

**You are the “weakest link”
in realising socio-economic
rights: Goodbye**

Strategies for effective implementation
of court orders in South Africa

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EXECUTIVE SUMMARY

The justiciable place of socio-economic rights in the South African Constitution is being undermined by non-compliance with court orders issued in court processes involving the enforcement of these rights. This has, in some cases, left successful litigants stranded and unable to benefit from the orders arising from their victories. One of the provinces where this problem has risen to unprecedented levels is the Eastern Cape, as is clear from the many social grant judgments which have not been implemented as directed by the courts. Generally speaking, non-implementation can be blamed on the approach adopted by the courts as seen, for instance, in the Constitutional Court's reluctance to use the structural interdict.

While not overlooking the deficiencies in the courts' approach, however, a more critical evaluation reveals many problems apart from this approach. Foremost among these is the reluctance of state officials to observe the rule of law and respect court orders. The outbursts of Amos Masondo, the mayor of Johannesburg, whenever the city loses a critical court challenge, epitomise the magnitude of this problem. After a recent case decision outlawing the use of prepaid water meters, the mayor stated that judges are not above the law and should not take over the roles of Parliament and the National Council of Provinces.

Another contributing factor is the lack of transparency and consultation in the implementation of court orders. Successful petitioners and other stakeholders involved in the court process are usually not informed about



the steps that the state is taking to implement the court orders. This makes both meaningful participation and the monitoring of progress extremely difficult. It has contributed to delays in the execution of court orders since it excludes a number of role-players who could contribute positively to the process of implementation.

Similarly, there is an absence of inter-governmental cooperation and coordination when implementing orders which involve the participation of more than one sphere of government. Most socio-economic rights, for example, fall into this category.

The analysis also reveals that, in some instances, non-implementation, as is the case in the Eastern Cape, has arisen from maladministration combined with a lack of capacity to carry out the required reforms, rather than from obstinacy. The housing sector has also been prone to this problem. Incapacity, especially at the provincial and local government levels, has made timely delivery of quality housing difficult. Sometimes, the obstinacy is a product of the failure to appreciate the nature of the constitutional obligations imposed on the state.

Nevertheless, there is room for optimism. The progress made in the implementation of the interlocutory order in the recent case of *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* is evidence that the state can fulfil its obligations. This case has illustrated the power of negotiated settlements if done at the behest and under the close supervision of the court.

To confront the challenge of non-implementation, this paper proposes various strategies, including:

1. Taking advantage of the *Nyathi v MEC Department of Health Gauteng* judgment invalidating s 3 of the State Liability Act 20 of 1957. This has widened the possibilities for securing compliance by the state with court orders.
2. Inculcating and entrenching a culture of constitutionalism and respect for the rule of law, as state officials must learn that judicial processes are not adverse to other organs of state but play a complementary role.
3. Cultivating inter-institutional trust between the courts, the government and civil society, which can be achieved by promoting alternative dispute resolution and amicable settlement, not only as alternatives to court action, but also as part of the court processes.
4. Using a combination of strategies and heightening the use of social mobilisation after successful litigation to call for the implementation of



court orders. Social mobilisation has the potential to promote the implementation of court orders in the same way that it has promoted substantive litigation on socio-economic rights.

5. Heightening monitoring by civil society and other actors of the implementation of court orders. Monitoring and supervision, if done in a coordinated and amicable manner, can help to overcome some of the administrative hurdles likely to be encountered in the implementation of the orders.
6. Promoting consultation and intergovernmental cooperation between the different spheres of government in the implementation of orders. This will achieve coordination in the implementation process and will minimise delays.



1 INTRODUCTION

The inclusion of socio-economic rights in the South African Bill of Rights signifies that the redress of poverty and disadvantage is a matter of constitutional concern.¹ For those who toiled under apartheid, were deprived socio-economically, and sacrificed their lives to fight authoritarianism, the new Constitution was perceived as a beacon of hope. While they might not have expected to drive expensive cars and live in up-market suburbs, they expected, at the very least, to move out of their shacks, have greater access to sufficient food and water, and access to health care services. To these people, enforcement of socio-economic rights through the courts is of utmost importance. Indeed, the courts have taken note of the long years of deprivation and the constitutional commitment to reverse this situation.² In this regard, the justiciability of the socio-economic rights protected in the Constitution and their transformative potential has been given a judicial nod. The Constitutional Court (Court) has held that the judicial enforcement of these rights does not raise any more complex problems than the judicial enforcement of civil and political rights.³ According to the Court, socio-economic rights are expressly included in the Bill of Rights and the question is not whether they are justiciable, but how to enforce them in a given case.⁴

Despite this, although more than 12 years have elapsed since the adoption of the final Constitution, the majority of the population in the country remains entrapped in poverty. A significant number of South Africans still live in appalling conditions on the peripheries of the country's modern



economy.⁵ Poverty has been exacerbated by a skewed distribution of wealth, lack of access to basic services for the poor, unemployment and the socio-economic effect of HIV/AIDS.⁶ These conditions raise a pertinent question: given the entrenchment of socio-economic rights in the Constitution and their recognition as capable of judicial enforcement, why has poverty persisted? Jagwanth argues that constitutional litigation leads to the conclusion that it is the more privileged groups in society and not the vulnerable that are seeking the protection of the Bill of Rights.⁷

However, a number of decisions on socio-economic rights have in fact been made by the courts. The question is whether these decisions have made any difference to the lives of the poor. Have these judgments had the desired effect? How have those in authority reacted to the judgments and the orders made by the courts? Have the orders been obeyed and implemented? How have the courts and other role-players responded to the problem of non-compliance with court orders? This paper seeks to find answers to these questions. In addition, it aims to address the issue of the extent to which litigation, *per se*, can be used to achieve socio-economic transformation.

The failure of socio-economic rights court decisions to lead to rapid socio-economic transformation can be attributed in some measure to the failure of the state to comply with court orders arising from these decisions.⁸ When broadly assessed, the government's record in implementing court orders, especially those concerning socio-economic rights, has not been satisfactory.⁹ As will be seen with respect to housing, for instance, there are generally many progressive court judgments. However, the effect of these judgments is limited.¹⁰

The failure to implement court orders effectively could, therefore, be described as the "weakest link" in realising socio-economic rights. Successful litigants have remained hopeless and the judiciary helpless in the face of non-compliance with court orders, which has undermined the legitimacy of the courts. As was observed by the Court in *Nyathi v MEC Department of Health Gauteng* (*Nyathi case*),¹¹ deliberate non-compliance with court orders by the state detracts from the dignity, accessibility and effectiveness of the courts.¹² The magnitude of this problem has forced the courts to conclude that some state officials have become a law unto themselves, and openly violate people's rights while believing that they cannot be held responsible for their actions.¹³

This state of affairs has cast doubt on the potential of litigation to ensure rapid socio-economic transformation. Until something is done to improve the situation, the independence and legitimacy of the judiciary remain under



enormous threat. This paper, in addition to answering the questions raised above, makes some recommendations on how to improve the situation. I submit, however, that one cannot tackle the problem of non-compliance with court orders without understanding the philosophical and practical underpinnings that define the nature of the orders (judicial remedies) that emanate from the courts and the manner of their implementation. One also needs to appreciate the transformative potential of judicial enforcement of human rights standards and the role of the courts in championing social justice. This paper begins with this issue, following it with a discussion of the theoretical and practical underpinnings of judicial remedies.

The paper also sketches the courts' approach to interpreting the substance of socio-economic rights. Furthermore, it reviews a number of socio-economic rights judgments and discusses the extent to which the orders granted in those cases have been complied with. The last section of the paper makes suggestions on the best strategies for implementing court orders in socio-economic rights cases; in other words, saying goodbye to the “weakest link” in socio-economic rights litigation.

1.1 What is a remedy?

The term “remedy” means several things, not only in generic but also legal terms. In legal terms, a remedy is a process of legal redress embracing all the legal procedures that a person has to follow to redress the violation of their rights. The term is also used to mean the substantive rights which exist before legal proceedings begin.¹⁴ In addition, the term refers to all means by which the violation of rights are vindicated, including non-judicial means exercised at the discretion of the executive and legislative organs of state.

The definition which has been adopted for purposes of this paper is, however, a narrower one: a remedy is the order made by a court in response to a proven violation of a person's rights. It constitutes what a court orders as the final equivalent given to a person in place of his original primary rights which have been broken.¹⁵ To determine whether a remedy is appropriate requires one to appreciate the obligations created by the court order and then to determine whether these obligations have been discharged.

There are four types of obligations arising from court orders: (i) cessation; (ii) non-repetition; (iii) reparation; and (iv) just satisfaction.¹⁶ The obligation of cessation requires the person to whom the order is directed to put an end to the breach or condemned conduct. This is a negative duty requiring one



to desist from continuing with certain conduct. The obligation of non-repetition is a deterrent: it prevents further violation in future. This could be against not only a specific litigant but also similarly situated people (foreseen and unforeseen). Reparation is compensatory; it requires the person to whom the order is directed to repair the damage caused to the applicant. Although this obligation has been defined mainly in relation to the need to restore the *status quo* of an individual litigant before the breach,¹⁷ it also includes restoration of the rights of groups of people. This remedy is particularly relevant to socio-economic rights because they mainly require the state to undertake affirmative action to provide for people's socio-economic needs. The final obligation, just satisfaction, entitles the victim to an award of compensation from the perpetrator as relief.

1.2 Remedies under the South African Constitution

In South Africa, the power of the courts to award remedies for violations of the rights protected in the Constitution derives from ss 38 and 172 of the Constitution. Section 38 empowers the courts to “grant appropriate relief, including a declaration of rights”. Section 172(1) provides:

- When deciding a constitutional matter within its powers, a court –*
- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and*
 - (b) may make any order that is just and equitable, including –*
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and*
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.*

In *Fose v Minister of Safety* (*Fose case*),¹⁸ the Court held:

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 all important rights.¹⁹

In the *Fose case*, the Court also held that as a court it had a duty to ensure that “within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights enshrined in it”.²⁰ Accordingly, “an



appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced”.²¹ The Court held further that, in order to provide an effective remedy to vindicate constitutional rights, it could “forge new tools and shape innovative remedies”.²²

The South African experience illustrates that the enforcement of constitutional rights faces two formidable challenges. The first challenge, as seen in such early cases as *Fose*, is devising appropriate, just and equitable remedies in response to violations of constitutional rights. The second is devising “appropriate remedies” in response to the failure to comply with court-ordered remedies. This paper deals with the second challenge. Indeed, as already mentioned, the failure to enforce court orders in socio-economic rights litigation effectively has cast doubt on the effectiveness of litigation as a tool of socio-economic transformation. In my opinion, however, the transformative potential of litigation, despite some of its constraints, should not be doubted. I elucidate this point in the next section.

2 LITIGATION AS A TOOL OF SOCIAL TRANSFORMATION

Using the court to enforce rights has a number of limitations and might fail to drive socio-economic transformation as rapidly as would be expected. Court action, in addition to being reactive, is often a bilateral contest between two parties.²³ The success of court action is conditional upon cases being instituted and the effective implementation of the resultant court orders. Despite this, in my opinion, court action plays a very important role in delivering social justice and realising an egalitarian society. Indeed, the history of struggle in South Africa shows that “courts can be an important forum for ventilating popular concerns, for dramatising them and bringing them to public attention, and in some cases for finding a satisfactory resolution”.²⁴ However, for court action to be effective, it must be supported and complemented by other strategies such as advocacy and social mobilisation.²⁵ It is clear therefore that, without other strategies, court orders might not bring about fundamental change in society as quickly as might be desired.²⁶

Nevertheless, the importance of court action *per se* should not be underestimated. Where the political system has failed to respond to demands for socio-economic transformation, court action might achieve significant results.²⁷ Court action can precipitate policy formulation and/or reformulation, lead to political mobilisation, achieve enforcement of legal



standards, and complement and support electoral politics.²⁸ This is because, like the electoral processes, court action might force the government to account for its actions.²⁹

To be successful, litigation itself must overcome some obstacles and follow certain processes. According to Gloppen:

The success or failure of litigation depends on (a) the ability of groups whose rights are violated to articulate their claims and voice them into the legal system – or have the rights claimed on their behalf; (b) responsiveness of the courts at various levels towards the social claims that are voiced; (c) the capability of the judges – that is, their ability to find adequate means to give legal effect to social rights; (d) whether the social rights judgments that are handed down have authority in the sense that they are accepted, complied with and implemented through legislation and policy.³⁰

It would be useful to discuss briefly each of the components described above and to assess their application in South Africa. First, successful victim voicing is dependent on resources or the capacity of victims to articulate their concerns.³¹ This capacity is determined by organisational resources; access to legal aid/advice; availability and quality of *pro bono* litigation; awareness through legal literacy programmes; overcoming practical barriers of access to courts such as costs, distance, language and lack of information; the nature of the legal system in terms of structure, formalism, bureaucracy, rules of standing, courts' jurisdiction and formal position of social rights; and overcoming motivational barriers such as distrust, social fear, past experience and perceptions.³²

Second, Gloppen describes the factors that influence the responsiveness of the courts.³³ The first factor is the legal culture, which includes the judges' perceptions of their role in politics. The second factor is the extent to which courts have been sensitised about social rights issues, which could be through training and curriculum development. A third factor is the nature of the legal system; this raises the same questions about the structure of the courts, their jurisdiction and standing as the ones applicable to the voices of the victims. Lastly, Gloppen refers to the composition of the bench in terms of the social background of the judges and other social attributes such as gender and ethnicity.

The third component – *capability* – is very relevant to the discussions in this paper. It is this factor that determines the nature of the remedies that the courts hand down. Equally relevant is the fourth component – *compliance*. According to Gloppen, the willingness of judges to respond to



social rights claims is not enough; the judges must also be able to find adequate legal remedies to repair the violation. This requires professional competence and creativity, access to relevant knowledge and command of the necessary legal remedies.³⁴ The factors that condition capability include: sensitisation to social rights issues; access to relevant legal materials; capacity and infrastructure as determined by resources available to the courts, independence from government influence and dominant forces; and the nature of the legal system and the composition of the bench.³⁵

Compliance with social rights judgments, according to Gloppen, is conditioned by the political culture; the balance of power between dominant social forces; political will as shown by ideological commitments and prioritisation; the extent of social mobilisation; implementation capacity in terms of economic and administrative capacity, and as defined by the level of state formation; independence of the judges; and the court's legitimacy in terms of public support.³⁶

The status in South Africa of each of Gloppen's four criteria has been discussed briefly above. In this section, the paper deals in more detail with the first component (victims' voices) and the others are looked at in the following sections. Access to justice for the poor in South Africa, like many African countries, is limited by many problems. These include: the “[c]ost of lawyers and court fees, transport, income loss; language barriers, and lack of information and knowledge”.³⁷ Although the South African legal system is regarded as being fairly favourable to social rights litigation, it is noted that the system has remained quite bureaucratic and formalistic.³⁸ In addition, the usual difficulties of accessing justice are exacerbated by gross socio-economic inequalities and the remoteness of the law from peoples' lives: “[i]n the absence of legal aid for constitutional matters, poor people are largely unable to take cases through the normal judicial system, which is both lengthy and costly.”³⁹

Although poor people can access legal aid through the Legal Aid Board, such access has not been without problems. Besides its limited capacity, there are concerns regarding the quality of the services provided by the Board.⁴⁰ This gap has to a certain extent been closed by the flexible rules on standing before the courts and the Court's endorsement of the concept of *amicus curiae*. The Rules of the Court have been used to allow privately funded institutions – such as the Community Law Centre (University of the Western Cape), Centre for Human Rights (University of Pretoria), Legal Resources Centre, Treatment Action Campaign and the Centre for Applied Legal Studies (CALS) (University of the Witwatersrand) – to intervene in social rights litigation and provide legal services to those in need. Indeed,



these interest groups have instituted or participated in almost all the key socio-economic rights cases decided by the courts in South Africa so far. The role of these groups has been to ensure that human rights discourse does not remain the domain of the privileged few in society.⁴¹ The organisations have brought new perspectives to the interpretation of socio-economic rights, and have organised and assisted poor litigants and provided them with the resources to access courts. This is in addition to actively overseeing the implementation of court orders. In these respects, the organisations have played an important role in developing the content of socio-economic rights and the obligations they give rise to.

3 A SKETCH OF THE COURTS' CONCEPTUALISATION OF HUMAN RIGHTS OBLIGATIONS

3.1 Relevance of rights/obligations analysis

This section discusses the second component of Gloppen's anatomy – *responsiveness* of the courts to social rights. It draws on Gloppen's scheme to make the point that one cannot determine the most appropriate remedy to vindicate a right without understanding the nature of the right and the obligations it gives rise to. It should be noted that there could be rights which do not necessarily attract judicial remedies and which could be enforced through means other than judicial enforcement. The relevance of such rights should not be undermined. Nevertheless, the importance of court orders in enforcing human rights needs to be emphasised.⁴²

Rights and remedies are inextricably linked, and determination of neither right nor remedy can be made in isolation from one another.⁴³ It is evident in ordinary procedural terms that the process of finding the most appropriate remedy begins only after establishing that a right has been infringed.⁴⁴ In this regard, rights and remedies could be defined as having primary and secondary aspects respectively. The primary aspect addresses the obligations to which the rights give rise and the secondary aspect address the question of what ought to be done once these obligations have not been discharged.⁴⁵

To a certain extent, therefore, there is a permeable wall between rights and remedies. When crafting remedies, courts must consider the nature of the right and the obligations it creates to ensure that the right and obligations are respected and protected in full.⁴⁶ This is only possible if the substantive nature of the rights and the obligations it gives rise to are understood.



3.2 Approach in substantive rights terms

In South Africa socio-economic rights can be judicially enforced. Despite this, questions often arise regarding the suitability of the courts as avenues of enforcing these rights. Thus, concerns about separation of powers as regards the enforcement of socio-economic rights continue to detract significantly from the progress made in enforcing the rights. It has been fairly easy to justify the status of socio-economic rights as pure rights and to dispel assertions that these rights are essentially positive, have budgetary implications and touch on the redistribution of resources.⁴⁷ Responses to these objections have been simple and very practical: civil and political rights are no different – they also engender positive obligations and have budgetary implications.⁴⁸ Additionally, socio-economic rights give rise to negative obligations.⁴⁹

The judicial competence-based objections, as often glossed by concerns about separation of powers, have also focused on the supposed special features of socio-economic rights. Despite this, competence objections are based mainly on the perceived institutional inappropriateness of the judiciary to adjudicate these rights. The judiciary, staffed by unaccountable elites detached from the daily experience of poverty, is believed to lack the skills required for making decisions that have budgetary and redistributive effects. Decisions touching on these rights are also believed to be polycentric – they have multiple repercussions, some of which the judiciary might not easily discern and respond to when the decision is made.⁵⁰ Moreover, setting aside decisions of democratically elected representatives of the people by unaccountable judges is counter-democratic.⁵¹ If judges become “heavily involved in essentially political decisions, yet ... not accountable as political bodies are normally, a sense of irresponsibility can emerge”.⁵²

The Court has shrugged off the separation of powers- and institutional-based objections and asserted its powers to adjudicate socio-economic rights, holding that its primary duty is to the Constitution. According to the Court, where state policy is challenged as inconsistent with the Constitution, the Court has powers to determine whether the policy gives effect to the Constitution and to declare that it is unconstitutional: “[i]n so far as [this] constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself”.⁵³ Despite this, the Court has been conscious of its delicate and weak position within the framework of separation of powers. In the case of *Minister of Health and Others v Treatment Action Campaign (TAC case)*,⁵⁴ for instance, the Court cautioned that courts are ill-suited to adjudicate upon issues where court orders could have multiple



social and economic consequences for the community.⁵⁵ Hence, the position adopted by the Court is that, although the judiciary is duty-bound to prod and prompt the executive and legislature continuously, it must be aware of the need for self-imposed limits.⁵⁶

Awareness of the need for self-imposed limits is manifested not only in the Court's approach in construing the content of the rights and the obligations they engender, but also in defining what it considers appropriate, just and equitable relief. In light of this, the judicial competence and the concerns based on the separation of powers are an inevitable consideration in any analysis of judicial remedies for socio-economic rights violations. In my view, a court's understanding of its institutional role might dictate the kind of remedies that it is prepared to grant. Additionally, the lack of technical expertise might prevent courts from awarding certain remedies and might also shape the scope of the selected remedy.⁵⁷ As will be seen, evidence in South Africa reveals that the perceived role of the judiciary within the framework of the separation of powers has been one of the factors that explain why the government's attitude towards court orders is sometimes negative.

From the perspective of the normative construction of the rights, the Court's rejection of the minimum core obligations concept and its resort to the reasonableness inquiry could have been motivated by the separation of powers and competence-based concerns. The Court has held that it has no capacity to determine the minimum core. In the *Grootboom* case, after considering the variables that have to be taken into account in defining the minimum core, it concluded that "[a]ll this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right[s]".⁵⁸ In the *TAC* case, the Court held that it should be borne in mind that courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining the minimum core.⁵⁹

Initially, as can be seen in the *Soobramoney* case, the Court adopted a highly deferential standard of review.⁶⁰ It held a court would be slow to interfere with *rational decisions taken in good faith* by the political organs and authorities whose responsibility it is to deal with such matters.⁶¹ The approach of the Court was later refined into the reasonableness review, a more substantive and less deferential approach.⁶² In the *Grootboom* case, the Court held that a reasonable programme is one that is comprehensive and well coordinated. The programme must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.⁶³ Accordingly, each sphere of government must accept responsibility for the implementation of particular parts of a comprehensive and well-coordinated programme.⁶⁴



The programme must be balanced and flexible and must make appropriate provision for attention to short-, medium- and long-term needs. “A programme that excludes a significant segment of society cannot be said to be reasonable.”⁶⁵ Those whose needs are most urgent and whose ability to enjoy all rights is most in peril must not be ignored by measures aimed at achieving realisation of a particular right.⁶⁶ The Court held further that the programme must be reasonable both in conception and implementation, as formulation of a programme is only the first stage in meeting the state’s obligations; it must also be reasonably implemented.

It should be noted, however, that while the reasonableness approach is more rigorous than the rationality test, it still incorporates an element of judicial deference. It remains respectful of the democratic decision-making process and the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met.⁶⁷ Despite this, there are cases in which the Court has pushed the boundaries of the separation of powers. One example is *Khosa and Others v Minister of Social Development; Mahlaule and Another v Minister of Social Development and Others*.⁶⁸ In this case, the applicants were permanent residents and the Court found that their right to social assistance had been violated. On the basis of this, the Court made substantial incursions into the state’s rationalisation based on financial considerations. It used the evidence before it, albeit scanty, to reject the contention that resource constraints justified non-extension of the right to the applicants. According to the Court, the inclusion of the applicants was likely to lead to a very small proportional increment (2%) in the entire social grants budget.⁶⁹ While applying the principle of proportionality, the Court concluded that the rights of the applicants were very important; such a minimal increment in the budget could not justify their exclusion.

Despite such levels of incursion, South African judicial decisions still stand out as respectful of democracy and its institutional settings. What the courts have done is to remove obstructions to the functioning of democracy but without usurping the political decision-making powers. The courts have only done what has been described as “unblocking the channels of democracy”.⁷⁰ Despite this, the effect of the court judgments from the perspective of judicial remedies has raised more questions than answers. It is contended that the courts have not adopted those remedies that are appropriate in countering state non-compliance.⁷¹ These questions will be answered by considering the remedial approach of the courts and the factors that have influenced the kinds of remedies awarded thus far.



4 CONSTITUTIONAL REMEDIES: FORMS, PHILOSOPHICAL AND PRACTICAL UNDERPINNINGS

In defining the third component of his anatomy of the legal process, Gloppen identifies factors that condition a court's approach to remedies. These are "professional competence and creativity, access to relevant knowledge and command of the necessary legal remedies".⁷²

In my opinion, however, there are other factors that influence the courts in granting remedies. These factors could be philosophical and ideological. Courts also take into account practical considerations such as the obstacles likely to be encountered when implementing the remedies. These include the facts of the case and the circumstances on the ground; the level of willingness to comply shown by the state; administrative hurdles likely to be encountered in implementing the remedy; general acceptance of the remedy by the parties and other stakeholders; and financial and logistical considerations.

4.1 Philosophical considerations

One of the most important philosophical factors that influences courts in choosing judicial remedies is the form of justice to which they are inclined.⁷³ However, judges rarely expressly acknowledge that their remedies have been influenced by a particular form of justice. This influence can only be deduced from reading court judgments. One cannot do this, though, unless the different forms of justice are identified and understood. In this section, two competing forms of justice will be discussed: corrective justice and distributive justice.

Corrective justice is associated with libertarianism, a philosophy based on the notion of individual autonomy.⁷⁴ The law exists only to protect this autonomy and to restore it whenever there is an infraction. Justice from this perspective is compensatory – the remedies here seek only to restore the victim of a violation to the position he or she would have been in had the violation not occurred.⁷⁵ This means that any remedy that lacks the potential to restore the victim's position is inappropriate. Corrective justice is backward-looking. Understanding past events is an integral part of the adjudication process because it enables courts to determine the position of the victim before the infringement. The court is also required to look backwards for the purposes of establishing the defendant's guilt as based on facts.⁷⁶



Unlike corrective justice, distributive justice is concerned with the distribution of benefits and burdens among members of a given group.⁷⁷ This form of justice is about the fair apportionment of the burdens and benefits of risky activities.⁷⁸ Distributive justice is closely linked to utilitarianism, which is a philosophy based on the principle that human beings are a community with a collective agenda to maximise community welfare. The objective here is to ensure that benefits produced by everyone's efforts are fairly distributed and shared.⁷⁹ From this perspective, the individual is not an end but exists together with others with whom he or she pursues a common end.⁸⁰

In terms of legal adjudication, this means that although a court might be adjudicating a seemingly individual claim, it must consider the effect of its decision on the collective wellbeing. The court must establish any conflict of values that have to be reconciled. A court inclined towards distributive justice might, therefore, decline to restore the victim to the position he or she was in prior to the violation, if this would have a negative effect on the legitimate interests of other members of society. Remedies arising from this form of adjudication will not be restricted to remedies that restore the position of the victim.⁸¹

South Africa's commitment to the ethos of distributive justice is reflected not only in the manner in which courts have interpreted the substantive socio-economic rights but also in the remedies granted for their violation.⁸² As a response to widespread poverty and deprivation, the Constitution protects socio-economic rights as extending entitlements that can largely be claimed in a group. The Constitution itself is perceived as an instrument to move the country towards a society of equal distribution of resources.⁸³ It should be noted, however, that due to resource and other constraints, such equitable distribution cannot be achieved at once. This has dictated the rejection of approaches that construe socio-economic rights as conferring individual entitlements on demand.⁸⁴

Consequently, courts have generally avoided orders that confirm individual entitlements.⁸⁵ The general approach of the court has been to define “appropriate, just and equitable relief” from the perspective of distributive justice. The Court has, for instance, held that when rights are violated, though the victim might be an individual, society as a whole is injured.⁸⁶ It is for this reason that the courts have opted for remedies that spread the benefits of constitutional litigation to all those affected or similarly situated: “[t]he resources of the State have to be deployed ... in a manner which best brings relief and hope to the widest sections of the community.”⁸⁷

The problem, however, is that the Court has so far not explored the



option of awarding damages to be “employed in structural and systemic ways” that reduce the causes of infringements. It is on this basis the Court has been urged to explore the possibility of awarding what has been described as “preventive damages” to counter widespread and persistent violations.⁸⁸ Preventive damages are awards that, instead of compensating the individual victim, go to bodies carrying out activities designed to deter future infringements of specific rights. They are usually accompanied by directions that the damages be used to support activities directed at promoting the full realisation of the right(s) forming the subject of contention.⁸⁹

4.2 Practical considerations: intransigence, administrative and resource considerations

Courts should not operate in the abstract; rather, the context in which they operate should not only influence their approach to giving meaning to the substantive rights but should also guide them in choosing remedies for the violation of these rights. Remedies that work where there is good faith compliance with court orders will be inadequate in the face of intransigence. Additionally, remedies that ignore the administrative and resource hurdles of their implementation will remain paper tigers. Accordingly, what works with a government that is simply inattentive to constitutional standards might not work with a government that is incompetent.⁹⁰ “[S]tronger remedies, including ultimately the threat and use of contempt proceedings, may be necessary to deal with government actors that are simply opposed or intransigent to constitutional standards.”⁹¹ This could explain why a court in some circumstances may opt for a declaration instead of a mandatory or supervisory injunction and *vice versa*.

4.2.1 Declaratory orders

A declaratory order is a legal statement of the legal relationship between the parties.⁹² It is primarily used to declare whether a particular decision or conduct is legally valid.⁹³ A declaratory order does not, however, give directions as to how a violation should be remedied. It is left to the state to determine how and when to remedy the violation.⁹⁴ It might not be prescriptive as regards the options that are available, but there is no bar to such orders being crafted in a manner that clarifies all the legal uncertainties. A declaratory order may contain broad normative guidelines on the positive action required for remedying the breach.⁹⁵ Where, for



instance, the obligation to remedy the violation falls on more than one person, it is important to specify the obligations of each person in clear and certain terms. This might be the case where the matter involves several spheres of government.⁹⁶

Declaratory orders are particularly successful against states that are committed to the rule of law and have demonstrated positive responsiveness to the decisions of the courts.⁹⁷ For example, states parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms have consistently complied with declaratory judgments of the European Court of Human Rights. Likewise, the Canadian government has responded positively to declaratory orders.⁹⁸ This has made declaratory orders very common remedies in these jurisdictions.

In South Africa, the declaratory order in the *Grootboom* case was handed down on the basis of the belief that the government would abide by the findings of the Court. It is clear from the judgment that the government's housing programme was found lacking. Ideally, any order of court should have required the state to take measures to rectify the defects identified. It could be contended that the decision of the Court to make a declaratory order was based on the amicable settlement of the dispute between the parties following the state's offer of temporary shelter. Despite this, the Court could still have made any order it considered “appropriate”, including a mandatory order, even when the same had not been prayed for.⁹⁹ In my opinion, however, the Court did not take this course because it had every reason to believe that the state would be guided by the declaratory order to make changes in the Housing Programme.

This was the first major socio-economic rights case decided against the state under the new Constitution. There was no evidence of previous non-compliance with court orders in cases of this nature, so the Court had no reason to believe that the state was unlikely to abide by the declaratory order. It was, therefore, appropriate for the Court to rely on the good faith of the state. Indeed, the evidence in the case indicated such good faith: the state had settled the case between itself and the applicants and had, by way of interlocutory judgment, undertaken to provide the applicants with some basic housing services.¹⁰⁰

4.2.2 Mandatory interdicts

A mandatory interdict is an order expressed in positive terms requiring the person to whom it is directed to undertake positive steps to remedy a wrong for which he/she is responsible.¹⁰¹ While this type of order is appropriate as



a means of enforcing both the negative obligations engendered by socio-economic rights, it is most suited for the enforcement of positive obligations of these rights.¹⁰² Such orders might therefore “be given against government officials in respect of violations of the positive duties ‘to protect and fulfil’ socio-economic rights”.¹⁰³ The mandatory interdict is most appropriate in cases where there is evidence of possible non-compliance with the court order.

However, the South African experience shows that other than non-compliance, the justification for making mandatory interdicts has arisen from the nature of the violation and the urgency to remedy it. In some cases though, evidence of possible non-compliance has been detected on the sidelines of the case. While it is not expressly acknowledged in the sometimes diplomatically written judgments, one cannot rule out the possibility that such evidence could have influenced the making of the orders. For example, in response to the High Court decision in the *TAC* case, the then-Minister of Health, Tshabalala-Msimang said:

If this judgment is allowed to stand it creates a precedent that could be used by a wide variety of interest groups wishing to exercise quite specific influences on government policy in the area of socio-economic rights. It could open the way for a spate of court applications and ‘policy judgments’ not only relating to health care but also to other service areas, such as education, housing and social services. What happens to public policy if it begins to be formulated piecemeal fashion through unrelated court judgments?¹⁰⁴

Later, the Minister proclaimed on public television that the government was not prepared to abide by any order against it.¹⁰⁵ This attitude was carried on to the Court, where the state, relying on the doctrine of separation of powers, submitted that all that the Court is empowered to do if it finds that government policy is unconstitutional, is to issue a declaration.¹⁰⁶

The Court was very firm on its powers to award effective remedies which included both declaratory orders and mandatory interdicts. It stated:

Where a breach of any right has taken place, including a socio-economic right, a court is under duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a mandamus and the exercise of supervisory jurisdiction.¹⁰⁷



Although at the end of the case, evidence had emerged that the government was prepared to abide by the judgment of the court, the Court thought that the urgency of the matter merited a mandatory interdict. The approach of the Court indicates that the commitment by the government was too fluid to merit a declaratory order alone. The final order of the Court required the government to remove, without delay, the restrictions that prevented nevirapine from being made available at public hospitals and clinics that had not been designated as research and training sites. Subsequent events proved the usefulness of the mandatory order, as some provinces had to be threatened with contempt of court order applications to extract compliance with the order.¹⁰⁸

The 2007 High Court decision regarding the rights of prisoners to access antiretroviral drugs also presents clear evidence of government non-compliance.¹⁰⁹ While publicly proclaiming its willingness to abide by the court orders,¹¹⁰ the government was delaying implementing the order in this case. They did so even though the court had applied what could be considered as the most powerful remedy in the form of the structural interdict. This means that declaratory orders alone in this case would have gone unnoticed. The government was keen to exploit procedural, yet untenable, legal technicalities to delay the implementation of the orders of the court by filing serial appeals. This, and events following the making of the court order, signalled the government’s reluctance to abide by the orders of court.

4.2.3 Structural interdicts

The structural interdict (or supervisory interdict) is also a useful tool to counter possible non-compliance. This form of remedy has proved effective in countering inefficiency, especially where it has become systemic. The structural interdict is a complicated form of interdict which challenges the doctrine of *functus officio*.¹¹¹ This form of remedy allows the court to supervise the implementation of its order by, for instance, requiring the defendant to report back to court on the measures taken to effect the directions of court. The challenge of the *functus officio* doctrine comes when the court returns to its order and modifies it. It can be argued, however, that courts retain residual jurisdiction over cases in which judgment has already been rendered with regard to the implementation of the judgment.¹¹²

Experiences in the United States show that in extreme cases the court may implement its own order by, for instance, taking over the management of the offending institution and effecting changes.¹¹³ This might be necessary where the institution is chronically inefficient and cannot be reformed



without external intervention. The structural interdict is considered to be an extreme remedy, especially when viewed in terms of the doctrine of the separation of powers.¹¹⁴ In the United States, this form of interdict has resulted in dramatic increases in public expenditure by the affected public institutions.¹¹⁵

The extreme nature of the structural interdict demands that it should only be used as a remedy of last resort.¹¹⁶ Courts should make a structural interdict only when the other organs are seriously and chronically in default.¹¹⁷ The courts should first ascertain whether there is a chance of using executive or legislative discretion to redress the constitutional violation.¹¹⁸ It is only when this initial attempt has failed that the court should intervene by issuing a structural interdict.

In South Africa, the High Court has used the structural interdict more readily than the Constitutional Court. In *Centre for Child Law and Others v MEC for Education and Others*, the High Court's use of this remedy seems to have rested on the need to counter the state's reticence in realising socio-economic rights.¹¹⁹ In *City of Cape Town v Rudolph and Others (Rudolph case)*,¹²⁰ the High Court, in making the order, employed the principles enunciated in the *Grootboom* case to hold that the government had failed to ameliorate the conditions of those in desperate need.¹²¹

The High Court has also granted the structural interdict in cases where there was insufficient information to determine the most appropriate relief that would redress the violation. This relief is suitable in such circumstances to enable the Court to adjust the order should new information emerge.¹²² In a sense, some judges of the High Court consider the structural interdict to be a deferential remedy, as it gives the state a chance to propose the most effective means of realising the rights.¹²³

In contrast, the Court has used this form of relief mainly in civil and political rights cases where there is evidence of lackadaisical conduct from the state,¹²⁴ and where the information before the Court is inadequate for the purposes of making a final order. The Court has also employed the remedy where it lacks the expertise to make appropriate arrangements for the eradication of the violation.¹²⁵ The Court has, however, been reluctant to use the structural interdict in socio-economic rights cases, as it is constrained by the need to defer to the executive and to avoid protracted litigation in such cases.¹²⁶

An exception to this general trend appears in the recent case of *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others (Olivia case)*.¹²⁷ This case, in which the Community Law Centre (together with the Centre on Housing Rights and Evictions) participated as *amicus curiae*,



was brought to court by more than 400 occupiers of two bad buildings in Johannesburg. They were resisting eviction, which was scheduled to take place in pursuit of the City of Johannesburg’s regeneration programme. The programme was intended to revamp the City by, among other things, rehabilitating all bad (dilapidated) buildings. In the High Court, the applicants argued that they could not be evicted without being provided with alternative accommodation.¹²⁸ The High Court found that the City’s programme fell short of the requirement to provide suitable relief for people in the City who were in a crisis or in desperate need of housing. In addition to interdicting the eviction, it ordered the City to devise and implement, within its available resources, a comprehensive and coordinated programme to realise the right to adequate housing progressively for those in desperate need of accommodation.

On appeal, the Supreme Court of Appeal (SCA) found that the buildings were unsafe and authorised the eviction of the occupiers.¹²⁹ It gave the occupiers one month to move out or risk being evicted. However, it also ordered the City to provide alternative temporary shelter to those in desperate need of housing.

The occupiers appealed to the Court against the SCA’s decision. During the case, the Court ordered the parties “to engage with each other meaningfully ... in an effort to resolve the differences and difficulties aired in this application”. They were also ordered to file affidavits on a stipulated date reporting on the results of the engagement between them.¹³⁰ This order is what could be described as “an interim structural order”. The order was justified by the need to have the dispute resolved amicably and by the fact that, as a public institution, the City had an obligation to engage vulnerable people before making decisions that adversely affected them.¹³¹

The order provided interim protection for the applicants against eviction. The negotiations resulted in an agreement on interim measures the City would take to make the buildings safer and more habitable. By promoting dialogue, the Court created a favourable environment for ensuring enforcement of its final order with minimal judicial involvement. Recent evidence shows that the negotiations have yielded positive results for the applicants. In a press statement, CALS, the legal aid clinic which represented the applicants, has indicated satisfaction with the implementation of the order arising from the settlement. The 450 residents have voluntarily been moved by the City to better housing.¹³² Here the residents have water, electricity, sanitation and shared cooking and ablution facilities.¹³³ The conclusion of this case could be described as a great success for advocates of housing rights in South Africa. This is because:



What was labelled 'impossible' by the city just a few short years ago has now been achieved, largely through active and (mostly) positive engagement with the poor communities. Ironically, it was the difficulty the city had with the idea of engaging with poor people that formed much of the basis for its reluctance to implement an inner-city housing programme in the first place.¹³⁴

The interim order made by the Court was also implemented before the relocation was effected at San José and 197 Main Street. The City had restored the water supply, provided portable toilets, refuse removal services and fire extinguishers in accordance with the terms of the interim order. The City also took charge of the relocation, providing trucks, movers and security.

5 GOVERNMENT: A RELUCTANCE TO IMPLEMENT COURT ORDERS?

The conclusion of the *Olivia* case could lead one to the conclusion that the state is compliant after all. However, such a conclusion would be based on one isolated case. A proper conclusion should assess the success that has been achieved in cases other than *Olivia*. The starting point could be the successes scored in implementing the judgment in the *Grootboom* case. In August 2008, it was reported in the press that Mrs Irene Grootboom had died in her shack despite the fact that she had successfully litigated for the right to decent housing.¹³⁵ The question is whether the *Grootboom* judgment has been implemented. Two studies have been undertaken to assess the housing situation of the Wallacedene community after the *Grootboom* judgment. The first study was done by Karrisha Pillay, two years after the judgment.¹³⁶ The other study is as recent as 2008 – an evaluation of public interest litigation done by Gilbert Marcus and Steven Budlender.¹³⁷

According to Pillay, 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. In her opinion, a key contributing factor to the lack of implementation of the judgment was the nature of the orders handed down by the Court.¹³⁸ The first order arose from the settlement of the parties, while the second order was a general declaratory order made at the end of the case. The fact that this case produced two orders contributed to the confusion as to what needed to be done to comply with the judgment.¹³⁹ The South African Human Rights Commission, for example, was not sure about which order it was mandated to monitor.¹⁴⁰

The formulation of the order raised more problems. Pillay has submitted:



This general order is weaker than the order handed down by the High Court because it is merely a declaratory order and does not compel the State to take steps to ensure that its programme complies with the Constitutional requirements. A further problem with the Constitutional Court order, which also stems from the declaratory nature of the order, is that the order does not contain any time frames within which the State has to act. The result is that, more than a year after the Grootboom judgment was handed down, there has been little tangible or visible change in housing policy so as to cater for people who find themselves in desperate and crisis situations.¹⁴¹

Because of the unclear formulation of what was expected from the government, “there ... [was] a clear lack of understanding that the judgement ... [required] systemic changes to national, provincial and local housing programmes to cater for people in desperate and crisis situations”.¹⁴² The Court’s refusal to play any role in supervising implementation of these orders only served to compound the problem.¹⁴³

One cannot assess the extent to which the order itself is to blame for its non-implementation without understanding the theoretical and practical considerations that influenced its grant. One could not reasonably have expected the Court to make a mandatory order in the first major social justice case to be decided against the state. It was too soon for it to determine whether the state would abide by its directions. Furthermore, as the case between the parties had been settled, judgment was only to determine the overall effect of the housing policy.¹⁴⁴

There is no doubt that the situation of the Wallacedene community has not changed much since *Grootboom* was decided. This community is still exposed to severe flooding every winter and still lacks the basic facilities the state undertook to provide.¹⁴⁵ In 2004, press reports indicated that all that the Wallacedene community had to show for their victory was a smelly ablution block built in a donga that had served as a latrine. The shelter and sanitation services were found to be in a sorry state.¹⁴⁶ Marcus and Budlender discuss the question of whether the situation of the Wallacedene community has resulted from the non-compliance of the court order in the case. What one can deduce from their discussion is that despite the initial problems encountered in implementing the interlocutory order, the order was later implemented fully:

Though government had taken months to comply with the terms of the offer and urgent order and though there was some disagreement about whether every aspect of the order had been complied with, it is clear that generally the terms of the offer and order were fulfilled by the government.¹⁴⁷



Marcus and Budlender have revealed what is at the heart of the disillusionment of the Wallacedene community. To them, “[t]he community’s disillusionment seems to stem mainly from its perception that the court victory meant that they would ultimately be getting actual housing, rather than some temporary form of shelter”.¹⁴⁸ In this respect, Marcus and Budlender believe that there is nothing in the Court’s judgment that suggested that formal housing for the community was on the immediate horizon.¹⁴⁹ “the expectations seem to have resulted at least partly from a lack of clear communication between the lawyer and his clients about the likely and actual outcome of the case.”¹⁵⁰

From the above, it is clear that the success of the *Grootboom* judgment cannot be determined by reference to the Wallacedene community alone because the final judgment was not only directed at them but at all homeless South Africans. The remaining question, therefore, is whether the judgment has had any significant effect on the housing policy and the overall delivery of adequate housing to those in need. The following section addresses this question.

5.1 Effect on housing policy and actual access to housing

A recent report by the Special Rapporteur on adequate housing, Miloon Kothari, details the deficiencies in the housing policy and access to adequate housing.¹⁵¹ The report provides evidence of failure to respond to the housing needs of the poor, failure to implement housing laws and policies coherently and to halt forced evictions.¹⁵² The factors the Special Rapporteur identifies as being responsible for this state of affairs include the lack of cooperative governance in housing development; the insufficient information-sharing between levels of administration; the lack of integrated housing development which considers social services within housing projects; and poor quality construction.¹⁵³ This is in addition to there being no mechanisms for the implementation of the “well-intentioned policies” made at the national level.¹⁵⁴

However, there have been some positive changes in housing policy and case law, although these are limited:¹⁵⁵

[T]he decision has had two distinct positive impacts as regards housing rights. First, it has created a powerful tool for the advocates of specific communities involved in eviction proceedings, building a growing body of right-to-housing case law. That tool has led to discrete victories for local communities, even if the victory is simply the difference between being evicted and left homeless, or being allowed to remain in their, albeit informal, homes. Second, a recently adopted na-



*tional program for housing assistance in emergency circumstances is a very promising document that if actually implemented could lead to meaningful change in the lives of millions of South Africans.*¹⁵⁶

With regard to policy and access to housing, Budlender and others suggest that the decision has forced the government to adjust its housing programme to accommodate the needs of people in intolerable conditions and those threatened with eviction.¹⁵⁷ Evidence of effect of this is found in the *National Housing Programme: Housing Assistance in Emergency Circumstances* (Emergency Housing Programme)¹⁵⁸ and the *Informal Settlement Upgrading Programme* (Informal Settlements Programme).¹⁵⁹ The Emergency Housing Programme expressly acknowledges the influence of the *Grootboom* case on its formulation.¹⁶⁰ Its main objective is to provide temporary assistance in the form of secure access to land and/or other basic municipal services and shelter in a wide range of emergency situations. This is to be done, among other things, through the allocation of grants to municipalities.¹⁶¹ The policy increases the possibility of people in desperate need obtaining assistance.¹⁶²

For its part, the Informal Settlements Programme allows municipalities to apply for a community-based or area-based subsidy that is not linked to individual households but based on the actual cost of improving an informal settlement. It discourages municipalities from relocating informal settlements from expensive or geo-technically unsuitable land to new housing developments on the outskirts of cities and towns. Instead, it enables land which is already occupied to be made habitable, even if it is regarded as technically and economically unsuitable.¹⁶³

The adoption of these programmes represents a partial implementation of the *Grootboom* case. There are many concerns about the comprehensiveness of the programmes and their implementation. Wickeri, for example, contends that there has not been a revolutionary change in either the availability or delivery of housing for South Africa's urban poor.¹⁶⁴ Even at a policy level, one cannot say with confidence that the current policies on housing are comprehensive enough to cover all vulnerable people in need of housing.¹⁶⁵ There is, for instance, no coherent policy at the national level on housing people with special housing needs such as women, especially abused women, people living with HIV/AIDS, the aged, children, people with disabilities and the poor.¹⁶⁶

The *Grootboom* case has had a profound effect on subsequent cases dealing with access to housing. These cases indicate that the *Grootboom* case has not only altered South African law on housing and evictions but has also laid the foundation for the development of the relevant legal principles.



Nevertheless, a reading of these decisions also indicates that, had the principles arising from the *Grootboom* judgment been observed, these cases would not have arisen in the first place, the principles being that provision should be made for those in desperate need. What this also means is that “absence of an effective *Grootboom*-type programme of emergency relief might preclude evictions”.¹⁶⁷ An examination of a few cases will prove this point.

The cases that have come after the *Grootboom* judgment also emphasise the constitutional obligation on the state to fully implement court orders. One of the cases which is clear on this obligation is *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others*.¹⁶⁸ This case arose from an eviction order given to a private landowner to evict approximately 18 000 people settled on private land. The sheriff had insisted on a deposit of R1,8 million to cover the estimated costs of a security firm which she intended to hire to assist her in evicting the occupiers and demolishing their shacks. This amount by far exceeded the value of the part of the property which was occupied. The landowner was unwilling and unable to spend so much on executing the judgment and lodged an application against the state to force the sheriff to carry out the eviction order. The application argued that the failure on the part of the state to carry out the eviction order undermined the right to property as guaranteed by s 25 of the Constitution.

The occupants, who had by this time swelled to 40 000, also resisted the eviction and argued that they could not be evicted from Modderklip's property without provision of alternative accommodation. It was contended on their behalf that this would undermine their right of access to adequate housing as guaranteed by s 26(1) of the Constitution. The Court emphasised the constitutional obligation on the state to ensure execution of court orders arising from the principles of the rule of law. According to the Court, court orders must be enforced in a manner that prevents social upheaval.¹⁶⁹ The complexity of this case, however, arises from the fact that an eviction would have resulted in people being rendered homeless. To prevent this upheaval, the Court held that the state had an obligation to provide alternative accommodation in line with its constitutional duty to ensure access to adequate housing.¹⁷⁰ The Court ordered compensation for Modderklip for the use of the land. The Court also indicated that the option to expropriate the land to accommodate the applicants was open to the state.¹⁷¹

The aspect of the case most relevant to this paper is the extent of implementation of the court order requiring the occupants to be provided with alternative accommodation. In 2005, the Community Law Centre did research to establish this.¹⁷² At the conclusion of the case, expropriation of



the Modderklip farm appeared to be the only reasonable option because of the problems that would be encountered in relocating over 40 000 residents. The state, however, chose to relocate the people. This was based on findings that the site was geo-technically unsuitable because of previous mining on the land. The state indicated that the relocation was their top priority and would be effected as soon as the necessary legal and planning processes, including the provision of basic municipal services, had been completed.¹⁷³ The preparation for the relocation by ensuring proper planning and the provision of basic services conformed to the content of the right of access to adequate housing which requires services in addition to shelter.¹⁷⁴

Despite the above, the actual implementation of the order faced a number of obstacles. Foremost of these was the lack of transparency on the part of the authorities: vital information on the relocation, such as the time of relocation and the location of the alternative land, had been withheld from the occupants.¹⁷⁵ The importance of information in effecting court orders cannot be overemphasised. Information and transparency are vital for effective monitoring of the extent to which the order has been implemented.¹⁷⁶ It should also be noted that, despite the indication that relocation was top priority, there has been an inordinate delay in effecting this.

Among the cases which would not have arisen had the *Grootboom* principles been observed is the *Port Elizabeth* case. This case was brought under the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act,¹⁷⁷ but its facts and issues are similar in many respects to those in the *Grootboom* case. In this case, over 60 people and 23 children had occupied private land, some of them after being evicted from their previous residences. The *Rudolph* case is similar. It emanated from an eviction application made by the City of Cape Town. Just like the *Grootboom* community, the *Rudolph* community (in Valhalla Park) had moved on to vacant land owned by the City to escape from the intolerable conditions in which they lived. The community filed a counter-application in which they argued that they could not be evicted unless the City provided emergency shelter in terms of the *Grootboom* judgment. The City lost its application but the counter-application was successful, resulting in an order that the City make provision for the short-term housing needs of the *Rudolph* community.

The *Olivia* case is another example. The Court declined to adjudicate on the constitutionality of the housing plan proposed by the City to address the plight of all people in need of housing.¹⁷⁸ It is clear from this case that it should not have arisen had the City complied with the principles in the *Grootboom* case by making provision for those in desperate need, thus effectively implementing the Emergency Housing Programme.



5.2 Effect of *Grootboom* on other socio-economic rights

The *Grootboom* case has had a major effect on the development of other socio-economic rights because the decision has changed the government's attitude towards these rights. This has arisen from the awareness that failure to act reasonably will attract judicial sanction. These developments are feasible in policy formulation processes relevant to a number of socio-economic rights, some of which have been the subject of adjudication applying the principles in the *Grootboom* judgment. For the purpose of this paper, only the rights of access to health care services and to social security and assistance are discussed.

5.2.1 Effect on the right of access to health care services

The effect of the *Grootboom* case on the right of access to health care services can be assessed by first examining the *TAC* case. This case was instituted by a number of organisations led by the Treatment Action Campaign (TAC), with the *amicus* support of the Community Law Centre. The applicants challenged a government programme on the prevention of mother-to-child transmission of HIV/AIDS. The basis of the challenge was that the programme restricted the provision of nevirapine (medication for the prevention of mother-to-child transmission) to specific hospitals designated as research sites. Consequently, a large number of pregnant mothers and their children could not access the medication. Although the medication had been certified by the Medicines Control Council, the government argued that the restriction was necessary to ascertain the efficacy of the medication.

The main question in the case was whether the programme was reasonable.¹⁷⁹ The Court held that it was not. This is because not all mothers and their newborn babies could access the designated pilot sites.¹⁸⁰ It also found that the programme excluded the most vulnerable – “those who cannot afford to pay for medical services”.¹⁸¹ It also underscored the vulnerability of children at the risk of contracting HIV/AIDS:

*Their needs are 'most urgent' and their ability to have access to nevirapine profoundly affects their ability to enjoy all rights to which they are entitled. Their rights are 'most in peril' as a result of the policy that has been adopted and are most affected by a rigid and inflexible policy that excludes them from having access to nevirapine.*¹⁸²

What is of concern, however, is the extent to which the judgment has been implemented and the extent to which it has (as it should have) influenced



changes in the general response to the problem of HIV/AIDS. The TAC has consistently criticised the government for its failure to distribute antiretroviral medication effectively. Like the *Grootboom* case, the *TAC* case demonstrates the reluctance of the government to overhaul the health system to extend HIV/AIDS treatment to everyone.

The most recent case illustrating this failure is *EN and Others v Government of RSA and Others (Westville case)*.¹⁸³ This case was commenced by the AIDS Law Project (ALP), the TAC and 15 HIV-positive prisoners from the Westville Correctional facility in KwaZulu-Natal to compel the government to remove all obstacles preventing the 15 prisoners and other prisoners in a similar condition from accessing antiretroviral treatment. They also sought an order for the government to provide the 15 prisoners and other similarly situated prisoners with antiretroviral treatment in accordance with the existing government Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment (Operational Plan),¹⁸⁴ which they argued had not been implemented with reasonable speed and urgency.

The Court found that the implementation of the Operational Plan was unreasonable and inflexible with regard to the needs of prisoners. It granted the orders sought by the applicants. The recalcitrance of the state is reflected in its failure to comply with a consent agreement between the parties, and choosing instead to engage in adversarial litigation. As a result, the judge issued a structural interdict requiring the respondents to file a plan within two weeks on how they intended to implement the court order.¹⁸⁵

The most interesting aspect of the *Westville* case, however, is that even after judgment was handed down, the government was not willing to abide by the directions of the Court. The attitude of the government in this case is proof of lack of respect for the rule of law.¹⁸⁶ Rather than implement the court order, the government chose to appeal on a technicality: the judge had erred in refusing to step down despite the fact that one of the counsel for the applicants was his daughter. The government also applied to stop the implementation of the orders of the High Court pending the appeal. At the conclusion of this application,¹⁸⁷ Nicholson J found that the prisoners would suffer irreparable harm if the interim order was set aside. This harm was far greater than the inconvenience likely to be suffered by the state.¹⁸⁸ Nicholson did not spare the government:

If the government of the Republic of South Africa has given such an instruction [to disobey the Court order] then we face a grave constitutional crisis involving a threat to the doctrine of separation of powers. Should that continue the members of the judiciary will have to con-



*sider whether their oath of office requires them to continue on the bench.*¹⁸⁹

Although finally the government did file a plan, a lot of damage had already been done. The reputations of the Department of Correctional Services and the Minister of Health were damaged and the case almost led to the breakdown in the relationship between the executive and the judiciary. Despite some shortcomings dictated in the department's Operational Plan, it was acknowledged that the plan was evidence that the it had begun, in a more systematic way, to address the issue of HIV/AIDS – including providing access to antiretroviral treatment.¹⁹⁰ Recent reports indicate that the department is taking the issue of providing antiretroviral treatment to prisoners seriously. The reports indicate that access to antiretroviral treatment by prisoners has increased and was projected to increase by 76% by the end of 2008.¹⁹¹

5.2.2 Social assistance cases: despondence in the Eastern Cape

The Eastern Cape provincial government has been foremost in disobeying court orders in cases concerning the right to social security and assistance.¹⁹² In explaining the problem of non-compliance, the Court observed in *Vumazonke and Others v MEC Department of Social Development, East Cape* that:

*notwithstanding that literally thousands of orders have been made against the respondent's department over the past number of years, it appears to be willing to pay the costs of those applications rather than remedy the problem of maladministration and inefficiency that has been identified as the root cause of the problem. ... the courts are left with a problem they cannot resolve: while they grant relief to individuals who approach them for relief, they are forced to watch impotently while dysfunctional and apparently unrepentant administration continues to abuse its power at the expense of large numbers of poor people, the very people 'who are most lacking in protective and assertive armour' and whose needs 'must animate our understanding of the Constitution's provisions'. What escalates what I have termed a problem into a crisis, is that the cases that are brought to court represent the tip of the ice-berg.*¹⁹³

One cannot, however, fully understand these cases without an appreciation of the context within which they arose. Before the new constitutional dispensation, South Africa had a fragmented, inequitable and



administratively inefficient social security system that mainly covered those in formal employment.¹⁹⁴ During this period, social security and social assistance were not protected as constitutional rights, since the Constitution did not even have a Bill of Rights. In the new dispensation, the Constitution guarantees the right to have access to social security, which includes appropriate social assistance for those unable to support themselves and their dependants.¹⁹⁵ The promulgation of the Constitution, however, did not immediately solve the administrative problems in the social security system. Worst hit by maladministration was the Eastern Cape. The Court in the *Ngxuza* case described the problems of administering the system in the province. These included the fact that the information on record for many of the beneficiaries was incomplete, there was duplication of payments and the eligibility of many of the beneficiaries was suspect.¹⁹⁶

In the *Ngxuza* case, the Eastern Cape provincial government requested all beneficiaries to re-apply for their social grants as part of an attempt to ascertain the number of deserving recipients of the grants and to eradicate corruption. It also imposed a moratorium on new applications and on the processing of arrears for beneficiaries. As a result, many people whose grants had been terminated and whose applications had not been processed within reasonable time resorted to litigation. In this case, the provincial government was found to be in violation of the right to social security and assistance and the right to just administrative action.¹⁹⁷

In the *Bushula* case, the applicant, who had been receiving the disability grant for over five years, was verbally informed of the termination of his grant. The Court found that the termination violated the provisions of the Social Assistance Act¹⁹⁸ and its accompanying regulations, which authorised the suspension of the grant after notification to the beneficiary but did not confer the power of cancellation of a grant. In the end, the Court made the following order:

- (a) *The decision ... cancelling the first applicant's disability grant is declared to be invalid and of no force and effect and is set aside;*
- (b) *The first respondent is ordered to reinstate the first applicant's disability grant within a period of two weeks from the date of this order, such reinstatement to be with effect from date of cancellation thereof;*
- (c) *It is declared that the first respondent is entitled to payment of all arrears owing under his disability grant from the date of cancellation therefore up to the present time.*¹⁹⁹

One would have expected the provincial government to apply the *Bushula* case to all people in a similar predicament. Unfortunately, this is not what



happened; the government did not reinstate the grants that were cancelled. This precipitated further litigation; the most immediate was the *Ngxuza* case referred to above. This case was followed by the *Njongi* case. The facts leading to the termination of Njongi's grant are similar to those in the two cases cited above. However, Njongi had successfully re-applied for the reinstatement of her grant. The trouble was that the application was determined 18 months after its submission. The issue therefore was whether she was entitled to arrears. The Court castigated the provincial government for not reinstating the cancelled grants immediately after the *Bushula* case was decided:

[B]earing in mind that there has been no appeal against the judgment in Bushula ... the Provincial Government had accepted both that their procedure had been wrong and that all grants improperly cancelled ought to be fully reinstated in the sense ordered in Bushula. All affected people ought to have been placed in the position in which they would have been absent the unlawful administrative decision. Indeed, the Provincial Government should have taken proactive measures to fully reinstate every improperly cancelled social grant. This is a necessary consequence of the duty of every organ of State to "assist and protect courts to ensure that ... dignity ... and effectiveness of the courts." It would also be mandated by the constitutional injunction that an order of court binds all organs of State to which it applies. The Provincial Government had every right to appeal the order in Bushula. Once it did not do so however, it had the duty in my view to ensure full redress for every person in the position of Mr. Bushula. Nothing less would have been acceptable.²⁰⁰

The Court confirmed the holding in the *Bushula* case that the termination of the social grants was unlawful and unconstitutional, and ordered the retrospective reinstatement of the applicant's grant and payment of all the arrears due with interest.²⁰¹ It remains to be seen whether this decision will eventually be respected.

6 YOU ARE THE "WEAKEST LINK": GOODBYE!

6.1 Identifying the challenges

One cannot devise strategies to achieve full compliance with court orders without identifying the challenges to be confronted. The challenges in this regard can be deduced from the cases discussed above. Foremost of these is



the reluctance on the part of state officials to observe the rule of law and respect court orders. Evidence of this could be found in the reaction of the mayor of Johannesburg, Amos Masondo, after judgment in the recent case of *Mazibuko and Others v City of Johannesburg and Others* (*Mazibuko* case).²⁰² In this case, the Court held that the installation of prepaid water meters in the Phiri area (and by implication all municipalities in South Africa) was *ultra vires* and unconstitutional. This is because it violated the Promotion of Administrative Justice Act,²⁰³ the Water Services Act²⁰⁴ and the constitutional right of access to sufficient water (s 27(1) of the Constitution). The Court also found that the provision of 25 litres of water per person per day was unreasonable and, on the basis of the minimum core obligations approach, constitutionally inadequate. The Court ordered the provision of 50 litres of water instead.

In reaction to this judgment, the mayor is quoted as saying:

*Judges are not above the law. We don't want judges to take the role of Parliament, the role of the National Council of Provinces, the role of the legislature and the role of this council. Judges must limit their role.*²⁰⁵

The mayor is also quoted as saying that if judges want to run the country they should join political parties and contest elections.²⁰⁶ While one might fault the judgment to the extent that it prescribes 50 litres of water on the basis of the concept of the minimum core, the reaction of the mayor is unbecoming and indicates a misconception of constitutional democracy.²⁰⁷ The mayor's reaction clearly undermines the fundamental principle of the rule of law.²⁰⁸ It should be noted that a respondent with such an attitude would definitely ignore any orders arising from a judgment he or she considers illegitimate. This attitude exacerbates inter-institutional mistrust between the courts and the other organs of state and inevitably puts them on a collision course, as can be clearly seen in the aftermath of the *TAC* and *Westville* cases.

Another challenge noticed is the lack of transparency in the implementation of court orders. As is seen from the *Modderklip* case, the successful applicants and other stakeholders involved in the court process are usually not informed about the steps that the state is taking to implement the court orders. This makes both meaningful participation and the monitoring of progress extremely difficult. There is apparently no rational justification for this lack of transparency; the only reason offered is that consultation would delay the process of implementation.²⁰⁹ However, the lack of transparency and consultation delays the process, since it excludes a



number of role-players who could contribute positively to the process of implementation. Consultation of the civil society organisations involved in the process might, for instance, assist in clarifying the full import of the court order. This is one of the factors that contributed to the successful implementation of the orders in the *Olivia* case.

The factors responsible for the slow delivery on housing, as identified by the UN Special Rapporteur on adequate housing, apply with equal force to the implementation of court orders for housing as to other rights. The factors the Special Rapporteur identifies include the lack of cooperative governance and the insufficient information sharing between levels of administration. These are fundamental flaws which greatly hamper compliance. It should be noted that the semi-federal nature of governance in South Africa and the sharing of components of socio-economic rights obligations between the different spheres of government make cooperative governance inevitable. It is for this reason that the Court in the *Grootboom* case held that a reasonable programme to deliver socio-economic rights must be well coordinated between the different levels of government. As seen from the discussion by Pillay, lack of cooperation between the different spheres of government is identified as one of the factors responsible for the initial delays encountered in enforcing the interlocutory orders in this case.

The non-implementation of court orders in the Eastern Cape in social grant cases arises from maladministration combined with a lack of capacity to carry out the required reforms, rather than obstinacy alone. These deficiencies are not only responsible for the violation, but are also to blame for the failure to remedy the violation – even after court action. It should be noted that these problems are prevalent in sectors other than social assistance and are not restricted to the Eastern Cape but are found in other provinces too. Similar challenges exist in the housing sector where a lack of capacity, especially at the provincial level, has made timely delivery of quality housing difficult to achieve. The obstinacy and uncaring attitude exhibited at the early stages of the *Olivia* case seem to have arisen partly from the failure to understand the constitutional obligations imposed on the state. Had proper skill been applied in the formulation of the regeneration strategy, the upheavals it resulted in would not have occurred. During the initial stages of the hearing of the case in the Court, for instance,²¹⁰ some of the evidence demonstrated confusion about which sphere of government (provincial versus local) was responsible for budgeting and funding emergency housing.



6.2 Way forward: strategies to overcome challenges

6.2.1 Exploiting invalidation of provisions of the State Liability Act

The recent judgment of the Court in the *Nyathi* case, invalidating s 3 of the State Liability Act,²¹¹ has widened the possibilities of securing the compliance of the state with court orders. The judgment has come after a long period of obduracy by state institutions and officials. As observed by the Court in this case, courts have had to spend too much time in trying to ensure that court orders are enforceable against the state. This has arisen from the fact that a simple and straightforward procedure for enforcing judgments against the state is not available.²¹² Before the judgment in the *Nyathi* case, the state was protected by the State Liability Act from execution of court orders against it, even when there was clear evidence of recalcitrance. Section 3 provided that:

No execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against any property of the state, but the amount, if any, which may be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any action or proceedings may be paid out of the National Revenue Fund or a Provincial Revenue Fund as the case may be.

An example of a case where this section was applied is *Jayiya v MEC for Welfare, Eastern Cape and Another*.²¹³ In this case, the High Court found in favour of the applicant and ordered the Permanent Secretary of Welfare, cited as the second respondent, to make a lump sum payment to the applicant within a period of 30 days. When default was registered, the applicant's attorneys commenced contempt of court proceedings and prayed for the incarceration of the second respondent. The Supreme Court of Appeal found that, by virtue of s 3 of the State Liability Act, the application for committal was misconceived.²¹⁴

In the *Nyathi* case, the applicant developed a medical condition from the negligence of doctors at two public hospitals. Although the state admitted liability, it failed to comply with an order to make interim payments to the applicant pending the final determination of damages. To enforce this order, the applicant sought a declaration that s 3 of the State Liability Act was unconstitutional. In the Court, the state argued that it would be highly prejudicial to the public interest to allow the attachment or sale of state assets to execute (enforce) a judgment debt (compensation).²¹⁵ The Court



rejected this submission and held that the section infringed on the right to equality before the law and equal protection and benefit of the law. It stated:

A judgment creditor who obtains judgment against a private litigant is entitled to execute against a private litigant in order to obtain satisfaction of the judgment debt. However, a judgment creditor who obtains judgment against the state is expressly prohibited from executing against state property in order to obtain satisfaction of the judgment debt. The effect of this is that section 3 disallows a judgment creditor who obtains judgment against the state the same protection and benefit that a judgment creditor who obtains judgment against a private litigant enjoys.²¹⁶

The Court viewed s 3 as effectively placing the state above the law, as it did not positively oblige the state to comply with court orders as required by the Constitution.²¹⁷ The Court also found that the section infringed upon the right to dignity because it compelled the applicant to wait for an extremely long time before the money required for his treatment could be paid.²¹⁸

The *Nyathi* judgment will have a major effect on state compliance with court orders. The state, conscious of the fact that it is no different from private litigants, will take court orders seriously. The effect of this will be felt mostly with respect to monetary judgments. The judgment is, however, of limited application to other forms of orders. In particular, the Court discouraged contempt of court orders as tedious and onerous for a successful litigant who has already spent a great amount of time and money.²¹⁹ The Court also denounced the approach of holding officials responsible for the wrongs they have committed in their official capacity, as this would result only in “naming and shaming” and would not produce a real remedy for the victim.²²⁰ However, it is argued that the reasons the Court gives for discouraging contempt of court proceedings are not particularly convincing. Execution by attachment and sale can be as tedious as contempt of court proceedings – a warrant has to be sought, a court sheriff and auctioneers appointed, and payments made for these processes.

6.2.2 Inculcating a culture of constitutionalism and promoting the rule of law

While the invalidation of s 3 of the State Liability Act should be lauded, it should be emphasised that, ultimately, the successful implementation of court orders is largely dependent on the political will of the state. The state could still undermine the court by excepting through legislation, as the



Court conceded,²²¹ certain kinds of property from attachment. What needs to be done is to inculcate and entrench a culture of constitutionalism and respect for the rule of law, something which, as seen from the remarks of such officials as the mayor of Johannesburg after judgment in the *Mazibuko* case, has eluded some state officials. In light of this, it is necessary for state officials to learn that judicial and state processes are not adverse to one another, but are complementary. Instead of viewing the courts' role in enforcing rights as an unwelcome intrusion, officials should understand that this is part of the “constitutional conversation” between courts and the government on how best to realise human rights. In this regard, rather than detracting from democratic politics, the judicial enforcement of human rights enriches constitutional democracy.²²²

6.2.3 Promoting inter-institutional dialogue and amicable settlements

In addition to the above it is important to cultivate inter-institutional trust between the courts, the government and civil society. This can be achieved by promoting alternative dispute resolution and amicable settlements, not only as an alternative to court action, but also as part of the court processes. There is no doubt that the state is more likely to carry out orders realised through amicable settlements. Indeed, it is especially at the level of remedies that the greatest potential lies for forging relations between institutions to bring about relief that is both effective and legitimate.²²³ This is a course that the Court has already embarked on, as seen in the *Olivia* and *Port Elizabeth* cases; in the latter the Court observed that this approach might not only “reduce the expenses of litigation ... [but also] avoid the exacerbation of tensions that forensic combat produces”.²²⁴

Promoting institutional dialogue and amicable settlements, as was done in the *Olivia* case, also has the advantage of obtaining meaningful enforcement of the court order while minimising court involvement.²²⁵ This is because engaging the government in the interpretative process of the rights and respecting its interpretations where appropriate will produce acceptable remedies. This approach can prove far more effective when compared to the seemingly antagonistic process by which the government waits for specific court instruction.²²⁶ The approach also gives the executive freedom to decide how to fulfil its constitutional obligations. In the process, courts are in a position to understand the government's perspectives of its own constitutional obligations.²²⁷ It is important that civil society also cooperates in this process to ensure that a good working relationship between courts and the government develops.²²⁸



6.2.4 Combining litigation with other strategies

It should be noted that litigation *per se*, even when successful for the litigants, might not lead to socio-economic transformation as rapidly as might be expected. As a matter of fact, it is fruitless and even dangerous to look to the courts for the first and last word on any matter concerning the vindication of fundamental rights. This is because real gains in the area of social justice often spring from years of grassroots organising by individuals and social movements. South Africa has a rich history of grassroots struggles and social movements including political organisations, trade unions, civic organisations, religious organisations and NGOs.²²⁹

A new generation of social movements has now emerged.²³⁰ They include the TAC, Concerned Citizens Forum, Anti-Eviction Campaign, Anti Privatisation Forum, Soweto Electricity Crisis Committee, Landless Peoples Movement, Basic Income Grant Coalition, and the Education Rights Project.²³¹ While these organisations have used litigation to challenge certain socio-economic policies, by reminding the government of its socio-economic rights obligations, they have shown that they realise the limitations of litigation. Consequently, some of them have successfully combined litigation with social mobilisation through protests, demonstrations and public campaigns. They have also used the Constitution and the language of rights to legitimise their social mobilisation activities.²³² In the process, they have not only contributed to the development of the law, but have also contributed to the abolition of oppressive laws by, for instance, advocating civil disobedience.²³³

The South African experience has shown that litigation and social mobilisation feed into each other. Social mobilisation before litigation has not only been used to force the government into submission, thus rendering litigation unnecessary, but has also been used to illustrate the problems and extent of the violations for which litigation has been instituted. This “means that a court deciding a conflict does so in the knowledge of the expectations and lives that depend on the outcome”.²³⁴ The experience of the TAC vividly demonstrates that using court action can catalyse political and community mobilisation and create a space where poor people can contest the policies and practices of both public and private entities.²³⁵

There is a need to increase the use of social mobilisation, after successful litigation, to call for the implementation of court orders. Such social mobilisation has the potential to promote the implementation of court orders in the same way that it has promoted substantive litigation on socio-economic rights. Indeed, it has been argued that full implementation of the *Grootboom* case will depend largely on the continued ability of civil society “to mobilize



political support while simultaneously putting pressure on government at all levels through litigation”.²³⁶

6.2.5 Heightening the monitoring of implementation

There is a need to heighten monitoring of implementation of court orders by civil society and other actors. It has been argued that delays in enforcing court orders can be minimised by having bodies such as the South African Human Rights Commission monitor the process. These institutions could investigate and highlight any delays and bring them to the attention of the appropriate structures.²³⁷ Monitoring and supervision, if done in a coordinated and amicable manner, can also help to overcome some of the administrative hurdles likely to be encountered in the implementation of orders. There is often a lack of follow-up on the implementation of court orders following successful court action. It appears that when public interest litigators get positive judgment in one case, they move on to other areas, which explains some of the difficulties encountered in trying to get information on whether orders have been implemented. There is definitely a need to monitor the case until final implementation, as has been done by CALS in the *Olivia* case with regard to the interlocutory order.

It also appears that frequent use of the structural interdict has now become inevitable in South Africa, given the state’s record of non-compliance. As argued earlier, this form of relief should be a last resort and only introduced in a graduated manner. It compels the government to reform its policy and become more responsive to the needs of the poor. The *Olivia* case has shown how structural relief combined with amicable settlement can be effective in implementing court orders.

6.2.6 Promoting intergovernmental cooperation and consultation

It is necessary to promote consultation and intergovernmental cooperation in the implementation of orders. This makes it imperative for all the spheres of government to understand the nature of the obligations imposed on each of them by the court order. Such cooperation will lead to coordination in implementing orders and will minimise delays. All spheres of government need to be made respondents to the court action. This lays very good ground for cooperation after judgment. For instance, the confusion caused in the *Olivia* case regarding funding of emergency housing between the local and provincial government could have been avoided if the provincial government had also been joined as a respondent.



7 CONCLUSION

The judiciary is undoubtedly central to the South African goal of achieving transformation through the realisation of the socio-economic rights in the Constitution. However, the role of litigation as a tool of realising these rights has been seriously undermined by government indifference and, at times, open defiance of court orders relating to socio-economic rights, thus depriving litigants of the fruits of successful litigation.

This paper has illustrated the magnitude of the problem and the factors underlying it. While the court orders might in some cases be faulted, the greater concern has been the state's non-compliance with them. Many factors could be cited for such non-compliance. These include capacity or resource constraints. However, there is also clear evidence of the state's reluctance to obey the directions of the courts. For instance, despite several court orders, the state has not taken any visible steps to address the capacity and administrative problems in the social and welfare development sector of the Eastern Cape. Likewise, the state has failed to provide for the housing needs of those in emergency situations, as was held in the *Grootboom* case.

The paper has proposed a number of strategies to address the problem of non-compliance with court orders. First, courts should encourage negotiated settlements of disputes in socio-economic rights cases, as this will improve the chances of implementation of court orders arising from such settlements. The *Olivia* case has opened the way for this strategy. The decision in the *Nyathi* case, which invalidated s 3 of the State Liability Act, has also widened the opportunities for enforcing court orders involving liquidated damages. This case exposes the state to the same consequences of litigation as those that private litigants face with regard to money orders.

To cover the gaps that are still left, the paper has emphasised the need to inculcate a culture of rule of law and the appreciation of the role of the judiciary within the context of the separation of powers. Moreover, civil society and other stakeholders should combine litigation with other strategies of realising socio-economic rights. Based on the experiences of such organisations as the TAC, social mobilisation is a formidable tool for bringing about social change and holding the state accountable.



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Notes

- 1 Liebenberg (1998: 44–1).
- 2 In one case, the Constitutional Court observed that the issues in the case reminded it of the intolerable conditions in which many people lived and that unless the plight of these people is alleviated, they might be tempted to take the law in their hands. See *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC) (*Grootboom* case) para 2.
- 3 *In re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) para 77.
- 4 *Grootboom* case para 20.
- 5 Noyoo (undated: 4).
- 6 As above.
- 7 Jagwanth (2003: 15).
- 8 See Andrews (2006: 65).
- 9 AfriMAP and Open Society Foundation for South Africa (2005: 17).
- 10 Chenwi (2008: 147).
- 11 2008 (9) BCLR 865 (CC).
- 12 At para 43.
- 13 *Nyathi* case paras 60–63.
- 14 See Zakrzewski (2005: 13).
- 15 Pomeroy (1876), as quoted by Zakrzewski (2005: 21).
- 16 See House of Lords and House of Commons Joint Committee on Human Rights (2007: 10).
- 17 As above.
- 18 1997 (7) BCLR 851 (CC).
- 19 Para 19 (footnote omitted). See also *Mohamed and Another v President of RSA and Another* 2001 (3) SA 893 (CC) para 71.
- 20 Para 69 (footnote omitted).
- 21 As above.
- 22 As above.
- 23 See Hatchard (2006: 66).
- 24 Budlender (2008: 3).
- 25 See generally Scott and Macklem (1992).
- 26 For a discussion of the features of these strategies, see Khoza (2006).
- 27 Gloppen (2005: 154).
- 28 Mulugeta (2005: 13).
- 29 Lu (2008: 16).
- 30 Gloppen (2005: 157).



- 31 Gloppen (2005: 158), Figure 2: Factors affecting litigant's voice.
- 32 As above.
- 33 Gloppen (2005: 160), Figure 3: Factors conditioning court's responsiveness.
- 34 Gloppen (2005: 160–1).
- 35 Gloppen (2005: 161), Figure 4: Factors affecting judges' capability.
- 36 Gloppen (2005: 162), Figure 5: Factors affecting compliance with social judgments.
- 37 Gloppen (2005: 165).
- 38 Gloppen (2005: 164).
- 39 Dugard (2006: 266).
- 40 Report of proceedings of the Access to Justice Round-Table Discussion organised by the Open Society Foundation for South Africa, Johannesburg, 22 July 2003. Available at <www.osf.org.za/File_Uploads/docs/File_Download.asp?ThisFile=Access_to_Justice_Roundtable_July_2003.pdf> (accessed: 19 May 2008).
- 41 Jagwanth (2003: 15–16).
- 42 See Cooper-Stephenson (1991: 5).
- 43 Cooper-Stephenson (1991: 6).
- 44 Sturm (1991: 1360).
- 45 Shelton (1999: 37–38). See also Cooper-Stephenson (1991).
- 46 Gewirtz (1983: 678–9).
- 47 See Didcott (1988: 59–60).
- 48 Alston (1987: 172). See also *August and Another v The Electoral Commission and Others* 1999 (3) SA 1 (CC) (*August* case).
- 49 See *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* 2005 (4) BCLR 301 (CC) paras 70–71.
- 50 See Fuller (1978).
- 51 See Davis (2003: 104) and Forsyth and Elliot (2003).
- 52 Cottrell and Ghai (2004) 89. See also Gargarella (2006: 13).
- 53 *Minister of Health and Others v Treatment Action Campaign* 2002 (5) SA 721 (CC) (*TAC* case) para 99.
- 54 2002 (5) SA 721 (CC).
- 55 *Ibid.* para 38.
- 56 See Liebenberg (1998: 41–9).
- 57 Mbazira (2007: 92).
- 58 *Grootboom* case para 32.
- 59 *Ibid.* para 37.



- 60 See, generally, *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC)
- 61 *Ibid.* para 29 (Emphasis mine).
- 62 Liebenberg (2001: 67).
- 63 *Grootboom* case para 39.
- 64 *Ibid.* para 40.
- 65 *Ibid.* para 43.
- 66 *Ibid.* para 44.
- 67 Sustain (2001: 1).
- 68 2004 (6) BCLR 596 (CC).
- 69 *Ibid.* para 62.
- 70 Gloppen (2005: 156).
- 71 See, for instance, Swart (2005) and Trengrove (1999).
- 72 Gloppen (2005: 161).
- 73 Mbazira (2008a) and Mbazira (2008b).
- 74 See Sandel (1998: 16).
- 75 Shelton (1999: 38).
- 76 See Roach (1994: 3–17) and Schroeder (1990: 150).
- 77 Klimchuk (2003: 50).
- 78 Keating (2000: 194–5).
- 79 Rawls (1993: 16).
- 80 Mulhall (1996: 10).
- 81 Distributive justice has thrived on the limitations of corrective justice, especially in addressing violations of a systemic nature and providing flexible remedies. Where it is not possible to put the victim in the position he or she would have been in, proponents of distributive justice will exploit its flexibility to award more practical remedies. Distributive justice has also refined the traditional processes of adjudication; rather than merely focusing on establishing liability, a court pursuing distributive justice will focus on removing the legal wrong (Mbazira (2007: 237)). Distributive justice is also oriented to look to the future and to generate remedies with a future orientation instead of focusing on past wrongs. See Chayes (1976: 1294).
- 82 Mbazira (2007), Mbazira (2008a) and Mbazira (2008b).
- 83 See Van der Walt (2004: 148) and De Vos (2001: 262). See also generally Klare (1998).
- 84 For example, the Constitutional Court has rejected the argument that children are entitled to basic shelter immediately under s 28(1)(c). See *Grootboom* case para 74. See Mbazira and Sloth-Nielsen (2007) and Sloth-Nielsen (2003).



- 85 It should be noted, however, that there are cases in which the court has granted remedies that confer individual entitlements. See section 1.2 of this paper.
- 86 *Hoffman v South African Airways* 2001 (1) SA 1 (CC) (*Hoffman* case) para 43.
- 87 *Azanian People's Organisation (Azapo) v President of RSA* 1996 (4) SA 671 (CC).
- 88 Varney (1998: 343). See also Trengrove (1999).
- 89 Varney (1998: 343).
- 90 Roach and Budlender (2005: 345) referring to Hansen (1994) and Braithwaite (2002).
- 91 As above.
- 92 Aldous (1993: 66).
- 93 Lewis (1992: 174).
- 94 Shelton (1999: 55). In the *Rail Commuters* case, the Court observed that declaratory relief is of particular value in a constitutional democracy because it enables courts to declare the law, on the one hand, but to leave to the other arms of government, the executive and the legislature, the decision as to how best the law, once stated, should be observed (para 107).
- 95 Liebenberg (1998: 41–54).
- 96 Mbazira (2007: 299).
- 97 Shelton (1999: 199). See also Roach (2005: 113).
- 98 See *Mahe v Alberta* (1985), 22 D.L.R. (4th) 24, 39 Alta. L.R. (2d) 215 (Q.B.). See also Roach (1994: 3–38 and 12–2); Borchard (1941: 876).
- 99 In the *Khosa* case, for instance, the Court considered the merits of the case in spite of the fact that the parties had reported on settling the case between themselves.
- 100 See generally Pillay (2002a).
- 101 *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC); 1998 (2) SA 363 (CC) para 96; Mbazira (2007: 319).
- 102 As above.
- 103 Liebenberg (1998: 41–53).
- 104 'Government, not courts, must decide HIV/AIDS and other social policy' *Sunday Times*, 30 December 2001, as quoted by Jagwanth (2003: 17).
- 105 See Bilchitz (2003: 23–24).
- 106 *TAC* case para 96.
- 107 *Ibid.* para 106 (emphasis mine).



- 108 See *TAC v MEC for Health, Mpumalanga and Minister of Health* unreported, TPD, Case No 35272/02. See also Heywood (2003).
- 109 *Westville* case.
- 110 See, for instance, G Stolley “Prisons dept reveals plan for Aids drugs” *Mail & Guardian online*, 11 September 2006.
- 111 The principle holds that once a court has decided a matter and delivered its judgment the matter is closed and the court cannot go back to its decision except through such formalities as review and revision. See generally Pretorius (2005).
- 112 I have argued elsewhere that the retention of jurisdiction helps a party who thinks that the order is not being complied with to bring this to the attention of the court. It also helps the people to whom the order is directed, in certain circumstances, to seek clarity from the court as regards what the order entails. Most importantly, however, it enables the court to oversee the implementation of its order and to sometimes participate sporadically in the administration of the institutions whose reform it seeks to achieve. Additionally, the period of retention may be used as a delaying tactic to allow parties a cooling off period before compromise is reached. See Mbazira (2007: 333–4).
- 113 See Fiss (1978).
- 114 Horowitz (1977: 20). See also Frug (1978: 739).
- 115 In one case, the operating and capital expenses of a mental institution increased by US\$ 29 million in one year. See Nagel (1984: 397).
- 116 Klaaren (1999: 9–16).
- 117 Mbazira (2007: 375–85). Fletcher supports this view (1982).
- 118 Mbazira (2007: 374).
- 119 Case No 19559/06, unreported (the *Luckhoff* case), High Court Transvaal Provincial Division at 11.
- 120 2003 (11) BCLR 1236 (C).
- 121 *Ibid.* 1279.
- 122 *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 292.
- 123 *Ibid.* 292.
- 124 See *Sibiya and Others v DPP* 2005 (8) BCLR 812 (CC).
- 125 See generally *August* case.
- 126 See Davis (2006: 304) and Khoza (2006: 9).
- 127 2008 (5) BCLR 475 (CC). For a summary of the history of this case see Chenwi and Liebenberg (2008).



- 128 See *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W); 2006 (6) BCLR 728 (W).
- 129 See *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) SA 417 (SCA); 2007 (6) BCLR 643 (SCA). For a discussion of this case see Quinot (2007) and Mbazira (2007).
- 130 At para 5.
- 131 *Olivia* case para 16.
- 132 See M Hathorn, L Royston and S Wilson 'Victory for engagement in relocation from San José' *Business Day* 9 September 2008.
- 133 As above.
- 134 As above.
- 135 See "Housing activist Grootboom dies in Cape shack" *The Citizen* 5 August 2008.
- 136 Pillay (2002a).
- 137 Marcus and Budlender (2008).
- 138 Pillay (2002b: 17).
- 139 AfriMAP and Open Society Foundation for South Africa (2005: 17).
- 140 As above.
- 141 Pillay (2002b: 17–18).
- 142 Pillay (2002b: 18).
- 143 Pillay (2002a: 232).
- 144 Mbazira (2007: 300).
- 145 AfriMAP and Open Society Foundation for South Africa (2005: 18).
- 146 B Schoonakker "Treated with Contempt" *Sunday Times* 21 March 2004.
- 147 Marcus and Budlender (2008: 61).
- 148 Marcus and Budlender (2008: 62).
- 149 As above.
- 150 Marcus and Budlender (2008: 63).
- 151 Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights including Development. *Report of the Special Rapporteur on Adequate Housing as a component of the Rights to Non-discrimination in this context: Mission to South Africa* (29 February 2008) A/HRC/1/16/Add.3.
- 152 *Ibid.* paras 35–53.
- 153 *Ibid.* para 35.
- 154 *Ibid.* para 36.
- 155 Wickeri (2004: 6–7).
- 156 As above.



- 157 Budlender (2004: 41). See also AfriMAP and Open Society Foundation for South Africa (2005: 18).
- 158 National Department of Housing, *National Housing Programme: Housing Assistance in Emergency Circumstances* April 2004, Chapter 12 of the National Housing Code. Available at http://www.housing.gov.za/Content/legislation_policies/Emergency%20Housing%20Policy.pdf (accessed: 30 May 2008) (hereafter Emergency Housing Programme).
- 159 Adopted in 2004, Chapter 13 of the National Housing Code.
- 160 It states: “the Constitutional Court in the *Irene Grootboom* case, led Housing: MINMEC ... to authorise the development of a National Housing Programme to ... relieve the plight of people in emergency.” Emergency Housing Programme, 4 (footnote omitted).
- 161 Emergency Housing Programme para 12.2.1.
- 162 Marcus and Budlender (2008: 64).
- 163 School of Architecture and Planning, University of Witwatersrand *Research on Informal Settlement Policy and Intervention in the School of Architecture and Planning*. Available at <http://web.wits.ac.za/Academic/EBE/ArchPlan/Research/informalsettlements> (accessed: 17 June 2008).
- 164 Wickeri (2004: 6).
- 165 *Grootboom* case para 44.
- 166 Chenwi (2006). See also Chenwi (2007).
- 167 Marcus and Budlender (2008: 65).
- 168 2005 (8) BCLR 786 (CC) (*Modderklip* case).
- 169 *Ibid.* para 46.
- 170 *Ibid.* para 49.
- 171 *Ibid.* paras 62–65.
- 172 See Chenwi (2005).
- 173 “Govt: ‘Priority’ to move Modderklip community” *Mail & Guardian* 31 May 2005.
- 174 See Chenwi (2005: 4).
- 175 As above.
- 176 As above.
- 177 Act 19 of 1998.
- 178 See *Olivia* case para 34.
- 179 *TAC* case para 93.
- 180 *Ibid.* para 67.
- 181 *Ibid.* para 70.



- 182 *Ibid.* para 78.
- 183 2007 (1) BCLR 84 (D).
- 184 The Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment is available at <http://www.info.gov.za/otherdocs/2003/aidsoperationalplan.pdf> (accessed: 10 June 2008).
- 185 *Westville* case paras 32–33.
- 186 See De Vos (2003).
- 187 Also recorded as *EN and Others v Government of RSA and Others* Case No. 4576/06, unreported.
- 188 *Ibid.* para 42 of Nicholson’s judgment.
- 189 *Ibid.* para 32 of Nicholson’s judgment.
- 190 See *Affidavit: Applicants’ commentary on Respondents’ plan*. Available at http://alp.immedia.co.za/index.php?option=com_content&task=view&id=41&Itemid=8 (accessed: 19 September 2008).
- 191 See “76% rise in prisoners on ARVs” *24News.Com* 29 July 2008.
- 192 See eg *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (6) BCLR 571 (CC) (*Njongi* case). Among others, this case arose from the same facts as *Bushula and Others v Permanent Secretary, Department of Welfare Eastern Cape, and Another (Bushula case)*, *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another (Ngxuza case)*, and *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others*.
- 193 2005 (6) SA 229 (SE).
- 194 Liebenberg (2007: 70).
- 195 Section 27(1)(c) of the Constitution.
- 196 *Ngxuza* case at 6151.
- 197 Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Section 33(2) provides that everyone adversely affected by administrative action has the right to be given written reasons.
- 198 Act 59 of 1992, repealed in 2004 and replaced with Social Assistance Act 13 of 2004.
- 199 2000 (7) BCLR 728 (E) at 736.
- 200 *Ibid.* para 16.
- 201 *Ibid.* para 92.
- 202 Unreported, High Court of South Africa (Witwatersrand Local Division) Case No 06/13885. For a discussion of this case, see Khalfan and Sonkita (2008).



- 203 Act 3 of 2000.
- 204 Act 108 of 1997.
- 205 “Masondo takes on ‘water judge’” *Business Day* 15 May 2008.
- 206 See Coalition Against Water Privatisation *Attack on High Court judgement [sic] and Judge Tsoka is unwarranted, dangerous and betrays a complete ignorance of how democracy works* 16 May 2008. Available at http://www.anarkismo.net/newswire.php?story_id=8914 (accessed: 18 June 2008).
- 207 See P de Vos “Another mayor, another attack on the judiciary” Constitutionally Speaking blog: <http://constitutionallyspeaking.co.za/?p=545> (accessed: 18 June 2008).
- 208 S Liebenberg “South Africa: Crucial leaks in Mayor’s attack on water ruling” *Business Day* 20 May 2008.
- 209 Chenwi (2005: 6).
- 210 Attended in part by the author.
- 211 Act 20 of 1957.
- 212 *Nyathi* case para 63.
- 213 2004 (2) SA 611 (SCA).
- 214 *Ibid.* paras 15–16.
- 215 *Nyathi* case para 28.
- 216 *Ibid.* para 40.
- 217 *Ibid.* para 44.
- 218 *Ibid.* para 45.
- 219 *Ibid.* para 75.
- 220 *Ibid.* para 76.
- 221 *Ibid.* para 51.
- 222 S Liebenberg “South Africa: Crucial leaks in Mayor’s attack on water ruling” *Business Day* 20 May 2008.
- 223 Scott and Alston (2000: 224).
- 224 *Port Elizabeth* case para 42.
- 225 Ray (2008: 54).
- 226 Ray (2008: 26).
- 227 Ray (2008).
- 228 Ray (2008: 27).
- 229 See Ballard (2005: 80).
- 230 Ballard (2005: 83).
- 231 As above.
- 232 Ballard (2005: 88).
- 233 See Heywood (2005). For a similar American experience, see Siegel (2004).



234 Heywood (2005: 210).

235 Heywood (2005: 206). See also Mbali (2005: 213).

236 Ray (2008: 27).

237 Newman (2003: 201).