

A closer look at the right to have access to adequate housing for inhabitants of informal settlements post *Grootboom**

Clarence Tshoose**

Abstract

In South Africa informal settlement dwellers are faced with a myriad of socio-economic problems, which relate, amongst others, to living standards, access to basic services, and suitable housing. Notwithstanding these problems, the Constitution affords everyone the right to have access to adequate housing. It also makes it obligatory for the state 'to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'. In light of the above, this article examines the constitutional obligation on the state to provide informal settlement dwellers the right of access to adequate housing. It explores some of the landmark cases that have shaped the jurisprudence of the right to have access to adequate housing in South Africa *post* the ground-breaking Constitutional Court's *Grootboom* decision.

1 Introduction

In South Africa informal settlement dwellers are faced with a myriad of socio-economic problems, which relates, amongst others, to living standards, access to basic services, and suitable housing.¹ Notwithstanding these problems, the Constitution affords everyone the right to have access to adequate housing.² The Constitution also requires the state to take reasonable legislative and other

*This article is based on a paper presented at the Unisa College of Law Social Security Flagship community engagement seminar titled 'Land and housing: Prospects and challenges' Burgers Park Hotel, Pretoria, South Africa, 18-19 September 2014. The comments received during the presentation of this paper are hereby acknowledged. I should also like to thank anonymous reviewers for their suggestions and comments.

**LLB, LLM (North West University). Senior Lecturer, College of Law, (Unisa).

¹Richards *et al* 'Measuring quality of life in informal settlements in South Africa' (2007) *Social Indicators Research* 386 available at <http://www.jstor.org/stable/pdfplus/20734430.pdf> (accessed 2014-05-05).

²Section 26(1) of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

measures, within its available resources, to achieve the progressive realisation of this right.³ Lecke asserts that the right to have access to housing encapsulates the following issues: housing that is secure, accessible, and affordable, including provision of basic infrastructure (for example water, sanitation, drainage, health care and transportation) and secure tenure for squatters.⁴

In *Government of the Republic of South Africa v Grootboom*,⁵ the Constitutional Court made it clear that housing entails more than bricks and mortar. The court noted that it requires available land, appropriate services such as the provision of water, the removal of sewage and the financing of all of these, including the building of the house itself. According to the court for a person to have access to adequate housing all of these conditions must be met.⁶

Against this background this article examines the constitutional obligation on the state to provide to the inhabitants of informal settlements the right of 'access to adequate housing'.⁷ It explores some of the landmark cases that have shaped the jurisprudence of the right to have access to housing in South Africa. Finally it notes that more work is required in order to realise the right to housing for inhabitants of informal settlements.

2 The right to have access to adequate housing under the South African Constitution

The South African Constitution in section 26 provides that 'everyone has the right to have access to adequate housing'.⁸ Furthermore the Constitution makes it obligatory for the state 'to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'.⁹

Tushnet states that it would be more useful to avoid rights-talk altogether and focus instead on the real experiences that trigger rights claims in the first place. He further opines that:

People need food and shelter right now, and demanding that those needs be satisfied – whether or not satisfying them can today persuasively be characterised as enforcing a right – strikes me as more likely to succeed than claiming that existing rights to food and shelter must be enforced.¹⁰

³Section 26(2) of the Constitution.

⁴Lecke 'The UN Committee on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an appropriate approach' (1989) *Human Rights Quarterly* 531.

⁵2001 1 SA 46 (CC) para 35 (*Grootboom*).

⁶*Grootboom* (n 5) para 33.

⁷*Id* para 35.

⁸Section 26(1) of the Constitution.

⁹Section 26(2) of the Constitution.

¹⁰Tushnet 'An essay on rights' (1984) 62 *Texas LR* 1363-1364.

It is argued in this article that inhabitants of informal settlements have limited resources, and that their living standards, access to housing, basic services and, personal health are the factors that hinder them from enjoying the quality of life as promised by the Constitution.¹¹ This finds consonance, with Bilchitz's argument, that if fundamental rights are to mean anything at all, they must guarantee to individuals the prerequisites for living a life of value.¹²

The right to have access to housing enshrined in the Constitution imposes a positive duty on the state to endeavour to provide access to housing for inhabitants living in informal settlements in South Africa. This requires specific attention, as a matter of priority, to the question of those who are homeless. They cannot be told to wait in a queue, homeless, for twenty-one years. The government must have a very compelling case in order to justify leaving people without shelter, and without a place where they can legally call home.

In order to protect the homeless people, under these circumstances the court might postpone making a final order, and perhaps give interim relief such as a stay of any eviction for a period to enable the programme to reach the people affected. In *Port Elizabeth Municipality v Various Occupiers*,¹³ the Supreme Court of Appeal set aside the order of eviction granted by the High Court,¹⁴ and agreed with the respondents that the applicant (Port Elizabeth Local Municipality) was under an obligation to provide alternative accommodation to unlawful occupiers.¹⁵ The Municipality applied to the Constitutional Court for leave to appeal against the decision of the Supreme Court of Appeal and to have the eviction order restored. The Municipality sought a ruling that it was not constitutionally obliged to find alternative accommodation for the unlawful occupiers. Justice Sachs argued that in cases where there is a conflict between section 25 (dealing with property rights) and section 26 (concerned with housing rights) of the Constitution,¹⁶ these sections must be read together in order to find a fair and equitable outcome.¹⁷ It is clear from this case that the court has made a sterling effort to protect the housing needs of the homeless and vulnerable. According to the court 'it is not

¹¹For a detailed discussion on this issue, see Richards *et al* (n 1) 375-387; Huchzermeyer 'The new instrument for upgrading informal settlements in South Africa: Contributions and constraints' in Huchzermeyer and Karam (eds) *Informal settlements: A perpetual challenge?* (2006) 41-61; Moller 'Quality of life in South Africa: The first ten years of democracy' (2007) 1-10 available at eprints.ru.ac.za/pdf (accessed 2011-05-04).

¹²Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 6-46.

¹³*Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) (*Port Elizabeth Municipality*).

¹⁴*Id* para 4.

¹⁵*Id* para 5.

¹⁶*Id* paras 19-23.

¹⁷*Id* paras 27-37.

only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads'.¹⁸ The court went further to state that 'the integrity of the rights-based vision of the Constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence'.¹⁹

In addition, the Constitutional Court in *Grootboom* held that the government had failed to appreciate that its national programme did not provide a short-term solution for the people in dire need of access to adequate housing in this context.²⁰ It misconstrued its constitutional obligations, and as a result failed even to attempt to meet the needs and constitutional rights of the respondents.

Furthermore, the Constitution protects the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. It also requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights.²¹ It is argued that South Africa's track record on the protection of civil and political rights is good, but the delivery and enforcement of the social and economic rights guaranteed in the Constitution has been slower and less effective.²² Similarly, the compliance of court orders by the government leaves much to be desired,²³ this is exacerbated by a shortage of financial resources.²⁴

¹⁸*Id* para 18.

¹⁹*Ibid.*

²⁰*Grootboom* (n 5) paras 52 and 64.

²¹Section 7 of the Constitution. Koch in her article questions whether the tripartite typology, to respect, protect and fulfil, really is a helpful analytical tool in the on-going debate on the justiciability of economic, social and cultural rights. Koch admits that the tripartite typology has contributed to a better understanding of the normative character of the two sets of rights by pointing out that both encompass a spectrum of legal obligations going from the 'negative' to the 'positive'. In that way the typology has functioned as a bridge builder between the two sets of rights and thereby confirmed the long tradition of considering all human rights as indivisible, interrelated, and interdependent. For a detailed discussion on this matter see Koch 'Dichotomies, trichotomies or waves of duties' (2005) 5 *Human Rights LR* 82-103.

²²Bilchitz (n12). For further discussion on housing rights litigation, see Langford *et al Socio-economic rights in South Africa: Symbols or substance* (2014) 187-225.

²³*Madzodzo v Minister of Basic Education* 2014 3 SA 441 (ECM) (*Madzodzo*); *Somyani v MEC for Welfare, Eastern Cape* unreported case no 597/2002 (SECLD); *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (3) SA 609 (E) 615H-I; *Jayiya v MEC for Welfare, Eastern Cape* 2001 2 SA 609 (E). The disregard of court orders by the state has been clearly shown in the following cases, *Government of the Republic of South Africa v Grootboom* (n 5); *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) (*Treatment Action Campaign*). There are exceptional cases where the government has shown some degree of compliance with court orders as is evident in the following cases: *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) (*Olivia Road*); *Abahlali baseMjondolo Movement SA v Premier, KwaZulu-Natal* 2009 3 SA 245 (D); *Mazibuko v City of Johannesburg* 2013 6 SA 249 (CC) (*Mazibuko*); *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC), 2005 (1) BCLR 78 (CC) (*Jaftha*); *President of RSA v Modderklip Boerdery (Pty) Ltd*

Some commentators point to the lack of effective enforcement mechanisms,²⁵ others to the weak form of judicial enforcement²⁶ and cautious court orders,²⁷ whilst others contend that an inherent feature of public interest litigation is its inability to effect political change.²⁸ The challenges are further compounded by the fact that South African society is deeply scarred by its history of apartheid and colonialism, which ensured the deep inequalities that still persist, especially regarding land.²⁹ The *Grootboom* judgment shows that social and economic rights are about the duty on government to attend, as a matter of priority, to the basic needs of the poorest. Therefore, the Constitution requires that courts hold government accountable in respect of their focus on and attention to critical issues affecting our communities and societies at large. Thus we need the Constitution and the courts to call government's attention to the need for a coherent and rational plan of action in respect of the right of access to housing.³⁰ It is submitted that the right of access to housing cannot be interpreted in isolation, as there is a close correlation between it and other socio-economic rights. These rights are interrelated, interdependent and mutually supportive. As pointed out in the *Grootboom* judgment,³¹ all socio-economic rights must be read together in the context of the Constitution as a whole and their interconnectedness needs to be taken into account in interpreting a specific socio-economic right, and in determining whether the state has met its obligations in terms of that right. In the court's opinion:

There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to

2005 8 BCLR 786 (CC) (*Modderklip Boerdery*).

²⁴De Beer and Vettori 'The enforcement of socio-economic rights' (2007) 3 *Potchefstroom Electronic Journal (PER)* 2-9.

²⁵Mbazira 'Non-implementation of court orders in socio-economic rights litigation in South Africa' (2008) *Economic and Social Rights Review* 2-7.

²⁶Tushnet 'Enforcing socio-economic rights: Lessons from South Africa' (2005) *Economic and Social Rights Review* 2-5.

²⁷Pieterse 'Eating socio-economic rights: The usefulness of rights talk in alleviating social hardship revisited' (2007) *Human Rights Quarterly* 796-822.

²⁸Madlingozi 'Post-apartheid social movements and the quest for the elusive new South Africa' (2007) *SA J of Law and Society* 77-98.

²⁹Van Wyk *Planning law* (2012) 16; Dixon *et al* 'Discourse and the politics of space in South Africa: The squatter crisis' (1994) *Discourse and Society* 277-292.

³⁰If the government has a coherent and rational plan of action, the courts will be slow to interfere. For example, if the government had said, 'we do have a priority programme for people in this position, and this is how far we can reach. We cannot help these people today, but we will do so tomorrow', it would probably have met the constitutional requirements.

³¹*Grootboom* (n 5) para 24.

the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.³²

Fulfilling the right to have access to adequate housing for informal settlement residents could have an impact on the extent to which or the way in which the other rights have to be met. The Constitutional Court further remarked that:

The poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between sections 26 and 27 and the other socio-economic rights is most apparent. If under section 27 the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants that would be relevant to the state's obligations in respect of other socio-economic rights.³³

The provision of housing to informal settlement residents may therefore enable them to have access to other socio-economic benefits, such as land, health care, food and water. It will also help such people to realise their rights to human dignity, equality and freedom. The right of access to housing can therefore be viewed broadly as guaranteeing the material conditions for an adequate standard of living. It serves to protect human beings from the life-threatening and degrading conditions of poverty and material insecurity.³⁴

3 The socio-economic conditions faced by the inhabitants of informal settlements post-*Grootboom*

It is trite that the Constitutional Court case of *Government of the Republic of South Africa v Grootboom* is the *locus classicus* when dealing with claims based on the right to housing. The court stated that '[s]ection 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme to progressively realise the right of access to adequate housing'.³⁵

The *Grootboom* decision gained international recognition as it placed emphasis on the justiciability of socio-economic rights, which brought a glimmer of hope for those who are destitute and in dire need of housing. In light of this

³²*Id* para 23.

³³*Id* para 36.

³⁴García and Gruat 'Social protection: A life cycle continuum investment for social justice, poverty reduction and sustainable development' (2003) International Labour Organisation (ILO), Geneva 22-23 available at <http://www.ilo.org/public/english/protection/download/lifecycl/lifecycle.pdf> (accessed 2015-03-22).

³⁵*Grootboom* (n 5) para 99 (2) a.

decision, one would have thought that it may have had an impact on South Africa as far as socio-economic rights are concerned, but this does not appear to have been the case. It is estimated that the housing backlog is 2.1 million housing units, affecting 12 million people living in informal settlements.³⁶ There is an extreme shortage of affordable housing for the poor in South Africa; about 1.8 million households in the middle to lower income groups live in rented accommodation, as opposed to about 5.2 million households that own property.³⁷ Moreover, informal settlements have mushroomed around cities as the state has failed to keep pace with population growth. The housing backlog of about 1.5 million in 1994 has burgeoned to 2.1 million as the population has grown by 13 million to 53 million.³⁸

According to Statistics South Africa's General Household Survey (GHS),³⁹ 18.9 per cent of South African households were living in 'RDP' or state subsidised dwellings. The survey found that although the government has expanded access to basic services, the public was dissatisfied about the quality of these services. The proportion of people living in informal dwellings appears unchanged between 2002 and 2010 at 13 per cent. Statistics South Africa found that Gauteng had 22 per cent of informal dwellers, followed by North West with 19 per cent, whilst the Western Cape had 17 per cent and Free State had 13 per cent of people living in informal dwellings.

The other challenges faced by these households include poor environmental quality of these settlements, which is exacerbated by the lack of basic services.⁴⁰ Access to affordable land and housing is one of the main challenges facing policy makers in South Africa. According to Statistics South Africa, as of mid-2009, 13.4 per cent of households in South Africa lived in informal dwellings. There are over 2 700 informal settlements in the country, comprising approximately 1.2 million households.⁴¹ An estimated 4.4 to 5 million people lived in informal settlements in 2012.⁴²

³⁶ *South Africa Yearbook 2009/10* (Department of Human Settlement), 311; Tissington and Royston 'Creating a better life for all through informal settlement upgrading' available at <http://www.afesis.org.za/Sustainable-Settlements-Articles/creating-a-better-life-for-all> (accessed 2014-08-28); Nombembe 'Shack dwellers mourn freedom' *The Times* (2011-04-27) 5 available at <http://www.timeslive.co.za/local/2011/04/27/shack-dwellers-mourn-freedom> (accessed 2011-04-28). The South African government has come a long way in responding to the issue of the realisation of socio-economic rights, but is still falling short of what is possible, and lacks the progress that has been made by its neighbours and other countries in a similar standing.

³⁷ Available at <http://www.ngonewsafrika.org> (accessed on 2014-08-28).

³⁸ Brand and Cohen 'Where the heart is: South Africa's post-apartheid housing failure' *Mail & Guardian* (2013-08-02) available at <http://mg.co.za/article/2013-08-02-where-the-heart-is-south-africas-post-apartheid-housing-failure> (accessed 2013-08-24).

³⁹ Statistics South Africa *General Household Survey* (GHS) 5 May 2011.

⁴⁰ See *South Africa Yearbook* (Department of Human Settlement) (2009/10) 311.

⁴¹ President Zuma 'State of the nation address' 10 February 2011 available at <http://www.thepresidency.gov.za/pebble.asp?reid=3503> (accessed 2015-01-25).

⁴² Van Wyk (n 29) 16-17.

As part of the approach to enhance and speed up delivery of services, the government initiated a number of programmes to deal with informal settlements. For example, the Upgrading of Informal Settlements Programme (UISP) was launched in collaboration with the national department of human settlements. This initiative aims to address the housing backlog, including details on the norms and standards to be followed when upgrading the informal settlements. The implementation of the UISP has been slow and plagued by various obstacles, which includes amongst others, lack of capacity at the local government level as well as political will in upgrading informal settlements.⁴³

This housing shortfall raises several fundamental questions relating to government's constitutional mandate to provide access to housing to the destitute who reside in informal settlements in South Africa.⁴⁴ The first question is whether the government has devised measures of realising the right to housing for the informal settlement inhabitants within a reasonable period. Secondly, whether there have been any measures put in place by government to improve the living conditions of informal settlement dwellers in South Africa. Before attempting to answer these questions, I will examine the impact of *Grootboom* in the context of the inhabitants of informal settlements.

4 The impact of *Grootboom* on informal settlement dwellers

The *Grootboom* judgment had a major impact on the development of South African constitutional jurisprudence, particularly on the enforcement of socio-economic rights. In this regard the judgment has been hailed as a positive precedent for the judicial enforcement of economic and social rights.⁴⁵

⁴³Parker 'Informal settlements: The challenge to upgrade' (2014) available at <http://thewritecandidate.co.za/informal-settlements-challenge-upgrade/> (accessed 2015-01-25). In *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC), a provincial government delayed taking a decision on the application for upgrading the settlement for three years. In ruling that the delay was unjustified and unacceptable, Van der Westhuizen held that the provincial government's actions complied neither with s 237 of the Constitution, nor with the requirement by s 26(2) of the Constitution with regard to access to adequate housing.

⁴⁴The majority of the South African population lives in poverty with great structural inequalities. A visit to any of the townships surrounding the cities confirms the fact that a large part of the population is not experiencing their full right to have access to adequate housing, food, and water. De Vos argues that this acute housing shortage lies, partly, in the apartheid policy of influx control, which sought to limit African occupation of urban areas, see De Vos 'The right to housing' in Brand and Heyns *Socio-economic rights in South Africa* (2005) 85-56. For a detailed discussion on the historical context of urban forced evictions see Muller 'The legal-historical context of urban forced evictions in South Africa' (2013) *Fundamina* 367-396.

⁴⁵Liebenberg 'The implications of *Grootboom* for current social security policy in South Africa' (2001) 17 *SALJ* 211-240.

Nonetheless, in the years following *Grootboom*, it has become apparent that the court's decision did little to change the *status quo* in South Africa with regard to a right to basic shelter.

Scholars argue that, if there is a right to housing in South Africa, how could Irene Grootboom have died 'homeless and penniless' in August 2008, more than eight years after the court's decision?⁴⁶ However, this is not a fair question. A fairer question to ask is whether the courts are ideally suited to lend content to social rights and the standards of compliance that they impose?⁴⁷ Similarly, in cases of constitutional non-compliance, particularly where the fundamental rights of vulnerable groups or categories of people had clearly been infringed, the courts did not hesitate to intervene and to force government to review its existing policies. The courts did this, not only indirectly through the granting of mandatory orders,⁴⁸ but also, at times, by directly ordering government to undertake a particular policy review.⁴⁹

⁴⁶For a detailed discussion on this issue see, Pillay 'Implementing Grootboom: Supervision needed' (2002) 3 (1) *Economic Social Rights Review* 1; Makhanya 'A pity Grootboom will not be there to ask about unfulfilled promises' *The Times* (2008-08-09) available at <http://www.thetimes.co.za> (accessed 2013-03-22); Joubert 'Grootboom dies homeless and penniless' *Mail & Guardian* (2008-08-08) available at <http://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless> (accessed 2013-03-22); Mbazira 'Non-implementation of court orders in socio-economic rights litigation in South Africa' (2008) 9 *Economic and Social Rights Review* 2-8; Dixon 'Creating dialogue about socio-economic rights: Strong-form versus weak form judicial review revisited' (2007) 5 *International Journal of Constitutional Law* 395-416; De Vos 'Water is life but life is cheap' (2009) 1-4 available at writingrights.org/2010 (accessed 2011-05-09); See also Wesson 'Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *SAJHR* 284-287.

⁴⁷Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *SAJHR* 383-417; See also Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (n 12) 135-176.

⁴⁸See for example the following judgments *Khosa v The Minister of Social Development*; *Mahlaule v The Minister of Social Development* 2004 6 BCLR 569 (CC) 572H; *Minister of Health v Treatment Action Campaign* (n 21); *Madzodzo v Minister of Basic Education* 2014 3 SA 441 (ECM), and *Port Elizabeth Municipality* (n 13).

⁴⁹When reviewing socio-economic rights cases in South Africa, one is left with a distinct feeling that non-enforcement is, but not always, the immediate and default position. Follow up litigation seems to be a regular feature of almost all socio-economic rights cases, see Berger 'Litigating for social justice in post-apartheid South Africa: A focus on health and education' in Gauri and Brinks (eds) *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008) 38-99. There are cases that provide exception to the general rule of immediate non-enforcement. In some recent cases, particularly on forced evictions, see for example *Olivia Road* (n 23) and *Modderklip Boerdery* (n 23); the decisions and settlement orders have been implemented in a very short space of time, often beyond the terms of the order. There are varying levels of enforcement between the cases, for example, in some instances a period of three to five years had elapsed since the judgment was delivered. Thus, it is not uncommon to find one part of the order implemented and another not.

It follows from the above that there is a specific constitutional focus on addressing the plight of the most vulnerable and desperate in society.⁵⁰ In particular, where categories of people belonging to deprived and impoverished communities are negatively affected, and the right infringed is fundamental to their well-being (such as the right to have access to adequate housing), the Constitutional Court appears to be willing to intervene.⁵¹ This is particularly true where the said communities have been historically marginalised.⁵² In *Treatment Action Campaign* the court again emphasised that:

[t]o be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. 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.⁵³

⁵⁰*Grootboom* (n 5) paras 52 and 69, where the failure to make express provision to facilitate access to temporary (housing) relief for people who have no access to land, no roof over their heads or who live in intolerable conditions was found to fall short of the obligation set by section 26(2) of the Constitution. See also *Treatment Action Campaign* judgment (n 23) para 135, where government was ordered to remove the restrictions that prevent Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites.

⁵¹See *Grootboom* (n 5) and *Jaftha* (n 23). For a detailed discussion of the *Jaftha* judgment see Liebenberg *Socio-economic rights adjudication under a transformative Constitution* (2010) 215-218. The *Grootboom* and *Jaftha* judgments provide the most important examples of the judicial enforcement of socio-economic rights in South Africa. Although scholars generally agree that the approach taken by the court in the *Grootboom* judgment was cautious, they disagree as to how much stronger the courts approach could have been without overtaxing judicial competence and legitimacy. It is argued that the court decision in fact did little to change the *status quo* in South Africa with regard to a right to basic shelter; see Pillay 'Implementing *Grootboom*: Supervision needed' (2002) 13 *Economic and Social Rights Review* 13; Davis 'Socio-economic rights in South Africa: The record after ten years' (2004) *New Zealand J of Public and International Law* 5. Quite recently, there have been vigorous debates as to how much stronger the court's approach could have been, given the potential limits on judicial competence and legitimacy – see Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *SAJHR* 5-11; Chenwi 'A new approach to remedies in socio-economic rights adjudication: Occupiers of 51 Olivia Road v City of Johannesburg' (2009) 2 *CCR* 371-393; For a criticism of the *Mazibuko* judgment see De Vos 'Water is life: But life is cheap' (2009) 1-4 available at writingrights.org/2010 (accessed 2013-05-10); Liebenberg *Socio-economic rights adjudication under a transformative Constitution* (n 51) 146-206.

⁵²*Grootboom* (n 5) para 35. A statistical advance may not be enough and the needs that are most urgent must be addressed; the state is not solely responsible for the provision of houses, but it may be held responsible if no other provision has been made or exists.

⁵³*Grootboom* (n 5) para 44. It follows from this that regard must be had to the extent and impact of historical disadvantage. Furthermore, particularly vulnerable groups may not be neglected. Finally, basic human dignity must be seen to be accorded to everyone when a social security programme is constructed and implemented.

In addition, with regard to the criterion of reasonableness,⁵⁴ the Constitutional Court held, *inter alia*, that this implies that (particularly with regard to the plight of the vulnerable):

- the measures adopted by the state must be reasonable in both their conception and their implementation;⁵⁵
- a wide range of possible measures could be adopted of which many might meet the requirement of reasonableness;⁵⁶
- reasonableness must be assessed in the light of the context; and⁵⁷
- this context is informed by factors such as:
 - the vulnerable status of an affected category of people subject to the infringement of a particular right such as the right of access to social security, the extent and impact of historical disadvantage, the need to ensure that the basic necessities of life are available to all, and the importance of not neglecting particularly vulnerable groups,⁵⁸
 - the extent of the impairment and the impact thereof on an affected category of people,⁵⁹
 - the purpose of social security,⁶⁰ and
 - the impact of the infringement or exclusion on other intersecting rights.⁶¹

⁵⁴The South African Constitution links the right to have access to housing to the availability of funds and the realisation of this right over time. In the meantime, a number of low-income communities have put their hopes in the courts to enforce the right to housing and to resolve housing related issues, of which the Grootboom case has probably been the most prominent. For further reading in this regard see De Vos 'Grootboom: The right to access to housing and substantive equality as contextual fairness' (2001) 17(2) *SAJHR* 258-276; Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) *The South African Law Journal* 264-283.

⁵⁵*Grootboom* (n 5) para 42.

⁵⁶*Khosa* (n 48).

⁵⁷*Ibid.*

⁵⁸*Grootboom* (n 5) para 42.

⁵⁹*Khosa* (n 48).

⁶⁰*Ibid.* For further reading on the purpose of social security see, Mpedi 'Charity begins – but does not end – at home: *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 BCLR 569 (CC)' (2005) *Obiter* 178.

⁶¹*Ibid.* For example, in *Khosa* the Court held that where the right to social assistance was conferred by the Constitution on 'everyone' and permanent residents were denied access to this right, the equality guarantee entrenched in s 9 of the Constitution was directly engaged (572J).

The above-mentioned considerations show that the state's duty to realise the right in question may differ according to the ability or inability of those affected to realise the right themselves. For example, in *Grootboom* the Constitutional Court held that where there is an ability to pay for adequate housing, the state's primary role is not that of a direct provider. Rather, the state is responsible for unlocking the system and providing access to housing stock and a legislative framework that facilitates self-built houses through planning laws and access to finance.⁶²

For those who cannot afford to pay, issues of development and social welfare are raised.⁶³ This was forcefully stated in a subsequent judgment of *Minister of Public Works v Kyalami Ridge Environmental Association*,⁶⁴ in which the Constitutional Court assumed that flood victims who had been left homeless have a constitutional right to be provided with access to housing.⁶⁵ The point here is that state policy needs to address both those who indeed have the ability to satisfy their own needs and those who do not. In this regard it should also be recognised that the poor are particularly vulnerable and their needs therefore require special attention.⁶⁶

5 Improving the quality of life using constitutional remedies

The courts, in particular the Constitutional Court, fulfil a crucial role in the enforcement of fundamental rights. As far as appropriate remedies are concerned,⁶⁷ the courts are empowered, whenever they decide on any issue

⁶²*Grootboom* (n 5) para 36.

⁶³*Ibid.*

⁶⁴*Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC).

⁶⁵*Id* para 28. In this matter, the court had to deal with the erection of temporary transit housing on state land for the victims of floods that had occurred in the greater Johannesburg area. The court concluded that this was an essential national project implemented in terms of a policy decision taken by government that called for a co-ordinated effort by different spheres of government which would require substantial funds out of the government coffers. The provision of relief to the victims of natural disasters is an essential role of government in a democratic state, and government would have failed in its duty to the victims of the floods if it had done nothing to assist them. There was no legislation that made adequate provision for such a situation, and it cannot be said that in acting as it did, government was avoiding a legislative framework prescribed by parliament for such purposes. Nor can it be said that government was acting arbitrarily or otherwise in a manner contrary to the rule of law. If regard is given to its constitutional obligations, to its rights as the owner of the land, and to its executive power to implement policy decisions, its decision to establish a temporary transit camp for the victims of the flooding was lawful, see para 52 of this case.

⁶⁶*Minister of Public Works v Kyalami Ridge Environmental Association* (n 64) para 52.

⁶⁷In the context of socio-economic rights, the effect of the remedial provisions of the Constitution is to confer a wide discretion on the courts to fashion appropriate and innovative remedies to meet the needs of the poor and the desolate. The impact of this wide remedial power is reinforced by the jurisprudence developed by the Constitutional Court, which emphasises that in order for remedies

involving the interpretation, protection and enforcement of fundamental rights contained in the Constitution, to make any order that is just and equitable⁶⁸ and may grant appropriate relief in this regard.⁶⁹ Specific constitutional remedies include orders of invalidity,⁷⁰ the development of the common law to give effect to the constitutional rights,⁷¹ and procedural remedies derived from some of the substantive rights.⁷²

In addition to the courts, there are also other institutions that are constitutionally entrusted with the task of monitoring compliance with and enforcing the constitutional fundamental rights.⁷³ The South African Human Rights Commission is mandated to, amongst other things, monitor and assess the obligation of the state to progressively realise the rights in the Bill of Rights. Theoretically, this appears to be a perfect system, but the lived experiences of the poor and marginalised in South Africa would provide a different picture.⁷⁴

The South African courts face the challenge of enforcing social and economic rights, while at the same time showing an appropriate level of

to be 'appropriate' they must be effective see, *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC).

⁶⁸Sections 172(b) and 167(7) of the Constitution.

⁶⁹Section 38 of the Constitution. In *Fose v Minister of Safety and Security* (n 67) para 19, appropriate relief is described as follows. Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these important rights.

⁷⁰Section 172(1)(a) of the Constitution.

⁷¹Sections 173 and 8(3) of the Constitution.

⁷²Sections 32(1), 33(2), and 34 of the Constitution.

⁷³Civil society has also played a crucial role in the enforcement of socio-economic rights in South Africa. There have been a number of cases where the role of civil society has been alluded to; see for instance *Nyathi v Member of the Executive Council for the Department of Health Gauteng* 2008 5 SA 94 (CC). The *Nyathi* case suggests that strategies for enforcement need to look beyond civil society mobilisation to deeper reforms. Secondly the degree of mobilisation of broader social movements or attentiveness by NGOs may affect broader enforcement, but the role of Applicants in enforcement should not be overlooked.

⁷⁴Ngang 'Judicial enforcement of socio-economic rights in South Africa and separation of powers objection: The obligation to take other measures' (2014) 14 *African HRLJ* 673-674. One of the major obstacles in developing monitoring tools has been the obtuse way in which state obligations have been defined in international law. The consequence of such vague language within the rights discourse has been criticised. This stems from the fact that there has been very little attempt by international or national human rights institutions to add value to the content of the fulfilment and enjoyment of human rights and to hold nation states accountable to their obligation. For example, see De Vos's criticism of the *Mazibuko* judgment, which he describes as 'utterly unconvincing' (n 46) 4.

deference to the legislative and executive branches of government,⁷⁵ which have the mandate and capacity to make broad policy choices in this area. With regard to the violation of socio-economic rights, the courts have over the years adopted innovative and far-reaching remedies and principles to enable them to fulfil their constitutional mandate.⁷⁶ Bilchitz considers reasonableness, equality, and minimum core as viable approaches to ensuring that socio-economic rights have teeth.⁷⁷ He illustrates the weaknesses of the reasonableness approach, by arguing that this approach limits the scope for the normative development of socio-economic rights.⁷⁸

Chenwi notes that a minimum core approach involves identifying subsistence levels in respect of each socio-economic right and insisting that the provision of core goods and services enjoys immediate priority.⁷⁹ According to her it represents a floor of immediately enforceable entitlements from which progressive realisation should proceed.⁸⁰ One of the most important features of the minimum core approach is that the obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon the government to realise them.⁸¹

⁷⁵McLean 'Constitutional deference, courts and socio-economic rights in South Africa' (2009) 61-87 available at http://www.pulp.up.ac.za/pdf/2009_13/2009_13.pdf (accessed 2015-03-25).

⁷⁶See Liebenberg 'From the crucible of the Eastern Cape: New legal tools for the poor' (2015) *Speculum Juris* 1-18 available at http://www.speculumjuris.co.za/files/pdf/SJ4214FPLiebenberg_27Jan2015.pdf (accessed 2015-06-25).

⁷⁷Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) *SAJHR* 5-11.

⁷⁸Bilchitz (n 12) 135-176.

⁷⁹Chenwi 'Unpacking progressive realisation, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) *De Jure* 747-755. Although the courts in South Africa reject the minimum core approach, it is argued in this study that research has revealed that conditional cash transfers improve the livelihoods of the poor, enhance their skills, and support economic growth. See Ulriksen 'How social security policies and economic transformation affect poverty and inequality: Lessons for South Africa' (2012) *Development Southern Africa* 5-6; Dancey 'Why payment systems matter to financial inclusion: Examining the role of social cash transfers' (2013) *Journal of Payments Strategy and Systems* 120-121; Barrientos and De Jong 'Reducing child poverty with cash transfers: A sure thing?' (2006) *Development Policy Review* 539-546.

⁸⁰See also Young 'The minimum core of economic and social rights: A concept in search of content' (2008) *The Yale J of Int L* 140-172. For further reading on the minimum core approach see Arendse 'The obligation to provide free basic education in South Africa: An international law perspective' (2011) *PER* 109-110.

⁸¹For a detailed discussion on the minimum core approach see Chenwi (n 79) 747-755; See also Simbo 'The right to basic education, the South African Constitution and the *Juma Masjid* case: An unqualified human right and a minimum core standard' (2013) *Law, Democracy and Development* 489-500; Assefa 'Defining the minimum core obligations – conundrums in international rights law and lessons from the Constitutional Court of South Africa' (2010) *Mekelle University LJ* 48-70.

At the same time the courts have shown reluctance to make policy decisions that go against the government.⁸² With regard to remedies in cases where social and economic rights are involved, the South African Constitutional Court has developed an innovative remedy in housing rights jurisprudence that it termed *engagement*.⁸³ In its simplest form, engagement requires municipalities to use negotiation or mediation when it becomes clear that the adoption of a new policy will require evicting residents.

The concept of meaningful engagement as a remedy of accountability provides a litmus test to determine whether the state has acted constitutionally.⁸⁴ In *Occupiers of 51 Olivia Road v City of Johannesburg*,⁸⁵ the Constitutional Court delivered judgment against the backdrop of the engagement order. This case concerned an appeal by more than 400 occupiers of two buildings in the inner city of Johannesburg. The occupiers challenged the correctness of the decision and the order of the Supreme Court of Appeal authorising their eviction by the City of Johannesburg, on the grounds that the buildings they occupied were unsafe and unhealthy.

In its judgment the court requested the two parties to engage with each other with a view to finding a mutually beneficial solution to the dispute. The court also held that it is essential for a municipality to engage meaningfully with the affected people before evicting them from their homes if the eviction would render them homeless. Furthermore, the Constitutional Court in its judgment encouraged the involvement of communities and community organisations in matters of local government, and enjoined them to respect, protect, promote and fulfil the rights in the Bill of Rights.⁸⁶ In addition, other methods which the courts have employed to enforce socio-economic rights include structural interdicts. A structural interdict is another useful tool in this respect. It is an injunctive remedy that requires the party to whom it is directed, to report back to the court, within a specified period in respect of the measures that have been taken to comply with the court's orders.⁸⁷

The Constitutional Court has been criticised for its failure to impose structural interdicts in cases involving social and economic rights, where the state action in

⁸²Wesson 'Reasonableness in retreat? The judgment of the South African Constitutional Court in *Mazibuko v City of Johannesburg*' (2011) *Human Rights Law Review* 9-16.

⁸³Liebenberg (n 51) 410-423; Ray 'Engagement's possibilities and limits as socio-economic remedy' (2010) *Washington University Global Studies LR* 399-424.

⁸⁴Ray 'Occupiers of 51 Olivia Road v City of Johannesburg: Enforcing the right to adequate housing through engagement' (2008) *Human Rights Law Review* 703.

⁸⁵*Olivia Road* (n 23).

⁸⁶Section 7(2) of the Constitution.

⁸⁷For further reading in this regard see Pillay 'South Africa: Access to land and housing' (2010) *International J of Constitutional Law* 554-556.

response to Court orders is slow and inefficient.⁸⁸ Currie and De Waal⁸⁹ assert that in the *Treatment Action Campaign* case, the Constitutional Court was again urged to establish a core minimum content, this time for the right to health care. Nevertheless, the court declined to do so, holding that the section 27 right was implemented by the state taking reasonable measures progressively, and that the court's role was confined to ensuring that the legislative and other measures taken by the state were reasonable. They further note that while such determinations of reasonableness may in fact have budgetary implications, the courts are in themselves directed at rearranging budgets.

Both *Grootboom* and *Treatment Action Campaign* emphasised the need for government policy to be capable of being adapted to changing conditions. In *President of the Republic of South Africa v Modderklip Boerdery*,⁹⁰ there was room for flexibility of this kind as the company had expressed a willingness to negotiate the sale of the affected land. However, the relevant state officials were unwilling to explore that route or any other.

Mbazira⁹¹ citing Pillay argues that the *Grootboom* judgment failed to live up to the expectations of both the litigants and those who were hoping for a dramatic change in government policy on housing. He further notes that a key contributing factor to the lack of implementation of the judgment was the nature of the orders handed down by the Court. He contends that because of the unclear formulation of what was expected from the government, there was a clear lack of understanding that the judgment required systemic changes to national, provincial and local housing programmes to cater for people in desperate and crisis situations.⁹²

In the *Modderklip* judgment Langa ACJ emphasised that the courts have a duty to mould an order that will provide effective relief to those affected by a constitutional breach.⁹³ The court further remarked that:

Constitutional remedies will differ by circumstance. The only appropriate relief that, in the particular circumstances of the case, would appear to be justified is that of 'constitutional' damages, for example, damages due to the breach of a

⁸⁸Davis 'Socio-economic rights in South Africa: The record after ten years' (2004) *New Zealand Journal of Public and International Law* 51-66.

⁸⁹Currie and De Waal *The Bill of Rights handbook* (2013) 583-584.

⁹⁰*President of the Republic of South Africa v Modderklip Boerdery* 2004 6 SA 40 (SCA) 61.

⁹¹Mbazira 'You are the "weakest link" in realising socio-economic rights: Goodbye: Strategies for effective implementation of court orders in South Africa' (2008) *Socio-economic Rights Project*, Community Law Centre, University of the Western Cape 20-39 available at https://docs.escri-net.org/usr_doc/Mbazira,_Weakest_Link_in_Realising_Socio-Economic_Rights.pdf (accessed 2015-07-01).

⁹²Mbazira (n 91) 21.

⁹³*Modderklip Boerdery* judgment (n 90) para 20.

constitutionally entrenched right. No other remedy is apparent. Return of the land is not feasible. There is in any event no indication that the land, which was being used for cultivating hay, was otherwise occupied by the lessees or inhabited by anyone else. 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). A declaratory order to this effect ought to do justice to the case. Modderklip will not receive more than what it has lost, the State has already received value for what it has to pay and the immediate social problem is solved while the medium and long term problems can be solved as and when the state can afford it.⁹⁴

It is submitted that in order to address the housing backlog and concomitant socio-economic realities faced by inhabitants of informal settlements the following cardinal points are important. First, the government ought to identify land which is suitable for low cost housing. Secondly, government should provide the poor with access to serviced land on which they can erect a temporary dwelling which, over time, they can improve. This land needs to be reasonably close to basic services including schools and transport to the main centres of employment. Lastly, government ought to allocate land to those who use it for the benefit of the community, not just the benefit of the few who currently own it. This includes the land used by individuals and private companies for profit without any benefit to the people.

In summation Davis contends that:

the sooner a clear principle of accountability to the key distributional commitments enshrined in the Constitution is embraced (initially by the courts and then, *via* the dialogue initiated through litigation, accepted by the other institutions of the state) the less likely it is that the courts will become a site of political struggle, of a kind that will yet again force them to adhere to the timidity of deference.⁹⁵

6 Conclusion

In *Grootboom* the Constitutional Court stressed, within the context of the right to have access to adequate housing, that effective implementation requires at least adequate budgetary support by national government.⁹⁶ It emphasised that it is essential that a reasonable part of the national housing budget be devoted to

⁹⁴*Id* para 66.

⁹⁵Davis 'Socio-economic rights in South Africa: The record after ten years' (n 88) 66.

⁹⁶*Grootboom* (n 6) para 68.

granting relief to those in desperate need, but that the precise allocation is for national government to decide in the first instance.⁹⁷ Guidelines drawn up in the wake of budget constraints have to be reasonable.⁹⁸

It is clear that section 26(1) requires state planning that is flexible enough to adapt to changing social conditions. According to Pillay 'this echoes the reasoning in *Minister of Health v Treatment Action Campaign*,⁹⁹ in which it was held that the state's policy regarding the provision of nevirapine, an antiretroviral drug to prevent the mother-to-child transmission of HIV, was unreasonable and inconsistent with the constitutional protection of the right to health care services, because, among other things, it was too inflexible'.¹⁰⁰

In the *Madzodzo* judgment, the court rejected the government's interpretation of the right to basic education as described in various policy documents as a right to be progressively realised over time. Instead, the court reaffirmed the developing jurisprudence on the right to basic education by saying that the state must take all reasonable measures with immediate effect to realise the right.

My conclusion is then threefold: First, it is submitted that both the *Grootboom* and *Treatment Action Campaign* judgments emphasised the need for government policy to be adaptable to changing conditions, in particular, courts have a duty to mould an order that will provide effective relief to those affected by a constitutional breach.¹⁰¹ Secondly, the *Grootboom* judgment provides a critical reference point for policy makers to gauge whether these policies have actually complied with the Constitution, for example, the right to have access to housing, especially insofar as it may have an impact on the lives of residents of informal settlements. Thirdly, the *Grootboom* judgment provides a yardstick for government to take the policies that are made seriously and to make sure that these policies are respected and implemented. Finally, the ruling gives directions in as far as what the government ought to do, for example, the government has a duty to improve the lives of the residents of informal settlements who live in appalling conditions. In a sense the *Grootboom* judgment attests that without attaining the social and economic rights of the masses, the realisation of individual liberty is a fruitless constitutional exercise.

⁹⁷ *Id* para 66.

⁹⁸ *Soobramoney v Minister of Health, Kwazulu Natal* 1998 1 SA 765 (CC) para 25.

⁹⁹ *Treatment Action Campaign* (n 23).

¹⁰⁰ Pillay (n 87) 551-552.

¹⁰¹ *Treatment Action Campaign* (n 23) para 102.