis, were to be permitted to receive automatic access to the programme. In sharp contrast, patients who, like the appellant, suffered from chronic renal failure, which is irreversible, were not automatically admitted. For such patients, the primary requirement for admission was whether they were eligible for a kidney transplant. If they indeed were, then they were to be provided with dialysis until such time as an organ donor was found and the subsequent transplant successfully completed. The criteria in question stated further that, a patient would only be eligible for a transplant if he or she was “free of significant vascular or cardiac disease”.⁷ Unfortunately, as the applicant suffered from both ischaemic heart and

³ Choma H The environmental rights entered in the constitutions : A critique, *The Journal of US-China Law Review Volume 5*, 2008 at 1. See also *In Re Certification of the Constitution of the Republic of South Africa*, 1996 (1996) (4) SA 744; 1996 (10) BCLR 1253 (CC)

⁴ Olivier M Constitutional Perspectives on the enforcement of socio-economic rights : A recent South African experience, 2002 *Victoria University of Wellington Law Review*.
<http://www.austlii.edu.au/nz/journals/VUWLR/2002/5.html#7/24/2007>

⁶ 1998 (1) SA 765 (CC) 1997 12 BCLR 1696 (CC)

⁷ *Soobramoney* referred to above.

cerobro-vascular disease, he was considered to be ineligible for a kidney transplant and was refused access to the dialysis programme.

Budgetary considerations were taken into account. So, for instance, the hospital had not made provision for the purchase of more dialysis machines. Although it had requested a budget increase, it had been told by the relevant department that further funds were not available. Furthermore, in the year before the case was heard the department had overspent its budget by R152 million, and, in the current year, it was projected that it would overspend by R700 million.⁵⁷ It was therefore clear that there were indeed severe financial constraints and it was essential for the hospital to prioritise the services it provided.

The appellant brought his claim under section 27(3) of the Constitution, dealing with emergency treatment, which it was argued, when read together with the right to life, set out in section 11 of the Constitution, obligated the state to provide ongoing renal dialysis. The court dismissed the claim, since the situation was not an emergency calling for immediate remedial treatment. It was an ongoing or chronic state of affairs, resulting from an incurable deterioration of the applicant's renal function. Therefore, section 27(3), stating that "no-one may be refused emergency medical treatment", did not give such a person a right to be admitted to the dialysis program at a state hospital.⁸

Although not unexpected, this is a disappointing conclusion and that the application of a more progressive method of interpretation of the concept of "emergency" would have produced a different conclusion. Had the robust purposive interpretation found in the incisive judgment of Mahomed DP in *S v Mhlungu and Others*,⁹ been employed, this would indeed have been the case. However, Mahomed DP's interpretation in *Mhlungu* is, according to his own admission, "not entirely free from difficulties",¹⁰ but as a manifestation of "a purposive and mischief-oriented reading as against a purely literal one, [it is one that] always involves a degree of strain on the language," as explained by Sachs J

⁵⁷ *Soobramoney* referred to above.

⁸ *Soobramoney* referred to above.

⁹ 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC).

¹⁰ *Mhlungu* referred to above. Choma HJ *The protection and enforcement of socio-economic Rights in South Africa*

his judgment in *Mhlungu*. Furthermore, it can be argued that had the Constitutional Court applied the test of reasonableness, first applied in *Grootboom*, in *Soobramoney*, it may have reached a different conclusion. Also *Soobramoney* can be perceived as a discrimination on the grounds of poverty, since had he been a rich man he would have been able to pay for private dialysis treatment.¹¹

The Court did however consider the claim under section 27(1)(a), dealing with the right of access to health care services, within available resources, and section 27(2), stating that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of the right. In adjudicating in this matter the Court “saw fit to apply only low-intensity review”.¹²

There is however no difference in principle between *Soobramoney* and *Grootboom* so why are difference conclusions reached? Does the one appear to involve a greater infraction of separation of powers than the other? Furthermore, the important legacy of *Grootboom* is that it “demonstrated that the Court was willing to direct the government to enforce a socio-economic right even in the face of budgetary constraints”.¹³ This was not the position in *Soobramoney*. However, the polycentric nature of the decision required in *Soobramoney* is more pronounced than in *Grootboom*. This it is submitted may be the real reason why the Constitutional Court reached a different decision in the two cases.

Nevertheless, *Soobramoney* represents the low water mark in relation to the application of socio-economic rights by the Court. Intuitively, one feels that this judgment is not entirely satisfactory. As will be explained below the judgment in *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*¹⁴ to the effect that an existing right cannot be discontinued without jurisprudential justification, creates an important precedent, which is capable of being extrapolated¹⁵ to cases in which treatment for the chronically ill is discontinued. It is submitted that the reasoning in the *Bon Vista Mansions*,¹⁶ discussed below, is preferable to jurisprudential reasoning of that found in

¹¹ *Soobramoney* referred to above.

¹² *Soobramoney* referred to above.

¹³ Devenish A *Commentary in the South African Bill of Rights* 368

¹⁴ 2002 6 BCLR 625 (W), 2002 JOL 9513 (W).

¹⁵ *Residents of Bon Vista Mansions* referred to above.

¹⁶ *Residents of Bon Vista Mansions* referred to above.

Soorbramoney was receiving private dialysis treatment which was discontinued because of his inability to continue to pay for this.

Ngwena comments that judges prefer to exercise judicial restraint by virtue of the doctrine of separation of powers and consequently perceive the issue as one that must be resolved by elected politicians, who are accountable to the electorate.¹⁷ The Court explains that the state does not have the economic resources to provide sophisticated health care on request to all who require it. This means that limited resources must be allocated in a rational manner by professional persons involved in the health services and as a result the right to life is only negatively enforced in South Africa, whereas in European, Indian and even African law, it has a positive dimension.¹⁸ As far as other socio-economic rights are concerned, the Constitutional Court acknowledged that these “must at the very minimum ...be negatively protected from improper invasion”.¹⁹ There is an obligation on the state to ensure that these right are not violated.²⁰ This is of course a very timid rather than a robust approach to socio-economic rights.

In *Soobramoney* the Constitutional Court made no mention of the concept of reasonableness. The gravaman of its argument was that a Court should be slow to interfere with rational decisions taken in good faith by the relevant political organs and medical authorities whose responsibility it was to take budgetary and medical decisions respectively. *Soobramony* reflects a reluctance on the part of the court to interfere in any way with decisions taken by the executive branch of government. *Grootboom*, as will be explained below, effected a very important change in this regard. In the latter case, the Court no longer investigated mere rationality and good faith, but rather investigated the “reasonableness of the programme of the legislative and executive authorities and the manner in

¹⁷ Ngwena C Four/Rights concerning health in Brand D and Heyns C *Socio Economic Rights in South Africa*.

¹⁸ *S v Makwanyane and Another* 1995 (3) SA 391 (CC), 1995 6 BCLR 665(CC).

¹⁹ Choma HJ *et al* Protection and Enforcement in Olivier *et al Social Security Law, general*

²⁰ South African Human Rights Commission Act. Choma HJ *The protection and enforcement of socio-Economic rights in South Africa*

which the programme is implemented”.²¹ This represents a paradigmatic shift from the test of *rationality and bona fides* on the hand to *reasonableness* on the other hand.²²

2.1 Housing²³ and the *Grootboom* Case

Section 26 of the 1996 Constitution provides that everyone had the right to have access to adequate housing. In this regard the state is obliged to take reasonable legislative and other measures, within its resources, to achieve the progressive realisation of this right.²⁴ Furthermore, no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.²⁵

In *Jaftha v Schoeman*²⁶ the Constitutional Court took pains to explain that the three sub-sections of section 26 must be read as a whole as a part of an entirely new dispensation in relation to the housing needs of people. It is important to note that this right recognizes “a right to have access to adequate housing” as opposed to “a right to adequate housing”.

The distinction is cardinal since section 26 makes it clear that there is no unqualified obligation on the state to provide free housing on demand for all members of the public.²⁷

In *Government of the Republic of South Africa v Grootboom*²⁸ the Constitutional Court found that the group of indigent people concerned had lived in appalling circumstances, decided as a result to move out and subsequently occupied someone else’s land. They were then evicted and left homeless in the bitterly cold and wet winter in the Western Cape. The Court held that the measures of the provincial government to provide systematic housing over a period of time, to be unreasonable, since no

²¹ *Grootboom* referred to above.

²² *Grootboom* referred to above.

²³ “Housing” in *Fundamental Rights in the Constitution (ends)* Davis, Cheadle and Haysom 345

²⁴ *Grootboom* referred to above

²⁵ *Uitenhage Local Transitional Council v Zensa* (1997) 8 BCLR 1115 (SEC)

²⁶ 2005 (2) SA 140 (CC), 2005 1 BCLR 78 (CC)

²⁷ Devenish GE A *Commentary in the South African Bill of Rights* 369

²⁸ 2001 (1) SA 46 (CC), 2000 11 BCLR 1169 (CC)

contingent provision was made for temporary shelter for homeless and destitute people. This omission was found to be unreasonable since it ignored those most in need.²⁹

Grootboom pertinently illustrates just how controversial curial judgments on socio-economic rights can be, since the Constitutional Court's judgment undoubtedly impacted on state housing policy and could *prima facie* as such be perceived as a violation of the doctrine of separation of powers. This is however not unprecedented, since several

European Constitutions expressly involve provisions that required the state to fulfill the role of providing a just socio-economic political system. In this regard, the meritorious German Basic Law declares that the German state is a social federal one, and in so doing it requires the *laender* to adopt policies that promote the principles of a democratic and social state. As an elaboration of this, article 6(5) proclaims that the community has a duty to protect and maintain every mother.³⁰ Although a considerable margin of discretion must be given to the state in deciding how it ought to effect socio-economic rights, the reasonableness of the measures it applies can be evaluated by a court.³¹

As far as *Soobramoney* and *Grootboom* are concerned, there is a distinct difference in "tone and content of the two judgments".³² The latter is perceptively more sympathetic to the philosophy of socio-economic rights than the former. It is important to note that *Grootboom* was involved with a group of indigent and homeless person who were destitute, whereas *Soobramoney* dealt with one specific individual whose life who dependent on specialized dialysis treatment. In the latter expensive and specialized care was required, whereas in the former very rudimentary housing assistance was desired by a vulnerable group. The Court could see its way clear to help the former but not the latter. If therefore deemed the budgetary adjustment was justified in the former and not the latter.³³

Despite the cogent statements of the Constitutional Court in the *Grootboom* judgment concerning the justiciability of socio-economic rights, effective remedies for their enforcement remain

²⁹ *Grootboom* referred to above

³⁰ Devenish GE A *Commentary in the South African Bill of Rights* 367

³¹ Choma HJ The environmental rights entered in the constitutions: A critique
The journal of US-China law review. *volum 5, Number 1, January 2008*

³² Refer to page 156 of the book.

³³ Refer to page 156 of the book.

jurisprudentially elusive and problematic. In so far as the negative aspect of the right is violated, the appropriate remedy would in most cases be a declaration of invalidity of the infringing measure. In respect of a failure to fulfill apposite measure, more innovative measure “will have to be developed to vindicate the Constitution”.³⁴ A mandatory interdict and a declarator have up to now been used. The latter form of relief, granted to the hapless applicants in *Grootboom*, was not particularly effective and it is therefore submitted that more satisfactory forms of relief are likely to be developed in the future.³⁵ According to the Constitutional Court, the key to the justiciability of socio-economic rights in the Constitution is the standard of reasonableness.³⁶ Although, by virtue of both the letter and spirit of the doctrine of separation of powers, a meaningful measure of discretion must be accorded to the executive and legislative branches of government in deciding how it implements socio-economic rights, the reasonableness of the measures that it adopts can and must be evaluated by a court, when called upon to do so.

The precise contours and content of the measures to be adopted in relation to these rights are primarily a matter for the Legislature and the Executive. They must however, ensure that the measures they adopt are reasonable. What is very important to realize is that reasonableness must be evaluated at the level of a legislative programme and its implementation. In this regard the Constitutional Court held that: Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to achieve the intended result and the legislative measures will invariably have to be supported by appropriate, well directed policies and programmed implemented by the Executive. The policies and programs must be reasonable both in their conception and implementation. The formulation of the program must also be reasonably implemented. An otherwise reasonable program that it is not implemented reasonably will not constitute compliance with the State’s obligations.³⁷

³⁴ Devenish GE *A Commentary on the South African Bill of Rights*

³⁵ Devenish GE referred to above

³⁶ Olivier *et al Social Security A legal Analysis*

³⁷ *Grootboom* referred to above. Devenish *A Commentary on the South African Bill of Rights* 363

The importance of the above explanation by the Constitutional Court is of inordinate importance. It means that the courts can require comprehensive explanation from the state on the measures elected to fulfill the obligations inherent in the socio-economic rights in question.³⁸ The important legacy of *Grootboom* is that, as explained earlier, it “demonstrated that the Court was willing to direct the government to enforce a socio-economic right even in the face of budgetary constraints”.³⁹ This is obviously a precedent of singular importance, that is capable of being developed, as will be explained in the discussion of the subsequent case law. *Grootboom* also established an important precedent in relation to the requirement of reasonableness. This constituted a further significant development in the evolution of the operation of socio-economic rights in South Africa.

2.2 Health care, food, water and social security

Section 27 of the 1996 Constitution stipulates that everyone has the right to have access to health care services,⁴⁰ including reproductive health care, sufficient food and water, and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The state is obliged to take reasonable legislative and other measure, within its available resources, to achieve the progressive realisation of each of these rights.⁴¹ Finally in this regard, no one may be refused emergency medical treatment.⁴²

2.3 *Treatment Action Campaign Case*

In the seminal decision in *Treatment Action Campaign and Others v Minister of Health and Others*⁴³ the Gauteng High Court, per Botha J, ruled that the state had to provide the drug nerviropene to all pregnant women by virtue of a health plan. The national government appealed against this decision to

³⁸ Section 26 of the Constitution permits the state to refer to its tangible resources in explaining the progress effected in giving expression to this right. Devenish referred to above.

³⁹ Lienbenberg “Housing” in *Fundamental Rights in the Constitution* (eds) Davis, Cheadle and Haysom

⁴⁰ *B v Minister of Correctional Services* (1997) 6 BCLR 789 (C).

⁴¹ Section 27(2) of the Constitution.

⁴² Section 27(3) of the Constitution.

⁴³ 2002 4 BCLR 356 (T)

the Constitutional Court. In this case the applicants sought relief firstly to compel the respondents to provide nevirapine to pregnant women at public health facilities, and, secondly, to compel the state to produce and implement an effective national programme to prevent or reduce mother-to-child transmission of HIV. declaratory order requiring the state to provide nevirapine to pregnant women where medically required, and further to roll out a national mother-to-child transmission programme. In giving his judgment Botha J made considerable use of the Constitutional Court's judgment in *Grootboom*, discussed above. Although the latter judgment dealt with housing, the same principles apply, namely, reasonableness, progressive realisation and availability of resources. Drawing on the jurisprudence in *Grootboom*, Botha J declared that for a programme to move progressively there had to be a balance between goal and means. He commented further that government's assertion that once the lessons have been learnt from the test and research sites, the rollout will follow as the means follow, indicates a lack of impetus on the part of the government for its mother to child transmission programme to be realized progressively and "cannot be said to be coherent, progressive and purposeful."⁴⁴

Finally, on the issue of the estimates in relation the affordability of a universal mother-to-child transmission programme, Botha J commented that "with proper planning, it should be possible to achieve full implementation gradually"⁴⁵ Against these conditions and the assessment of current policy, the court ordered the state to plan and implement progressively, a comprehensive national mother-to-child transmission programme with voluntary counseling and testing, and where appropriate, provision for nevirapine or other appropriate medicine and formula milk for feeding.

What the court did reject in this case was the phased implementation of the programme because it would be discriminating and cause inequality and would deny access to those who found themselves outside the reach of the sites where implementation was being effected. This is an example where

⁴⁴ Treatment Action Campaign referred to above.

⁴⁵ Choma HJ *The protection and enforcement of socio-economic rights In South Africa.*

mere progressive realisation of a particular kind was found to be wanting.⁴⁶ As a result, the High Court found that the policy of the state to limit the drug to 18 pilot sites was not reasonable and that it was an unjustifiable barrier to the actual progressive realisation of the right to health care. A programme that excludes a significant segment of society cannot be said to be reasonable. The court has to take all the relevant considerations into account “determine whether the steps taken by the respondents were ...reasonable. That is the constitutional imperative.”⁴⁷ This imperative required that there be a plan and that resources had to be found progressively.⁴⁸

On appeal by the state against the Pretoria High Court’s policy directive of providing nevirapine only at a few selected sites was unlawful, and that it had to provide the drug at all birthing institutions where facilities exist to do so, the Constitutional Court denied the state leave to appeal against the High Court’s order compelling it to provide anti-AIDS drugs in state hospitals. In its judgment in *Grootboom* the Constitutional Court held that when state policy does not give sufficient weight to the needs of a “significant segment of society” then it may fall short of its obligations and therefore “cannot be said to be reasonable”. In this judgment,⁴⁹ which was a unanimous decision, the Constitutional Court stated that there was a pressing need to ensure that the loss of lives was prevented. The court indicated clearly that the order it made would require the state to revise its policy. In effect this meant, as Richard explains,⁵⁰ that the state’s policy was found to be unconstitutional as it did not fulfill the healthcare and other guarantees in the Bill of Rights. The judgment, she commented, represented a comprehensive defeat for the government. Not only was its passionately defended health policy declared unconstitutional in relation to seminal issues relating to the spread of HIV / AIDS from mother to child, but probably more significantly, it lost its challenge over the Court’s right to intervene on the question. This obviously constituted an important precedent. Does this not constitute a violation of separation of powers?

⁴⁶ Devenish GE *A Commentary on the South African Bill of Rights* 367

⁴⁷ Olivier *et al Social Security Analysis* referred to above.

⁴⁸ *Grootboom* referred to above.

⁴⁹ *Treatment Action Campaign* referred to above.

⁵⁰ Choma HJ *The protection and enforcement of socio-economic rights in South Africa*

The state in its appeal had claimed that the High Court's ruling infringed the key principles of separation of powers, and that the judiciary was trespassing on areas that were the prerogative of the executive. In its judgment, the Constitutional Court unanimously rejected all the state's contentions in this regard.

The Constitutional Court found that the state had not met its constitutional obligations, and ordered that, to do so, it should remove the restrictions preventing nevirapine from being made available at public hospitals and clinics that are not research and training sites. It found that there was no reason why the state could not continue to collect data and closely monitor the use of nevirapine at its chosen pilot sites. This should however not prevent it from providing the drug at other birthing institutions where facilities existed for doing so. The state was also ordered to take reasonable measures to extend testing and counseling throughout the public health sector to facilitate the use of nevirapine.

This very important judgment reflects the Court at its most assertive so far. What it illustrates is that the Constitutional Court will hold the government to its constitutional obligations. Rejecting the argument that the court could not make orders that would have the effect of altering policy, the judges found that this would indeed be the Court's obligation if the provisions of the Constitution were being infringed and obviously therefore did not violate separation of powers, as it operates in the South African constitutional paradigm. The judgment develops the law in certain important respects. It is now clear that socio-economic rights are not merely aspirations, but they are justiciable and implementable rights.

2.4 *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*⁵¹

Budlender AJ explained in this judgment that on the facts of the case, the applicants had existing access to water before the Council concerned disconnected the supply. The act of disconnecting the supply was *prima facie* in breach of the Council's constitutional duty to respect the right of access to

⁵¹ 2002 6 BCLR 625 (W), 2002 JoL 9513 (W)

water, in that it deprived the applicant of existing access. In accordance with the two stage process, that placed a burden or an onus on the Council to justify the breach.⁵² Budlender AJ explained further that the Water Services Act⁵³ created the statutory framework within which such breaches could be justified.⁵⁴ This required, *inter alia*, a genuine opportunity to make representations by the persons affected.

In his judgment, Budlender AJ held that the Constitution mandates the state to “respect, protect, promote and fulfil” the rights enumerated in the Bill of Rights. He observed that each of these terms is accorded a specific meaning, so for instance, the obligation to respect, requires of the to refrain from violating rights directly. Where socio-economic rights are involved, this requires *inter alia*, that the state must not terminate such services already in place, unless this could be justified by virtue of the limitation clause.⁵⁵ As a result, Budlender AJ held that the disconnection of an existing water supply amounted to a *prima facie* transgression of the state’s duty to respect the right of existing access to water, and places an onus on the state to furnish a jurisprudential justification for the breach. Since the applicants had shown a *prima facie* right to a continuing supply of water, the Court granted an interim interdict pending a final determination of the matter. This judgment creates an important precedent, which is capable of being extrapolated.⁵⁶

2.5 In Van Biljon v Minister of Correctional Services⁵⁷

The applicants in this case were HIV-infected prisoners who applied for a declaratory order to medical treatment to the provision of expensive anti-viral medication. It was indeed common cause that the requested drugs were the most effective treatment available for HIV. The minister argued that the state was only obliged to provide the applicants with the same standard of care as was provided in state

⁵² *Residents of Bon Vista Mansion* referred to above

⁵³ 108 of 1997

⁵⁴ *Residents of Bon Vista Mansions v Southern Metropolitan Council* 2002 6 BCLR 625 (W)

⁵⁵ Section 36 of the Constitution.

⁵⁶ Brand D and Heyns C *Socio-Economic Rights in South Africa* 16. Read with *Residents of Bon Vista Mansion*. The Court held that the provisions of the Water Service Act constituted a statutory framework within which such breaches may be justified.

⁵⁷ 1997 6 BCLR 789 (C)

hospitals, where use of the drugs was limited and as a result the applicants would not have qualified for the drugs under the policy in place in state hospitals. The court granted the order, holding that in determining what is “adequate medical treatment”, regard must be had to what the state can indeed afford. It was therefore nevertheless pointed out that the Constitution did not require “optimal treatment”, but merely “adequate treatment.”⁵⁸ However the state had not made out a reasoned case that as a result of budgetary constraints, it could not afford the treatment requested by the prisoners.⁵⁹ A bad assertion that this is the position would not suffice. Facts and figures would indeed be required. The jurisprudence of this case clearly represents a further development in the evolution of socio-economic rights

2.6 **Khosa and Others v Minister of Social Development and Others**⁶⁰

This judgment deals with the right to social assistance in terms of section 27 (1)(c) of the Constitution. The state has an obligation to provide social assistance under the Social Assistance Act 59 of 1992. The Constitutional Court found its judgment that the state has the obligation to provide assistance to residents who are not citizens. The difficulty was caused by the omission from section 3(c) of the Social Assistance Act 59 of 1992, prior to its amendment by the Welfare Laws Amendment Act 106 of 1997 of the words “or permanent resident” after the word “citizen”.

The two applicants in this judgment, which involved a consolidated matter. Khosa and Mahlaudewere were Mozambican citizens who had acquired residence status in South African in terms of exemptions granted to them under the former Aliens Control Act 96 of 1991. Weighing up competing considerations taking into account the intersecting rights that were involved, the majority of the court were driven to the conclusion that legislation excluding permanent residents from the scheme for social security, limited their rights in a manner that affected their dignity and equality in material

⁵⁸ Section 35 (2) (C) of the Constitution.

⁵⁹ *Van Biljon* case referred to above.

⁶⁰ 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)

respects. Dignity and equality were founding and fundamental values of the Constitution and lay at the heart of the Bill of Rights. Sufficient reason for invasive treatment of the rights of permanent residents had to be established. The Court therefore held that the exclusion of permanent residents was therefore inconsistent with section 27 of the Constitution in so far as it related to social security.

In its judgment, the Constitutional Court stressed the importance of the interconnectedness of the rights and held that an important factor in ascertaining the reasonableness of a measure is its impact on other rights. So, for instance, conferring benefits of the social security systems on citizens only was deemed to be unreasonable because it violated the equality of rights of permanent residents who, but for their lack of citizenship, would qualify for the benefits provided under the system.⁶¹ In relation to the standard of reasonableness, the Court explained that “[i]n considering whether the exclusion is reasonable, it is relevant to have regard to the purpose served by social security, the impact of the exclusion on permanent residents and the relevance of the citizenship requirement to that purpose”.⁶² Using this as a basis, the Court addresses the arguments presented by the state, inter alia, its primary obligation to its own citizens, and as to whether the financial consequences of extrapolating grants to permanent residence would be unaffordable, and that the state should encourage self-sufficiency. Each of these is found to be wanting. In addition the court found that the discrimination was unfair. Excluding permanent residents was considered unfairly discriminatory against a group of people deemed to be vulnerable in our society. Furthermore, permanent residents in no small measure contributed to fiscus through payment of taxes in the same manner that citizens did. To exclude them from benefits enjoyed by citizens creates the distinct impression that they were less worthy of social assistance.⁶³

2.7 The position of disabled refugees

⁶¹ *Khosa and Others v Minister of Social Development and others* 2004 6 SA 505 (CC), 2002 (8) BCLR 771 (CC)

⁶² *Khosa* referred to above

⁶³ Brand and Heyns C *Socio-Economic Rights in South Africa* 4

There is a strong probability that a court, in the light of the judgment of the Constitutional Court in *Khosa v Minister of Social Development*⁶⁴ would hold that the unqualified exclusion of disabled refugees from access to disability grants or appropriate social security, impermissibly limits their fundamental rights to equality, dignity and social security and therefore violates both the Constitution and South Africa's obligations under international law. However, this does not exclude the possibility that disabled refugees could legitimately be afforded a different form of social security, provided that any differentiation must be capable of being justified in terms of the Constitution. It is however submitted that there is indeed some room to maneuver in this regard. As far as refugees are concerned the following dictum in the judgment of Mokgoro J in *Khosa*, referred to above, indicates that there is indeed some room to maneuver.

It may be reasonable to exclude from the legislative scheme workers who are citizens of other countries, visitor and illegal residents, who have only a tenuous link with this country. The position of permanent residents, however, quite different to that of temporary or legal residents.⁶⁵ It is important to note from the last dictum that Mokgoro J in *Khosa* does not mention refugees. It can therefore reasonably be inferred that their position is in some way *sui generis* and in a continuum it falls somewhere between "workers who are citizens of other countries, visitors and illegal residents, who have only a tenuous link with this country" who are excluded and "permanent residents" who are now included by virtue of the *Khosa* judgment.

Although the right to social security is guaranteed to "everyone", in section 27(1), and in the light of the *Khosa* decision this must, it is submitted, now include disabled refugees, as explained above, the State's obligations, in terms of section 27(1), are to take reasonable legislative and other measures to achieve the progressive realisation of the guarantee of access to social security.

⁶⁴ 2004 (6) SA 505 (CC)

⁶⁵ *Khosa* referred to above...

In effect this gives the state some room to maneuver and to argue that the exclusion of disabled refugees from social security is merely temporary and will in the fullness of time be addressed as part of a plan to progressively realize all those persons who fall within the ambit of “everyone” deserving social assistance in accordance with the Constitution and the law and the actual factual status of refugees.

The state will however have to produce plausible evidence in relation how it intends to meet its obligations and the financial and capacity constraints on it, preventing it from the immediate realisation of its obligations. These will have to stand up to rigorous examination. This is clear from the judgment in the *Khosa* case where in relation to permanent residents *Makgoro J* stated that “Bearing in mind that it is anticipated that the expenditure on grants will in any event, increase by a further R18.4 billion over the next three years without making provision for permanent residents, the costs of including permanent residents in the system will be only a small proportion of the total cost”⁶⁶

Soobramoney v Minister⁶⁷ of Health, KwaZulu-Natal involved a claim of a breach of the right to health care brought by one person pursuant to section 27 of the Bill of Rights.⁶⁸ *Grootboom v Oostenburg Municipality⁶⁹* involves a claim of breaches of rights to housing or shelter brought by some 900 persons under section 26 and 28. the research seeks to demonstrate why the Court’s judgment in *Soobramoney* would be problematic if replicated in future cases, most immediately in the decision in *Grootboom*. The researcher argues that the result in *Soobramoney* may have been correct, but that its reasoning on several fronts should not be treated as a dispositive precedent in the face of better understandings that will evolve as the courts, and the Constitutional Court itself, gradually feel their way forward in the adjudication of social rights.

Similarly, the judgment in *Grootboom* is found wanting for having been far too deferential to government justifications as to why the failure to meet even the core shelter needs of the applicant

⁶⁶ *Khosa* referred to above

⁶⁷ 1998 (1) SA 765 (CC)

⁶⁸ Scott G & Alston P adjudicating Constitutional Priorities in a Transitional Context : A Comment on *Soobramoney’s* Legacy and *Grootboom’s* Promise

⁶⁹ 2000 (3) BCLR 277 (CC)

adults was not a violation of section 26. At the same time, the High Court in *Grootboom* was too ready to interpret children's rights to shelter under section 28 as absolute priorities without locating that interpretation in a discussion of the concept of core minimum entitlements, a concept which, it is further argued, should have been equally applicable to the section 26 claims of the applicant adults as to the section 28 claims of the children.

The doctrinal analysis of the two cases is situated within an interpretative account of the relationship between the South African Constitution's Bill of Rights and both international human rights law and foreign constitutional law.

3. **Mazibuko and others v The City of Johannesburg and others**⁷⁰

This case is the first concerning the fundamental right to have access to sufficient water and the right to human dignity. The Department of Water Affairs in its September 2003 Strategic Framework for Water Services stated that "Water is life, sanitation is dignity".

The applicants challenge the third respondent's (The Minister of Water Affairs and Forestry) Regulations Relating to Compulsory National Standards and Measures to Conserve Water (GN R509 of 8 June 2001) ("the National Standard Regulations) and the water policies of the first (The City of Johannesburg) and the second (The Johannesburg Water (Pty) Ltd) respondents. The applicants seek to prove that the National Regulations and the water policies do not accord with the declaration of "Water is life, sanitation is dignity".

3.1 **Background of the litigants**

The first respondent is the City of Johannesburg, a municipality, established as such in terms of section 12(1) of the Local Government : Municipality Structures Act 117 of 1998 (Structures act). It is a water service authority as contemplated in the Water Service Act, 108 of 1997 (Water Service Act).

⁷⁰ High Court of South Africa (Witwatersrand Local Division) Case No: 06/13865. See also *Minister of Health v New Clicks SA (Pty) Ltd and Others* 2006(2) SA 311 (CC). The meaning of administrative action within the meaning of the Constitution was first considered by the Court, in *Fedsure Life Assurance v Greater Johannesburg TMC*

The second respondent is Johannesburg Water (Propriety) Limited, an incorporated company. Its sole shareholder is the City. The City delegated to the second respondent its authority to act as water service provider as contemplated in the Water Service Act.⁷¹

The four applicants are all residents of Phiri a township in Soweto, Johannesburg. The resident of that township are mainly poor, uneducated, unemployed and are ravaged by HIV / AIDS. Each account hold in the township has more than one household in his/her stand. Those who are employed earn about R1100.00 per household per month. The majority of the residents depend on either the government old age pension, or child grant. The first applicant has since left Phiri although she still pursues the application on behalf of her household.

32 Facts of the case

Prior to 2001 all residents of the City of Johannesburg (the City), except the residents of the township of Phiri (Phiri), were only entitled to an unlimited water supply at flat rate. Phiri is one of the township forming the larger area of Soweto that falls within the area of the City of Johannesburg. In 2001 the City and Johannesburg Water (Pty) Ltd (Johannesburg Water) agreed to provide every household within the City with 6 Kilometres free water per month was to be dispensed by a prepayment meter system. The prepayment meters were only implemented in 2004.⁷²

In terms of the system once 6 kilometres have been consumed, the water supply to the stand is automatically cut off. The affected account holder then purchase water credits to be entitled to the supply of water until he/she becomes entitled to the next month's 6 kilometres free water.

⁷¹ 108 of 1997, the minimum standard for basic water supply service isa minimum quantity of potable water of 25 litres per person per day or six kilometres per household per month at a minimum flow rate of not less than 10 litres per household per month at a minimum flow rate of not less than 10 litres per minute, within 200 metres of a household and with an effectiveness such that no consumer is without supply for more than seven full days in any year. See also Brand D *et al Socio-Economic Rights in South Africa* at 200

⁷² Brand D *et al Socio-Economic Rights in South Africa* 200, the manner in which the right has been framed makes it clear that the state is not obliged to provide every inhabitant of South Africa with a free water supply. The State's duty towards those individuals who have the ability to pay for water services entails that the state must create the conditions and opportunity to ensure that those individuals have "access" to sufficient water. See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC)

Phiri, being one of the oldest townships of Soweto had neglected, old and poor water piping infrastructure. Its worn out and ageing water piping system was losing water for the City. As a measure to renovate the infrastructure and save the unaccounted water usage, in 2004 the City introduced prepayment meters in Phiri. This was through an operation called Operation *Gcinamanzi* (OGM). Each prepayment meter dispenses 6 Kilometres free water per stand per month.

Applicant's submissions

- The applicants seek an order declaring Regulation 3(b) of the National Standard Regulations⁷³ unconstitutional and invalid. It is common cause that if it is found that the Regulation is unconstitutional and invalid that *per se* will invalidate and dispose of the entire application as the respondents' water policy flows from the Regulation.
- In terms of section 9(1)(a) of the Water Service Act, the Minister is empowered to prescribe the compulsory national standards on the provision of water services. Regulations 3(b) was promulgated for this purpose. It defines "Basic Water Supply" as follows:

"The minimum standard for basic water supply service is,

- the provision of appropriate education in respect of effective water use, and
- a minimum quantity of potable water of 25 litres per person per day or 6 Kilometres per household per month
 - _ at a minimum flow rate not less than 10 litres per minute.
 - _ within 200 metres of a household, and
 - _ with an effectiveness such that no consumer is without a supply for more than seven full days in any year".

The respondents contend that they are not obliged to provide free basic water to the poor. They contend that their obligation is to provide basic water at a free as stipulated in the Standard for Water Services Tariff promulgated in terms of section 10 of the Water Services Act.

⁷³ *Government Gazette 22355, 8 June 2001, Government Notice R509, Regulation 3.* The Constitution does not provide explicit guidance as to the meaning of 'sufficient' water and in particular does not preferibe the quantity and quality of water each individual is entitled to access. The meaning of 'sufficient' is yet not be considered by a South African Court.

The applicants however, submit that section 27(1) of the Constitution guarantees that everyone has the right to have access to sufficient water. In terms of section 39(1) of the Constitution, the courts interpreting the Bill of Rights must consider international law. In terms of section 233 of the Constitution a reasonable interpretation of any legislation which is consistent with international law, must be preferred.⁷⁴

It is therefore, imperative and instructive to consider the international law regarding the right to have access to water. Article 11 and 12 of the International Covenant on Economic, Social and Cultural Rights implicitly recognize the right to adequate standard of living and the continued improvement thereof as well as the right to the enjoyment of the highest attainable standard of both physical and mental health.

The Court held that it is unable to appreciate the contention of the respondents that they are under no obligation to provide basic water to the poor. Respondents' obligation is to ensure that every person has both physical and economic access to water. Respondents' contention to the contrary is incongruent with their actions. The third respondent's promulgation of Water Service Act and its regulations as well as the respondents' water policies and its various adaptations, all point in the direction of compliance with the provisions of section 27(2) of the Constitution, that is, the progressive realization of the right of access to sufficient water as well as compliance with the provisions of section 7(2) of the Constitution, that provides the obligation not only to respect, protect but to promote and fulfill the rights contained in the Bill of Rights.⁷⁵

The Court made the following order:

⁷⁴ In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2006 (6) BCLR 625. Read with *The Government of the Republic of South African and Others v Grootboom and Others* 2001 (1) SA 46 (CC), the Court held that the relevant international law can be a guide to interpretation but weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.

⁷⁵ *Minister of Health and Others v Treatment Action Campaign & Other* 2002 5 SA 721(CC) (TAC). Section 27(1)(b) of the 1996 Constitution states that 'everyone has the right to have access to sufficient water'. Section 27(2), according to the Constitutional Court, qualifies this right : 'The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights. Brand D *Socio-Economic Rights in South Africa* 197

- The decision of the City of Johannesburg alternatively Johannesburg Water (Pty) Ltd to limit free basic water supply to 25 litres per person per day or 6 Kilometres per household per month is reviewed and set aside
- The forced installation of prepayment water meter system in Phiri Township by the City of Johannesburg alternatively Johannesburg Water (Pty) Ltd without the choice of all available water supply option, is unconstitutional and unlawful.
- The choice given by the City of Johannesburg alternatively Johannesburg Water (Pty) Ltd to the applicants and other similarly placed residents of Phiri of either a prepayment water supply through stand standpipes is declared unconstitutional and unlawful.⁷⁶

3.3 Conclusion

Brand submits as follows:

“The measure of neglect of the right to water in international and national jurisprudence stands in contrast to the severity of the plight of the millions without proper access to water. However, lately this gross deprivation has resulted in the increased conceptualisation of water access in human rights terms. This in turn has led to new international and national legal standards about access to water being developed. On this basis a right to water jurisprudence is in fact developing, both in international and regional law, and within domestic jurisprudence such as South Africa”.⁷⁷

This research suggests a relativistic approach whereby the values in the constitution will play a role in the interpretation of the fundamental right. The fundamental right interpreted in conjunction with the values in the constitution will then establish if the positive law entrenches the particular fundamental

⁷⁶ *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 1 SA 765 (CC). The judgment contains few safeguards against government decisions: the decision must be ‘rational’ and must be taken ‘in good faith’. If these requirements are met, courts will not interfere with a particular decision. The state will not act rationally if it allocates grossly inadequate or no resources to the realization of a particular socio-economic right, but barring such extreme examples, the State has a free hand in the allocation of resources. See also *The Government of the Republic of South Africa and Other v Grootboom and Others* 2001 1 SA 46 (CC), the Court stated that the national government must provide adequate budgetary support, which appear to be a more stringent test than rationality. *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC) held that the state has to take reasonable measures that may have budgetary implications. This statement could be read to indicate that the State must provide reasonable budgetary support, which also sets a more stringent test than more rationality.

⁷⁷ Brand D *Socio-Economic Rights in South Africa* 208

right or not. Constitutional values will thus play a role in the interpretation of the right to social security and the interpretation by the Constitutional Court of this right will establish whether this right is enforceable or not. The categorizing of fundamental rights according to negative or positive state action is dogmatic and artificial. An approach is suggested whereby each fundamental right with certain socio-economic implications such as the right to social security is interpreted on its own merit and with recognition of changing circumstances. Human dignity will play an important role in the interpretation of the right to social security. It must however, be stressed that all the constitutional values must be considered in the interpretation of the fundamental right to social security. These values stand on equal footing and cannot be applied in isolation.