Reasonableness, subsidiarity and service delivery: A case discussion

1 Introduction

Since the Constitutional Court's groundbreaking decision in *Government of the Republic of South Africa v Grootboom*,[1] there have been a number of judgments in which the Court has expanded on its obligations in terms of section 26 and 27 of the Constitution.[2]

The most striking from all the decisions interpreting socio-economic rights was the development of the so-called reasonableness test, which measures government's action or inaction in fulfilling its constitutional obligations, and the rejection of attaching the so-called minimum core content to socio-economic rights.[3] In essence, the reasonableness test laid down in the relevant case law means that a government programme must be capable of facilitating the realisation of the right; it must be comprehensive, coherent and co-ordinated; there should be appropriate financial and human resources; balanced and flexible provision for short-, medium- and long-term needs; it must be reasonably conceived and implemented, transparent, and it must make short-term provision

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[1] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); (*Grootboom*).

[2] These include, but are not limited to, *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 46 (CC) (which preceded *Grootboom*), *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) (*TAC*), *Khosa v Minister of Social Development; Mahlaule v Minster of Social Development* 2004 6 SA 505 (CC), *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC), *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 9 BCLR 847 (CC), *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC).

[3] The court's major objection against adopting a minimum core content to rights was the fact that groups are differently situated and their needs will, therefore, vary according to their context, a context which according to the Court it is not in a position to ascertain. The arguments for the adoption of a minimum core standard and reasons for its rejection were discussed in *Grootboom* (n 1) paras 29-33 and *TAC* (n 2) paras 26-39. The reasons for rejecting this concept is aptly summarised in Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) *SAJHR* 1 at 17. These reasons include the assumed inflexibility of the minimum core, the lack of institutional competence for determining minimum standards and the impossibility of the South African government being able to give everyone immediate access to even core needs.

for those whose needs are urgent and who are living in intolerable conditions.[4]

The court's rejection of the minimum core concept and acceptance of a reasonableness standard has been met with considerable criticism.[5] The main contention being that the reasonableness test is structured in such a vague and open-ended manner that no substantive content can be awarded to socio-economic rights and therefore the state's obligation in relation to these rights is vague and open-ended.[6]

Ten years after the *Grootboom* decision, in light of the jurisprudence and clear trend that has emerged in interpreting socio-economic rights, the question is how are the courts expanding upon and interpreting current claims based on socio-economic rights.[7] This question is specifically relevant in the light of two recent Constitutional Court decisions, namely, *Nokotyana v Ekurhuleni Metropolitan Municipality*,[8] (*Nokotyana*) and *Joseph v City of Johannesburg* (*Joseph*),[9] where in both decisions access to basic services were claimed under the auspices of section 26 of the Constitution,[10] reflecting the current challenges South Africa is facing with regard to service delivery.

Ultimately the question that will be asked is, to what extent does the Constitutional Court's approach to socio-economic rights adjudication assist in resolving service delivery concerns, specifically in the light of an already established model of reasonableness review and subsequent to the latest judgments' reliance on the principle of subsidiarity.[11]

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[4]These principles were extracted from the relevant case law as discussed by Liebenberg *Socio-economic rights adjudication under a transformative Constitution* (2010) 131 at 152.

[5]Liebenberg (n 4) 173; Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or what are socio-economic rights for?' in Botha, A van der Walt and J van der Walt (eds) *Rights and democracy* (2003) 33 at 45; Pieterse 'Coming to terms with judicial enforcement of rights' (2004) *SAJHR* 383 at 410; Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) *SAJHR* 301 at 312; Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) *SAJHR* 1 at 10.

[6]Liebenberg (n 4) 173;

[7]The *Grootboom* decision could be regarded as the Constitutional Court's most significant judgment concerning socio-economic rights as the judgment laid the foundation for the future adjudication of these rights; see Wesson 'Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) *SAJHR* 284 at 285.

[8]2010 4 BCLR 312 (CC).

[9]2010 3 BCLR 212 (CC).

[10]According to s 26(1) of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution) everyone has the right to have access to adequate housing.

[11]The principle, as referred to in *Nokotyana* and *Joseph*, provides that where there is a piece of legislation that enables individuals to make a claim, that relief must be applied for in terms of the relevant legislation rather than relying directly on a constitutional right. The legislation may be tested against constitutional norms, but then the claim must be formulated as a constitutional challenge against the legislation as opposed to challenging the conduct ultimately at issue. See Bilchitz 'Is the Constitutional Court wasting away the rights of the poor? *Nokotyana v Ekurhuleni Metropolitan*

2 Factual analysis

In *Nokotyana*, the Court was tasked with interpreting the right to have access to adequate housing. Although the case was not strictly concerned with housing as such, the case dealt with the provision of sanitation and lighting to residents of an informal settlement.[12]

In this matter community members of an informal settlement approached the High Court for an order against their municipality to provide them with certain basic services. This order was sought pending a decision by the municipality as to whether the settlement would be upgraded to a formal township, which would entitle them to access to the services they currently could not receive. The applicants submitted that, pending the municipality's decision, which was already three years in the making, the municipality was obliged under the Constitution, legislation and the National Housing Code to provide them with certain basic services with immediate effect. These services included communal water taps, temporary sanitation facilities, refuse removal and high-mast lighting in key areas.[13]

The municipality accepted its obligation to provide water taps and refuse removal services; therefore, the only remaining point of contention was the

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Municipality' 2010 *SALJ* 591 at 594; Chaskalson, Marcus and Bishop 'Constitutional litigation' in Woolman, Roux, Klaaren, Stein, Chaskalson and Bishop (eds) *Constitutional law of South Africa* (2008) (2nd ed) 3-8. The principle of constitutional avoidance equitable to the principle of subsidiarity was first laid down in *S v Mhlungu* 1995 3 SA 867 (CC) para 59 where Kentridge AJ in the minority judgment stated: 'I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed'. One of the most recent decisions where this was reiterated was *Mazibuko* (n 2) para 73. Various other decisions where the principle was applied include: *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 4 SA 490 (CC); 2004 7 BCLR 687 (CC) paras 22–26 (in the context of the Promotion of Administrative Justice Act 3 of 2000 which gives effect to the constitutional right to administrative justice in s 33 of the Constitution); *MEC for Education, KwaZulu-Natal v Pillay* [2007] ZACC 21; 2008 1 SA 474 (CC); 2008 2 BCLR 99 (CC) para 40 (in the context of s 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000) and *South African National Defense Union v Minister of Defense* [2007] ZACC 10; 2007 5 SA 400 (CC); 2007 8 BCLR 863 (CC) *(SANDU)* para 52 (in the context of labour legislation and the labour rights protected in s 23 of the Constitution).

[12] See *Nokotyana* (n 8) para 1-9, for a discussion of the relevant factual background.

[13] The relief sought by the applicants in the High Court was formulated as follows in the prayers of their notice of motion:

> Pending the decision on whether the Harry Gwala Informal Settlement shall be upgraded *in situ* the respondent is ordered to comply with its constitutional and statutory obligations in terms of sections 26 and 27 of the Constitution of the Republic of South Africa, 1996 and Chapters 12 and 13 of the Housing Code read with Section 9(1) of the Housing Act, 1997, that it provide to the Harry Gwala Informal Settlement, the following basic interim services, immediately: communal water taps for the provision of water in accordance with the basic standards required by Regulation 3(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water promulgated in Government Notice No. R.509 dated June 2001 in terms of the Water Services Act, 108 of 1997; Temporary Sanitation Facilities; Refuse Removal Facilitation; and High Mast Lighting in key areas to enhance community safety and access by emergency vehicles.

See *Nokotyana* (n 8) fn 14.

provision of sanitation and high-mast lighting. The High Court rejected the applicants' claim, and found that that chapter 12 of the National Housing Code which dealt with housing assistance in emergency circumstances was not applicable as their position could not be classified as an emergency.[14] The Court further rejected their reliance on chapter 13 of the code as it would only be applicable once a decision has been made with regard to the upgrading of the settlement.[15] Lastly the High Court found that that the municipality was fulfilling its constitutional obligations by taking all reasonable and necessary steps, within the provided legislative framework, to ensure that services were provided for in a manner which was economically sufficient.[16]

The applicants appealed to the Constitutional Court where they specifically requested so-called 'VIP' latrines (ventilated improved pit latrines) including high-mast lighting to enhance safety and easy access to the settlement.[17] The applicants contended that the High Court erroneously found that:

(a) they were not entitled to the relief provided for in the National Housing Code;
(b) that the right of access to housing, read with the Housing Act,[18] the National Housing Code and the Waters Services Act,[19] imposes a mandatory minimum core content with regard to basic sanitation which cannot be denied on the basis of budgetary constraints; and
(c) that the municipality took all reasonable steps to ensure that services were provided in an economically efficient manner.[20]

The applicants again based their claim on the right to access to adequate housing including various other constitutional rights and chapters 12 and 13 of the National Housing Code.[21] According to the municipality, the central concern is not the applicants' entitlement to the rights claimed, but the reasonableness of the measures implemented by the municipality to achieve these rights.[22]

Writing on behalf of a unanimous Court, Van der Westhuizen J confirmed the High Court's decision concerning the applicants' reliance on chapters 12 and 13

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[14] *Nokotyana* (n 8) para 12.
[15] *Ibid.*
[16] *Id* para 13.
[17] Whilst the applicants in the High Court claimed temporary sanitation facilities they specifically claimed for 'VIP' latrines in the Constitutional Court. Both parties sought to tender new evidence and claims before the Constitutional Court, which claims and evidence the Court rightfully rejected. This new evidence mainly concerned a new policy on the provision of temporary sanitation services which was adopted after the delivery of the High Court judgment. See *Nokotyana* (n 8) para 18-20.
[18] The Housing Act 107 of 1997.
[19] The Water Act 108 of 1997.
[20] *Nokotyana* (n 8) para 24.
[21] The applicants further relied on ss 2, 7, 10, 39 and 173 of the Constitution.
[22] *Nokotyana* (n 8) para 35.

of the National Housing Code.[23] The applicants' contention that the right to access to housing should be afforded a minimum content was, however, rejected in the following terms:

> It is not necessary to make a finding on these submissions. Chapters 12 and 13 were promulgated to give effect to the rights conferred by section 26 of the Constitution. They do not purport to establish minimum standards. Their manifest purpose is to regulate the provision of services pending a decision on upgrade, as in this case. The applicants have not sought to challenge either chapter of the National Housing Code. This Court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation or alternatively challenge the legislation as inconsistent with the Constitution.

The applicants recognised this by relying primarily on chapters 12 and 13. They also tried to rely directly on the Constitution though. They cannot be permitted to do so. It would not be appropriate for this Court in these proceedings to consider whether the Municipality's new policy complies with the Constitution, for this reason, as well as in view of the above-mentioned inadmissibility of the new documentary evidence in which the policy is embodied.[24]

Further the Court stated that the applicants' reliance on sections 2, 7, 10, 39 and 173 of the Constitution,[25] was vague and insufficiently specified, specifically that where both a specific right and a general right is invoked it is more appropriate to invoke the specific right first:

> Section 39 of the Constitution requires courts when interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. It is incontestable that access to housing and basic services is important and relates to human dignity. It remains most appropriate though to rely directly on the right of access to adequate housing, rather than on the more general right to human dignity.[26]

The only relief afforded to the applicants was an order that a decision be taken within 14 months, as to the upgrading of the settlement as according to the Court the delay was the most immediate reason 'for the dilemma and desperate plight of the residents'.[27]

Parallels could be drawn with another decision where bricks and mortar were not in contention, but the right to access to adequate housing was the main right relied upon by the parties. In *Joseph* the applicants' electricity supply was terminated after their landlord had fallen in arrears with their service provider, City Power.[28] The

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[23] *Id* para 45.
[24] *Id* paras 47-49.
[25] Section 2 of the Constitution deals with the supremacy of the Constitution; s 7 with rights; s 10 with human dignity, s 39 with the interpretation of the Bill of Rights and s 173 with inherent power.
[26] *Nokotyana* (n 8) para 50.
[27] *Id* para 57.
[28] *Joseph* (n 9) para 1.

applicants received no prior notice of the disconnection and most applicants consistently kept up with their electricity payments to the landlord.[29] The applicants sought reconnection of their electricity supply and an order declaring that the disconnection without notice to them was procedurally unfair in terms of section 3(2)(b) of the Promotion of Administrative Justice Act (PAJA).[30] The High Court rejected the applicants' claims on the basis that their rights were not affected.[31]

The difficulty of the case was that, as tenants, the applicants did not have a contractual right to receive electricity, as their electricity bills were paid to the landlord who had contracted directly with City Power.[32] In arguing that section 3 of PAJA applies, they did not base their claim on a legitimate expectation, but argued that their rights were materially and adversely affected by the termination of the electricity supply.[33] The applicant in support of this claim relied on the right of access to adequate housing, the right to human dignity and their contractual right to electricity in terms of their lease contracts with the landlord.[34]

The applicants' main contention was that the termination of the electricity supply constituted a retrogressive measure which violated the negative obligation of the state to respect the right of access to adequate housing and which materially and adversely affected their constitutional right to housing for the purposes of PAJA. The Court rejected the applicants' reliance on the right to housing and dignity.[35] According to the Court, the real issue was whether the broader constitutional relationship that exists between a public service provider and the members of the local community gives rise to rights that require the application of PAJA.[36]

Although the outcome of the case was in favour of the applicants following an administrative law approach,[37] the reliance on the 'broader constitutional

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[29] *Id* para 7.

[30] Section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000, states:

> In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) –
> (i) adequate notice of the nature and purpose of the proposed administrative action;
> (ii) a reasonable opportunity to make representations;
> (iii) a clear statement of the administrative action;
> (iv) adequate notice of any right of review or internal appeal, where applicable; and
> (v) adequate notice of the right to request reasons in terms of section 5.

[31] *Joseph* (n 9) para 10.

[32] *Id* para 2.

[33] *Id* para 12.

[34] *Ibid*.

[35] *Id* para 31

[36] *Id* para 32.

[37] See *Joseph* (n 9) para 46 where the Court found:

> In my view therefore, when City Power supplied electricity to Ennerdale Mansions, it did so in fulfillment of the constitutional and statutory duties of local government to provide basic municipal services to all persons living in its jurisdiction. When the applicants received electricity, they did so by virtue of their corresponding public law right to receive this basic municipal service. In depriving them of a service which they were already receiving as a matter of right, City Power was obliged to afford them procedural fairness before taking a

relationship' that exists between public service providers and the community and the rejection of the applicants' constitutional claims is questionable.

Interpretation

While the context of these two decisions is vastly different, they ask the same interpretative question – does the right to housing include certain basic services? The Court answers this question differently in both, but in essence relies on the principle of subsidiarity to circumvent the constitutional questions posed.

In *Nokotyana* the tone of the judgment is set by Van der Westhuizen J who states:

> The case shows that the role of courts in the achievement of socio-economic goals is an important one and that bureaucratic efficiency and close co-operation between different spheres of government and communities are essential.[38]

From this statement, and a further reading of the judgment it is clear that the Court adheres to the clear cut institutional barriers it has set up for itself within the realm of the separation of powers doctrine and affirms its reluctance to impose any additional burdens on government.[39]

The principle of subsidiarity as applied in these matters requires litigants to rely on the relevant legislation and not directly on the constitutional provision.[40] In *Nokotyana* the Court specifically stated that that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation or alternatively challenge the legislation as being inconsistent with the Constitution.[41] In *Joseph* the Court rejected the applicants' reliance on section 26 of the Constitution in relation to PAJA as, according to the Court, the real issue was the broader constitutional relationship that existed between a public service provider and the community.[42]

The importance of, and the Court's reliance on, the principle of subsidiarity is necessary, and to a certain extent understandable as the Constitution should not be over utilised to decide issues that can be disposed of with reliance on specific, subordinate and non-constitutional precepts of law.[43] Direct reliance on constitutional provisions might fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfill the rights in the Bill of Rights.[44] This was aptly illustrated in *Joseph* where legislation that

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decision which would materially and adversely affect that right.

[38]*Nokotyana* (n 8) para 4.

[39]Davis (n 5) 304; *Nokotyana* is comparable to the other socio-economic cases heard by the Court, in that the applicants essentially requested the Court to attach a minimum core content to the right to housing, see (n 3) above.

[40]See (n 11) above; Van der Walt 'Normative pluralism and anarchy: Reflections on the 2007 term' (2008) *Constitutional Court Review* 77 at 100.

[41]*Nokotyana* (n 8) para 47.

[42]*Joseph* (n 9) para 31.

[43]Du Plessis 'Subsidiarity: What's in the name for constitutional interpretation and adjudication' 2006 *Stell LR* 207 at 215.

[44]Van der Walt (n 40) 102.

was specifically enacted to give effect to the rights in the Bill of Rights was utilised to provide the applicants with the desired relief.[45]

My concern is not with the principle of subsidiarity as such, but the way in which it was applied in these specific judgments. The mere brushing off of the applicants' constitutional claims was disappointing, but not surprising, considering the Court's focus on the justifiability and reasonableness of the state's policy choices and the over-reliance on limiting the content of these rights to sections 26(2) and 27(2).[46] It seems as if the Court in *Nokotyana* and *Joseph*, not being able to rely on the reasonableness test, 'replaced' the test with the principle of subsidiarity to avoid attaching some content to the right to housing.

According to Klare, courts cannot apply subsidiarity without addressing precisely the questions and making precisely the value judgments that the theory means to avoid.[47] This dilemma stems from the ambiguity in the constitutional provisions that authorise Parliament to give effect to certain constitutional rights, such as the right to just administrative action, which state that national legislation must be enacted to give effect to these rights.[48] Accordingly, the term to 'give effect' can be interpreted to mean that the right is free standing with a content of its own, but that Parliament is only invited or mandated to implement and give concrete, practical significance to the rights.[49] Therefore the content of the right is not necessarily exhausted by the statute giving it effect.[50]

Klare further points out that to some extent, enforcement and remedies determine what a right means in practical effect in the lives of the parties involved.[51] When legislation prescribes a remedy, it defines the right 'by setting out its metes and bounds', and the question that needs to be asked is to what extent courts are confined to these 'metes and bounds'.[52] This is aptly illustrated by the following example:

> Particularly in the field of socio-economic rights, when Parliament enacts an effect-giving statute providing a range of benefits, rights, and entitlements to qualified

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[45]PAJA was enacted to give effect to section 33 of the Constitution which specifically required national legislation to be enacted to give effect to the right to just administrative action; also see Currie and de Waal *The Bill of Rights handbook* (5th ed) 78.

[46]Section 26(2) and 27(2) provides that the state must take reasonable, legislative and other measures within its available resources to achieve the progressive realisation of these rights. See *Grootboom* (n 1) para 21, 34-38; *TAC* (n 2) para 23 as interpreted by Brand (n 5) 45; Liebenberg (n 4) 176.

[47]Klare 'Legal subsidiarity and constitutional rights: A reply to AJ van der Walt' (2008) *Constitutional Court Review* 129 at 138.

[48]*Id* 140; s 33(3) of the Constitution.

[49]*Ibid*.

[50]Klare (n 47) 140; Klare also provides for another possible interpretation namely that the right has the meaning and effect that Parliament gives it, which allows for a more restrictive approach that supports subsidiarity. However, Klare supports the interpretation that content is not necessarily exhausted by relevant legislation.

[51]*Ibid*.

[52]*Ibid*.

> applicants and imposing corresponding obligations and prohibitions on the government, it will trade off limitations on the coverage, administration, and enforcement of the right in return for greater generosity of benefits and ease of access to them. Such tradeoffs are entirely legitimate means to make economical use of scarce resources needed to fulfill other constitutional rights and to provide for orderly conduct of executive and judicial business. Legislatures are supposed to make such trade-offs, and the Constitution requires South African courts to respect the considered judgment of Parliament. But must courts give it dispositive weight on practical questions of enforcement and remedies? Leave aside crudely under-protective and otherwise patently inadequate remedial schemes. Assume the legislature's scheme falls within a range of reasonable decision making. In a democracy, are there any circumstances under which a court may properly substitute its own thinking for that of the legislature? What if a court concludes that a different choice of remedies would do a significantly better job of protecting the constitutional right in question, with a net gain for democracy? Is it nevertheless precluded by the legislative government (except in extreme cases)? (footnotes omitted).[53]

The application of the principle of subsidiarity in the above judgments are of concern for the future development of socio-economic rights jurisprudence. The Court's application, or in a sense, reliance on the principle simply reverts back to the debate about separation of powers, a separation which the court is acutely aware of and intent upon upholding.[54] Therefore, the age-old question remains: does the Constitutional Court have the authority to optimise the protection of fundamental rights?[55]

The principle that constitutional issues should be avoided is not absolute, and when avoided should be clearly motivated especially in relation to claims based on socio-economic rights.[56] An overly cautious attitude as clearly illustrated in these judgments might abdicate the courts' obligation to protect and promote the rights in the Bill of Rights.[57] The unique nature of these matters should also be kept in mind, especially considering that these cases are often brought by the very poor and marginalised in society. Merely rejecting these constitutional claims may discourage poor litigants from bringing matters to the Court and leave a hollow ring to a document aimed to improve the quality of life of all citizens.[58] Litigants should not feel that relying on constitutional rights should be their last resort.[59]

Following the reasoning of Klare, the mere existence of a legislative framework does not mean that any further content cannot and should not be prescribed to socio-economic rights.[60] Thus far there has been no sustained and coherent attempt

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[53] *Id* 141.
[54] *Id* 144.
[55] *Id* 142.
[56] *Ibid.*
[57] *Id* 141.
[58] Brand (n 5) 52.
[59] *Ibid.*
[60] Klare (n 47) 140.

by the court to describe the substantive standard that government policies are supposed to work towards.[61] The present decisions are no different but differ in the fact that far from considering the content of these rights, reliance on constitutional claims is rejected outright based on the principle of subsidiarity.

Another concern is the Court's rejection in these judgments of the applicants' reliance on certain other constitutional rights, as according to the Court, this reliance was vague and insufficiently specified.[62] Ultimately, this comes down to an application of the principle of subsidiarity as the Court prefers to rely primarily upon a specific right, rather than upon a general right.[63] Although the Court did confirm the importance of the right to dignity in relation to the right to housing in *Nokotyana*, the Court's statement in this respect is remains a concern as it seems to create a hierarchy of constitutional rights and fails to recognise the multi-faceted nature of socio-economic rights.[64] Perhaps the Court, having previously established the importance of human dignity in relation to socio-economic rights and its test of reasonableness review, feels that a repetition of such an analysis is unnecessary.[65]

However, the Court needs to take account of, and analyse, the right to dignity in relation to every socio-economic rights claim, as to reject the provision of these social resources might undermine the very foundation of our constitutional

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[61]Brand (n 5) 46; The courts reliance on its interpretation of reasonableness and refusal to attach substantive content to socio-economic rights as set out in *Grootboom* (n 1) and *TAC* (n 2) was reaffirmed in no uncertain terms in *Mazibuko* (n 2) para 57-61. Here the court, requested to determine the content of the right to access to water by quantifying the amount of water necessary to lead a dignified life relied on its previous decisions and stated that its reason for rejecting core content is twofold namely:

> The first reason arises from the text of the Constitution and the second from an understanding of the proper role of courts in our constitutional democracy. As appears from the reasoning in both *Grootboom* and *Treatment Action Campaign No 2*, section 27(1) and (2) of the Constitution must be read together to delineate the scope of the positive obligation to provide access to sufficient water imposed upon the State. That obligation requires the State to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources. It does not confer a right to claim "sufficient water" from the State immediately … Secondly, ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.

[62]*Nokotyana* see (n 21) and (n 25) above; *Joseph* (n 9) para 31.

[63]*Nokotyana* (n 8) para 50.

[64]*Ibid.*

[65]See *Grootboom* (n 1) para 83 where the Court stated:

> It is fundamental to an evaluation of the reasonableness of State action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of State action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the State in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings.

democracy.[66] An interpretation or re-interpretation of the right to dignity is also called for as it has been ten years since the court's decision in *Grootboom*. Since its decision, the nature of deprivation and socio-economic need has not changed much, and the dignity of people is still affected by the circumstances in which they live, be it without proper sanitation or electricity, irrespective of the existence of a proper legislative framework and reasonable government policy.

3 Conclusion

When first reading the facts of *Nokotyana* and *Joseph* I was fairly optimistic of the possibility of an interpretation of the right to housing that would include some content. However, the Court's reasoning is disapointing, as the court's reliance on the principle of subsidiarity merely confirms its stance on the interpretation of socio-economic rights and brings us back to the general debate about how 'separate' the separation of powers should be.[67]

The Court established its socio-economic jurisprudence by rejecting the concept of a minimum core; however, by rejecting this concept, the Court should not be restrained in attaching some content to socio-economic rights. What this content should be is debatable, but a possible starting point could be an independent interpretation of subsection 1 of sections 26 and 27 as opposed to the current reading where the emphasis is placed on subsection 2.[68] Liebenberg suggests developing the normative content of the various rights described in sections 26(1) and 27(1), which require considering the purpose and values which the rights seek to promote in the light of their historical and current socio-economic context.[69]

Ultimately this will not require prescribing a comprehensive and detailed definition of these rights, allowing space for the evolution of new meanings in response to changing contexts and forms of injustice.[70] Prescribing to such a normative interpretation means that the more 'general rights' such as human dignity would become more important and that the court should not only focus on the more 'specific rights' but look at these rights holistically within the framework of the Constitution as a transformative document.[71]

Brand also points to the fact that the Court's strenuous reliance on its reasonableness approach, and in the current instances reliance on the principle of subsidiarity, could be questioned once the Court is confronted with a matter where a coherent, rational, comprehensive policy exists but where the realisation

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[66]Liebenberg (n 3) 12.
[67]Klare (n 47) 144.
[68]Bilchitz (n 5) 19.
[69]Liebenberg (n 4)180.
[70]*Ibid*.
[71]*Ibid*.

of socio-economic rights are still substantially affected and where a decision would have a significant budgetary implication.[72] The difficult question remains: what will the future of socio-economic litigation entail? The two judgments discussed are disappointing in terms of expanding on the jurisprudence laid down in *Grootboom* and *TAC* and the question remains as to how we are going to build on the reasonableness test and avoid reliance on subsidiarity. To date, the approach followed by the Court can be seen as a failure in the sense that it fails to provide for the needs of its citizens, ultimately derogating the purpose of the Constitution to improve the quality of life of all.[73]

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[72]Brand (n 5) 53.
[73]Pieterse (n 5) 407.