



Final Report

# Constitutional Justice Project

Democracy, Governance, and Service Delivery

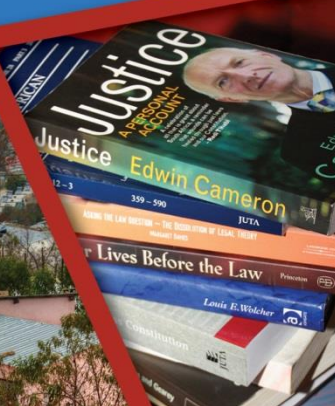
Human Sciences Research Council

and

Nelson R Mandela School of Law

University of Fort Hare

July 2015





# CONSTITUTIONAL JUSTICE PROJECT

Assessment of the Impact of Decisions of the Constitutional Court and  
Supreme Court of Appeal on the Transformation of Society

## Final Report

Prepared for

**The Department of Justice and Constitutional Development**

by the

**Democracy, Governance and Service Delivery Research Programme of the  
Human Sciences Research Council**

in partnership with the

**Nelson R Mandela School of Law of the  
University of Fort Hare**

**November 2015**

**FOR CONSULTATION ONLY.**

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## List of abbreviations

ADR	Alternative Dispute Resolution
AIDS	Acquired Immune Deficiency Syndrome
AMU	Arab Maghreb Union
ANC	African National Congress
ARV	Anti-retroviral
AU	African Unions
CALS	Centre for Applied Legal Studies, University of Witwatersrand
CC	Constitutional Court of South Africa
CJ	Chief Justice
CJRP	Civil Justice Reform Programme
DA	Democratic Alliance
DGSD	Democracy, Governance and Service Delivery
DOH	Department of Health
DOJ&CD	Department of Justice and Constitutional Development
EAC	East African Community
ECA	Environment Conservation Act
ESC	Economic, Social and Cultural Rights
ESCR	United Nations Economic, Social and Cultural Rights Committee
ESTA	Extension of Security of Tenure Act 62 of 1997
EU	European Union
FHR	Foundation for Human Rights
GM	Genetically Modified
HIV	Human Immunodeficiency Virus
HOI	Human Opportunity Index
HSRC	Human Sciences Research Council
HSCT	Hematopoietic stem cell transplantation
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGR	Inter-governmental relationships
ILO	Constitution of the International Labour Organisation
KI	Key informants
LAB	Legal Aid Board
LASA	Law Society of South Africa
MEC	Member of Executive Council
M&E	Monitoring & Evaluation
MPRA	Mineral and Petroleum Resources Development Act 28 of 2002
NDP	National Development Plan
NGO	Non-governmental Organisation
NHI	National Health Insurance
PIL	Public Interest Litigation

PMTCT	Prevention of Mother-to-Child Transmission
REC	Research Ethics Committee
SA	South Africa
SAFLII	Southern African Legal Information Institute
SAHRC	South African Human Rights Commission
SAJHR	South African Journal on Human Rights
SALRC	South African Law Reform Commission
SASA	South African Schools Act
SASAS	South African Social Attitudes Survey
SCA	Supreme Court of Appeal, South Africa
SER	Socio-economic Rights
SERI	Socio-economic Rights Institute of South Africa
SGBs	School Governing Bodies
SPII	Studies in Poverty and Inequality Institute
STF	Supremo Tribunal Federal
TAC	Treatment Action Campaign
TB	Tuberculosis
TOR	Terms of Reference
UDHR	Universal Declaration of Human Rights
UFH	University of Fort Hare
UK	United Kingdom
UN	United Nations
UNISA	University of South Africa
US	United States

## Executive Summary

### Introduction

The Human Sciences Research Council (HSRC), together with its partner the University of Fort Hare (UFH), were appointed by the Department of Justice and Constitutional Development (DoJ&CD) to assess the impact of the decisions of the Constitutional Court (CC) and the Supreme Court of Appeal (SCA) on the transformation of society. Subsequently called the **Constitutional Justice Project**, the research focused on the lived experiences of all South Africans, particularly in respect of the adjudication and implementation of socio-economic rights within the context of a capable and developmental state (NDP Vision 2030).

The Constitution of the Republic of South Africa, 1996 provides both the framework and foundation for the transformation of law, state and society within an African and global context. Government has initiated the transformation of the justice system, including the establishment of the Office of the Chief Justice, to further enhance the independence of the Judiciary and give further effect to the separation of powers doctrine in the Constitution.

In this project an in-depth legal analysis of the jurisprudence of the apex courts was complemented with a strong empirical component that sought to investigate the broader impact of these court decisions on South African society, as well as the extent to which South Africa's highest courts are accessible. The research was informed by the following principles:

- a) Supremacy of the Constitution and the rule of law;
- b) Human dignity and equality;
- c) Judicial independence;
- d) Separation of powers as embodied in the Constitution;
- e) Access to justice for all; and
- f) Transparency and openness.

In addition, the research at all stages reflects the mission, vision and values of the HSRC and the UFH and conforms to the ethical standards of both institutions, which are based on universally applicable principles of research integrity.

In the fieldwork phase of the project, researchers canvassed the perspectives of a broad spectrum of stakeholders and social actors relevant to this assessment. A case study methodology was adopted to track the impact of selected landmark cases at all spheres of government and within affected communities, which involved interaction (key informant interviews and focus group interviews) with various role players from academics to litigants

to members of the Bench, and public officials responsible for the implementation of court orders.

The table below illustrates the category and number of interviews conducted:

<b>Category</b>	<b>Nr of Informants interviewed</b>
Advocates	10
Attorneys	4
Bench	12
Legal academics and social scientists	9
Public Officials	24
Indirect beneficiaries and community leaders (focus groups and individuals)	42
Applicants (focus groups and individuals)	26
NGOs and Civil society organisations	13
<b>Total number of interviews</b>	<b>140</b>

## **Themes**

Based on the department’s 2013 terms of reference, the study was structured into four “themes”:

**Theme 1** consists of a comprehensive legal analysis of the developing socio-economic jurisprudence in landmark cases of the CC and SCA.

Included in this theme was the collection, collation and analysis of data on the decisions of the CC from 2009 to 2013. This was done in order to inform the rest of the research and update the statistics published in the *South African Journal of Human Rights* from 2006 to 2008.

**Theme 2** consists of an analysis and investigation into the implementation of court decisions, by tracing their impact on the work of government departments, across all spheres, including changes to policy, legislation, budgets and institutional practices. This research assessed the success or challenges of implementation of court decisions, particularly focused on evaluating the extent to which court judgments in favour of the poor are implemented effectively, as well as identifying blockages and proposing ways to address challenges. In order to provide balance to the study, the researchers also interviewed community members and community leaders who had been directly or indirectly involved in litigation related to the cases chosen for more in-depth empirical investigation.

**Theme 3** comprises desk-top studies (including an international and regional comparative study) on direct access to the Constitutional Court, especially by indigent persons. The

research focused specifically on whether the rules and the practices with regard to direct access to the CC promote access to justice in socio-economic rights cases, or create obstacles in accessing justice.

**Theme 4** focused on access to justice in more general terms. Qualitative interviews were conducted with litigants of landmark socio-economic rights cases and other key role-players, including members of NGOs and Public Interest Litigation (PIL) firms. The aim was to ascertain experiences with regard to the socio-economic rights cases, including the cost and time taken to finalise these cases.

Lastly, public perceptions of litigation and provision of services were tested at a national level through the 2014 South African Social Attitudes Survey (SASAS) of the HSRC. SASAS is a nationally representative cross-sectional survey that has been conducted annually since 2003.

This is the Final Report submitted to the DoJ&CD by the Project Team for the **Constitutional Justice Project (CJP)**. This report builds on the work reflected in:

- the Concept Report submitted to the department in March 2014;
- the Mid-Term Report, submitted on 31 October 2014; and
- the Fieldwork Report submitted on 31 March 2015.

### **Quality assurance**

The findings of the desk-top and quantitative research across the themes were critically reviewed in two ways. Firstly, through three colloquia attended by experts from various disciplines and practices who were invited to provide feedback and to participate in public debate on the research methodologies and preliminary findings. The colloquia were attended by approximately 45 to 50 stakeholder representatives per colloquium, including retired judges, lawyers, members of the South African Human Rights Commission (SAHRC) and Foundation for Human Rights (FHR), academics and representatives from public interest litigation firms. This was part of “democratising” the project and addressing concerns around the integrity of the research. A number of other outputs, in the form of publications, have emanated from this research project, which has yielded a rich collection of data that will also be independently assessed through a peer review process. Secondly, a five member Think Tank of experts appointed (on a voluntary basis) by the project steering committee provided valuable inputs throughout the research process.

### **Observations and findings**

It should be noted that the research conducted for the Constitutional Justice Project (CJP) was far-reaching in scope, and the Final Report should thus not be read or understood in



isolation from the other reports. However, some key observations and findings that have emerged are highlighted in this final report. The detailed findings are discussed in Section 5 of this report.

**a. General observations**

- The research generally highlighted the complexity of the relationship between justiciable socio-economic rights, the functions and roles of the courts and the responsibilities for implementing court orders.
- The dynamics and complexities of the relationships are underpinned and informed by the imperative of the “transformation of society”, the central concept of the research project.
- The project research is premised upon the fact that the transformation imperative is located in the Constitution, which envisages Improv[ing] the quality of life of all citizens and free[ing] the potential of each person”.

**b. Jurisprudence and the Role of the Courts (Theme 1)**

• ***The meaning of transformation***

- Desk-top and empirical research conducted for this project has determined that the courts have, on balance, been transformative within the context of constitutional imperatives.
- It should however be noted that “transformation” tends to mean different things to different people.
- There is broad agreement that transformation in its many forms does, and should, take place incrementally, and the courts have been wise in their approach to transformation (progressive realisation of socio-economic rights) within our particular local, historical and constitutional context.
- There is also broad agreement that the courts should play a role in constitutional transformation; but courts cannot implement their own judgments – they rely on the legislature and the executive to comply with their (mostly transformational) orders.
- However, assessing transformation through the adjudication of socio-economic rights (SERs) represents a narrow, yet important, understanding of transformation

as social justice. As rights are interdependent, it is necessary to also consider the ways in which the adjudication of civil, political and cultural rights has contributed to transformation.

- ***Political will and implementation determine the impact of transformative judgments***

- As the courts cannot implement their own orders, lack of transformation cannot be solely “blamed” on the courts.
- Generally, as the executive is responsible for the development, choice and implementation of policy, it bears primary responsibility for the realisation of socio-economic rights, and hence social transformation.
- This does not mean, however, that the court has no role to play at all as they are widely understood to be “guardians” of the supreme Constitution. Courts can thus use innovative remedies to encourage compliance with their orders.

- ***Difference in approach between the CC and the SCA***

- It was observed, especially by legal practitioners, that the CC has been more focused on social justice than the SCA. In other words, the CC is perceived to be more sensitive to societal needs.
- The SCA has tended to focus on resolving rights claims through the common law, but this has been changing over time as it hears more SER cases.
- The trends in the High Courts were not assessed owing to the limitations of this study (DOJ&CD TORs 2013).

- ***Separation of Powers***

- Understandings vary concerning how the principle of separation of powers should be interpreted.
- Most respondents were sensitive to the democratic imperatives of the separation of powers doctrine and understood that the courts are not well-placed to make policy, or even prescribe to government as to how it should make its policy choices. Judges acknowledge that they do not have the skills to determine state budgets, and so on.

- However, the right of judicial review entrenched in the Bill of Rights, and the justiciability of socio-economic rights, does place the issue of separation of powers within a specific local context. In other words, courts do have the power to judge the *reasonableness* of government policy and the validity of legislation, and should do so without fear or favour.
  - Given the realities of service delivery failures, the courts could become more interventionist by, for instance, adopting innovative remedies such as structural interdicts and ‘meaningful engagement’, which enable judicial supervision to ensure that government departments implement and deliver on court orders.
  - It was noted that the courts should take into account the difficulties faced by a post-*apartheid* government with resource constraints. However, many believe that it is time to become more demanding and less cautious, as we are no longer a “young” democracy.
  - Respect for the courts is necessary to entrench respect for the rule of law. Non-compliance imperils the rule of law as a cornerstone of constitutional democracy. Lack of compliance could lead to contempt of court charges being laid.
- ***“Constitutional dialogue”***
    - An emerging argument supports a more flexible interpretation of the concept of separation of powers that allows for a respectful, public “Constitutional Dialogue” where all the arms of government, civil society and the private sector act in some co-ordinated way to share ideas about how to create a better life for all, as promised in the Constitution.
    - One particular focus for necessary dialogue between the courts and the executive concerns the effective implementation of court orders. The South African Human Rights Commission may be an acceptable neutral facilitator in this regard.
- ***Minimum core content of socio-economic rights***
    - The courts have a constitutional duty to oversee, encourage and ensure that the state takes steps to ensure progress towards the realisation of SERs.
    - However, most commentators and respondents agree that it is not for the courts to determine the minimum core content of SERs, as this would infringe on the policy-making powers of the executive. The courts are also institutionally ill-suited

to make complex polycentric decisions best left to the executive and the legislature.

- However, in order to measure the progressive realisation of rights, a clear determination of what is “sufficient provision” for the well-being and dignity of South Africans living in extreme poverty, is necessary
- The “minimum core” is not considered by most to be an adequately flexible approach that is readily adaptable to realities that fluctuate in a non-linear manner. Most respondents and commentators feel that the “reasonableness” measure is a more appropriate test that prevents the courts from becoming too involved in policy-making.
- However, it should be noted that the Constitution does not preclude the adoption of a minimum core approach, and the CC has not closed the door completely to the development and adoption of a minimum core jurisprudence.
- It was agreed that the courts should play a role in extreme and urgent cases, and when or if government persists in failing to act “reasonably”.
- ***The right to food***
  - Questions arose as to why some SERs are litigated more than others, and why, for instance, the right to food has not been litigated at all, despite the fact that research shows that one in four South Africans go to bed hungry every night.
  - Even though the subject-matter of landmark cases may have been limited to a few of the SERs enshrined in the Constitution, especially housing and evictions, the general principles and approaches set out in these precedents bind the lower courts and apply to other SERs.
  - Because of separation of powers considerations, the CC wants to see that concerted efforts have been made to exhaust available opportunities to engage the responsible authorities to effect the realisation of rights.
  - SER litigation is complex and requires careful planning, solid, convincing research, patient engagement with the responsible authorities, and careful timing. Effective litigation of SERs is also usually dependent on the existence of an organisation that focuses on the right(s) in question, for instance the Treatment Action Campaign (TAC).

- SERs are often litigated in the lower courts, but as cases often do not reach the apex courts, we may be less aware of them.
- The particular formulation of the “negative” right not to be evicted from one’s home has caused it to be the most extensively litigated SER.
- ***International and comparative jurisprudence and norms***
  - The CC in particular has, and indeed does, consider international and comparative jurisprudence and norms in its interpretative work, as per the requirements of the Constitution.
  - However, some argue that South African jurisprudence has passed the developmental stage and is now far more advanced and sophisticated; hence, there should be less reliance on international and comparative jurisprudence and norms.
  - Other respondents and commentators are of the view that regard to comparative constitutional experiences can be helpful in illuminating the possibilities and pitfalls of various forms of constitutional design and interpretative strategies, although there should not be an uncritical transplantation of constitutional models and institutions from one context to another.
  - Although the courts must consider international law when interpreting the Bill of Rights, the courts are not obliged to *follow* it unless it has been domesticated in legislation. Ultimately, the standard is the South African Constitution and its particular constitutional context.
  - The CC has more readily considered international and comparative law than has the SCA. This has been attributed to the excellent research resources available to the CC. However, these differences in approach are declining as the SCA is exposed to more SER litigation.
  - There is general agreement that it is imperative that our courts consider African norms and jurisprudence, but they are not as readily accessible to the courts, and they are rarely (if ever) presented by Counsel. This may be addressed by the South African Legal Information Institute (SAFLII), which makes African jurisprudence more accessible to South Africans.

- Jurisprudentially, there is a tendency by South African courts to borrow profusely from Canadian law, very little from American and German law, and hardly anything from comparative jurisdictions in Africa.
- It should be noted that the development of a more robust approach to SERs in other countries of the South may not be suitable for the South African context. The activism of courts in India, Brazil and Colombia may lead to an undue focus on individuals who have the “voice” to claim their rights at the expense of others.
- Courts in South Africa have more recently been learning and referring to best practices from beyond borders, particularly as regards remedies geared towards ensuring compliance with court orders. Specific examples include contempt of court orders, the use of structural interdicts and reporting requirements.
- As a way of ensuring compliance with court decisions, court orders can be framed in such a way that a monitoring agency is identified or put in place to ensure the implementation of such orders (some suggest that the SAHRC could play this monitoring role in South Africa).

### **c. Implementation and impact (Theme 2)**

- Implementation is usually a more complex process than that envisaged by a particular adjudicating court. Judgments, by definition, are narrowly defined and issue-driven, while implementation may be subject to a number of variables, dependencies and sequencing, which may not have been apparent at the time of the court decision.
- In some cases, especially *Grootboom*<sup>1</sup> and *TAC*<sup>2</sup>, the impact of the outcome has been widespread as significant strides have been made in ensuring services to millions of South Africans with regard to housing and receiving anti-retroviral treatment.
- In order to be effective and sustainable, the implementation of court orders by state departments must include the full and meaningful engagement of citizens and residents before rolling out any remedial programmes. Failure to engage may result in dissatisfaction.

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<sup>1</sup> *Govt of the RSA & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC).

<sup>2</sup> *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* (CCT 8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC).

- In cases where the rights of children are concerned, the priority should be on acknowledging the best interests of the children, rather than “turf wars” on authority over mandates and rights. It should also be noted that childrens’ rights are not conditional, but must be realised immediately.
- Cases such as *Nokotyana*<sup>3</sup> reveal the importance of ensuring that competing interests do not lead to further alienation of the communities that desperately require transformation in their lives. The community’s (and individual’s) rights to a healthy and safe environment, and dignity, need to be respected in the implementation phase of court judgments.
- It also emerged that accountability, oversight and monitoring mechanisms have to be strengthened—or developed where they are not in place—to ensure that there is progressive realisation of the socio-economic rights and efficient and expedient implementation. This can be done within state departments or more centrally.
- There is a need for civic education that empowers communities to understand how state machinery functions.
- State officials should avoid complacency because it leads to the frustration of communities who have been waiting for service delivery for many years prior to – or even after – a given judgment.
- There is a need to maximise efficiencies in the provision of services with optimal utilisation of resources, be it financial, material or human capital.
- Intergovernmental relation (IGR) failures emerge in the implementation of the SER court decisions, due to the different (and at times overlapping) competencies of national, provincial and local spheres of government with regard to water, electricity, land rezoning, mining and mineral licencing, and so on.
- An interesting and relatively unique development is evidenced in the formation of what is referred to as *The Human Settlements Legal Forum*, comprising Heads of Legal Services in the National Department of Human Settlements, provincial Departments of Human Settlements and Human Settlements Institutions. The primary objective of the Legal Forum is to create a platform for sharing and support on legal matters affecting the human settlements sector. The research team could find no evidence of similar fora in other government departments.

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<sup>3</sup> *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* (CCT 31/09) [2009] ZACC 33.

- Implementation of court decisions may be delayed because of fear of transgressing the PFMA/MFMA financial requirements, especially if there is no flexibility built into the system. On the other hand, there are case studies, such as *Nokotyana*, where money was budgeted for implementation, but was not spent.

**d. Direct and indirect access (Theme 3)**

- Despite some strong academic support for direct access to the CC, most respondents had reservations about the benefits of direct access as a solution to a multi-faceted problem associated with access to justice challenges generally.
- Possible cost and time savings to clients were outweighed by most lawyers' and all judges' perceptions concerning the strategic jurisprudential value of indirect access.
- The main concerns raised are that direct access may over-burden the CC and it is not ideal for a court to be a tribunal of both first and last instance. In addition, the CC benefits from the narrowing of issues achieved in other courts.
- Most respondents, especially Civil Society Organisations (CSOs) and public interest litigators, believe strongly that generalised improvements in access to justice are of greater priority than direct access to the CC, to allow for cheaper and faster results for those who live in desperate circumstances.
- Most respondents agree that direct access to the CC is valuable for exceptional and urgent matters, and where the decision will have broad relevance and application (e.g. may affect national policies).
- Most respondents agree that greater flexibility in structural aspects of the CC and the more effective implementation of judgments, are preferable to a relaxation of direct access criteria.
- There have been suggestions that effective access to justice in SER matters can be enhanced by strengthening High Court benches to include two or three judges who are familiar with SER litigation.
- The need to broadly transform the judiciary (and the legal profession) suggests that it is important to encourage and require judges in the High Courts and the SCA to consider constitutional claims. It is necessary in order to ensure that the Constitution "lives" in every courtroom.



- Most respondents are of the view that it is increasingly reasonable to expect to achieve just outcomes in the High Courts, including the realisation of SERs, especially in urgent matters.
- International comparative experiences of broadened direct access (for example, in Brazil, India and Germany) indicate that significantly larger portions of apex judges' time is spent in sifting out the overwhelmingly higher percentage of cases that will not be heard – which is not likely to enhance perceptions concerning access to justice.

**e. Access to justice: costs, duration and process (Theme 4)**

- The empirical investigation for this study has revealed a particularly complex South African legal subjectivity in which citizens and communities hold a significant faith in the law as an independent “bulwark” against the abuse of power, but may also resort to illegal means to reach a desired end.
- The barriers to accessing justice are not only about issues internal to the court system but are also related to a prior process in which citizens become aware of their rights.
- Many litigants in SER cases gained a significant sense of empowerment through the process of litigation, particularly at CC level. Therefore, despite the fact that the outcomes of many cases were perceived to be ambiguous, litigants interviewed appeared to remain convinced of the value of the *process* of litigation.
- The response of litigants in terms of the outcomes of their cases was more unequivocal than their perspectives on the legal process itself, with many feeling that they received justice in the courts, but not outside the courtroom.
- The investigation found that there was general consensus that costs are a critical issue in SER litigation despite the fact that most of this litigation is funded by PIL firms. Litigants faced several hardships in terms of covering transport and other ancillary or indirect costs.
- The question of access to legal representation was also canvassed. However, SASAS respondents appear to feel that funding for legal services (59%) is a far more important issue than the fact that it would “be hard to get a lawyer to help” them (14,2%).

- There was widespread support expressed for the idea of state funded legal representation for SER litigation through extending the mandate of LASA. However, concerns were raised about the quality of representation and the independence of a state funded body conducting SER litigation in which the state is often a defendant.
- While duration of cases has been identified as a crucial issue, some stakeholders contested whether duration actually does impact on litigants' decisions to participate in the judicial process. South Africans canvassed through the SASAS survey also indicated that duration was one of their lesser concerns in terms of access to justice.
- There was widespread in principle agreement among a variety of stakeholders about the value of *pro bono* legal representation as a means to improve access to justice in general and for SER litigation in particular. However, concerns were raised about both the current organisation of *pro bono* work as well as the quality of representation in complex SER cases.
- The critical role of civil society in making SER litigation possible since 1994 was emphasised by most respondents and commentators. Civil society organisations have played a critical role in providing legal representation and assisting to mobilise communities around SERs.
- Alternative dispute resolution (ADR) was explored as a means to potentially avoid costly litigation in SER cases. Overall, interviewees felt that any form of mediation or dispute resolution should be court supervised rather than independently arbitrated, otherwise precedent would not be set in a young democracy where the law is still being developed.
- On the issues of enhancing access to justice by simplifying rules and procedures, most stakeholders believe that the current rules, particularly in the SCA and lower courts are "archaic" and from a "bygone era" and therefore need to be significantly reformed. The CC rules appear, however, to be less subject to criticism. Its provision for the standing of *amici curiae* was mentioned as an important innovation in terms of rules.
- Different suggestions were made as to how case management may be most effectively implemented by the OCJ.

#### f. The South African Social Attitudes Survey 2014<sup>4</sup>

- The SASAS survey provided a quantitative and generalised national backdrop to the case-based findings from the desk-top research and fieldwork (key informant interviews and focus groups).
- Only 16% of the survey respondents had been involved in a court action since 1994. Of the 16% over 40 % was in a Magistrate Court, and only 17% in the apex courts. Contact with the CC and the SCA was most prevalent in Gauteng, Northern Cape and KwaZulu-Natal.
- Sixty-six percent of the respondents who had *contact* with a court, were either very satisfied or satisfied with the court service. This opinion was almost equal for all provinces.
- The most important reasons that might make it difficult for someone to access justice from the courts in South Africa in times of need included: lack of funds to pay expenses (59%), lack of knowledge about laws and legal rights (26%) and lack of general education (19%).
- Over 76% of respondents favoured or strongly favoured the state using tax funding for legal services when needed. These percentages remained more or less the same when the question was linked to SERs.
- Taking into account the differences between urban and rural communities, it seems that the latter find it most difficult to access justice from the courts. However, the survey indicated that over 40% of those who had had contact with the courts, had used the Magistrates Court, with only about 7% using the community courts.
- Satisfaction with the way the state delivers services was quite even in terms of percentages: Almost 40% of the respondents were satisfied or very satisfied, while 39% were dissatisfied or very dissatisfied. A remarkable 21% was unsure. Dissatisfaction was highest in rural communities (60%).
- However, there was a more negative attitude about the *speed* of delivery of services: 54% found delivery slow or very slow, while only 19% perceived it to be fast or very fast.

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<sup>4</sup> SASAS 2014 Survey, Data Analysis: Constitutional Justice Project. HSRC. Unpublished Report.

- Success of implementation of court judgments drew slightly different opinions: almost 33% viewed it as successful, almost 27% viewed it as unsuccessful, while almost one-third (31%) were unsure.
- While lack of capacity of the state to provide services is often indicated as a reason for non-delivery, the survey respondents had a more positive view of state capacity: 36% believed or strongly believed that the state had capacity to deliver, almost 31% were unsure, while 23% did not believe the state had the necessary capacity for service delivery.

### **The way forward**

Based on a number of stakeholder inputs from Key Informants, focus group participants, colloquia attendees and the Parliamentary Portfolio Committee on Justice, this study could be extended to include the following:

- High Court cases.
- Other human rights, such as language and culture, which influence issues around access to (social) justice and the courts.
- Alternative dispute resolution mechanisms such as expanding the CC to regional or provincial branches, or adjudication on SERS in lower courts.



## 1 BACKGROUND AND CONTEXT OF THE PROJECT

*“The challenge for us as we near the end of our second decade of democracy is to consolidate the advances we have made in such a way that we begin to make a difference in the lives of all South Africans. This should be upper most in our minds as we forge ahead in consolidating our constitutional democracy” (Preface by Minister Radebe, **Discussion Document 2012 at III**).*

In 2012 the DOJ&CD published a Discussion Document entitled *“The transformation of the judicial system and the role of the judiciary in the developmental South African state.”*<sup>5</sup> This document laid the groundwork for the current project. The first terms of reference (TORs) were published in 2012, and the amended TORs were published in 2013.

In October 2013 the DOJ&CD assigned the **Constitutional Justice Project** to the Democracy, Governance and Service Delivery (DGSD) Research Programme of the Human Sciences Research Council (HSRC) in partnership with the Nelson R Mandela School of Law of the University of Fort Hare (UFH). The aim of the project was to assess the impact of decisions of the two highest courts—the Constitutional Court (CC) and the Supreme Court of Appeal (SCA)—on the transformation of society, with specific reference to the lived experiences of all who reside in South Africa. The project focused primarily on the adjudication and implementation of socio-economic rights as defined in the Constitution within the context of a capable and developmental State (NDP Vision 2030). Pertinent issues relating to access to justice, such as costs and duration, were also addressed.

The project contributes to the outcomes of National Development Plan in the following ways:

1. **Reversing inequality and poverty** through socio-economic rights jurisprudence;
2. **Building a capable state** by identifying the capacity gaps needed to implement decisions of the courts for the advancement of the rule of law;
3. **Strengthening judicial governance** by identifying aspects of governance that may require reform;

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<sup>5</sup> [Online] Available from : <http://www.justice.gov.za/docs/other-docs/20120228-transf-jud.pdf> [Accessed: 20/01/2014.

4. **Transforming society and unifying the country** by using jurisprudence to complement legislation and policy in reducing poverty and inequality in line with constitutional imperatives.

From the outset, the research team has received different types of responses and reactions:

- Strong support for the need for such a project, particularly after the Terms of Reference were amended in 2013 to address criticism from the official Opposition in Parliament and the media.
- Moderate concern about the (political) origin and objectives of the project, particularly from civil society and academics; the colloquium re-assured most of these critics.
- Stronger objections, particularly as to the need for such research and the possibility of interfering with the independence of the judiciary. Such concerns were raised by retired Chief Justice Ngcobo and initially, Justice Kriegler. The latter has been interviewed, participated in the colloquia and feels that the research in its current form is valuable.
- The Office of the Chief Justice has failed to respond to numerous requests to engage in this project.

Based on the 2013 TORs, the project was structured according to four themes:

*Theme 1:* An analysis of the jurisprudence of socio-economic rights cases, eg. education, social assistance, health care, housing, electricity, water, sanitation and the environment (land and labour were excluded as they are mostly dealt with by separate courts);

*Theme 2:* The extent to which the socio-economic rights decisions of the CC and SCA were implemented by the executive;

*Theme 3:* Direct access to the Constitutional Court; and

*Theme 4:* The experience of users of the justice system in these cases.

The themes and sub-themes are described in more detail in the Concept Report.

Desk studies on forty-three landmark case have been conducted. Full details appear in Annexure C of the *Concept Report*. The choice of landmark cases was based on:

- The full range of socio-economic rights listed in Chapter 2 of the Constitution;

- The ground-breaking nature of the case;
- Whether the case has been heard in both the CC and SCA;
- The implications for women and children;
- A mix of different litigants as well as government respondents; and
- Media commentary and public perceptions

The selection criteria and rationale for the cases to undergo further empirical analysis was based on:

- Contribution or non-contribution of the case to transformation;
- SER categories;
- Impact on jurisprudence and lower courts;
- Extent of implementation
- Change in policy/legislation;
- Impact on lives of litigants (individuals, groups, communities, classes); and
- Access (direct, indirect) to CC.

In addition to the desk studies and interviews of key informants and focus groups, public perceptions of the justice system and the implementation of decisions were surveyed through the South African Social Attitudes Survey 2014. The questions and the raw data appear as Annexure F. The resulting quantitative data has been integrated into the relevant sections in this report.

This *Final Report* concludes the research project, and focuses on key issues identified in the desk-top and empirical research, such as separation of powers, minimum core content of rights and constitutional dialogue; monitoring and evaluation of implementation; direct access to the CC; and court procedures, duration and indirect costs of litigation. Throughout this report cross-references are made to earlier reports in which relevant issues have been discussed in more detail. This applies particularly to the conceptual analyses in the *Concept Report*, the in-depth analyses of SERs in the Annexures in the *Mid-Term Report* and the jurisprudential and implementation analyses in the *Fieldwork Report*.

The report has seven Annexures, which provide detailed background information:

- *Annexure A*: Research references



- *Annexure B*: Report on the first colloquium held on 6 February 2014, during which the draft Concept Report was discussed.
- *Annexure C*: Report on the second colloquium held on 26 November 2014, during which the Mid-Term Report was discussed.
- *Annexure D*: Report on the third colloquium held on 4 June 2015, which addressed the outcomes in the Fieldwork Report.
- *Annexure E*: The tabulation report for the SASAS Survey modules, including the questions.
- *Annexure F*: “Intestate Succession”, Chapter 9 of Chuma Himonga and Elena Moore, *Reform of Customary Marriage, Divorce and Succession in South Africa*, which will be published in 2015. The chapter deals in much detail with socio-economic rights of traditional women, and includes an analysis of the *Bhe* case, which was one of the landmark cases in the Constitutional Justice Project. Unfortunately, despite numerous efforts, the research team could not make contact with Ms Bhe, members of her family or her community. It is for this reason that the chapter has been annexed to the report. Prof Himonga is a member of the CJP Think Tank and we appreciate her assistance SASAS Survey results.
- *Annexure G*: DoJ&CD landmark case data and case summaries. This data can be referred to when mention is made of particular landmark cases in this report.

## 2. METHODOLOGY AND PROJECT TRAJECTORY

The research provided for a unique methodology combining high level legal scholarship and in-depth legal analysis with evidence-based empirical research, both qualitative and quantitative. An international and comparative focus enabled the team to benchmark South Africa’s position in relation to the global community in areas such as minimum core and direct access to the CC. The research canvassed the perspectives of a wide range of stakeholders and social actors relevant to this investigation. A case study methodology tracked the impact of landmark cases at all levels of government and society. The research thus involved interaction with a broad spectrum of role players from court officials to litigants to former and current members of the Bench. A full analysis of the desktop and empirical aspects of the research appears in the *Mid-Term Report* and the *Fieldwork Report*. Copies of these reports as well as the Concept Report are available upon request.

The analysis in this study consisted of a number of **desk-top studies**, including:

- Constitutional jurisprudence through a critical analysis of landmark judgments of the CC and SCA;
- An interpretation of the selected landmark CC cases and SCA and how the court decisions have impacted on the lived experiences of South Africans; the study was complemented by **fieldwork** including:
  - (a) interviews with several erstwhile judges of the Constitutional Court and other legal practitioners and experts; and
  - (b) a collation of a range of data on indicators of progress towards the broad realisation of socio-economic rights in South Africa.
- A comparative desk-top analysis of Columbian, Kenyan, Indian and Brazilian jurisprudence related to the protection and enforcement of socio-economic rights, with a special focus on minimum core content of SERs;
- Desk-top study of documentation of selected cases in the media;
- An empirical investigation on the way the decisions in CC and SCA cases “cascade” down through all spheres of government, including concrete implementation on the ground as experienced by litigants and indirect beneficiaries (community leaders and members of communities affected by the court process and outcome);
- A desk-top study on jurisprudence related to access, and particularly direct access to the CC. The pros and cons of direct access were analysed, as well as the implications of adopting a “pro-poor” (or anti-poverty) jurisprudence, focussing on issues related to access to justice by indigent people;
- A comparative desk-top study on principles and practice relating to direct access to the CC as reflected in foreign jurisdictions such as India and Brazil;
- Information on costs, processes and duration of court cases from documentary evidence, and interviews with NGOs, legal practitioners, as well as from the applicants/ litigants themselves.

For landmark cases a number of key informants were selected. In addition, thirteen focus group interviews were held with applicants (litigants) and indirect beneficiaries. Table 2 summarises the initial categories and number of interviews planned, as well as the key informant categories involved, and the number of interviews actually conducted. All the interviews have been transcribed and translated (where applicable) and stored in accordance with the ethical requirements of the HSRC.

<b>Category</b>	<b>Total planned</b>	<b>Interviewed for</b>	<b>Informants interviewed</b>
Advocates	10	Theme 1	10
Attorneys	10	Theme 1	4
Bench	10	Theme 1	12
Legal academics and social scientists	10	Theme 1	9
Public Officials	20	Theme 2	24
Indirect beneficiaries and community leaders (focus groups and individuals)	30	Theme 2	42
Applicants (focus groups and individuals)	30	Theme 4	26
NGOs and Civil society organisations	10	Theme 4	13
<b>Total number of interviews</b>	<b>130</b>		<b>140</b>

*Table 1: Interviews planned and conducted*

The difference in numbers is as a result of accessibility of key informants, which was identified as a risk in the Project Proposal. However, the total amount of interviews exceeded the numbers identified initially.

Through the involvement of the Human and Social Development Research Programme of the HSRC the research analysis was expanded to include (see Annexure P of the Mid-Term Report):

- how the print media comments on, influences, challenges and stimulates public discussion on CC and SCA cases dealing with SERs, including service delivery themes related to housing, health care, water and sanitation; and
- how the print media comments on government delivery of SERs.

As mentioned, three colloquia were organised to present interim reports, solicit critique and suggestions, and to increase public awareness of the project. On average 45 to 50 members of the various stakeholder groups participated in the vibrant discussions at the colloquia. Keynote addresses were delivered at the second colloquium by former justices Thembele Skweyiya and Richard Goldstone, while Prof Jonathan Klaaren (one of the CJP Think Tank members) delivered the keynote address at the third colloquium. Former Justices Johann Kriegler and Albie Sachs delivered closing speeches at the last colloquium. The *Colloquium Reports* can be found in Annexures C to E of this report.

At the halfway point in the project, the research leadership and management team appointed a Think Tank consisting of retired CC Judge Zak Yacoob, Prof Steven Friedman (Director of the Centre for the Study of Democracy, University of Johannesburg and Rhodes University), Prof Chuma Himonga (UCT, NRF Chair in Customary Law), Prof Nhlanhla Maake (English Department, UNISA) and Prof Jonathan Klaaren (School of Law, Wits). The five

members of the Think Tank have a diverse range of skill-sets and are highly respected in their fields. In the absence of an anticipated Reference Group (to be appointed by the DOJ&CD in terms of the SLA), the role of the Think Tank was to provide critical input on key issues in the research, the research methodology and preliminary research findings.

During the course of the project, the research team identified two research projects with similar or related scopes and objectives. The Studies in Poverty and Inequality Institute (SPII) is working with the South African Human Rights Commission (SAHRC) to progressively develop a detailed mechanism for monitoring the realisation of SERs in South Africa. The Foundation for Human Rights (FHR) is working with the DOJ&CD to implement a multi-year research programme to analyse the nature and impact of SER jurisprudence by the CC, the SCA and the High Courts. Meetings have been held with the leaders of both projects in order to identify opportunities for collaboration and information-sharing, with a view to enhancing synergies between the three projects.

### 3. DELIVERABLES

The project was managed through three structures:

Structure	Members	Responsibilities and meetings
Project Management Team	Project Leaders, Theme Leaders and Project Manager	Day-to-day management; meeting as needed, at least once a month
Project Steering Committee	Project Leaders, Theme Leaders, senior researchers from the HSRC, UFH and two representatives from DOJ&CD	Meetings on 19 Nov 2013; 19 Apr 2014; 6 May 2014; 4 and 10 Sep 2014; 15 Oct 2014; all meetings were officially recorded
DOJ&CD project manager	DOJ&CD manager	Ongoing communications

*Table 2: Management structures*

Under the guidance of the management teams, the following deliverables have been produced by the research team:

- Concept Report
- Mid-Term Report
- Fieldwork Report
- Preliminary Report
- Three colloquium reports (Annexures B-D of this report)
- Monthly Reports
- Scholarly publications, including CC statistics published in the *South African Journal of Human Rights* (See section 9 for details).

In the next section of this report a summary of the main findings is presented, drawn from the desk-top studies, key informant interviews and focus groups. It should be noted from the outset that this is a “snap-shot” of a very large and at times unwieldy research mandate. For this reason the Final Report should be read in conjunction with the other reports and understood within the broader context of the Constitutional Justice Project.

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**Justice**  
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- Rudi Thabane  
Edwin Cameron

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## 4. THEME 1: JURISPRUDENCE

### 4.1 The meaning of “transformation”

#### a. Introduction

The “transformative nature” of a case can be understood in different ways: in terms of the nature of a decision or remedy in a case, or the fact that the case is brought by a particular person or class/ group of persons. The term “transformative” could mean, for instance, one or more of the following:

- *Transformation of substantive law.* For example, whether the decision is transformative in terms of the jurisprudential significance of the decision(s), or its innovation, or whether it introduces a new understanding of a principle or rule, or whether the decision entails the use or application of a new principle or constitutional value.
- *Transformation of procedural law.* For example, whether the case represents the first time a particular right has been litigated or upheld, whether ordinary rules of procedure have been interpreted more flexibly in the light of constitutional values and imperatives, or whether the decision represents the first time that a particular type of litigant has been recognised as having legal standing to litigate in an SER case.
- *Impact on lived experiences* (whether potential or actual) of the people to whom it applies, or wider social impact. There are several possible criteria to measure impact. For example, impact could be understood in terms of the decision’s ability to:
  - i. reduce inequality;
  - ii. enhance dignity; or
  - iii. meet, fully or partly, one or more basic need.
- *Impact on governance*, for example, a change in government’s legislative, policy or budgetary effort – and whether that has translated into tangible outcomes.

For purposes of this project, the team has agreed to focus on lived experiences, while acknowledging that other forms of transformation exist. Of course, several further important questions arise concerning how transformation might be usefully assessed. Included in the desktop research in theme 1 was an analysis of the transformation of common law and customary law, with a focus on how such transformation affects the lives

of the poor. Cases relevant to the lived experiences of women and children were also included as desk studies (see *Mid-term Report*).

The fight against poverty has major implications for national reconciliation, nation-building and social cohesion in South Africa. While recognising that all human rights are universal, indivisible and interdependent, socio-economic rights are particularly relevant in the South African context of widespread poverty and inequality. This is especially true for vulnerable and disadvantaged groups – primarily women and children – in society who are most affected by poverty and have limited access to resources, opportunities and services.

In examining the concepts of social justice and transformation, Liebenberg (2006, p. 5) argues that the concept of social justice should inform our interpretation of rights claims. Social justice has been described as a core foundational value of our constitutional democracy and it is argued that the other constitutional values of “human dignity, equality, freedom, accountability, responsiveness and openness” should be used side-by-side, or even interactively, to achieve the goal of social transformation (Stewart, 2010, p.487). In terms of this reasoning, progress towards the attainment of social justice can be used as a yardstick to measure the impact of the judgments of the CC and SCA, which of course depends upon implementation by all 3 spheres of government.

As part of the Constitution’s commitment to uplifting the quality of life of all people, it specifically protects a broad array of socio-economic rights. These rights include the rights of access to land (section 25), housing (section 26), healthcare, water, food, and social security (section 27), and education (section 29). In respect of all these rights – apart from the right to basic education, which is an unqualified right, along with the rights of children and prisoners to basic socio-economic goods and services – the State is obliged to take “reasonable legislative and other measures”, within its “available resources”, to “progressively realise” each entrenched socio-economic right.

#### **b. Transformative constitutionalism**

In furthering an agenda of social transformation, the court in *S v Makwanyane & Another* (1995)<sup>6</sup> held that the Constitution aspires to provide “a transition from these grossly unacceptable features of the past to a conspicuously contrasting ... future”. The court went further in *Du Plessis & Others v De Klerk & Another* (1996)<sup>7</sup> to state that the Constitution “is a document that seeks to transform the *status quo ante* into a new order”.

As a new South African jurisprudence of human rights emerges, progressive legal academics and practitioners have argued that the Constitution is “post-liberal” and

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<sup>6</sup> 1995 (6) BCLR 665 (CC) Para 262.

<sup>7</sup> 1996 (3) SA 850 (CC) Para 157.



“transformative” in nature (Klare, 1998, p.146). Transformative constitutionalism places an emphasis on attaining socio-economic justice and has been described as having a “pro-poor” (or anti-poverty) orientation that focuses on addressing inequalities within the post-*apartheid* context (Brand, 2009). The analysis below is premised upon the notion of “transformative constitutionalism” as first articulated by Klare in 1998, which entails:

“... a long term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.”(Klare, 1998, p.150).

Accordingly, it can be argued that when interpreting and applying the law, courts must keep in mind the transformation of the lives of all South Africans within the framework of human rights and other constitutional imperatives. As the Preamble of the Constitution proclaims, the aim is to assist in creating a better life for all:

“...by establishing a society based on democratic values, social justice and fundamental human rights, and improving the quality of life of all citizens in the Republic.”

The late Chief Justice Langa has stated that at the heart of this kind of transformative constitutionalism is the objective of creating a truly equal society and “to heal the wounds of the past and guide us to a better future” (Langa, 2006). Langa describes “transformation constitutionalism” as:

“... a social and an economic revolution. South Africa at present has to contend with unequal and insufficient access to housing, food, water, healthcare and electricity. As former Chief Justice Chaskalson wrote in *Soobramoney*<sup>8</sup>, ‘[f]or as long as these conditions continue to exist that aspiration [that is, of substantive equality] will have a hollow ring.’ The provision of services to all and the levelling of the economic playing fields that were so drastically skewed by the apartheid system must be absolutely central to any concept of transformative constitutionalism (Langa, 2006, p.3).”

In accordance with this approach, the establishment of an equal society and access to basic SERs are a necessary part of legal transformation in its broadest sense, and includes the ability of the judicial system to continuously transform itself and contribute in a positive way to the transformation of society. Langa also submits that transformation is an ongoing process that helps South Africans to strive for a different, a better life:

“... transformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of

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<sup>8</sup> *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 (12) BCLR 1696 (CC).

justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation is truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. (Langa, 2006, p.4)”

### **c. Transformation and justiciable socio-economic rights**

The CC clarified early on that, in South Africa, socio-economic rights are justiciable and the Court has an important role to play in interpreting and adjudicating socio-economic rights claims (see *Certification of the Constitution of the Republic of South Africa*<sup>9</sup>). While there have been a number of landmark CC and SCA) judgments confirming the State's obligation to take reasonable measures to ensure the progressive realisation of SERs within the realities of resource constraints, a range of SERs, are in reality, still not accessible to many vulnerable and marginalised communities. It has been argued that despite finding in favour of (poor) applicants in almost all of its SER cases, the apex courts have pursued a constrained approach to the adjudication of socio-economic rights claims (Wilson and Dugard 2011). For many, the constitutional promise of a better life for all remains unrealised, leading to frustrations and, in some cases, service delivery protests, some of which are destructive and violent in nature.

On the other hand, Justice Cameron has suggested a more positive assessment (Cameron, 2014, p.270):

“The courts’ decisions on socio-economic rights have undoubtedly shown how rights-directed litigation can improve the conditions of many socially vulnerable people, in ways that would have not been possible without these rights. The decisions also show how rights claims can be practically translated into material improvements to people’s lives”.

The desktop research and subsequent empirical fieldwork research indicated that the answer seems to lie between the two polarised views of failure and success.

### **d. A brief discussion of jurisprudential trends and debates<sup>10</sup>**

In a comprehensive “law and politics” analysis of the jurisprudential trends of the “Chaskalson court” (first court appointed by President Nelson Mandela), Roux (2013) illustrates, through an analysis of 3 landmark SER cases (*Soobramoney*<sup>11</sup>, *Grootboom*<sup>12</sup> and *TAC*<sup>13</sup>), that the CC exercised caution in these cases –# correctly in his view. As –a result of the political context within which the Chaskalson court operated – as a new court that did

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<sup>9</sup> 1996 (4) SA 744 (CC).

<sup>10</sup> Constitutional Justice Project: Concept Report p.25ff.

<sup>11</sup> See fn 8, *supra*.

<sup>12</sup> *Govt of the RSA & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC).

<sup>13</sup> *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* (CCT 8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC).

not want to unduly offend or alienate the executive – a more deferential “reasonableness” approach that focused on procedure in enforcing SERs was preferable. In other words, the courts did not interfere in policy-making, but tested the reasonableness of government policy. Now that the political context has changed, Roux submits that the CC should enter a more activist era that focuses on the substantive “minimum core” content socio-economic obligations.<sup>14</sup>

In the CC’s first SER decision in the case of *Soobramoney*<sup>15</sup> (1998), Chaskalson CJ applied a relatively modest level of scrutiny of government policy (regarding the limited provision of renal dialysis treatment) in the form of a “rationality standard” in upholding the hospital’s policy, declaring that the court would not readily interfere with a rational decision taken by the responsible authorities (MacLean, 2009, p. 14). A rationality standard requires only that government’s chosen policy must be plausible or defensible, adopted in good faith or with sincerity and applied fairly. The Court need not scrutinise government’s policy choices too closely, or the appropriateness of associated budgetary allocations. The fact that the hospital could not afford to keep Mr Soobramoney on renal dialysis was considered to be rational as a result of resource constraints (and the greater good).

The CC’s decision in *Grootboom*<sup>16</sup> followed in 2001. In this case, a group of destitute people evicted from private land by a municipality claimed that their circumstances violated the right of access to adequate housing. Departing from the rationality standard applied in *Soobramoney*, the Court held that “reasonableness” is the applicable standard in socio-economic rights cases, although the “precise contours and content of the measures to be adopted are primarily a matter for the legislature and executive”<sup>17</sup>.

Nevertheless, the Court also held that the measures adopted by the State should be responsive to the most urgent needs. The CC therefore found that the State’s housing programme was unconstitutional to the extent that it failed to make provision for the most vulnerable, especially children. Significantly, the Court declined to adopt a “minimum core” approach, which would have entitled all individuals without adequate shelter, including the litigants in this matter, to claim assistance as a matter of right. A minimum core approach to the adjudication of SERs accepts that these rights have an objectively defined and irreducible substantive content (is discussed in more detail below). Instead, the Court held that reasonableness required the introduction of a comprehensive and co-ordinated programme addressing the needs of such individuals, and set out a number of criteria, although again the precise details should be left to the State to determine. Notably, the

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<sup>14</sup> Roux, 2013, p. 394. Minimum core is discussed in more detail below.

<sup>15</sup> See fn 8, *supra*.

<sup>16</sup> See fn 19, *supra*.

<sup>17</sup> *Ibid*, para 41.

Court failed to make any order that provided immediate substantive relief to the adult respondents.

In *Treatment Action Campaign*<sup>18</sup> (2002), the CC considered government's adoption of a policy that failed to make generally available in the public health sector, an antiretroviral drug (ARV) "Nevirapine", which reduces mother-to-child transmission of HIV / AIDS. The court carefully considered the arguments advanced by government, demonstrated why these were unconvincing and found that government's policy failed to meet its constitutional obligations in terms of sections 27(1) and (2). The Court ordered government to remove restrictions on Nevirapine being made available in public hospitals as part of a comprehensive and co-ordinated programme that immediately and progressively realised the rights of pregnant women and their new-born children to have access to health services to combat mother-to-child transmission of HIV / AIDS. However, the Court again declined to adopt a minimum core approach to the enforcement of SERs<sup>19</sup>.

Subsequently, in the *Khosa*<sup>20</sup> case, decided in 2004, the provisions of the Social Assistance Act 59 of 1992 that reserved welfare benefits for South African citizens only, were challenged. The applicants argued that these provisions were inconsistent with the right of access to social security, as well as with the guarantee of equality in section 9 of the Bill of Rights. The Court held that an obligation not to unfairly discriminate is implicit in the standard of reasonableness and that the exclusion of permanent residents from welfare benefits was unconstitutional. Mokgoro J emphasised that reasonableness should not be conflated with rationality review and went further to hold that the more stringent requirement of "proportionality" should form part of the reasonableness standard.<sup>21</sup>

The proportionality test requires that government policy or legislation must:

- (a) be "rationally connected to the objective" sought to be achieved;
- (b) entail the least possible impairment of the right or freedom in question; and
- (c) achieve proportionality "between the *effects* of the measures which are responsible for limiting the ... right or freedom, and the *objective*" (MacLean, 2009, p. 27).

The CC's earlier SERs decisions were therefore characterised by an increasingly more searching standard of review, as the Court developed the rationality standard initially

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<sup>18</sup> See fn 20, *supra*.

<sup>19</sup> *Ibid*, paras 26 to 39.

<sup>20</sup> *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) BCLR 569 (CC).

<sup>21</sup> *Ibid*, para 39.

employed in *Soobramoney*<sup>22</sup> to something approaching the proportionality review in *Khosa*.<sup>23</sup>

The *Mazibuko*<sup>24</sup> matter (2010) dealt with access to sufficient water. The decision was seen by many as withdrawing from the more activist approach in the *Khosa*<sup>25</sup> case. The CC held that it is ordinarily:

“...institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right.” (para 61).

The CC again declined to determine the exact content of a constitutional right, and again, did not adopt the internationally recommended approach of “minimum core”. O’Regan J noted in this case that the evidential record provided numerous different answers to the question of what constitutes “sufficient” water, and that it is doubtful that the judiciary is the appropriate institution to determine which should be adopted (Wesson, 2011, p. 399).

The effect of this “reasonableness” approach is that the courts do not assume the task of making policy, but they do require the government to account to citizens for its policy decisions and their impact on socio-economic rights. In this sense, the Court’s approach does support and promote the constitutional values of accountability and responsiveness. However, the focus in socio-economic rights cases has emphasised the need for government to follow correct and fair procedure, rather than to consider the substantive content of the law.<sup>26</sup>

## e. Fieldwork

- **Introduction**

Proceeding into the fieldwork, the central underlying questions were:

- What kind of transformation is envisaged by the Constitution and supported by all spheres of government?
- How have the apex courts understood their mandated responsibilities, and how have they chosen to exercise their authority?
- Finally, is this transformation felt in the lives of South Africans, especially the poor, marginalised and vulnerable?<sup>27</sup>

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<sup>22</sup> *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 (12) BCLR 1696 (CC)

<sup>23</sup> *Ibid*, fn 27.

<sup>24</sup> *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC).

<sup>25</sup> *Ibid*, fn 27.

<sup>26</sup> See further in this regard the section below on separation of powers.

<sup>27</sup> See the Fieldwork Report 31 March 2015 for full details, including the interview instruments.

Consideration of the transformative nature of South African SER jurisprudence was informed by the way in which the judges, advocates, attorneys and academics who were interviewed understood the doctrine of separation of powers, and to what extent this doctrine constrains the apex courts. The views of respondents on these questions mostly informed their views on whether or not the courts should be more proactive by, for instance, recognising and enforcing a minimum core content of SERs that requires implementation by government, or by adopting more creative remedies to ensure implementation.

- **Interviews**

This section discusses the fieldwork on the meaning of transformation; other issues will be dealt with later.

“I had a habit of saying to young colleagues who used to come to the court and ask for advice ... go and look at your certificate of appointment. You were appointed a judge, not God. There’s only so much you can do ... I don’t think you can change societal structures and its essentials solely through court cases. Absent of political will we really can do very little. You know the breakthrough that the TAC made with AIDS was a combination of public opinion, advocacy, public demonstrations, media exposure, and litigation, and the law working hand-in-hand ... You’ve got to use the law and public awareness at the same time.”  
(Justice Johann Kriegler)

In response to the critique by some academics<sup>28</sup> that the courts have been “cautious”, a retired CC Justice commented:

“You said the Chaskalson Court was cautious? Cautious compared with what? I think we were cautious in the sense of being modest about working with the most sophisticated Constitution in the world and we had no previous experience with doing that.”

Justice Sachs echoed this view (also expressed by Theunis Roux) that the courts were patently aware of their role in a new democracy and purposefully chose not to be seen as interfering with the other arms of government unduly:

“... and it was [the late] Chief Justice Arthur Chaskalson who said at one stage ... that the role of the Court in these socially stressful situations is much more than simply to interpret and apply the law in a technically correct way. It’s to manage very stressful social situations created by our history, to manage it in a fair way ...”

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<sup>28</sup> Such as Theunis Roux, Sandra Liebenberg, Jackie Dugard, Stewart Wilson and David Bilchitz.

Sachs explains that this “judicial ideology, if you like, moved incrementally and I think appropriately” without the CC losing sight of its transformative role. He added that the Constitutional Court:

“...started partly by transforming itself. [W]e developed a collegial style of work amongst ourselves, which is very pronounced and a huge asset ... consensus seeking is a very South African thing: the indaba, the lekgotla, the bosberaad, the debate. So now the judges themselves are having indabas and lekgotlas and bosberaads. I think that was important from a methodology point of view.”

He further stated that:

“certainly all the judges on the Constitutional Court recognised the need for major transformations in society, not only the ugliness and unfairness and injustice of apartheid dreadfulness, but the fact that it had left quite deeply entrenched patterns of inequality and disparity”.

However, in a less cautious tone a senior attorney stated in strong terms that:

“I think their role [the apex courts] has become more significant because transformation is a very sensitive matter, and in the hands of politicians it is sometimes used as a slogan or a word rather than given absolute meaning. So, I would say yes [the courts] have been actually ... becoming the watchdogs of transformation.”

An advocate at the Johannesburg Bar articulated that:

“by transformation I really understand ... two things ... and they’re related. [Transformation is] a commitment to the values of the Constitution, and it is a commitment to changing the society that we found ourselves in, in 1994.”

His view, shared by most other respondents, is that:

“...our Constitution unlike some others was designed to be a break with the past. It was designed to build a future and transform the society and change the systemic inequality and the systemic repression that had occurred before.”

In his view the courts have implemented those values.

The same advocate warned against concluding that, if poor people lose a case, “the Court is anti-poor and anti-transformation. I don’t think that’s fair.” When poor people lose a case and they get no relief, we must ask ourselves whether something is wrong, whether with the judgment, or with the system, or with the way the case was litigated. But “it’s lazy

reasoning” to assume that when poor people lose a case and government or a corporation wins it, that means that it’s an anti-poor / anti-transformation judgment.

This Counsel was of the view that:

“...the courts have at times bent over backwards to try and assist people who come to them, even where cases have not been properly brought”

and that:

“I’ve been on both sides in that Court [CC], for Government and for poor communities or disenfranchised communities. You always feel that that the Court takes the concerns of poor people and the concerns of social justice incredibly seriously”.

A retired CC Justice intimated that the CC may have been too transformative in its judgments:

“The word transformation is itself an imprecise one and I think people give it the content they want to give it, and it also has to take its meaning from its context from time to time”.

#### **f. Findings and main trends**

- ***Transformation***

Although there is not full consensus on the meaning of the court’s role in social transformation, it is generally felt that the courts have been transformative within the context of constitutional imperatives. It was clear that the meaning of transformation needs to be carefully thought through (as explained above), but it is also clear that justiciable SERs place both negative and positive obligations on the State, as the State must “respect, protect, promote and fulfil” all the rights in the Bill of Rights (section 7).

Most respondents were of the view that transformation does - and should - take place incrementally, and that the courts have been wise in their approach to transformation within our particular historical and constitutional context.

Most respondents also agree that Courts should play a role in constitutional transformation; but obviously courts cannot implement their own judgments – they rely on the legislature and the executive to comply with their orders.



Some respondents noted that assessing transformation through the adjudication of socio-economic rights represents an inappropriately narrow understanding of transformation. As rights are interdependent, it is necessary to also consider the ways in which the adjudication of civil and political rights has contributed to changes in South African society since 1994. For instance, the rights to equality and dignity play a central role in transformation. This came up in the Parliamentary Portfolio Committee colloquia, as well as in interviews with key informants.

- ***Political will and implementation determine the impact of transformative judgments***

A senior attorney stated that:

“...these judgments ... are handed down, [but are not] given ... full force and effect, and very often we are finding that there’s a gap between the executive and the legislature and the judgments of the Constitutional Court, or the Supreme Court of Appeal, or even some of the High Courts...”

Respondents pointed out that, as the courts do not implement their own orders, lack of transformation cannot be “blamed” on the courts. The problems may lie with the failure by the executive or legislature to implement the courts’ decisions, either as a result of a lack of political will or a lack of capacity. Generally, as the executive is responsible for the development, choice and implementation of policy, it bears primary responsibility for the realisation of socio-economic rights, and hence social transformation. This does not mean, however, that the court has no role to play at all. On the contrary, the courts are widely understood to be “guardians” of the Constitution.

- ***Difference in approach between the CC and the SCA***

A number of respondents – especially legal practitioners – were of the view that the CC has been more focused on social justice than has the SCA. The CC is perceived as more sensitive to societal needs and issues of social justice, as well as to the resource constraints and limitations that face government, whereas the SCA is seen as locating itself as the “watchdog” of government and as focusing less on the socio-economic impact of its judgments. A further view expressed was that the SCA has tended to try to focus on resolving rights claims through the common law. It was, however, recognised that the SCA is changing as it deals more with constitutional issues, and is consequently hearing more SER cases.

## 4.2 Separation of Powers

Despite the transformative imperatives discussed above, one of the potential obstacles to the courts making a substantive difference in people's lives is the adoption of a strict interpretation of the principle of "separation of powers". The separation of powers is implicit in the Constitution and is one of the cornerstones of South Africa's democracy because it regulates the exercise of public power. However, this doctrine – although important – should not be seen as inflexible.

In positivist arguments, courts have no role whatsoever to play in the policy-making process as they must not interfere with executive decision-making on the basis that judges are not democratically elected representatives of the people. But, the reality is that the courts – especially the CC – are guardians of a Supreme Constitution, and the other branches of government are called upon to account for their policies and legislation and must justify the choices that they make. Similarly, under the Constitution, the courts themselves are called upon to justify the decisions that they make, using constitutional values and rights as their yardstick.

The interim Constitution of the Republic of South Africa (1993) was described by the late Professor Etienne Mureinik (1994) as a bridge from a culture of "authority" to one of "justification". In terms of this new and continuously evolving legal culture, Parliament is no longer supreme and may not use its powers to promulgate legislation without ensuring that all law reflects the spirit, purport and objectives as embodied in the Constitution, and in particular the Bill of Rights. In addition, in South Africa's constitutional democracy the executive can also be called upon to account for its actions.

Thus, the supremacy of the legislature (Parliament) has been replaced by constitutional supremacy in terms of which the courts are the guardians of the Constitution, and all organs of State – executive, legislature and judiciary – are bound by the rule of law and the underlying values of the Constitution. Sections 1(c) and 2 of the 1996 Constitution provide that the Constitution is the Supreme Law of the land. Section 2 must be read with section 7 of the Constitution, which states that the Bill of Rights is the cornerstone of the South African democracy, and which requires the State to "respect, protect, promote and fulfil" the rights in the Bill of Rights. In addition, section 8(1) provides that the provisions of the Constitution apply to all law, and bind the legislature, the executive, the judiciary and all organs of State.

Therefore, the courts should no longer merely apply “black letter law”<sup>29</sup> in terms of their interpretation of the intention of the legislature. This formalistic approach to legal interpretation has been replaced by a purposive, generous and value-oriented interpretation of legislation, the common law and customary law (see Annexures J and K of the Constitutional Justice Project Mid-Term Report). In view of the supremacy of the Constitution in general, and section 39(2) in particular, the traditional and orthodox methodology of interpretation must be adapted to be in line with the new constitutional order. Section 39(2) of the Constitution provides that:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”.

In terms of this value-laden approach to interpretation, courts are obligated to ensure a *just outcome* of the legal process, and can be held accountable – within the ambit of the Constitution – for their judgments and the choices that they make. Furthermore, courts have been granted limited powers to “create” law in terms of judicial review, where laws and policies can be tested against the Constitution and declared invalid or struck down if found wanting. In short, the Supremacy of the Constitution has replaced a corrupt system of *apartheid* rule, and the values of dignity, equality, freedom and *Ubuntu* have become central to the judicial interpretation and application of the law. Consequently, constitutional values are meant to serve a *transformative role* in the sense that the values, goals, and analytics of social change must inform the *both the process and the outcome* of adjudication.

**a. “Deference”, or “judicial modesty and restraint”?<sup>30</sup>**

However, what this transformative role of the courts means when adjudicating SER cases remains contested. Pieterse (2004) has written extensively about the tensions inherent in the judicial enforcement of SERs and the duty of the judiciary to intervene in policy-making “to some extent”. He argues for the courts to find a balance between absolute deference to the executive and reckless judicial activism.

According to the more constrained approach to the adjudication of SERs, it is argued that constitutional principles, such as the separation of powers between the various branches of government, severely constrain the manner in which courts may act. This constraint is complemented, in former CC Justice O’Regan’s view, by the need for “judicial modesty and restraint” (2011). She contends that:

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<sup>29</sup> That is, the law as it is written, or at face value.

<sup>30</sup> HSRC: Constitutional Justice Project: Concept Report.p.28.

“...[c]ourts need to be modest about the judicial role in addressing the legacy of our history. They must recognise that their responsibility is primarily to ensure that government works within the threefold framework of legality, rationality and compliance with the Bill of Rights. Outside of this framework, it is not for courts to impede the functioning of government.”

Secondly, she observes (and many agree), that courts are institutionally ill-placed to make the complex decisions that policy requires. This is so because:

- judges have no experience in the field of policy formulation;
- courts are responsive to cases that come before them, and often the picture they obtain is incomplete; and
- the doctrine of precedent means that, when the Constitutional Court decides cases, the principle that underpins their decision binds all courts in the future.

In addition, they lack the legitimacy of the legislature’s and executive’s democratic mandate.<sup>31</sup>

Liebenberg (2009) disagrees with the deferential or “constrained” approach and argues that the drafters of the Constitution clearly envisaged a far-reaching role for it in the transformation of post-*apartheid* society, which, in turn, requires a more “activist” court. As noted earlier, among the key aims of the Constitution is to “improve the quality of life of all citizens and free the potential of each person” (Preamble). According to Liebenberg, the Constitution’s concern with the socio-economic well-being of people is especially evident in the entrenchment of a wide range of justiciable socio-economic rights in the Bill of Rights. If, however, these rights “are to amount to more than paper promises, they must serve as useful tools in enabling people to gain access to the basic social services and resources needed to live a life consistent with human dignity” (Liebenberg, 2009, p. 1).

Therefore, Liebenberg argues, the inclusion of SERs as *justiciable* rights indicates that the Constitution envisages an important role for the judiciary in their enforcement. The strategic importance of SERs as tools in anti-poverty initiatives will diminish if the courts interpret them as imposing “weak” obligations on government and fail to protect them as vigorously as they do the other civil and political rights in the Bill of Rights.

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<sup>31</sup> See *Moseneke & Others v Master of the High Court* 2001 (2) SA 18 (CC).

This approach holds significance not only for future litigation aimed at enforcing socio-economic rights, but also in guiding the adoption and implementation of policies and legislation by government to facilitate access to them. It is also important to the monitoring and advocacy initiatives by civil society, the South African Human Rights Commission (SAHRC), the Commission for Gender Equality (CGE) and the South African Law Reform Commission (SALRC), amongst others.

MacLean also submits that the South African courts have been unduly deferential to the executive and the legislature when interpreting and enforcing socio-economic rights. In fact, courts – including the apex courts – have not treated these rights in the same way as they do civil and political rights. This difference in treatment is demonstrated primarily in the choice of a lower standard of review and the use of weak remedies in SER cases. This differential treatment is applied despite the CC's acceptance that SERs are justiciable. Maclean argues that the constitutional drafters made a conscious effort to align the constitutional text with the text of ICESCR, and the Constitution requires the courts to consider international law when interpreting the Bill of Rights (section 39(1)(b)).

As mentioned above, the CC, after the brief exploration of the proportionality test in *Khosa*<sup>32</sup>, has adopted a reasonableness test for the review of “qualified” SERs, i.e. the progressive enjoyment of these rights is subject to reasonable measures and available resources. It thus applies a test with a lower standard of review than the proportionality test adopted for the review of civil and political rights. This test has permitted the courts largely to avoid substantive engagement with the *content* of the rights, and to focus on the reasonableness of State action (*procedure*) in fulfilling the right. However, international and comparative jurisprudence, particularly in India and Brazil, favours a more robust approach to the protection of the “negative” aspects of a right, i.e. the State's duty to “protect” rights from being breached or undermined (discussed in more detail below).

MacLean points out that reasonableness review is a flexible instrument that:

“...potentially could include a range of levels of scrutiny, from rationality (as a fairly minimal level of scrutiny), through to proportionality (as an intermediate level), and a correctness standard as the most rigorous degree of scrutiny, where a court prefers its [own] interpretation as authoritative (MacLean, 2009, p. 174).”

By focusing *solely* on the reasonableness of State action, the Court has failed to give “appropriate substantive content” to the rights to adequate housing; healthcare services;

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<sup>32</sup> *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) BCLR 569 (CC).

sufficient food and water; and “social security”. McClean argues that this is problematic as, without the clear articulation of the objective of a SER, or a more or less fixed point of reference concerning what the State is obliged to achieve, it is extremely difficult for the State, the courts, or anyone else to assess the reasonableness of its policy or other action (or inaction).

MacLean’s evaluation suggests 2 primary observations. Firstly, there is no need for the South African courts to adopt a deferential approach to the interpretation and enforcement of SERs, as a matter of principle. Deference may be appropriate in a particular matter (whether it involves socio-economic, civil or political rights), but this must be decided on a case-by-case basis. Secondly, where a court does choose to adopt a more deferential approach, it must be transparent about the reasons for this approach. Transparency in judicial choices will force the courts to engage directly with the reasoning underpinning their choices, and to contribute to a culture of justification<sup>33</sup> throughout all the spheres of government. The courts’ current approach is not useful and has resulted in the courts sidelining themselves in the dialogue with the executive and legislature over the constitutional vision of a better life for all. The courts have effectively diminished their own role, to the detriment of all spheres of government and the poor in South Africa.

#### **b. Enforcement and remedies**

Although the Constitution is clear that all courts are responsible for upholding and protecting human rights,<sup>34</sup> many post-1994 cases show that judges in the lower courts, including in the SCA, are reluctant to deviate from traditional legal reasoning and thus fail to be more sensitive to the context – and potential and real *consequences* – of their judgments. In the context of the development of the common law and customary law, Davis and Klare (2010) point out that most judges tend to stick to the comfort of old methodologies that chime with their sometimes implicit world-view and that this results in three problems:

1. A reluctance to interrogate the socio-economic consequences of private law rules on lived experiences;
2. The emergence of a neo-liberal strand in the application of the Constitution; and
3. A lack of critical sharpness when it comes to issues related to the separation of powers.

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<sup>33</sup> Highlighted by Mureinik. See above.

<sup>34</sup> To some extent making direct access to the CC unnecessary.

The use of new interpretive methods and creative remedies that are sensitive to context could lead to real change on the ground. To this end, the CC has accentuated the importance of developing effective and innovative remedies for the infringement of constitutional rights.<sup>35</sup> In the case of *Fose v Minister of Safety and Security*<sup>36</sup> (1997) the Court stated that:

“[A]n 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. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal”. (para. 69)

When developing responsive remedies, in order to make progress towards the full realisation of rights and their implementation by the State, a court is not limited to the mere enforcement of negative duties – the Constitution’s ideal imposes a duty not only to “protect” rights, but also to “promote and fulfil”. In accordance with section 8(1), this duty applies as much to the courts as to the other branches and organs of the State. The Court has reasoned that:

“...where a breach of any right has taken place, including a socio-economic right, a Court is under a 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.<sup>37</sup>

However, the positive duty to realise (“promote and fulfil”) SERs has been interpreted as being subject to progressive realisation and the requirement that the government must take reasonable steps within the constraints of its available financial resources. To that end, the court in *Soobramoney*<sup>38</sup> reasoned that:

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<sup>35</sup> Currently available remedies include declaratory orders; mandatory orders including prohibitory interdicts; structural interdicts; constitutional damages; ‘reading in’ words; severance of words; ‘reading down’; meaningful engagement; and contempt of court orders.

<sup>36</sup> 1997 (3) SA 786 (CC).

<sup>37</sup> *Minister of Health & Others v Treatment Action Campaign & Others* (No 2) (CCT 8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC), para. 106.

<sup>38</sup> *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 (12) BCLR 1696 (CC).

“...the obligation imposed on the State by section 26 and 27 in regards to access to health care, education, food, water and social security are dependent on the resources available for such purposes, and that the corresponding rights are limited by the lack of resources. Given the lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.”<sup>39</sup>

While cognisant of the various constraints facing the State, it should be recognised that the Constitution aspires to create a socially just society. Therefore, as argued by Davis and Klare (2010), because of the high levels of poverty in South Africa, the CC and SCA should keep in mind, when determining appropriate remedies, the need for *distributive justice*. As a result of the pressures of limited State resources, remedies for socio-economic rights litigation have avoided conferring individual rights on demand and instead define the rights as collective and to be realised in a progressive manner, taking into account resource constraints.<sup>40</sup>

### c. Fieldwork

Advocate Carol Steinberg felt strongly – as did most respondents – that in terms of the separation of powers doctrine the courts should not interfere with policy-making:

“The courts are only as strong as there is buy-in, and for me the type of judicial activism as often called for, might be a short-term solution to somebody’s specific problem, but in the long-term might well cause antagonism with the other branches of Government and with other sectors in society, and in fact, weaken the legitimacy of the courts. So I think the overarching project of the courts is to solve the particular case that is before them in the best possible way for the litigant, but in a manner that promotes democracy, deliberation, public buy-in.”

However, she admitted “to some extent service delivery is a problem, so the courts should take a more activist role ... in terms of remedy perhaps”. This view was echoed by other respondents. In this respect, “there seems to [be] more and more reason to look to remedy”. Steinberg spoke for many respondents when she said she “would largely agree that the time has come to look at more structural interdicts”. In this respect the courts should say “look, you made the policy, we respect that policy, but you now have to report to us in implementing it properly. And I think there’s more and more room for that.

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<sup>39</sup> *Ibid*, para 11.

<sup>40</sup> The exception is in the case of children, where the court has recognised in *Grootboom* (2000) (right to housing) and *TAC* (2002) (right to health care), amongst others, that the state has a special duty to protect and uphold the rights of children, especially in circumstances where parents are unable to fulfil their obligations towards their children.



Timetables, accountability, public accountability in courts ... it's crying out for that at the moment".

A legal academic pointed out that SERs are justiciable under the South African Constitution and that the courts have the power of judicial review. As a result, "judicial oversight over policy formulation and implementation implies that it will not always be strictly left to the executive and legislative branches." While a court may legitimately "prescribe... certain elements of where a policy or particular action has been unconstitutional or is unconstitutional...", there is no argument that courts do not *make* policies or draft legislation, and should leave this to the domains of the executive and legislature.

He continued to state that when the court has issued an order declaring a particular law or action to be unconstitutional,

"it is not incorrect for the court to supervise the carrying out of that order. The influence of the court should thus extend beyond just a declaratory order, to include timeframes for reporting back to the court on progress in implementation. "That then leaves policy formulation and implementation not *strictly* to the executive branch, but it includes judicial oversight even after there has been judgment" (emphasis added).

A sitting SCA judge emphasised that local context should be taken into consideration as the Constitution spells out in clear terms the contours and the parameters of the powers of each arm of government:

"[W]e need to develop a concept of separation of powers that fits our particular local conditions. The fact that our Constitution, [like] the interim Constitution, ... gives the courts the power of constitutional review ... entails ... that unlike in the past where we had Parliamentary supremacy, we now have Constitutional supremacy and the principle of legality which says, all organs of State must ensure that they operate within the powers as entrusted to them by the Constitution. The question therefore is who is going to oversee the process? It cannot be the executive, it cannot be Parliament."

However, he reiterated – as did all the interviewed members of the judiciary - that in:

"...all matters that are polycentric, judges should defer to the specialised knowledge and expertise of those institutions that do have the experience".

One retired CC justice indicated that, in order to ensure that an order of court is enforced, courts may have to enter into policy questions. This is not unconstitutional, because section 38 empowers courts to grant "appropriate relief", and section 172 grants wide powers to the courts to make "just and equitable" orders.

#### **d. Main findings and trends**

There are varying understandings of how the principle of separation of powers should be interpreted. Most respondents were sensitive to the democratic imperatives of the separation of powers doctrine and understood that the courts are not well-placed to make policy, or even prescribe to government as to how it should make its policy choices. Judges admit that they do not have the skills to determine State budgets.

However, the right of judicial review afforded to the courts and the justiciability of socio-economic rights does place the issue of separation of powers within a specific local context. Courts do have the power to judge the reasonableness of government policy, and should do so without fear or favour.

It was felt by many respondents that, in the face of problems around the failure of government to deliver on basic services, courts could become more interventionist by, for instance, adopting innovative remedies such as structural interdicts and meaningful engagement, which enable judicial supervision to ensure government implementation and delivery. This may be perceived to be too “activist”, but some legal practitioners emphasised that courts are the guardians of the Constitution (referred to by two respondents as the “watchdogs” of the Constitution).

The majority of respondents cautioned, however, that the courts should take into account the difficulties faced by a post-*apartheid* government with resource constraints. However, there were differences expressed as to whether it is time to become more demanding and less cautious, with some interviewees feeling that we are no longer a “young” democracy.

Respect for the courts is necessary to entrench respect for the Rule of Law in South Africa, and for this reason the courts should use innovative but practical remedies to address SER violations and follow up on progress in implementation where possible. In this regard, it is noteworthy that concern and impatience are growing in response to failures to respect court decisions and to implement court orders, timeously or at all, which imperil the rule of law as a cornerstone of constitutional democracy. Theme 2 (below) considers the implementation of court orders in some detail, including in the *Nokotyana*<sup>41</sup> matter. The CC has recently expressed itself very firmly on contempt of court in a matter involving the same Ekurhuleni Metropolitan Municipality. In *Pheko & Others v Ekurhuleni Metropolitan*

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<sup>41</sup> *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* (CCT 31/09) [2009] ZACC 33.

*Municipality*,<sup>42</sup> Nkabinde J delivered the unanimous judgment of the Court. Although finding on the facts that the Municipality's political and administrative leadership, and their attorney, were not in contempt of its earlier orders, Justice Nkabinde noted that:

"The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of State to which they apply, and no person or organ of State may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced." (para 1)

Worryingly, the Court noted that:

"...[i]t is not difficult to reference examples of cases involving contempt, by State organs, of court orders where, most troublingly, constitutional rights are in issue" (para 27).

The Court referred with approval to the remarks of Justice Brandeis in *Olmstead et al v United States*<sup>43</sup> which have been endorsed by the CC and which remained apposite in the present matter:

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. . . . [G]overnment is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes a law-breaker, it *breeds contempt* for the law; it invites every man [or woman] to become a law unto himself [or herself]; it invites anarchy (para 66) (Emphasis added by the Court)".

## 4.3 Constitutional dialogue

### a. Introduction

A limited form of constitutional dialogue is generally understood to take place between the branches of the State when evidence is presented and argument takes place in courtrooms, a judgment is handed down; when the executive considers the judgment and adjusts its policies or actions; and when the legislature debates and adopts (amending) legislation.

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<sup>42</sup> [Online] (No 2) (CCT19/11) [2015] ZACC 10 (7 May 2015), available at <http://www.saflii.org/za/cases/ZACC/2015/10.html>. [Accessed: 2<sup>nd</sup> July 2015].

<sup>43</sup> 277 U.S. 438. [Reference sourced Online: Wikipedia. Accessed: 12<sup>th</sup> July 2015].

Within the context of separation of powers, some interesting ideas are emerging about the need for a more deliberate and sustained “constitutional dialogue” in South Africa amongst the 3 arms of government, especially in an attempt to strengthen respect for the Rule of Law. Put simply, each arm should be aiming to fulfil the promise of the Constitution to provide a better life for all: if this could be achieved without lengthy and expensive litigation, so much the better. Although there is wariness as to whether this might interfere with the independence of the judiciary and the doctrine of separation of powers, the Chief Justice of Kenya, Willy Mutunga, illustrated in a keynote address at the University of Fort Hare that such a development can be positive:

“... our [Kenyan] Constitution provides very clearly that the three arms are robustly independent, they have independent mandates. But there is a provision for consultation, for dialogue, for interdependence under collaboration, and that’s a tall order because at the moment there’s a lot of debate as to how you can [have] independence and how you can also have dialogue ... In fact, in our Constitution that culture is becoming open. I think in Africa we’re basically saying, it’s good to do it transparently, and I think that’s a good development.”

It could be argued that entering into such a dialogue would assist in moving us towards a determination of the content of SERs and thus a determination of what would be needed to ensure that South Africans live in dignity with adequate health care, enough water, hygienic environments and so on.<sup>44</sup>

## **b. Fieldwork**

Advocate Steinberg indicated that one of the reasons for evaluating government policy is to establish a constitutional dialogue between the various branches of the State. This “constitutional conversation” “maximises the participation of the different branches of [the State], so that the “deliberative process [is] as inclusive as possible”.

Some respondents, including former Justice Goldstone, found the idea of a deeper constitutional dialogue to be potentially promising, and were open to finding ways of ensuring greater co-operation amongst the 3 arms of government, without impinging upon the independence of the judiciary. In fact, most members of the Bench themselves were not against such an approach. Some respondents supported the idea of a more co-ordinated and sustained dialogue to assist the courts by undertaking research to help delineate the substantive minimum core content of SERs.

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<sup>44</sup> The debates around the minimum core content of SERs are discussed in the next section.

In his speech at the second colloquium, Goldstone expressed the view that dialogue between the courts and the executive is necessary. Another former CC Justice added that engagement of that nature was not unusual in South Africa as there are precedents of judges, and leaders of the executive and legislature gathering and debating constitutional issues, for example, the engagements that took place in relation to the Legal Practice Bill, which included conferences; and when this Justice was invited to Parliament to explain legal issues.

The former CC justices highlighted the need for engagement to effectively implement and enforce court orders – as part of constitutional dialogue – noting that:

“...in my view, courts are not in opposition to the executive and the legislature. I think [that] ... sometimes that dialogue creates a coordinated role for all of them to ensure [that], in that particular case, the rights are implemented.”

### **c. Main findings and trends**

An emerging argument supports a more flexible interpretation that allows for a respectful public “Constitutional Dialogue” where all the arms of government, civil society and the private sector act in some co-ordinated way to share ideas about how to create a better life for all, as promised in the Constitution. There are, however, skeptics who fear that such a process would unduly interfere with the independence of the judiciary.

### **d. Suggestions**

- Courts must be sensitive to the democratic imperatives of the separation of powers doctrine and it should be understood that the courts are not well-placed to make policy, or even strictly prescribe to government as to how it should make its policy choices.
- However, the right of judicial review afforded to the courts and the justiciability of socio-economic rights places the issue of separation of powers within a specific local context. Hence, courts, as guardians of the Constitution, should exercise their power to assess the reasonableness of government policy and should do so without fear or favour. In doing so, however, the courts should take into account resource constraints faced by government.
- The doctrine of separation of powers tends to be discussed in a negative way that rejects what is perceived as judicial encroachment onto the strictly exclusive terrain of the democratically legitimate legislature and executive. In view of Constitutional

imperatives, the doctrine should be understood as necessarily entailing *checks and balances*, and as pre-supposing an “energetic executive”.<sup>45</sup> It has a degree of flexibility, and should rather be focused on how branches of the State can complement the work of the others as they strive to realise enjoyment of SERs along with civil, political and cultural rights.

- A more flexible interpretation of the separation of powers doctrine should allow for a more coherent, purposeful and sustained public “Constitutional Dialogue” where all branches of the State, civil society and the private sector share ideas about how to create a better life for all, as promised in the Constitution. One particular focus for necessary dialogue between the courts and the executive concerns the effective implementation of court orders. The SAHRC may be an acceptable neutral facilitator in this regard.

#### 4.4 Minimum core content of SERs

##### a. Introduction

As discussed above, in the *Grootboom*<sup>46</sup> decision the CC developed the “reasonableness test” to provide clarity on the interpretation of the right to shelter, including in emergencies and the shelter of children, as well as to explain whether or not (and when) individuals could claim tangible services from the State. This test was then further developed in the *TAC*<sup>47</sup> case. In that decision, the Court again declined to adopt the “minimum core” approach to SERs. In both instances, the CC has been criticised for failing to take the opportunity to give substantive content to the rights to housing / shelter and healthcare specifically (sections 27 and 28 of the Constitution). Critics argue that this has resulted in the Court only *partially* protecting these socio-economic rights. However, the CC continued to reject the minimum core content approach in the *Mazibuko*<sup>48</sup> case, in relation to the right of access to “sufficient” water.

During the course of this research, the team learned that the SA Human Rights Commission (SAHRC) and the Studies in Poverty and Inequality Institute (SPII) are collaborating to develop methodologies to identify the substantive content – and track progress – in implementing and realising SERs. However, tracking progress is not possible

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<sup>45</sup> See *Certification of the South African Constitution* 1996 (4) SA 744 (CC) para 112.

<sup>46</sup> *Govt of the RSA & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC).

<sup>47</sup> *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* (CCT 8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC).

<sup>48</sup> *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC).

without identifying some substantive content of rights, i.e. a target. There remains a need for research on what constitutes a minimum core and then to progress to tackling the question of how these rights are realised. Comparative jurisprudence from India, Brazil and Colombia has brought the question of minimum core back onto the agenda. Although the concept was dismissed in *Grootboom*<sup>49</sup> and the *TAC*<sup>50</sup> cases, it was revived in legal argument in the *Mazibuko*<sup>51</sup> and *Nokotyana*<sup>52</sup> cases, although rejected by the Court.

## b. Interviews

One former CC Justice “subscribe[s]” “completely” to the notion that “a certain basic provision for food and shelter is essential for human dignity”, and he didn’t think that “anything the [Constitutional] Court has said would contradict the view that there is a certain basic minimum”. However, there will always be these tensions concerning choices:

“[T]he debate about minimum core is directed at something more explicit, more concrete than courts would like to venture [into]. And particularly because these rights themselves can clash, do you spend more on food, less on education, less on health?”

A Senior Advocate from the Johannesburg Bar noted the criticism of the courts’ approach, but disagreed with it:

“I can see a debate about it, but at the end of the day I don’t think I can say that the court got that obviously wrong ... I suppose it would not be unfair to say that, starting with *Grootboom*, the Constitutional Court has adopted what might be described as a cautious approach, but I certainly cannot say that that is a wrong approach, and I certainly cannot for one moment suggest that it has constituted any sort of impediment to the realisation of socio-economic rights. It has created a framework, and ... it has had a dramatic impact.”

Adv. Carol Steinberg stated eloquently the views of many respondents:

“[T]here can be no debate about whether the Courts must engage with Government policy-making or not. I think the Constitution obliges the Courts to do so. If Government comes up with a policy scheme that’s challenged, the Courts are obliged to evaluate that scheme against the Constitution. So I don’t think that it’s open to anybody to say that policy falls outside of the domain [of the courts]. That’s for me the starting point. The question [really] is *how* the Courts engage with policy issues (emphasis added).”

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<sup>49</sup> Fn 53, *supra*.

<sup>50</sup> Fn 54, *supra*.

<sup>51</sup> Fn 55, *supra*.

<sup>52</sup> *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* 2009] ZACC 33; 2010 (4) BCLR 312 (CC).

Steinberg explained the 2 reasons, in her view, why the approach adopted by the CC makes sense:

“The one is a principled reason and the other is a pragmatic reason. The principled reason ... really turns [on] the separation of powers, and I do have great respect for the democratic pedigree of the legislature. Whether we like it or not, it is the elective body and I do think there is primacy in their role in shaping the overall policy / political positions that our government takes. And the role of the courts then to me would be not to create policy but to evaluate policy. To me that’s the key distinction. And the moment you start defining what a minimum core is, I think you are creating policy.”

For her, the pragmatic reason is that she does not think “the courts have the expertise, nor do I think do they have the democratic pedigree, to determine what [minimum core] is. ... [H]ow do they know what it is? Isn’t that an inherently polycentric centralised issue? And within it, aren’t there also different legitimate policy choices to be made?”

She continues by stating that:

“[W]ithin the framework of our Constitution, the government can legitimately make very divergent policy choices. It can take a more welfare-based approach or it can take a more job creation-based approach. Now both of those are legitimate and both of those arguably could fulfil the State’s constitutional obligation in realising socio-economic rights. And to me that is the type of decision that necessarily is made by the elected officials rather than by ... the courts.”

Retired CC Justice Johann Kriegler adopts a pragmatic approach to the question of who should determine the content of the minimum core. He believes that it doesn’t make a great deal of difference which philosophy you subscribe to. Rather, what really matters is “how you apply it in given circumstances”. Therefore, it’s necessary to determine what the Constitution says and what is practicable in the circumstances; what the socio-political and economic realities are. For example, the content of the right to water must be responsive to demand and supply, to need and availability, and to State capacity to deliver, especially at local level, and this varies from time to time and from place to place. Thus, the content of SERs must be determined contextually. Ultimately, elected government must be held accountable for non-delivery.

Making a related observation, a senior academic who provided expert testimony in one of the landmark decisions, suggested that the tendency to leave the decision about minimum core content to the executive or the legislature if the courts aren’t the correct or appropriate forum, fails to consider the role of civil society and academia. The latter are



ideally placed, she argued, to undertake the necessary research to assist all branches of the State to develop an understanding of the minimum core content of SERs. *Amici curiae*, for instance, could provide the court with the information it requires to quantify rights.

Notably, the practicalities of implementation were of concern to many respondents. One attorney expressed the widely-shared concern as follows: as a developing country, our “hard-pressed” economy may never enable us to achieve “first world” aspirations. Nevertheless, it was accepted that efforts to realise “socio-economic rights for the masses of the people [is] ... imperative”. Similarly, an advocate suggested that: “minimum core must also be contextualised, and so if you accept that minimum core, you must be very sure that it’s implementable. Because you don’t want a ... judgment to be undermined because [it has] ordered something that can’t physically or practically be implemented.” This would be a threat to the rule of law and to trust in the courts.

Some respondents expressed the concern that a CC decision on the content of minimum core could also have the negative consequences of binding lower courts (through the system of precedent or *stare decisis*) and, thereby, of inhibiting appropriate innovation in the dynamic context of a developmental State and growing economy. A former CC Justice, commenting on the *Mazibuko* case, was willing to concede that water may be the exception to the reluctance to determine a minimum core content, because it is the most basic and essential of the SERs – and it’s relatively easy to determine what quantity is essential for a dignified and healthy existence. Nevertheless, like Kriegler and others, including the UN Human Rights Committee, she argues that minimum core thus has to be contextually determined and assessed.<sup>53</sup>

### **c. Summary of findings and some key trends**

Broadly, it is not for the courts to determine the minimum content of SERs, as this would infringe on the policy-making powers of the executive. The courts have been appropriately cautious about interfering in the policy-making process. This has led to many, if not most, judgments avoiding the determination of what could be considered the “minimum core content” of rights such as healthcare, housing and water. All respondents recognise the complexities entailed in establishing the substantive content of a minimum core for each SER, and almost all believe that it is not the responsibility of the courts to do so.

However, in order to measure progressive realisation of rights, some argue that this requires a clear determination of what is “sufficient provision” for the well-being and dignity

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<sup>53</sup> South Africa eventually ratified the Covenant on Economic Social and Cultural Rights in early 2015, and it remains to be seen how this will affect the jurisprudence of the courts and the policy-making initiatives of government.

of South Africans living in extreme poverty. This has significant implications for the provision of basic services.

There was overwhelming support for the understanding that, once it is accepted that SERs are justiciable, which the Constitution does, “then manifestly it is the Court’s prerogative to involve itself in this debate”. Indeed, the courts have a constitutional duty to oversee, encourage and ensure that the State takes steps to ensure progress towards the realisation of these rights.

Almost without exception, on balance and with some reservations, respondents supported the CC’s preference for the “reasonableness” test of government’s programmes for the progressive realisation of SERs, rather than supporting the idea of a minimum core. While the debate concerning the recognition of a “minimum core” is heated in South Africa, respondents interviewed tended to agree that it is not an adequately flexible approach that is readily adaptable to realities that fluctuate in a non-linear manner. Most regard the “reasonableness” measure as a more appropriate test that also prevents the courts from becoming too involved in policy-making. Unlike the criticism of a number of academics and activists<sup>54</sup> of the courts’ resistance to adopt a minimum core approach to the adjudication of SERs, judges and practicing lawyers tended to agree with the “cautious” approach of the courts for various reasons, as stated above.

The drafters of the Constitution adopted a particular formulation while being fully aware of the debates about the separation of powers. They decided on a particular formulation that requires government to take reasonable steps to ensure the progressive realisation of SERs within available resources. However, while one cannot ignore its text, the Constitution does not preclude the adoption of a minimum core, and the CC has not closed the door to the development and adoption of a minimum core.

Most respondents hold the view that, in a constitutional democracy, the legislature and the executive bear the primary responsibility for delivering on SERs. If they fail to do so, the most appropriate remedy is removal at the next election.

Between those poles, there was general support for the courts playing a role in extreme and urgent cases, and when government persists in failing to act “reasonably”. Thus, one legal representative was in support of the courts taking on the task of defining a minimum core, given government’s apparently limited understanding of its duties and its lack of commitment to fulfil its obligations. And one ex-CC justice noted that in, the absence of detailed debate or discussion, the CC could step in to order specific performance – as it had,

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<sup>54</sup> Amongst them Dugard, Bilchitz and Roux.

for example, in *TAC*<sup>55</sup>. Lack of implementation of Court Orders could be dealt with not by determining a minimum core content of rights, but by applying innovative remedies that require court supervision over engagement and implementation.

Many respondents suggested that a concerted joint effort by various combinations of the executive, the legislature, academics and civil society, led by the South African Human Rights Commission, is necessary in order to identify the substantive content of a minimum core for each SER, as well as criteria or benchmarks for the assessment of the reasonableness of government's performance in achieving the required progressive realisation. This is the preferred manner in which to support both the democratically elected and accountable government, as well as the courts with their constitutionally mandated role of oversight.

#### **d. Suggestions**

- There is a need for a concerted joint effort by various combinations of the executive, the legislature, academics and civil society, perhaps led by the SAHRC, to identify the substantive content of the minimum core for each SER, as well as criteria or benchmarks for the assessment of the reasonableness of government's performance in achieving the required progressive realisation. This is the preferred manner in which to support both the democratically elected and accountable government, as well as the courts with their constitutionally mandated role of oversight.
- In the possible circumstance of non-compliance or failure to implement by other arms of government, the court can order government to comply in a particular way within a particular time period as was done in the *TAC* case (eg though the application of supervisory interdicts).

## **4.5 The right to food**

### **a. Introduction**

While identifying landmark cases involving socio-economic rights, the research team was struck by the complete absence of apex court decisions involving the right to "sufficient" food. These fundamental needs – food and water – are closely related in human experience, and a right to both is recognised in section 27(1)(b) of the Constitution:

"Everyone has the right of access to sufficient food and water".

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<sup>55</sup> See fn 54, *supra*.

A broader question that arose was why the range of socio-economic rights, generally recognised as interdependent, appeared unevenly in the law reports. The team considered that these questions were sufficiently compelling to justify inclusion of the issue in the interviews with judges, legal representatives and academics.

The table below reflects research conducted by the project Team to update the CC statistics for the *South African Journal of Human Rights* in partnership with SERI and CALS (see Annexure W of the Mid-term report). The table 3 reflects the **rights-based cases heard by CC for the period 2006-2013**:

Right	Section	2006	2007	2008	2009	2010	2011	2012	2013	Total
Access to court	34	1	5	2	2	1	1	-	-	12
Access to information	32	-	-	-	1	-	-	1	-	2
Children	28	-	2	-	2	-	1	2	2	9
Dignity	10	3	2	2	-	1	3	1	3	15
Education	29	-	-	-	1	-	1	-	3	5
Environment	24	-	2	-	-	-	-	-	-	2
Equality	9	3	2	4	1	2	1	-	3	16
Fair trial	35	3	2	3	1	-	2	1	2	14
Freedom of assembly	17	-	-	-	-	-	-	1	1	2
Freedom association	18	-	-	-	-	-	-	-	1	1
Freedom of expression	16	1	2	1	1	-	2	1	2	10
Freedom of tradeoccup	22	1	-	-	-	-	-	-	-	1
Freedom and security	12	3	2	1	-	3	1	1	2	13
Health care	27	-	-	-	-	1	-	1	-	2
Housing	26	-	-	1	4	-	5	3	1	14
Just administrative	33	2	4	2	3	2	-	1	1	14
Labour relations	23	-	3	1	-	-	1	1	-	6
Life	11	1	-	-	-	-	-	1	-	2
Political	19	1	-	-	3	-	-	1	-	5
Privacy	14	1	1	-	-	-	-	-	3	5
Property	25	3	3	1	1	2	1	2	2	15
Remedy	38	-	-	-	-	1	-	-	-	1
Water	27	-	-	-	1	-	-	-	-	1
<b>Total</b>		<b>23</b>	<b>30</b>	<b>18</b>	<b>21</b>	<b>13</b>	<b>19</b>	<b>18</b>	<b>26</b>	

Table 3: rights-based cases heard by CC for the period 2006-2013

It is clear from this table that some socio-economic rights – notably housing – are adjudicated far more often than others. Water is only adjudicated once during this period

and food, not at all, despite its obvious importance, particularly as one in four South Africans go to bed hungry every night.

## **b. Interviews**

A large number of respondents agreed that NGOs and PIL firms are well-informed and connected with the needs and problems of communities and thus play a critical role in determining which rights are litigated. Several respondents agreed that, where those organisations do not exist, the SA Human Rights Commission should be proactively playing that connecting and facilitating role. There was, however, some concern about the fact that NGOs and other similar bodies dictate the agenda of rights litigation, sometimes in ways that do not directly respond to immediate needs.

## **c. Main findings and trends**

- Decisions by the CC are based on legal principles of broad application. Even though the subject-matter of landmark cases may have been limited to a few of the SERs enshrined in the Constitution, the principles and approaches set out in these precedents may have served to render litigation involving other SERs less necessary, or at least premature.
- Litigation in SER matters is a last resort. Because of separation of powers considerations, the CC wants to see that concerted efforts have been made to exhaust available opportunities to engage the responsible authorities to effect the realisation of rights.
- SER litigation is complex and requires careful planning, solid, convincing research, patient engagement with the responsible authorities, and careful timing. Undue haste can set back the cause by many years. Litigation of SERs is also usually dependent on the existence of an organisation that focuses on the right in question, and has forged links with and an understanding of an affected community, and has the ability to fund relevant research.
- SERs are often litigated in the lower courts, but because cases often do not reach the apex courts, we can be less aware of them.
- The particular formulation of the “negative” right not be evicted from one’s home has caused it to be the most extensively litigated SER – it is easier to protect an existing right than to create the reality of a right that does not yet exist in a person’s lived experience, and that cannot be easily measured.

- The sense of urgency – even crisis – that arises when mass homelessness looms has encouraged and enabled litigation on this issue.
- Recipients of grants set aside a minimum amount for food, with most expenditure allocated to meeting other needs. However, the need for food might also be partly addressed through the rights of children to access schools’ feeding schemes.

Regarding the question of when it might be appropriate and advisable to litigate the right to food, it was suggested that it might be helpful to consider the broad mobilisation model used to good effect by the Treatment Action Campaign (TAC) to complement ultimately successful litigation. Several analysts and commentators, as well as judges, have referred to it as a good example. The Treatment Action Campaign researched the issues and options carefully, and pursued an inclusive mobilisation and public awareness strategy. It started by working closely with those affected in order to thoroughly understand their needs and to identify an optimal solution. It then mobilised media support and public opinion in order to strengthen broad support for the move to supply Neviroprine to pregnant women at all clinics in South Africa, thus saving hundreds of thousands of lives. These tactics could be used when preparing to litigate for the right to sufficient food.

#### **d. Suggestions**

- SER litigation is complex and requires careful planning, solid, convincing research, patient engagement with the responsible authorities, and careful timing as undue haste can set back the cause by many years;
- Regarding the issue of litigating the right to food, it might be helpful to consider the broad mobilisation model used to good effect by the Treatment Action Campaign to complement ultimately successful litigation where the TAC researched the issues and options carefully, and pursued an inclusive mobilisation and public awareness strategy.

## **4.6 International and comparative laws and norms**

### **a. Introduction**

The Bill of Rights in the South African Constitution is according to Deputy Chief Justice Moseneke (2010: 64) an:

“...eclectic, collection of guarantees drawn freely from international human rights instruments and customary international law”, represents the “most prominent evidence of our subservience to international human rights standards.”

The Constitution imports international standards at both the interpretive and substantive levels. Section 39(1)(b) requires that, when interpreting the Bill of Rights, a court “must consider international law.” Section 232 of the Constitution explicitly incorporates customary international law as law in the Republic unless it is inconsistent with Constitution or national legislation. In addition, section 233 provides that when interpreting any legislation, the courts are enjoined by the Constitution to “prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.” Section 39(1)(c) provides that courts “may consider” foreign law when interpreting the Bill of Rights. Foreign law can be defined as the law of any country other than South Africa and usually refers to constitutions, legislation, case law and legal practice.

Comparative law, according to Berring (1989: 565), is “the study of the similarities and differences between the laws of two or more countries, or between two or more legal systems”. Comparative law is not itself a system of law or a body of rules, but rather a “method or approach to legal inquiry”. Liebenberg (2010: 18) has acknowledged the difficulties of drawing on comparative constitutional law for the interpretation of a national constitution. These include language difficulties and the differing legal systems of various jurisdictions, and the likelihood that “constitutional provisions acquire a distinctive meaning through their operation in concrete political, economic and social contexts” (*ibid*). Consequently, references to comparative constitutional law in the interpretation of a national constitution are thus:

“...susceptible to arbitrariness, in the sense that judges frequently only draw from jurisdictions whose language and legal traditions that are familiar to them; and superficiality, in that they suffer from the inevitable lack of in-depth knowledge of the relevant historical, social and legal contexts” (*ibid*).

A thorough appreciation of South African SER jurisprudence requires an understanding of the broader context within which it is developing, although it should be noted that South African courts have been groundbreaking in many respects. Globally, most States have repeatedly committed themselves to the domestic realisation of economic, social and cultural rights (SERs). This commitment is captured in the Charter of the United Nations (1945), and is found in the Universal Declaration on Human Rights (1948) and numerous international treaties, such as: the Covenant on Economic, Social and Cultural Rights (1966); the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the Convention on the Elimination of All Forms of Discrimination Against Women (1979); the Convention on the Rights of the Child (1989); the Convention on the Rights of Persons with Disabilities (2006); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).

These international commitments include the obligation to realise progressively economic, social and cultural rights in accordance with the maximum resources available to States, when acting individually and through international assistance and co-operation, and to guarantee these rights without discrimination on the basis of race, colour, gender, sex and gender identity, language, religion, political or other opinion, national or social origin, property, birth, disability or other prohibited grounds in international law. All these instruments incorporate an individual complaints procedure, thus generating jurisprudence on the interpretation of the protected rights in the context of concrete cases which is relevant and significant for the adjudication of such rights claims in South Africa, where the courts have steered away from considering the SERs of individuals outside the context of communities and society.

At the African level, a number of key regional human rights treaties explicitly entrench socio-economic rights. These include the African Charter on Human and Peoples' Rights (1981); the African Children's Charter (1990); and the African Women's Protocol (2003). Significantly, all these instruments are supervised by judicial and quasi-judicial mechanisms in the form of the African Commission, the African Court and the African Children's Committee of Experts. These judicial and quasi-judicial mechanisms have generated significant socio-economic rights jurisprudence, which is equally significant and could be useful to South African courts in the latter's adjudication of rights claims. Such transnational judicial dialogues can strengthen the rule of law, allowing domestic courts to arrive at the best responses to shared problems.

For comparative purposes, the section below highlights the protection of socio-economic rights under 2 African jurisdictions – Namibia and Kenya. Brazil and India are studied as comparative multi-cultural democracies of the South. Colombia is also highlighted owing to recent developments around the adjudication of SERs.

## **b. Namibia**

The only socio-economic rights provided for under the Namibian Constitution are the right to education and certain other socio-economic rights of children. The bulk of the socio-economic rights such as access to health; access to public facilities and services; right of senior citizens to social services; access to social assistance; access to legal aid; and access to education are provided under Chapter 11 of the Constitution as Guiding Principles of State Policy. The Namibian Constitution expressly declares the *non-justiciability* of these Guiding Principles and thus far there has been no attempt to judicially enforce them, unlike in India where Constitutional Directives have been enforced by the courts. Consequently, socio-economic rights jurisprudence is non-existent in Namibia.



### c. Kenya

The situation is different in Kenya. The 2010 Kenyan Constitution contains a comprehensive Bill of Rights, which includes a catalogue of civil and political rights, and social, economic and cultural rights. This Constitution provides for a set of 6 justiciable socio-economic rights relating to health, housing, food, water, social security and education. The courts have had a number of opportunities to enforce the socio-economic provisions of the 2010 Constitution as well as under Children's Act 8 of 2001, particularly the rights to education and housing.

However, the entrenchment of SERs under the Kenyan Constitution is a new phenomenon, and Kenyan courts are yet to contend with doctrinal issues associated with the judicial enforcement of such claims. These issues include determining the proper role of courts in enforcing SERs without upsetting the *doctrine of separation of powers*; ascertaining the nature of State obligations and the precise content of the socio-economic rights – issues that South African courts have been engaged with since the *Certification* judgments. In that regard, Kenyan courts may benefit from drawing on emerging South African socio-economic jurisprudence.

### d. Brazil

The adoption of the 1988 Brazilian Constitution ushered in a new era of SERs protection in Brazil, which has led to far-reaching SERs jurisprudence. This development has been aided by the fact that, in its human rights provisions, the Constitution emphasises the indivisibility, interrelatedness and interdependence of all human rights by entrenching economic, social and cultural rights in the same section of the Constitution as civil and political rights. The study considers the immense significance of the novel remedial rights introduced by the Constitution, namely, a writ of injunction to ensure the immediate exercise of constitutional rights, should a regulatory provision be lacking, and direct action for a declaration of unconstitutionality, on the basis of omission, to ensure the effectiveness of constitutional provisions in the case of a State organ's failure to act to realise constitutional rights. Significantly, Brazilian courts are fully empowered to adopt a teleological or substantive approach to interpretation in order to achieve the social values in the Constitution.

The Brazilian judiciary, led by its *Supremo Tribunal Federal (STF)*, and aided by the constitutional entrenchment of SERs, has generated significant jurisprudence that has positively impacted on the justiciability and realisation of SERs claims. Before the emergence of watershed SERs jurisprudence from Brazil's apex courts, it was largely assumed that the 1988 constitutional norms entrenching SERs did not have an immediate

effect, but were regarded as non-justiciable and therefore inappropriate for direct adjudication by the courts. The Brazilian courts have not shirked their responsibility of determining the nature and content of these SERs, issuing mandatory injunctions to compel the State to immediately provide the corresponding goods and services to litigants. The Brazilian apex courts have consistently adopted an assertive stance in their adjudication of SERs claims, particularly the rights to education and health.

#### **e. India**

The Indian judiciary has been bold and creative in responding to the needs of the poor. The Indian Supreme Court's intervention in economic, social and cultural rights has, as in the South African and Brazilian situations, generated substantial debate about the institutional competence and legitimacy of the judiciary to adjudicate in areas which have for long been perceived as belonging properly within the domain of the executive organs of State. However, there can be no doubt that the Indian judiciary, especially the Supreme Court, has positively contributed to the justiciability and realisation of rights claims, including catalysing changes in SER law and policy, particularly the right of access to primary / basic education.

Unlike in South Africa, Indian SERs jurisprudence has also helped to devise benchmarks and indicators relating to social goods. For instance, decisions concerning the right to health delineated the right to emergency medical care for accident victims as forming a core minimum of the right to health. Significantly, court orders concerning the right to food emphasise the right of access for those living below the poverty line to food supplies as forming the essential, non-derogable minimum that is a condition to preserving human dignity (Muralidhar 2008, p.117-118).

#### **f. Colombia**

In Colombia, the priority and applicability of the Social Rule of Law State and fundamental rights in Colombian constitutional interpretation, has brought about a transformation of the formalistic notion of law among judges, officials and legal practitioners. The 1991 Constitution imposed on the Colombian courts the difficult task of preserving the integrity and supremacy of the Constitution that provides a relatively high level of protection for SERs.

One of the tools that the Colombian Constitutional Court has used to comply with this mandate is the *tutela* action, through which the court has directly enforced SERs protected in the Constitution. It has been argued convincingly that within the sphere of its competencies, the Colombian Constitutional Court has responded to the challenges posed

to the judicial system by the complexities of life in Colombia (Sepulveda, 2008, p160). An examination of the Constitutional Court's case law shows that it has not disregarded the importance of the principle of separation of powers and the need to respect the expenditure priorities adopted through the national budget process. However, it has considered that, in exceptional circumstances, when faced with a situation of extreme necessity, the only way for the Court to uphold its constitutional mandate to safeguard the life, personal integrity and human dignity of the individual, is to order the relevant authorities to undertake the required expenditure. The Colombian Constitution also offers the opportunity for holding private actors accountable for human rights violations, particularly when such entities are carrying out the functions of the State.

Although there is still room for improvement, that there is no doubt that the Colombian Constitutional Court has played a leading and illuminating role in the judicial protection and enforcement of socio-economic rights in Colombia, and could inform developments in South Africa.

Additionally, dialogue between our courts and other judicial and quasi-judicial organs such as UN treaty bodies and African judicial and quasi-judicial mechanisms in adjudicating the rights in the Bill of Rights can generate new ways of interpreting these rights and thereby support transformative adjudication. This process of considering international and regional law standards promotes critical self-reflection, which should underpin the development of a transformative jurisprudence on socio-economic rights.

## **4.7 International and comparative norms under the South African Constitution**

### **a. Introduction**

According to Kirby, transnational judicial dialogues can strengthen the rule of law and assist domestic adjudicators to arrive at the best responses to shared problems (2009: 442). International and comparative norms are therefore likely to be valuable and a "dependable guidance from the collective wisdom of the family of nations" (Moseneke: 2010, 65). Additionally, dialogue between South African courts and other judicial and quasi-judicial organs such as UN and regional treaty bodies in adjudicating the rights in the Bill of Rights can generate new ways of interpreting these rights and thereby support transformative adjudication (Liebenberg, 2010). As noted by Langford (2008: 12):

"...opening up the domestic window to comparative experience allows one, whether judge or advocate, government or scholar, to better reflect on whether the prevailing views in a particular jurisdiction may be appropriate...such transnational perspective and normative reflection is solely needed..."

There is no doubt that the constitutional requirement to consider international law in human rights adjudication turns international law into a mandatory canon of constitutional interpretation when giving content to a right enshrined into the Bill of Rights. In the context of SERs, a particularly important source of inspiration in drafting the relevant provisions was article 2 of the International Covenant on Economic Social and Cultural Rights (ICESCR). Concepts such as the availability of resources, progressive realisation, and the adoption of legislative and other measures to give effect to rights were borrowed from the ICESCR although, as the Constitutional Court has observed, there are also differences in the formulation of the relevant provisions.

A significant consequence of South Africa's recent ratification (February 2015) of the ICESCR is that South African courts would have to align their jurisprudence not only with the obligations set out in the Covenant, but also the interpretative work of the Committee on Economic, Social and Cultural Rights (CESCR) as set out in its General Comments and Concluding Observations. Significantly, the standard of review provided for under the Optional Protocol to the ICESCR (Optional Protocol) when considering complaints and in assessing State compliance is that of reasonableness. Article 8(4) of the Optional Protocol provides that:

“...when examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party...in doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.”

#### **b. CESCR adjudication**

Article 8(4) of the Optional Protocol thus provides direction as to how the CESCR would adjudicate claims of alleged violations resulting from States' failures to adopt reasonable measures to realise the rights protected in the Covenant. International and comparative law thus provide useful normative insights on which constitutional and human rights adjudication can draw. International and comparative norms are therefore likely to be valuable and “dependable guidance from the collective wisdom of the family of nations” (Moseneke, *ibid.*). Furthermore, international and comparative law provides important normative standards that may assist in domestic constitutional interpretation particularly in a country like South Africa whose constitutional tradition is fairly young (Neuman: 2006, 183). This process of considering international law standards, according to Liebenberg (2010: 117), promotes critical self-reflection which should underpin the development of a transformative jurisprudence on socio-economic rights.

### **c. Fieldwork**

The fieldwork research component of the study sought to ascertain 2 key issues from respondents with regard to international and comparative norms and practices. Respondents included retired CC judges, SCA and High Court judges, and academics. The first issue, was to ascertain from the respondents whether the apex courts in South Africa, the CC and the SCA have made sufficient use of comparative international and regional norms, jurisprudence and practice. The second, was to establish whether there are best practices on the continent and abroad that South Africa can learn from in order to ensure effective implementation of court decisions.

The crucial question as to what would be “sufficient” use of comparative law is a value judgment. The dominant view of the respondents appeared to be that CC has always considered international law in its interpretative work as enjoined by section 39 of the Constitution which stipulates that our courts must consider international law and may consider foreign law. It was highlighted that “to consider international law” does not mean to slavishly follow it. It was pointed out that when the CC in the *Grootboom*<sup>56</sup> case, for instance, rejected the minimum core approach, it gave careful consideration to international law, including the applicable General Comments. However, considering international law does not mean the courts have to agree with it, because ultimately the test is our Constitution and our own constitutional scheme.

### **d. Findings and main trends**

- The CC in particular has, and indeed does, consider international and comparative law norms in its interpretative work. An opposing view was that there is a tendency in our courts to find the Constitution self-sufficient.
- Considering international law does not mean the courts have to agree with it. Ultimately the test has to be our Constitution and our own constitutional context.
- The CC has been very accommodative at considering international and comparative law as compared to the SCA. This has been attributable to the excellent research resources and personnel at the disposal of the CC as compared to the SCA, as well as the differences in the nature of the cases handled by the 2 courts.
- The extent to which the CC in particular considers international and comparative norms depends on the quality of the research and the submissions from Legal Counsel.

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<sup>56</sup> See fn 53, *supra*.

- Jurisprudentially, there is a tendency by our courts to borrow profusely from Canadian law, very little from American and German law and nothing from comparative jurisdictions in Africa. This is despite the fact that jurisprudence from the western jurisdictions is not very useful in the adjudication of socio-economic rights due to the non-recognition of such rights in the charters and constitutions of most western countries.
- Although consideration of it is required, international and comparative law should be tailored to the South African context and thus should not be followed slavishly.
- There is an imperative necessity and will to consider African norms and jurisprudence, but such norms and jurisprudence are not readily accessible to the courts, neither are they (ever) presented by counsel. Kenya's new constitution is modelled on South Africa's, but a relatively "African jurisprudence" is emerging from their apex court that could inform our own in positive ways.
- Regard to comparative constitutional experiences can be helpful in illuminating the possibilities and pitfalls of various forms of constitutional design and interpretative strategies, although caution should be taken on the dangers of an uncritical transplantation of constitutional models and institutions from one national context to another.
- South African jurisprudence has passed the developmental stage and is now far more advanced and sophisticated, hence there should be less reliance on international and comparative norms and jurisprudence. Although an isolationist approach is generally not recommended.
- The development of a more robust approach to SERs in other countries of the South may not be suitable for the South African context. The activism of courts in India, Brazil and Colombia may lead to more of a focus on individuals who have the "voices" and "sharp elbows" to claim their rights, and may neglect the importance of broader policy considerations and implications for poorer communities and society in general.
- There is a lack of awareness from the bench, academics and advocates / attorneys and civil society actors of any best practices on the continent and abroad to draw lessons and learn from with regard to implementing court decisions.

- However, our courts have been learning and referring to best practices from beyond our borders particularly on the question of remedies geared towards ensuring compliance with Court Orders – specific examples include the practice of contempt of Court Orders, the use of structural interdicts and reports. These practices have been drawn from foreign courts such as India.
- As a way of ensuring compliance with court decisions, court orders can be framed in such a way that a monitoring agency is identified or put in place to ensure implementation of such orders.

**e. Suggestions**

- Although comparative constitutional experiences can be helpful in illuminating the possibilities and pitfalls of various forms of constitutional design and interpretative strategies, caution should be taken on the dangers of an uncritical transplantation of constitutional models and institutions from one national context to another;
- Although critical, international and comparative law should be tailored to the South African context and thus should not be followed slavishly just for the sake of it;
- The SCA should be equipped with the necessary research resources and personnel at the same level as the CC so as to enable this court to consider international and comparative norms;
- South African apex courts should endeavour to consider comparable *African norms and jurisprudence* in their adjudicative work rather than exclusive reliance on western jurisdictions such as Canada and Germany, as there are some very progressive judgments from some African jurisdictions (eg Kenya) particularly on gender equality and customary law, that can enrich our own domestic jurisprudence;
- The development of a more robust approach to SERs in other countries of the South may not be suitable for the South African context. The activism of courts in India, Brazil and Colombia may lead to more of a focus on individuals who have the “voice” to claim their rights, and may neglect the importance of broader policy considerations and implications for poorer communities and society generally;
- There is need for more research on any best practices on the continent and abroad to draw lessons and learn from, with regard to implementing court decisions and this can enrich the South African judicial practice;

- As a way of ensuring compliance with court decisions, such orders should be framed in a way that a monitoring agency is identified or put in place to ensure implementation of such orders. Many respondents have mentioned the SAHRC as an appropriate independent Chapter 9 institution to serve this purpose.





## 5. THEME 2: IMPLEMENTATION AND IMPACT OF SELECTED JUDGMENTS

### 5.1 Background and rationale

The principal aim and focus of Theme 2 is to determine the *implementation* and *impact* of selected landmark decisions of the Supreme Court of Appeal (SCA) and Constitutional Court (CC). This section probes the extent to which landmark cases concerning socio-economic rights have transformed the lives of ordinary South Africans since the advent of democracy in 1994. So doing involves assessing the levels of implementation (i.e. fully, partially or non-implementation) of the judgments by State departments responsible for implementation. In instances where there has been no implementation, poor or partial implementation, reasons for such failures are examined. Where implementation is not the key recommendation of the judgment, the analysis was confined to investigating the impact that a judgment has had on the affected communities. As will be shown in this section of the report, there are tangible benefits for disadvantaged communities who took the State to court as well as precedents set in some of the landmark cases that are discussed herein.

As already mentioned Theme 2 assesses the implementation of court decisions, by tracing strategies adopted by the relevant state departments, which include changes to existing policies and legislation, allocation of budgets and adoption of new institutional practices. The analysis pays attention to understanding the relationship between the recommendations of judgments and their consequences for poor, vulnerable and marginalised South Africans. The courts have a duty to protect South Africa's constitutional democracy as well as being guardians of the Constitution. Their duty is to protect and uphold the rights of those who are most vulnerable in society. Courts should ensure that the state fulfils its obligation to meet the most fundamental needs of South Africans. This is linked to the discussions on transformative constitutionalism in Theme 1 of this project.

Since courts themselves are not directly involved in implementing judgments, the onus is on State departments to implement the judgments in a just and fair manner, as well as efficiently and effectively. The ordinary South African also has a part to play in ensuring State accountability, particularly where provision of socio-economic rights (esp. basic services) is concerned. While the public is supposed to play a significant role in ensuring that the State delivers services to them, survey data shows that this is not necessarily true in situations where court cases are involved. In order to gauge the perceptions of ordinary South Africans with regard to the government's implementation of court orders, two questions were included in the SASAS survey for 2014<sup>57</sup>:

1. To what extent do you agree or disagree that government departments including municipalities successfully implement court decisions that improve people's lives?

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<sup>57</sup> SASAS 2014 Survey, Data Analysis: Constitutional Justice Project. HSRC. Unpublished Report.

- How much do you agree or disagree that government departments and municipalities have the capacity to successfully implement court decisions that improve the lives of poor people and communities?

The findings are illustrated in Figure 1.

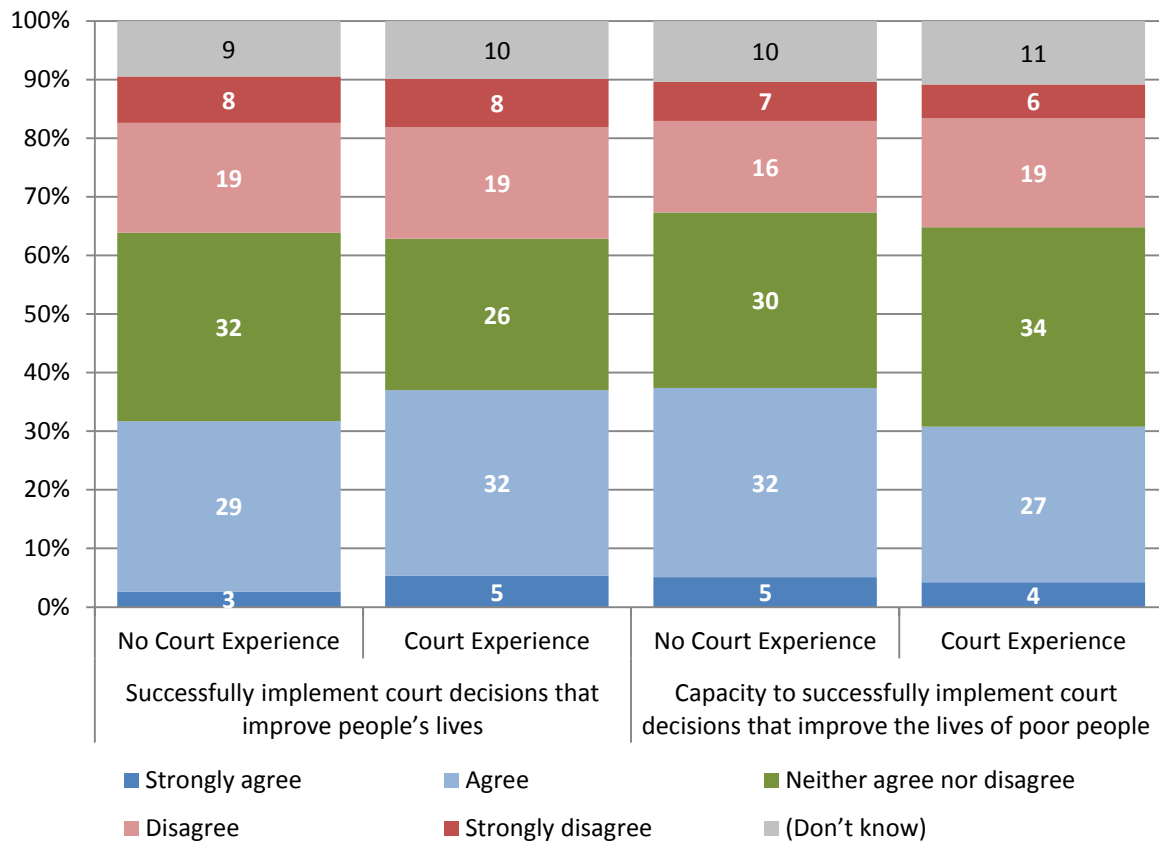


Figure 1: Successful implementation of Court Orders and capacity to implement successfully (SASAS 2014, Survey Data Analysis: Constitutional Justice Project. HSRC.Unpublished Report)

As can be observed in figure 3, less than two-fifths of South African adults felt that government implemented court orders successfully. Furthermore, less than two-fifths (36%) agreed that the government had the capacity to successfully implement court decisions that improve the lives of poor people. Approximately 1 in 10 adult South Africans answered “don’t know” to these questions while an average of 31% answered “neither agree nor disagree”. This could indicate that respondents found these questions cognitively challenging, or that there is a relatively low level of public trust in the ability of the courts to compel the country’s governing institutions to follow through and deliver on socio-economic rights of the poor. It is also possible that respondents had no knowledge of, or interest in, the level of implementation of court orders.

In order to understand which groups are most critical of the ability of the courts to induce the government to deliver on citizens’ socio-economic rights, subgroup analysis was conducted. The solid blue line below shows the share of South Africans who are satisfied

with the government’s handling the delivery of basic services; the broken green line represents the portion of the public who agrees that the government successfully implements court decisions that improve people’s lives; and the solid red line depicts the percentage of the adult population who agree that the government has the capacity to successfully implement court decisions.

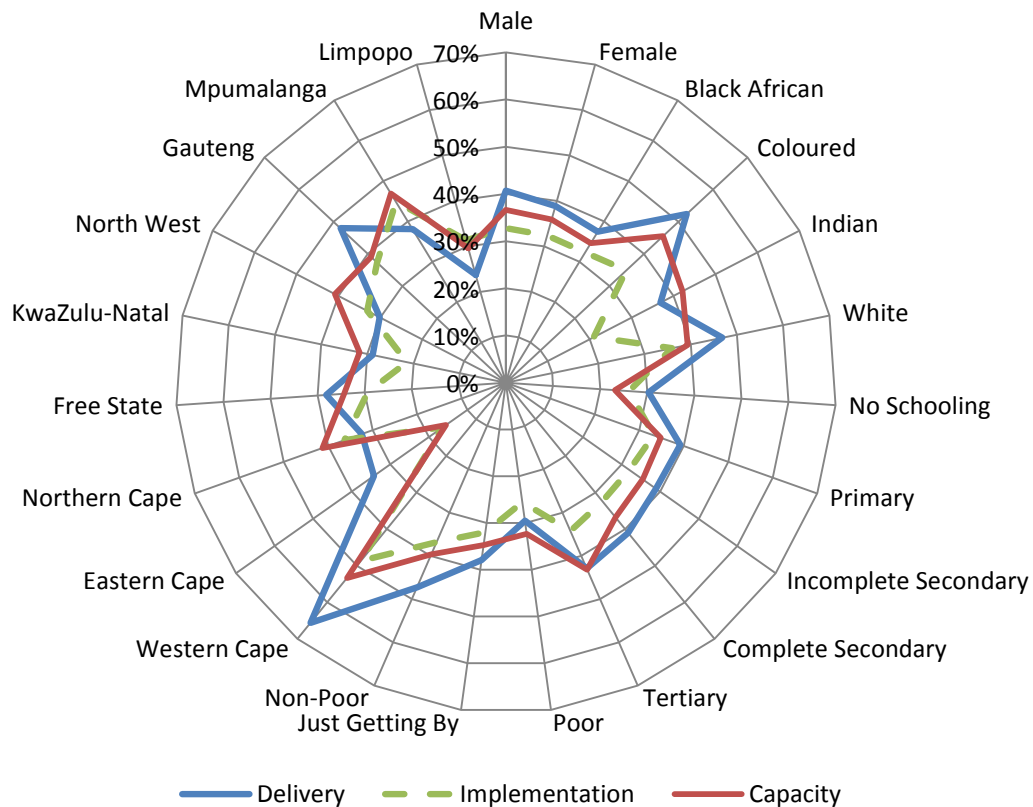


Figure 2: Successful implementation of court orders by government and capacity to implement successfully by sub-groups (SASAS 2014 Survey, Data Analysis: Constitutional Justice Project. HSRC. Unpublished Report)

If the blue line in is examined, it is apparent that the self-defined poor were generally dissatisfied with government delivery on basic services in their communities and less than a third (30%) were satisfied with government performance in this area. The green lines show that the poor were relatively unlikely to believe that the government could be induced by the courts to successfully implement improvements to people’s lives. This may be because the poor were less likely, compared to the non-poor, to think that the government had the capacity to successfully implement court decisions as can be observed when looking at the red line,

It is apparent from looking at the blue line that almost two-thirds of residents of the Western Cape are more satisfied with government’s delivery of basic services than those in other provinces. Residents of the Western Cape are also positive about capacity and ability of the courts to compel the government to improve their lives (see green and red lines). Residents of other provinces were less satisfied with the government’s delivery on basic services or the effectiveness of the courts to induce the government to improve the socio-

economic position of poor communities. Residents of KwaZulu-Natal and Limpopo were particularly despondent about government's delivery on basic services (see blue line). In these provinces, the share of the public who perceived the courts as effective in forcing government to enhance the socio-economic standing of the poor was also low (see green and red lines). This suggests that residents of these provinces have little faith in the use of the powers of the courts to deliver on the socio-economic rights of the people.

Nevertheless a considerable proportion of South Africans believe strongly (29%) that the State is capable of implementing court decisions successfully. A case specific analysis of CC and SCA cases as discussed below, shows that *affected* communities were seriously disgruntled by delays in realising the benefits of judgements which ordered the State to provide them with services.

In terms of grouping socio-economic rights, the cases assessed in this section fall into the following broad categories, namely, housing, water and sanitation, electricity, education, the environment, social welfare and customary law (especially related to the lives of women and girls).

## 5.2 Methodology

As already alluded to in the introduction of this report as well as the Concept Report (2014) and Mid Term Report (2015), the study was based on a mixed method design in which primary and secondary data were gathered through quantitative techniques and largely through qualitative techniques. The Human Sciences Research Council's South African Social Attitudes Survey (SASAS) 2014<sup>58</sup> data was used to gauge attitudes and perceptions of South Africans generally towards the government's ability to implement court decisions and delivery of services that impact on socio-economic rights. Other primary data was obtained from government documentation (Annual Reports, Annual Performance Plans (APPs) and secondary data obtained from published and unpublished articles, newspapers, reports, budget speeches among others to validate the argumentation of critical issues raised.

The qualitative primary data was obtained from key informant interviews with State officials, community leaders as well as civil society who were knowledgeable or directly involved in the cases under review. In particular the following were approached as key informants:

- *Public officials* in all spheres of government in order to determine the efforts they had made in implementing court judgments and the main challenges that they faced in the implementation of court orders. Questions posed during interviews with public officials included those related to:

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<sup>58</sup> SASAS 2014 Survey, Data Analysis: Constitutional Justice Project. HSRC. Unpublished Report.

- The oversight and accountability mechanisms (if any) that were put in place during the implementation of the court decisions.
  - Determinations of what worked and what did not work when implementing the court decisions.
  - The nature of the interventions that have been undertaken by the State to ensure that SERs are progressively realised.
  - Estimations and views on the extent and outcome of the implementation of the court decisions.
- Members of communities and community leaders<sup>59</sup> who played a direct or indirect role in litigation during the concerned case, or may hold views on the case itself as observers in the communities or as members of civil society.

The voices of the affected communities were captured through focus group discussions held in their communities. Focus group interviews were also conducted with members and leaders of affected communities in order to test their perceptions of the progress in implementation (the interview questions can be found in Annexure B of the Mid-Term Report).

Overall, each case discussed herein has been triangulated in the form of primary data drawn from government officials, members of the affected communities and community leaders and this includes government documentation and secondary data to back up the discussion.

### 5.3 Conceptual and theoretical issues

The conceptual and theoretical framework underpinning Theme 2 on issues of implementation and impact of the court decisions was discussed at length in the 2014 Concept Report. The Concept Report focused attention on what constitutes “implementation” which according to Cloete and Wissink (2000) encompasses those actions

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<sup>59</sup> These interviewees are referred in this research as “indirect” beneficiaries as opposed to direct beneficiaries. Indirect beneficiaries are the members of the affected community who benefited from the court judgments initiated by the litigants. Litigants are the direct beneficiaries of the case outcome: the people or persons who took the matter to court are directly affected, either positively or negatively (these key informants were interviewed as part of the research dealing with access to justice and the courts). But SER litigation is not focused only on one group, community or individual, but has broader policy implications for other similarly-situated communities and individual. For example, not only the litigants but also other members of the Harry Gwala Informal settlement were beneficiaries of the decision of the CC, *if that decision had been implemented in terms of the court order*. Either way, they were affected by the outcome and the lack of implementation.

directed at the achievement of objectives set forth in prior policy decisions. As stated several times in the colloquia organised for this study, implementation may be a more complex process than envisaged by a particular adjudicating court. Judgments by definition are narrowly defined and issue-driven, while implementation may be subject to a number of variables, dependencies and sequencing, which may not have been apparent at the time of the court decision. As implementation should be monitored and evaluated looking at the development of programmes and policies, allocation of resources and the delivery of services as well as meaningful citizen engagement, monitoring and evaluation (M&E) was also discussed in the Concept Report (2014) including separation of powers and the complexity of intergovernmental relations. This also links up with discussions around the role of separation of powers in a constitutional democracy in Theme 1.

Figure 3 below shows how the cycle of implementation works in State institutions.

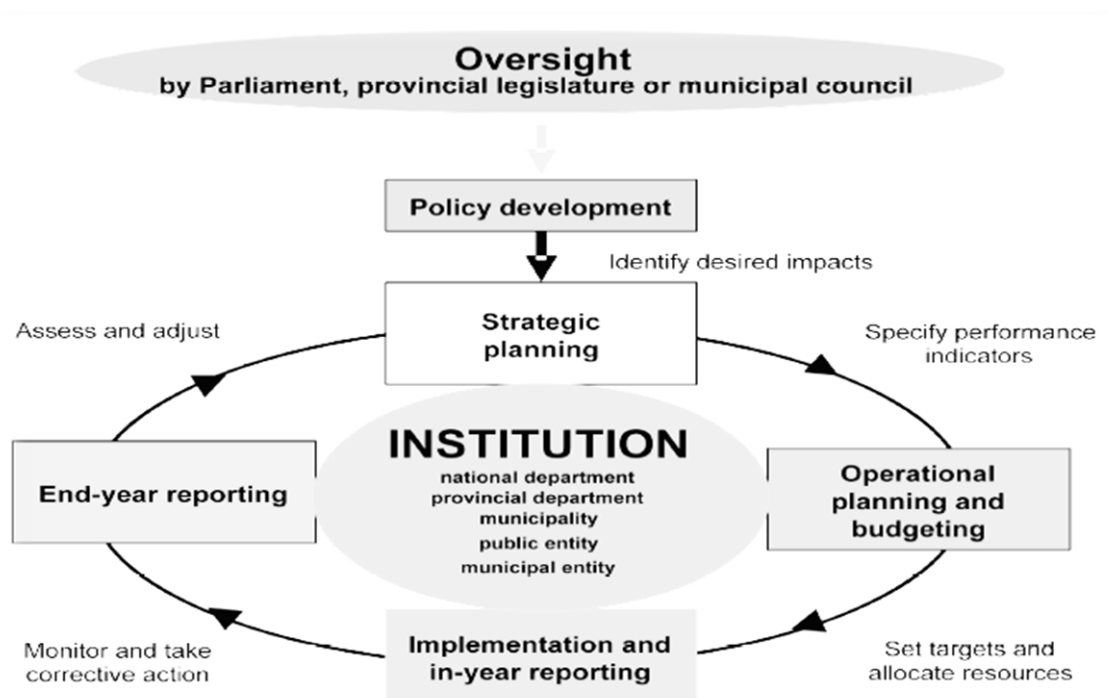


Figure 3: Cycle of implementation (Source: National Treasury, 2007:4)

In contrast to the process of implementation, “transformative impact” refers to the *outcome* of the course of action over an extended period of time. The advent of the post-1994 dispensation was accompanied by the emergence of the concept of transformation as the framework within which the new South Africa would attempt to create a new society free from the ruins of colonial and apartheid powers in which black people were vassals of the white minority. From a definitional point of view, transformation means fundamental changes which occur in nature, society, any entity or in the known universe. In this project the understanding of transformation is linked to Karl Klare’s post-liberal “constitutional transformation”. Transformation is much more than change, for it involves a radical and

fundamental metamorphosis in the nature, form and functionality of the entity so affected. In the context of society, transformation involves fundamental changes in the political, social, economic and legal institutions of society. Transformation is therefore inevitable in nature and society. And in this context, it should lead to the well being of all South Africans, especially the poor, vulnerable and marginalised.

In the following sections, specific case studies are used to illustrate how SERs have been litigated in selected cases, and as a result, how these judgments have contributed to transformation through either implementation, impact (or lack thereof).

## 5.4 Findings on levels of implementation and impact of SCA and CC judgments in socio-economic rights

### 5.4.1 Housing, Water, Sanitation and Electricity

#### a. Analysis

The starting point for any discussions around provision of housing in South Africa has naturally been the *Grootboom*<sup>60</sup> case, which had far-reaching implications for future litigation related to this socio-economic right and others.

The *Grootboom*<sup>61</sup> case first came before the Cape Provincial Division of the High Court on 1 June 1999 in the form of an urgent application launched by Mrs Grootboom. The Order sought from the High Court was one directing the respondents to provide the applicants with temporary and adequate shelter and / or housing and / or land pending the applicants and their children obtaining permanent accommodation. The respondents had been evicted from their informal homes situated on private land earmarked for formal low-cost housing. They applied to the High Court for an Order requiring government to provide them with adequate basic shelter or housing until such time that they obtained permanent accommodation. On the return day of the urgent application, when the matter came before Judges Davis and Comrie, the High Court made an Order that was in part declaratory (Pillay 2002: P. 260).

In paragraph 2, the High Court declared that, in terms of section 28 of the Constitution *the applicant children were entitled to be provided with shelter by the appropriate State department or organ and that the applicant parents were entitled to be accommodated with their children in the said shelter*. Scott and Alston (2000) described the Order handed down by the Cape High Court as creative and pragmatic, and it declares what the duties of the State are in respect of the child applicants according to section 28 of the Constitution.

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<sup>60</sup> See fn 53, *supra*.

<sup>61</sup> *Ibid*.



Subsequently, the CC held that socio-economic rights are justiciable in South Africa as construed in the judgment *Ex parte Chairperson of the Constitutional Assembly: In re-Certification of the Constitution of the Republic of South Africa, 1996*<sup>62</sup>. The question of how socio-economic rights were to be enforced, however, was a difficult issue which had to be carefully explored on a case-by-case basis, considering the terms and context of the relevant constitutional provision and its application to the circumstances of the case (para 20).

The roles and responsibilities of the different spheres of government in implementing the court order must be understood in the context of the broader housing policy framework. In terms of the Housing Act 107 of 1997, the provincial government has the duty to promote and facilitate the provision of adequate housing in its province within the framework of the national housing policy. A further power that the provincial government has is the power to intervene when a municipality cannot or does not perform a duty imposed by the Housing Act. At local sphere of government, every municipality must take reasonable and necessary steps, within the framework of national and provincial housing legislation and policy, to ensure that the housing right as set out in section 26 of the Constitution is progressively realised. This should be done by actively pursuing the development of housing, addressing issues of land, services and infrastructure provision, and creating an enabling environment for housing development in its area of jurisdiction (Pillay, 2002).

Overall, the lack of specificity in the court order with regard to the allocation of responsibilities between the three spheres of government has been blamed for discord and uncertainty with regard to their obligations under the *Grootboom*<sup>63</sup> judgment. Apart from making reference to “reasonable legislative and other measures” to progressively realise the right of access to adequate housing, it also called for administrative, judicial, economic, social and educational measures to be taken into account at all spheres of government which is not necessarily feasible. The SAHRC, in a letter filed in the CC, stated that “after initial uncertainty about the *locus* of responsibility for the implementation of the Court Order, the 2 organs of State finally put aside their differences in June 2001” (SAHRC, 2001).

The government of South Africa had been providing free housing to the poor,<sup>64</sup> but the *Grootboom* judgment made it mandatory for the State to put in place mechanisms that would speed up this process and provide shelter in emergency situations. This case led to the introduction of a new Housing Code that sought to respond to the CC’s judgment and order. As a result of the magnitude of the *Grootboom* judgment, its impact can be felt in the manner in which respondents often quoted the case in their analysis of other cases. In the interview with the Ekurhuleni Municipality one official explained:

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<sup>62</sup> 1996 (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (CC).

<sup>63</sup> *Govt of the RSA & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC).

<sup>64</sup> “The South African government had a robust (but oversubscribed) housing program that provided several hundred thousand units per year in place at the time of the ruling, but the Constitutional Court saw in it one major shortcoming: the program was merely equitable and they demanded one that was just.” [Online]. Available from : <http://www.tadamun.info/2014/01/05/the-landmark-case-of-grootboom-versus-the-republic-of-south-africa/?lang=en#.VQZ6XfmUeoM> [Accessed: 16<sup>th</sup> March 2015].

"I always go back to the *Grootboom* decision because the *Grootboom* decision really unpacks the section 26 right, and basically says .... [C]an you implement it? .... Are there policies and whatever put in place, and secondly, the issue of resources become key, because whereas people have the right of access to housing, but the constraints that are there, the issue of the availability of resources and taking cognisance of the fact that, that right cannot be realised like this. It can be realised on a progressive basis."

This official applauded the *Grootboom* case for its clarity on what the State had to do and its sensitivity to issues of resources which form the basis for implementation on the part of government.

Undoubtedly, the *Grootboom* case had a marked impact on the development of South African constitutional jurisprudence, particularly on the enforcement of socio-economic rights (IDASA 2002; Roux, 2002). As mentioned, the decision also had a major impact on housing policy in South Africa. Most municipalities have put in place a "Grootboom allocation" in their budgets to address the needs of those who are desperate.. The applicants were provided with basic amenities as a result of a settlement reached prior to the hearing of the case by the CC (ESCR-Net, 2000) and as a "meaningful step forward for socio-economic rights" (Sloth-Nielsen, 2001). Yacoob J held that, while the justiciability of socio-economic rights was beyond question, the issue to be grappled with was how to enforce these rights in any given context. Although arguably self-consciously limited in scope and ambition, *Grootboom* laid a stable foundation for a new order in eviction cases by requiring that, "at the very least" evictions had to be conducted "humanely", and by establishing that the State had an obligation to plan for those who would otherwise be rendered homeless by an eviction (SERI, 2013).

With regard to the water sector, there is a need for defined roles in as far as intergovernmental relations amongst the Department of Water and Sanitation, Water Boards and the Water Services Authority. It is unacceptable to see communities failing to exercise their socio-economic rights because of intergovernmental relations failures in the water sector. According to the late Chief Justice Langa, the provision of services to all and the levelling of the economic playing fields that were so drastically skewed by the apartheid system must be absolutely central to any concept of transformative constitutionalism (Langa, 2006:352). One respondent argued that in the previous "Minister's budget speech, she indicated that to completely eradicate the water services backlog, we need six hundred and seventy billion rands in the next ten years". However, it is not always the limitation of the resources, but also how those available resources are utilised to realise the socio-economic rights.

In her 2012 budget speech, the then Minister of Water Affairs Ms Edna Molewa acknowledged the dire straits of the country's water challenges:

"In 1994 only 59% of our people had access to clean and safe drinking water. Eighteen years later, we have progressed to a national average of 94.7% access to basic water services for all South Africans – an increase of 35,7%. The backlog now stands at 5,3%, or

some 710 000 households compared to 3, 9 million households in 1994. This trend illustrates that the government's performance is on an upward trend. In spite of this, there are still many rural areas and informal settlements close to urban areas without water. Even more worrying is the fact that there are areas where post-1994 infrastructural deficiencies are still characterised by taps that have run dry due to poor maintenance or operational problems. Such an unacceptable state of affairs dictates that functional water infrastructure and quality services to the remaining 5,3% of the population become a task to be undertaken with a sense of urgency (Molewa 2012)."

One respondent suggests that the affected communities should be exposed to pieces of legislation of the water sector as well as bureaucracy for providing such services. According to the respondent from DWAS:

"I think we still have a long way to go in terms of educating our end-users, our communities, the recipients of water and sanitation services. Our communities [should] be well conversant with water and sanitation policies and the understanding of the bureaucratic systems of delivering such services. Courts will always be there, but at the same time, sometimes you might find the issue will be just brought before the court, which should have been just brought along these bureaucratic systems, but depending as well how effective these bureaucratic channels to quickly respond to communities [concerns]".

The issue of empowering communities with knowledge as to how the State implements basic services – such as water provision – came to the fore here and this should not be downplayed, as it accounts for complexities of implementing court decisions.

Similarly, the impact of landmark cases such as *Mazibuko*<sup>65</sup> (the right of access to sufficient water) has been felt countrywide, especially in impoverished and low income communities. In this case 5 residents of Phiri in Soweto brought a case against the City of Johannesburg, Johannesburg Water (a company wholly owned by the City) and the National Minister for Water Affairs and Forestry. There were 2 key questions at issue: the first was whether the City's policy in relation to the supply of free basic water, and particularly, its decision to supply 6 kilolitres of free water per month to every accountholder in the city (the Free Basic Water (FBW) policy), was in conflict with the Water Services Act and the right to have access to sufficient water as set out in Section 27 of the Constitution. The second was whether installation of pre-paid water meters in Phiri, which charged consumers for use of water in excess of the FBW allowance, was lawful. The South Gauteng High Court found that the installation of pre-paid water metres in Phiri was unlawful and unfair. It also held that the City's FBW policy was unreasonable in terms of Section 27(2) of the Constitution and therefore unlawful. It ruled that the City should provide 50 litres of free basic water daily to the applicants and to other "similarly placed" residents of Phiri.

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<sup>65</sup> *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC).

Following appeal judgments, the CC rejected the applicants' argument that it should adopt a quantifiable standard determining the "content" of the right. According to the Court, this argument must fail for the same reasons that the minimum core argument failed in its earlier decisions in the *Grootboom* and *TAC*<sup>66</sup> cases. On pre-paid metering, the CC stated that the cessation in water supply caused by a pre-paid metre stopping is better understood as a temporary suspension in supply and not a discontinuation in water supply. The CC concluded that the installation of the metres was not unlawful and rejected the applicants' arguments. However, in implementing the decision by the City of Johannesburg, the CC's decision was greeted with dismay by socio-economic rights activists, community organisations, and a wide range of actors working on the right to water (ESCR, 2009).

The *Mazibuko*<sup>67</sup> case was also subject to considerable criticism from socio-economic rights academics who disagree with the CC's conclusions on the constitutional right to have access to sufficient water, as well as its re-characterisation of the Court's previous socio-economic rights jurisprudence (particularly the *TAC* case). The Anti-Privatization Forum (APF) has stated that the struggle for water rights will continue (ESCR, 2009).

The outcome of this judgment appears to have been satisfactory for public officials, but not for the affected communities. At the core of this CC case were issues around affordability, unemployment and poverty in relation to payment for services by residents located in communities notorious for non-payment. Interestingly, officials appeared to have shown concern for the plight of the community members during the journey of the *Mazibuko* case through the courts. One official from the Department of Water Affairs (DWA) indicated that taking:

"...the judgment to the Constitutional Court was not to prove a point, because one thing [is] for sure, that we've always been told, since after the first judgment given by the High Court, by our top management ... that the Department really ... shared the same frustrations as the communities".

In the City of Johannesburg's Group Annual Performance Report (2009), the city acknowledged 2 legal battles fought in that year which included the eviction of people that had invaded a private building in the inner city (the *San Jose*<sup>68</sup> case) and the *Mazibuko* case, both of which were bound to create new case law in the country. The report states that since these cases were closed at the Constitutional Court in favour of the city, they "in essence strengthened the policy framework adopted by the city in rendering services and managing the city."<sup>69</sup> With regard to the provision of free basic services, the same report then explains some of the developments that had occurred in the past few years:

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<sup>66</sup> *Govt of the RSA & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC); *Minister of Health & Others v Treatment Action Campaign & Others* (No 2) (CCT 8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC).

<sup>67</sup> See fn 72, *supra*.

<sup>68</sup> *City of Johannesburg v Rand Properties (Pty) Ltd* (253/06) [2007] ZASCA 25; [2007] SCA 25 (RSA) ; [2007] 2 All SA 459 (SCA) ; 2007 (6) SA 417 (SCA) (26 March 2007)

<sup>69</sup> City of Johannesburg Consolidated Group Annual Performance Report for Year, Ended 30 June 2009.

“At the start of the term of office all households in Johannesburg received the first 6 kl water for free every month and 50 kWh free electricity if they were deemed to be lifeline customers. These allocations were subsequently increased. In July 2007 the allocation of free basic water was expanded to 10 kl for all households on the City’s indigents register. There were approximately 119 000 registered indigent households at this point.”<sup>70</sup>

The *Mazibuko* judgment also meant the resumption of Operation *Gcin’amanzi* (Conserve Water) which had initially been launched in Soweto as a massive infrastructure upgrade project and was suspended in May 2008 following the judgment. According to the municipality, water consumption was brought down significantly by a 79% reduction in unaccounted-for water and approximately 220 million litres were saved in Phiri alone at the time.<sup>71</sup> The extent to which progress has been made with regard to access to sufficient water for the township poor, as a result of this infrastructure upgrade project, remains to be seen. Be that as it may, communities still feel that they got the short end of the stick in cases such as *Mazibuko* where the court refused to compel government to provide more water to households.

The outcome of the *Mazibuko* case is arguably reflective of the increasingly deferential and conservative approach adopted by the court in the context of socio-economic rights cases (ESCR 2009; Wesson 2011, p.390). As Friedman (2008) argues, the major lesson the *Mazibuko* judgment holds is that accountability alone is insufficient unless it is tied to appropriate standards of scrutiny that are structured by an appropriate set of principles. Based on this, a couple of factors distinguish *Mazibuko* from the court’s earlier socio-economic rights cases. While in earlier decisions, an individual or group had been either excluded (e.g. *Soobramoney*, *Treatment Action Campaign case* and *Khosa case*) or overlooked (e.g. *Grootboom*) by the relevant social programme, this was not the case in *Mazibuko* as there were many who are far worse off than the residents of Phiri in Johannesburg (Wesson, 2011).

According to Jackie Dugard, an attorney in this case, and others, the court decision also constitutes a massive failure and challenge as the Court has rejected or ignored pro-poor jurisprudential options and arguments, which might have directly promoted (social) transformation in South Africa and most certainly would have improved the living conditions of the claimants (Dugard, 2007; Friedman, 2008). But Murray Wesson suggests that the judgment should not be taken as the death knell of successful socio-economic rights litigation before the South African Constitutional Court (Wesson, 2011).

In the *Joseph*<sup>72</sup> case, dealing with the right to electricity (as related to the right to housing), the Applicants eventually won the case, but transformation on the ground was

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<sup>70</sup> *Ibid* p14.

<sup>71</sup> [Online] City of Johannesburg, “Water project back on track”[http://www.joburg.org.za/index.php?option=com\\_content&id=5681&Itemid=340#ixzz3VS0GR5Ou](http://www.joburg.org.za/index.php?option=com_content&id=5681&Itemid=340#ixzz3VS0GR5Ou) [Accessed 25<sup>th</sup> March 2015]

<sup>72</sup> *Joseph & Others v City of Johannesburg & Others* 2010 (3) BCLR 212 (CC).

slow and uneven after the case. Jackie Dugard from the Socio-economic Rights Institute (SERI), who was involved in the case, highlighted how although they had won the order to reconnect the electricity in *Joseph*, it was never possible because by the time the litigation ended, all the electrical cables had been stolen and neither the city, the property owner, nor the tenants were prepared to pay to replace the cables, so the electricity wasn't re-connected as proposed by the CC.

Another case in point is the *Residents of Chiawelo Flats v Eskom and City of Johannesburg*,<sup>73</sup> where the community was also the victim of electricity disconnection by the authorities, almost similar to the facts in the *Joseph*<sup>74</sup> case. The impact of the decision rests on the fact that the public law right to electricity implied by legislation in *Joseph v COJ*<sup>75</sup> was a significant advance in the interpretation and enforcement of SER (Wesson, 2011:390; Radebe, 2013). Through SERI, 420 low-income residents in Chiawelo Soweto secured the reconnection of electricity relying directly on the *Joseph v COJ* precedent. The decision taken in both cases raised the possibility of reviewing inaccurate billing practices and unjust disconnections that follow them.

Discontent existed amongst the affected community members in Chiawelo over the lack of prior communication between themselves and Eskom. According to a participant of the focus group interview, "they (Eskom) came in, they switched off the lights and people were asking why ... they said you haven't been paying". A similar pattern also occurred in the *Mazibuko* case. Although the residents of Phiri received notice that a pre-paid water system would be put in place on the 28 January 2004, Lindiwe Mazibuko did not receive such a notice and lived without water on her property for approximately 6 months (Van Rensburg, 2008:415).

One of the tenants argued in strongest terms that:

"...what happened is people from Eskom they came in, they switch off our lights without even warning us... they said you owe us three million. If you can pay that money in cash, that's when we'll switch on the lights".

These cases illustrate that the question of service delivery is a thorny issue and this is witnessed by a number of protests (violent and peaceful) and litigation related to socio-economic rights. The *Chiawelo* case is not an exception. Eskom failed to consult the tenants due to intergovernmental failures to include the tenants in the consultative process.

The impact of the decision rests on the fact that the public right to electricity implied by legislation in *Joseph* was a significant advance in the interpretation and enforcement of socio-economic rights (Wesson, 2011, p.390; Radebe, 2013). The judgment opens up a range of new possibilities for holding electricity providers accountable. Indeed, during 2010,

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<sup>73</sup> *Residents of Chiawelo Flats, Soweto v Eskom Holdings Limited & Another*; Unreported Case No. 2010/35177; South Gauteng High Court, Johannesburg. 10 September 2010.

<sup>74</sup> See fn 79, *supra*.

<sup>75</sup> *Ibid*.

SERI secured the reconnection of electricity to 420 low-income residents in Soweto, relying directly on the *Joseph* precedent. It is also possible that utility companies will be required to act reasonably in deciding whether or not to disconnect an electricity supply, in the future. The decision also raises the possibility of reviewing inaccurate billing practices and unjust disconnections. However, no substantive conclusions about the right can yet be drawn (ESCR, 2010).

The *Nokotyana v Ekurhuleni Metropolitan Municipality* case<sup>76</sup> was a rather complex one relating to housing, sanitation and electricity. On the surface the case was about the installation of:

- (1) communal water taps
- (2) temporary sanitation facilities
- (3) refuse removal facilitation
- (4) high-mast lighting in key areas

pending a decision by the Member of the Executive Council for Local Government and Housing, Gauteng (MEC), on whether the settlement was to be upgraded to a formal township. In terms of the Housing Code services could not be provided until the settlement had been upgraded. However a focus group interview in the Harry Gwala settlement, which included community leaders and members, focused on the desperate need for housing.

Members present during the group interview desired houses and wanted government to build these houses for them, because as citizens they were entitled to basic housing (including sanitation) like everyone else since the advent of democracy. One of the community members vented:

“We’re not foreigners, but yet the municipality and the government treat us like foreigners, because for many years, we’ve not been provided with RDP houses.”

An interesting point to note, however, is that some residents did not wait for government to build houses for them, as they took it upon themselves to do so. This was pointed out by a community leader who argued that if one had to go around the area, they would find that some residents had built houses, they “wouldn’t have done so if we weren’t given permission to stay on this land back in 1994”.

On the other hand, in an informal interview<sup>77</sup> the officials at the Gauteng Department of Housing who were responsible for upgrading the Harry Gwala settlement spoke of R8 million budget allocated to erect high rise flats in the area. A key informant also supported this claim by the officials that the provincial government did make an attempt to upgrade the Harry Gwala settlement by offering to build high rise flats, but the offer was rejected by the community due to health and cultural reasons. Thus, despite an alleged desire on the part of the GDHS to improve the area, the offer presented to the community was not satisfactory to their demands, which presented a challenge in terms of

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<sup>76</sup> *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* (CCT 31/09) [2009] ZACC 33.

<sup>77</sup> The officials did not want to speak on record.

implementation. The community expressed unhappiness that they had not been properly consulted on the upgrades. Thus, the court order for the MEC to decide on the upgrade to a township within 14 months of the judgment is yet to be fulfilled, 5 years later. And the residents of Harry Gwala remain without basic services and housing / shelter.

## **b. Summary findings**

Below is a summary of the key issues raised by public officials and communities' representatives as well as beneficiaries in the housing cases (with the understanding that water, sanitation and electricity provision is related to the right to housing and shelter):

- For officials, communication appears to be lacking, not only between State departments and municipalities and the affected applicants / communities, but also *within* government itself. Instances have been mentioned where communities would have their water or electricity disconnected without prior knowledge or proper arrangements. The courts have found such practices to be unconstitutional, which resulted in favourable judgments in the *Joseph*<sup>78</sup> and the *Chiawelo* cases. It is clear that lack of communication – or poor communication – among the local, provincial and national spheres of government have had adverse impacts. For instance in the *Nokotyana*<sup>79</sup> case there was a delay by the MEC of Housing to declare whether the area could be upgraded to township status at some point, which meant that the Ekurhuleni Municipality could not provide services to the area. Although the delay ostensibly occurred at Provincial level, the community directed blame at the municipality as they believe that these local officials are responsible for improving their lives. According to the community members interviewed, there have been further delays – since September 2014 – in conducting an audit in Harry Gwala area to determine the authenticity of the community claims for RDP housing, and the number of community members eligible for these RDP houses.
- Some officials also expressed that the judgments are not always easy to implement. There seem to be gaps between the recommendations made in a judgment and the action plans adopted by the relevant government authorities to address them. This was stated as one of the key reasons why officials “ignore” court orders. One official explained:

“I think the first port would be the Legal Department, just to understand the decision itself .... to then unpack the decision from a technical point of view and see how best it can [sic] be implemented, if it's implementable. .... You've

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<sup>78</sup> See fn 79, *supra*.

<sup>79</sup> See fn 83, *supra*.



got decisions really which are serious that will have to be enforced, because you know, the officials just sit and look at them but just ignore them.”

- Structural challenges exist where the issue of competencies according to spheres of government make the process of implementation cumbersome. Defective intergovernmental relations also tend to slow down progress towards transformation.
- Some communities expressed concerns that they lack agency and understanding of legal matters that affect them. Language and a lack of knowledge were mentioned as barriers to communication, particularly in the *Nokotyana* and *Chiawelo* cases. According to the key informants, people within the community don't speak or clearly understand English, or even know what is contained in the Constitution. This was mentioned in a number of interviews with indirect beneficiaries, where the main language of communication was not English. There is no clear and concise knowledge over how the judicial system in South Africa works amongst communities and where one can get legal assistance in instances of difficulty. According to a community leader in the *Chiawelo* case:

“...because most of the people they didn't care. If it wasn't the ten block reps, that said we are standing up, we said, we can't be living in the darkness. So if people are quiet, all of us we can't be quiet, so we had to fight.”

- Access was also another challenge, according to the community leader in the *Chiawelo* case:

“...the justice system in South Africa is very far from people in the location [township], and that's the majority people of the voters. So it gets very ... it's very difficult for them to access it”

It was interesting to observe that in many SER cases interest groups or human rights bodies – whom the affected parties initially didn't know of – played a crucial role in advancing their grievances through the court system. None of the affected parties approached the courts directly, with their own legal teams at their own expense. Human rights bodies or *pro bono* lawyers played a crucial role in this regard. Public officials mentioned how human rights bodies or *pro bono* lawyers were not always “out for the interests” of those affected, but were there for personal gain or publicity. One official mentioned how it is not surprising that civil society is often challenging policy makers when they feel there are injustices:

“...even the role of the NGOs, you must remember that your CALS, your SERIs, your Legal Resources Centre had been established to fight in a certain way against certain prejudices ... against the state then. But now that has passed... So they are now fighting still for the ordinary man, but against these people whom they were fighting together with. So the tone has changed and .... I think we do appreciate their efforts because only when they

do that can we then also be awake to what we need to do. So we don't [as local government] resent their role."

- Cost was identified as another barrier. In the words of a community leader in the *Chiawelo* case:

"...we used our monies, we used our petrol money, we used everything, our time and everything, we used everything that was ours for us to fight with the people, because we had a little knowledge of what people are supposed to be having".

This was before the intervention of the human rights lawyers.

- Community-based organisations such as *Abahlali BaseMjondolo*<sup>80</sup> placed the blame on State capacity for failure to implement court judgments:

"We regard the Constitutional Court as the supreme law of the land where we expect everybody to abide by the decisions thereof. It is clear from these eviction activities that there is totally a lack of will from government to address the plight of the people."

- According to one community respondent, the impression the communities get is that politicians can do whatever they want outside the law without any consequences imposed on them. They further argued that if there was a court ruling, be it in favour of the government or in favour of the people, the State must find a way of formulating mechanisms to implement such court decisions.

"The state has to take the initiative to implement these court decisions without fail, but unfortunately they are the first in line to violate them ... The lives of the people would have changed drastically if the state is serious about implementation".

### c. Conclusion

The state of housing in South Africa post-*Grootboom* remains a contested space as various government institutions responsible for housing and related service provision continue to face litigation from disgruntled citizens. The 2010 Annual report of the Department of Human Settlements shows that its Legal Chief Directorate was actively involved in a number of court cases, among them *Abahlali Basemjondolo Movement SA v Premier of KwaZulu-Natal & Others (including the Minister of Housing)*; *Nokotyana v Ekurhuleni Metropolitan Municipality*; *Residents of Joe Slovo Community v the City of Cape*

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<sup>80</sup> *Abahlali baseMjondolo* (Shack Dwellers), also known as AbM or the red shirts is a shack-dwellers' movement in South Africa which is well known for its campaigning against evictions and for public housing.

*Town, Minister of Housing and the Western Cape Provincial Department of Housing and local Government.*<sup>81</sup>

All these cases were landmark and show the extent to which transformation of people's lives in as far as housing, water, sanitation and related services is concerned, lags behind. The same report shows that there have been considerations by the State departments concerned that there is need for learned and informed approaches to legal matters in the provision of this service. This is evidenced in the formation of what is referred to as *The Human Settlements Legal Forum*, comprising Heads of Legal Services in the National Department of Human Settlements, provincial Departments of Human Settlements and Human Settlements Institutions.<sup>82</sup> The primary objective of the Legal Forum is to create a platform for sharing and support on legal matters affecting the human settlements sector. The extent to which such an initiative will lead to tangible results is yet to be established.

Minutes of meetings of the Legal Forum report on deliberations on many aspects of the delivery of houses and related services (water and electricity). The minutes show some complexities of intergovernmental co-operation, and the need to fully involve legal sections of relevant departments in planning and implementation. According to the minutes of the September 2014 meeting, the Legal Forum considers the development of a National Framework on Litigation Management for the three spheres of government and their respective entities and that should such a Framework should be endorsed by Technical MINMEC and MINMEC, to compel the provinces to comply.<sup>83</sup>

## **5.4.2 Access to Education**

### **a. Analysis**

The education sector has a number of cases which deal primarily with addressing barriers to accessing education. Provincial departments of education have in several instances challenged school leadership in matters regarding admission of pupils. In the *The Head of Department: Department of Education, Free State Province v Welkom High School & Harmony High School*<sup>84</sup> [*Welkom*] case, the learners' rights to education were affected by school admissions policies which excluded pregnant learners from attending classes. The CC ruled that amongst other issues, the School Governing Bodies (SGBs) of Welkom High School and Harmony High School had unconstitutional learner pregnancy policies. However, the

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<sup>81</sup> Department of Human Settlements Annual Report for the Year Ended 31 March 2010 (Vote 26).

<sup>82</sup> *Ibid*, p39.

<sup>83</sup> Department of Human Settlements Legal Forum. 2014. Draft minutes of the Human Settlements Legal Forum meeting held on 17 and 18 September 2014. Unpublished document.

<sup>84</sup> [2012] 4 All SA 614 (SCA).

HOD was also found to have over-stepped his authority in a way that undermined the autonomy of SGBs as set out in the Schools Act.

In 2008 and 2009, the school governing bodies (SGBs) of Welkom High School and Harmony High School respectively adopted pregnancy policies that provided for the exclusion of pregnant learners from school for certain periods of time. The Head of Department (HOD) issued instructions to the principals of the schools to readmit 2 learners who had been excluded from school in terms of the pregnancy policies. The main judgment did not focus on the constitutionality of the school pregnancy policies, but maintained that it would be remiss to ignore them. Following the SCA court judgment, the CC dismissed the appeal against the decision of the SCA, but ordered Harmony and Welkom schools to review their pregnancy policies in light of the judgment, while engaging the provincial department. Given the nature of the decision which called upon the applicant (Head of Department, Department of Education, Free State) and respondents (Welkom High School and Harmony High School) to engage meaningfully with each other in order to give effect to the Order, the decision does not have the paradoxical effect of providing the HOD or SGBs with authority over school policies.

The Director for Legal Services for the Department of Education in the Free State when asked whether the formulation of policy and its implementation should be left to the legislative and its implementation to the executive, based on the doctrine of the separation of powers. When asked how the process of implementation of court decision is planned, the Director for Legal Services iterated that it is quite complex:

“What we did, in the Department we have a dedicated section dealing with legal matters that is Directorate for Legal Services ... and when we received the court judgment ... we had to go and present it before our Executive Management. The Executive Management is the highest decision-making body in the Department, where the HOD, the DDG and Chief Directors form part. Then we also present it to the political head that is the MEC, .... And after we implemented it, then we got a mandate to ... cascade it down, and then from there we went to a particular section, which is the Chief Directorate that deals with the districts as well as governance. The governance Chief Directorate plans how we are going to implement the court decision. And then we sit down and plan together, to say cascading it down to the districts where service delivery is taking place like the SGB which is a government structure..”

When coming to success stories in implementation of the policy, the Director for the Legal Services hinted that:

“...after that we never, you know, received any complaints where schools were refusing learners to receive education”.

So the case was met with successful implementation of the court decision because of collective efforts from the provincial and the SGBs, including parents of the learners. However,:

“...in the future, I’m observing a very heavy load on the SGB in terms of policy-making, and regrettably the majority of the members of the SGB are not very much involved to take critical and crucial decisions like these that you are talking about here”.

In comparison to other similar cases on education, this case impacted on the lives of the school children more.

“And this case, you know, it helped a lot, because children that were told not to go to school, ultimately they received basic education”,

said the Director for Legal Services.

It is for this reason that the outcome of the implementation with the broader collective resulted in the drafting of school policies to accommodate the best interest of the learner. One argues that if school policies are implemented based on the best interest of the learners, this should not have been a court issue in the first place. While the schools will have to change their enrolment policies, the Department of Basic Education did not win the right to set pregnancy standards for schools (Nicolson, 2013).

Another landmark case involved the *MEC for Education in Gauteng Province & Others v Governing Body of the Rivonia Primary School & Others (Equal Education & Others as amicus curiae)*<sup>85</sup>. The SGB and principal had refused to admit a pupil on the basis that the school had exceeded its capacity of 120 pupils in Grade 1. The parents of a prospective Grade 1 learner challenged the exclusion of their child from the school in Rivonia, Johannesburg, where they resided. The HOD was of the view that the school had the capacity to admit additional learners. When they asked for the enrolment figures, it emerged that the school had in fact admitted 124 learners, but still declined to admit the prospective learner who was on the “A” waiting list. Since the 4 additional learners who had been admitted were white, and the excluded one was black, the HOD also argued that there was racial bias in the manner in which the school handled the matter.

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<sup>85</sup> 2013 (6) SA 582 (CC).

Advocate Matthew Chaskalson, who litigated in the *Rivonia Primary School*<sup>86</sup> case, explained the importance of the case:

“...[the] SCA saw this as an issue of a State department interfering with the autonomy of a public school, a formal Model C school. The Constitutional Court saw it as an issue of a State department grappling with the problems of providing decent education to a massive number of learners who needed it taking advantage of all of the facilities that were available in the education system.”

In his view, The Constitutional Court judgment:

“...was slightly critical of the way the Department engaged with the school, but accepted the underlying principle that the Department had to be in a position to say to schools in its jurisdiction: we need to utilise the capacity of your resources to provide for the education of learners who need it.”

Adv. Chaskalson pointed out that the CC said firmly:

“...that the resources of the public education system had to be publicly accessible, and the Department has to be in a position where it can deploy those resources in the best interest of all of the learners in the education system”.

This is therefore an example of the Court acknowledging “...government as having an empowering role and government as needing to be supported in certain cases when it performs that empowering role”.

The Gauteng HOD for Education in the *Rivonia*<sup>87</sup> case lamented the way in which the SGBs of privileged former model C schools use their admissions policies to exclude other races, and in some cases, classes. Hence they took the decision that the school had capacity to admit the additional learner. The HOD then issued an instruction to the school for the learner to be admitted. Like the *Welkom*<sup>88</sup> case the CC judgment was significant, as articulated by Chaskalson, which outlined who had the final say as far as admission was concerned in public schools. If this had not occurred it would have created a precedent amongst SGB’s across the country, where the power and authority of the HOD would be

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<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> See fn 91, *supra*.

constantly challenged or to say the least, undermined. The case also brought to the fore, the importance of engagements between the SGBs and the HODs in matters that affect learners' access to education.

Juma Masjid Primary School was established in 1957 as a public school. Since 1997, the Trust that owned the property that the school was situated on, allowed the Department of Basic Education to run the school on the property in terms of a lease agreement. In 2002 the Trust informed the Department that it wished to establish an independent school on the property and requested that the government school vacate the premises. After attempts made by the Trust to engage the Department proved unsuccessful, the Trust brought an eviction application before the High Court. Parents, guardians and caregivers of learners enrolled at the school entered the case and opposed the eviction.

The CC was eventually approached by the Centre for Child Law (CCL) and SERI admitted as *amici curiae*. After hearing the matter, the CC granted a final eviction order. The Order was only granted after the Department of Basic Education could show that the learners' right to basic education would be protected and that arrangements for alternative placement at other schools had been made. The CC was satisfied that the Trust had made out the case for eviction, which was carried out (Centre for Child law, 2011, p.6).

The Department of Basic Education in the KwaZulu-Natal Province has implemented the CC decision by developing policies and strategies to make sure that decisions and actions made by SGBs should be taken in the context of the best interests of learners. This landmark decision was critical in that some SGBs were taking decisions and introducing policies which negate sections 29(1) and 28 of the Constitution. This was especially so with regard to school admissions policies drafted by the SGBs. The implementation was made possible as the MEC ensured the closing of the school without negatively affecting the interests of the learners. The CC held that the High Court had erred when it decided that the Trust had no constitutional duty to the children at the school. The CC found that the MEC for Basic Education in KwaZulu-Natal had failed in her constitutional obligation set out in section 8(1) of the Constitution to respect, protect, promote and fulfil the rights of children to basic education by failing to engage with the Trust.

One social activist, Jumuah Majid Fareed argued that the Constitutional Court bungled on the case of the *Juma Masjid Primary School*<sup>89</sup>. According to him, the department did not really apply their mind when they decided to close a public school without proper consultation of the affected parties. According to him, every closure of public entities should

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<sup>89</sup> *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. & Others* (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC).

have been informed by the stakeholder consultation. Stakeholder consultation should not be about numbers, it should be about recognition of expressed inputs. The HOD and the MEC pre-conceived ideas about the closure of the school were consequential to the learners, hence they fought the system with determination in court. Today, one observes that schools that were closed were revived, but still later closed, and this on a long run adds to an already poor education system.

To this end, the discussions of the Welkom, Rivonia, Harmony and Juma Musjid Primary School cases show that implementation requires a step-by-step process that when followed can yield positive results. This may actually be peculiar to the judgments on education, which require implementation at school level, hence the elaborate processes illustrated earlier. It should also be noted that children's rights to a basic education is not conditional and therefore requires immediate and not progressive government action. However, there remain challenges in ensuring that SGBs try to balance their policies on admission with the unqualified constitutional rights of learners to education. One golden thread drawn in these 3 cases is that policies, decisions and actions have to be taken in the interest of the learner, and there should be a balancing act between admission policies and interest of the learners based on proper consultative processes.

Overall, the decisions of the CC had a fundamental impact on the democratisation of the provision of education by placing emphasis on the interests of learners in whatever decision is taken by the school and the Department of Basic Education.

#### **5.4.3 Environmental issues**

Environmental issues came to the fore in the *Director: Mineral Development, Gauteng Region & Another v Save the Vaal*<sup>90</sup> commonly referred to as the *Vaal Environment* case. The case had a component which made reference to the Minerals Act 50 of 1991, which provided for a mining authorisation to be granted to a qualifying applicant to mine within certain areas if authorised by the Department. It dealt with Sasol's application for mining authorisations from the Director of Minerals and Development in the Gauteng region to conduct open cast coal mining at the Vaal River. According to the Act, mining authorisation was to be issued or denied by the Director: Gauteng Mineral and Resources Development.

However during this particular application things worked differently. According to an official who was interviewed, it often happened that companies would firstly receive their mining authorisation, which would then serve as security of tenure. Approval would be

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<sup>90</sup> *Director: Mineral Development, Gauteng Region & Another v Save the Vaal Environment & Others* 1999 (2) SA 709 (SCA).



granted at a later stage. Environmental concerns also need to be addressed before authorisation is granted. The Mining Director at the time used his discretion and did not believe that extensive consultation with the community was necessary for permission to be granted to Sasol to begin their operations. This is why the Save-the-Vaal Environment pressure group took the case up in court.

This case had a high impact because new legislation was introduced, with the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRA) coming into operation, as well as an introduction of the system of integrated decision-making which was incorporated into the process. However, the MPRA does not place requirements over the zoning of land. The competency of rezoning of land lies with the local authorities and this can be a challenge for the Department of Mineral Resources. The State is now the custodian of granting, issuing or denying mining rights. The applicant must upon such application submit an environmental management programme. In addition, an extensive process of consultation now exists that includes public participation meetings and collaboration with other departments, affected parties and other interests groups. Forums of discussion are established involving, amongst others NGOs and CSOs. This shows that pressure groups or civil society organisations play a meaningful role in the society. The APP (2013: p. 3)<sup>91</sup> attests that the 2013 / 14 financial year will see increased community engagement by the Department to educate mining communities on how they can actively participate and work with mining companies to ensure that miners continue to mine in a stable and predictable environment.

The impact of the *Vaal*<sup>92</sup> case and the overall impact of granting mining licenses go even further than granting permission to the big role players. It would be too narrow to place emphasis only on economic factors in terms of the case, as the impact goes beyond that. The issue of sustainable mining has also come to the fore where mining should be such that it does not deny communities the benefits of a healthy environment amongst others, for the sake of future generations. The focus of the Mining Charter on the significance of the community is very important.

The *Vaal*<sup>93</sup> case was decided on technical grounds in favour of the Save-the-Vaal pressure group, thus the possibility exists that it was not well argued on part of the State. The official argued that:

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<sup>91</sup> Annual Performance Plan, 2013/14, Department of Mineral Resources, Republic of South Africa.

<sup>92</sup> See fn 97, *supra*.

<sup>93</sup> *Ibid*.

“...the outcome over mining as we know it would have created jobs and boosted the economy according to the respondent interviewed as there were measures in place to sustain the environment given the after-effects of mining.”

There is a need therefore to balance the competing interests of environmental and commercial interests at play. According to the then Minister of Mining Susan Shabangu, whilst mining contributes to growth and development significantly, its impact on the environment can be detrimental (Annual Report, 2009: p. 12)<sup>94</sup>.

To this end, according to the criterion proposed in the Brundtland Report (1987), there is a need to ensure that when issuing mining licenses, the present needs should be weighed against the future needs, or the ability of future generations to meet their own needs. A change in the ideological climate also came with a change in the legal and administrative approach to environmental concerns (Centre for Environmental Rights 2004). It is clear from this landmark case that the issuing of mining licenses must be weighed against environmental factors and the interest of the future generation, something taken on board by government as it increases its consultative processes.

Overall, the obligations on the national Departments for Mineral Resources and and Environmental Affairs concerning public participation in mining activity-related licence approval processes —even after a mining permit has been issued— are subject to the concurrent and exclusive responsibilities afforded to local and provincial governments by various pieces of legislation, as recognised in *Maccsand v City of Cape Town*<sup>95</sup>.

Another significant impact is the promulgation of National Environmental Management Laws Amendment Act (NEMLAA), (No. 25 of 2014). NEMLAA resulted in one environment system (OES). According to the senior public official interviewed, OES does not include municipalities as stakeholders, but only Departments for Mineral Resources and Environmental Affairs. Although OES has not yet come into effect, because the President has referred the MPRD Amendment Bill back to Parliament, it could assist to ensure greater coordination during public consultations relating to mining licence and EMP applications.

The *Fuel Retailers Association of Southern Africa v DG: Environmental Management, Dept of Agriculture, Conservation and Environment, Mpumalanga & Others*<sup>96</sup> was another case dealing with environmental rights. According to the court judgment, the Fuel Retailers Association of Southern Africa, as a section 21 company representing a number of

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<sup>94</sup> Annual Report, 2009 Department of Mineral Resources, Republic of South Africa.

<sup>95</sup> (709/10; 746/10) [2011] ZASCA 141 (23 September 2011)

<sup>96</sup> (CCT 67/06) [2007] ZACC 13 (7 June 2007); 2007 (6) SA 4 (CC).

fuel retailers in Southern Africa challenged the decision of the Director-General of the Department of Agriculture, Conservation and Environment in Mpumalanga Province to authorise the construction of a fuel station by the Inama Family Trust. This decision was challenged on the grounds, *inter alia*, that the environmental authorities in Mpumalanga had failed to consider the socio-economic impact of constructing the proposed filling station, contrary to the statutory requirements laid out in the EIA regulation. The authorisation was granted despite objections by the applicant, which then lodged an internal appeal against the decision (Murombo, 2008, p. 489-490).<sup>97</sup>

The Deputy Director, Mpumalanga Department of Environmental Affairs argued that there are no uniform policies about environmental issues especially in the provinces, and confirmed that Mpumalanga Province did not have one at the time of the interview:

“So as it stands we have Gauteng having their own policy of how they allow filling stations, we have the Western Cape having their own policy, but in Mpumalanga not having any policy. So we use policies that have already developed by other provinces, but I think there are discrepancies because these policies are not uniform across the country and I’d really want to see something that will actually be uniform to all of us.”

Asked, whether there is a plan in place, the Deputy Director warned that actually, “the line managers did not really apply their mind ... there was no [implementation] plan in place”. It is because the application was not re-lodged by the applicant. However, going forward, the Deputy Director assured that any application should be considered based on the desirability to be consistent with the court decision. Out of this case, the department learned to strengthen accountability mechanisms around the applications, oversight and monitoring according to the Deputy Director who said:

“we established a structure through which the decisions are subjected to scrutiny before they are finally signed off by the Chief Director who has been delegated to authorise”.

However, there is a need for Legal Services sections to be established to screen the authenticity of the applications in order to strengthen the accountability and monitoring mechanisms. As stated by the Deputy Director:

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<sup>97</sup> [Online] Available from: [http://reference.sabinet.co.za/webx/access/electronic\\_journals/ju\\_salj/ju\\_salj\\_v125\\_n3\\_a3.pdf](http://reference.sabinet.co.za/webx/access/electronic_journals/ju_salj/ju_salj_v125_n3_a3.pdf) [Accessed: 19<sup>th</sup> August 2014].

“...in my view I would have loved to have within the structure the person with legal background who can be able to screen the decisions and satisfy him or herself that the decision, if it is challenged, it would be able to stand the [legal] test ... before they are signed off.”

The issue of accountability and monitoring process is critical here. Public participation, according to the Deputy Director, is paramount and therefore useful to become an integral part of the decision-making process to avoid negative consequences that impact on the well-being of individuals and communities.

According to Smith (2009, p.4), the *Fuel Retailers* decision, gave effect to sustainable development principles. This decision affirmed the notion of sustainable development underpinned by environmental rights (Murombo 2008, p.503). The decision is significant for defining the scope of sustainable development within a domestic legal system despite the absence of shared legal content at the international level. The Court will, over time, develop a more nuanced approach to sustainable development that does justice to its history, makes subtle but important distinctions between economic and social concerns, and does not allow this concept to be captured by those parties with purely pecuniary motives (Tladi 2008, p.7; Feris, 2008)). The infusion of environmental law with the sustainable development therefore remains critical.

#### **5.4.4 The Right to Health Care**

The landmark case of the *Treatment Action Campaign vs. Minister of Health*<sup>98</sup> is one that has enjoyed relative success in implementation. Today South Africa has the largest anti-retroviral treatment programme in the world (est. 2.7 million)—resulting to a great extent from the case. When one analyses the perceptions of both TAC and the official from the Department of Health (DOH) there appears to be 2 different sides of the story: one is where the TAC were strongly highlighting the lack of early agreement and intervention from government towards the prevention of mother to child transmissions (PMTCT) of HIV / AIDS to unborn babies, whereas the interview with the DDG gave the impression of government always being co-operative.

The TAC played an instrumental role in this case having started their campaign in 1999 to demand Nevirapine provision as an intervention that was affordable and implementable, as well as sufficient in saving the lives of thousands of babies. The monitoring by TAC was intensive to ensure that implementation took place. This is illustrative of the fact that in all socio-economic rights cases, the role of direct action and

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<sup>98</sup> *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* (CCT 8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC).

monitoring and the on-going vigilance of civil society is crucial. With regard to socio-economic issues pertaining to education, what makes it harder currently, irrespective of favourable judgment, is the total mismanagement and malfunctioning of government in the provinces where these judgments are being delivered, requiring a lot more civil society vigilance and intervention. Whereas the *TAC*<sup>99</sup> case was more about denialism from government and refusing to rollout ARVs, current cases focus mainly on governance issues, maximising efficiencies and improving systems for delivery.

According to Mark Heywood, the core of the new dispensation is the whole notion of a participatory democracy. Participatory democracy requires meaningful citizen engagement. Many cases that civil society movements are currently working with involve firstly liaising with government officials by highlighting the problems being encountered by the community and not approaching the courts from the onset. Yet, more often than not, when civil society organisations fail to receive proper responses from the government officials, then they would resort to court action. Litigation often takes place because civil society is pushed beyond its limits of patience with no options left but to approach the courts. The success in the *TAC* case has been attributed by many to the strategic manner in which the case was litigated.

The *TAC* case had an even greater impact on South Africa's health sector in that the Department of Health decided to extend the roll out of ARV treatment to all age groups in the country as opposed to just prevention of mother to child which was the crux of the case. A respondent remarked:

"This judgment was limited just to prevent kids getting infected. But the bigger question in many ways was antiretroviral medicines for adults and for children with AIDS to prevent people from dying, and we had always planned a Court case on that if it should become necessary, and we would have used the *TAC* judgment as the foundation for that Court case."

The Department of Health's decision to then roll out a national ARV programme extending it to the other age groups shows the extent to which this case had a positive impact on HIV / AIDS policymaking in South Africa. This is confirmed by the APP (2011/12, p.60)<sup>100</sup> which records the spending over the MTEF period on strengthening HIV / AIDS prevention programmes, where expenditure has grown from R2,4 billion in 2007/8 to R6,7 billion in 2010/11 at an average growth of 4,4%. Over the medium term, the expenditure is expected to increase to 11,2 billion at an average rate of 18,8%. This growth is due to additional funding of R60 million in 2011/12 and 2012/3 and R1,4 billion HIV / AIDS

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<sup>99</sup> *Ibid.*

<sup>100</sup> Annual Performance Plan (APP), 2011/12-2013/14, Department of Health, Republic of South Africa.

conditional grants to allow provinces to significantly expand access to ARV for people living with HIV and to implement the HIV counselling and Testing (HSCT) campaign together with a more regulated male circumcision programme. The support of additional funding in this burden of disease is a major breakthrough in implementing the health policies and strategies to reduce the scourge of HIV/ AIDS, which has made a significant impact post the TAC court judgment.

It is therefore clear that the situation has improved, and government is estimated to be providing ARV's to about 2,4 million people in South Africa. But at the time of judgment there were many tensions, reflected in academic literature and media reports. According to Ngcaweni (2013, p.34):

“[t]here has been a stabilisation of the number of people living with HIV in South Africa which had been rising since 1990s. Despite this improvement, there has been an uneven performance across districts”.

In some districts ARVs are not readily available. According to Kahn (2013), “[o]ne in five public health facilities has experienced shortages of HIV/AIDS or tuberculosis (TB) medication in the past three months”. These shortcomings and challenges do not detract from the fact that government has developed policies, programmes and projects to implement court decisions relating to health care. Recently, President Jacob Zuma announced government's target to enrol at least 4,6 million people on its national ARV programme (South African Government News Agency 2014).

Adv. Marcus, who litigated on behalf of TAC, describes the importance of politically astute strategy and litigation as follows:

“Now let me tell you that was an agonising decision, because every day that went by, babies were dying. It's as blunt and as ugly as that. So we decided we had to wait until the Medicines Control Council had registered the nevirapene, and when they did, we moved. But none of this happened by accident. Trust me ... it was one of the most carefully thought out cases I'd ever been involved in. It was a hands-on case at every single turn.”

According to Mark Heywood, an official at the DOH at the time told him after the judgment that:

“you know, this had given them a wake-up about what duties the Constitution imposes upon their action and how they must look at their own policies through the lens of the Constitution”.

Mark Heywood confirmed that political will counts in the implementation of court decision:

“...the Department of Health for a long time was run by very bad ministers, so there were still court cases, we still went to court in 2006 because there was a new plan to treat people with AIDS, but then the Department of Health refused to make the plan available. So they issued a general policy...referred to Annexure ‘A’ mistakenly. So, we said where’s Annexure ‘A’ because that’s the timeframe, and they refused...eleven times they refused to provide Annexure ‘A’, so eventually we went to the Pretoria High Court to get Annexure ‘A’. When we went to Pretoria High Court they then told the judge there’s no such thing as Annexure ‘A’, so the judge made a very stern statement, you know, why are you misleading these people...I’ve forgotten the exact [words].”

As for the implementation of court decisions, Heywood laments that:

“why it’s even harder, even when you get a good judgment, for me one of the things that is making [service] delivery so hard is because you have this total mismanagement and dysfunction of government in the particular provinces where these judgments are being delivered, which then again requires a lot more civil society vigilance and civil society intervention”.

According to Heywood:

“the prominent role of the courts at times is not because the courts have chosen to be activist, necessarily, but because other institutions of government, including Parliament have failed, or have been unresponsive to people’s needs”.

When asked about impact of the court decision, the DOH DDG argued that:

“you can contest the fact that not every facility has every drug every day, that’s true, but on average, on the population level, we’re showing the impact of the antiretroviral programme, and of the TAC programme”.

For example, the prices for the antiretroviral and other medicines like GeneXpert have been reduced because of the volumes. The only input costs not reduced is human capital which is relatively expensive, says the DDG. It is apparent that the implementation of court decisions is largely influenced by cost drivers in the Department of Health.

Also, according to Annual Report (2013: p.10)<sup>101</sup>, Minister Aaron Motsoaledi states that there has been impact in the sense that:

“we have scored significant achievements where as a decade ago, 70,000 children in South Africa were born HIV-positive every year and we now have less than 8,000 annually due to massive and successful PMTCP programme”

According to the 2013 Annual Report there are plans to build on this success stories in the medium term until no child is born HIV-positive.

In their review of the 10 years since the *TAC*<sup>102</sup> case, Honerman and Heywood (2012) described the case as “a judgment that saved a million lives”. They cite remarkable data that shows that 327,000 children have not contracted HIV as a result of having access to PMTCT because of the case. Furthermore they laud the achievements over the past decade:

“It’s not often that we are able to quantify the effect of a judgment—even one of this import. It’s not often that a court has the opportunity to order the government to open barriers to public health interventions and 10 years on, it’s possible to calculate what this judgment has meant for the people who have benefited from its wise ruling.”

Their view is also that the relatively successful implementation of the *TAC* case can be attributed not only to the CC which provided a legal basis for provision of treatment for HIV / AIDS in South Africa, but also the role of civil society, health workers and the dedication to make resources available for treatment “that have ensured that the judgment did not remain on paper”.<sup>103</sup>

This case provides an inspiring model for integrating political and legal action. Five thousand people marched to the court in Johannesburg at the opening of the hearing. But the case also highlights the unimaginable suffering of so many from an epidemic that has its origins in earlier and ongoing violations of economic, social and constitutional rights in South Africa and around the world (Sebenzile, 2005; ESCR-Net 2002). The *TAC* mobilised affected individuals and groups across the country, and the court asserted its right to order effective relief, and to maintain supervisory jurisdiction, but chose to simply order immediate implementation of the remedy.

A longer term impact of the decision of the CC on provision of quality health services to the people has also led to the decision made by government to introduce the National Health Insurance (NHI) which will become the vehicle for the provision of universal access to healthcare across social and class boundaries. It is thus clear that the decision by the CC

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<sup>101</sup> Annual Report, 2013/14, Department of Health, Republic of South Africa, Foreword.

<sup>102</sup> See fn 105, *supra*.

<sup>103</sup> *Ibid*.



injected a sense of urgency in the corridors of political power and has changed the whole landscape of public health. Under the leadership of Dr Aaron Motsoaledi, Minister of Health, the health system has experienced progressive changes. However, poor management and budgetary constraints still remain to be resolved in various public hospitals across the country.

The issue of affordable medical drugs came to the fore in the case of *Aventis Pharma SA v Cipla Life Sciences*.<sup>104</sup>

This landmark case is about the removal of the trade mark of Cipla Medpro, ZENEX from the registrar of trade marks. Both ZENEX and ZETOMAX are pharmaceutical products used in the treatment of hypertension and certain cardiac conditions. ZETOMAX was registered as a trade mark in 1998 and ZEMAX in 2004. The appellants argued that, although the name ZENEX is not identical to ZETOMAX, it has the potential to deceive or cause confusion. The SCA held the patient has to be informed of the availability of a generic substitute for a branded medicine in terms of section 22F of the Medicines and Related Substances Act 101 of 1965. The generic product must be dispensed unless the patient forbids it. The patient is thus given a choice. Quite apart from this, section 8 of the National Health Act 61 of 2003 gives a patient the right to participate in any decision affecting his or her health and medical treatment. The SCA held that the trade marks were so similar that the patient could well be deceived or confused, and ordered the removal of the trade mark ZENEX from the register of trade marks (Registrar of SCA, 2012)<sup>105</sup>.

The Department of Trade and Industry (Dti) must consider the impact of patents on the development of local industry. In particular, it needs to accept and address the reality that foreign pharmaceutical companies are the main beneficiaries of its lax patent laws to grant or not to grant patents. If examined properly, approximately 80% of patents would not have been granted (SAHR 2-12/13:14). This study assessed the extent to which the patients have been consulted after the implementation of this court decision to determine the balancing act between commercialisation and the interest of the patients to access medicines without branding confusions that would lead to medicinal risks.

The SCA judgment handed down, touched on an issue that the DTI had found to be problematic for some time, i.e. the issue of extending patents of medicines by default when they expire in such a way that generic medicine pharmaceuticals find it difficult to tap into that market. Big pharmaceuticals were taking advantage of the gaps in South African law

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<sup>104</sup> *Cipla Medpro (Pty) Ltd v Aventis Pharma SA, Aventis Pharma SA & Others v Cipla Life Sciences (Pty) Ltd & Others* 2013 (4) SA 579 (SCA).

<sup>105</sup> [Online] [http://www.justice.gov.za/sca/judgments/sca\\_2012/sca2012-039ms.pdf](http://www.justice.gov.za/sca/judgments/sca_2012/sca2012-039ms.pdf). [Accessed: 10/11/2014].

and policy by exploiting the longevity, renewal and terms of patents when they expired.<sup>106</sup> There was a frivolous re-registration of patent agreements by multinational pharmaceutical companies.

There was satisfaction around the judgment, particularly its visibility within the media and public domain.

The court ruled that:

“Bearing in mind the commercial advantage of first-entry to the generics market, it is common for a patentee of a pharmaceutical product to enter the market shortly before its patent expires with an alternative product that will compete with anticipated generics ...The TAC’s opposition to the grant of the interdict (injunction) really comes down to no more than opposition to the monopoly that the law confers upon a patentee. It submits that those who cannot afford Taxotere, but are able to afford the price of Cipla docetaxel, will be prejudiced if distribution of the latter were to be prohibited. Where the public is denied access to a generic during the lifetime of a patent that is the ordinary consequence of patent protection and it applies as much in all cases. To refuse an interdict only so as to frustrate the patentee’s lawful monopoly seems to me to be an abuse of the discretionary powers of a court.”

Although the contestation between *Aventis* and *Cipla* could easily be seen as one of big drug firms battling for the market, the case would have been in the interest of the public if Cipla sought to manufacture a generic drug to replace *Aventis* that would have been significantly cheaper, which was not the case. Therefore the public interest would have been not severely affected if *Cipla* were disallowed from producing its generic drug.

With regard to impact, the researchers learnt that the *Cipla Medpro v Aventis Pharma*<sup>107</sup> case has no direct bearing on the issue of implementation of socio-economic rights in achieving transformation. The context of the case was one in which poor South Africans were not prejudiced by the judgment because on the issue of prices, the original drug patent-holder offered the drug to public hospitals at a fraction of the cost. However, the case becomes important in that it brought to the fore the complexity currently existing in South Africa, which is that the patent system makes it easy for multinational pharmaceutical companies to make minor changes to their products and obtain multiple patents, each spanning 20 years, thus keeping less expensive generics off the market.

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<sup>106</sup> South Africa’s patent system makes it easy for multinational pharmaceutical companies to make minor changes to their products and get multiple patents, each spanning 20 years, and keep generics off the market.

<sup>107</sup> See fn 118, *supra*.

Issues of parallel importation and compulsory licensing were raised as alternative ways of ensuring balance of convenience and pricing affordability. This includes expropriation and compensation of the patent-holder. As a result, in September 2013, the Department of Trade and Industry (DTI) released a draft National Policy on Intellectual Property to restrict or to control the patent landscape, due to be adopted by the Parliament in 2015. Thus, the *Cipla* case could have very far-reaching policy implications that will assist in facilitating access to cheaper medicines in future.

The successful implementation of this landmark court decision resolved the issue of pharmaceutical companies taking pharmaceutical brand decisions without involving the views of the patients, and taking into account the health care of the poor. It comes clear that pharmaceutical companies will have to be more careful when making decisions about branding and medicine. Failing to involve patients in some of these decisions, will have huge cost implication on the pharmaceutical companies themselves as they have to rebrand their products.

#### **5.4.5 The right to access social welfare services**

The issue of eligibility for social assistance, children's rights and reasonableness of socio-economic rights in South Africa was addressed in the landmark case, *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others (CCT 13/03 and 14/03)*<sup>108</sup>. In the *Khosa* case, the applicants challenged the constitutionality of Section 3(c) of the Act, which reserves social grants for elderly South African citizens. Similarly, in *Mahlaule and Another*, the constitutional challenge was to sections 4(b)(ii) and 4B(b)(ii) of the Act, as amended by the Welfare Laws Amendment Act, 1997 (Act No 106 of 1997). These similarly reserve child-support grants and care-dependency grants respectively for South African citizens only. Because the 2 matters are related and involved similar considerations and arguments of law, they were heard together both in the High Court and in the Constitutional Court. The CC, in a majority judgment penned by former Justice Yvonne Mokgoro ruled that the exclusion of South African permanent residents from State social assistance programmes was irrational and unconstitutional.

The *Khosa* case involved two groups of applicants who were Mozambican citizens with permanent residence status in South Africa. They sought to challenge the provisions of the Social Assistance Act 13 of 2004 after being denied a variety of social grants on the grounds that they were not South African citizens. The applicants had applied for old-age,

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<sup>108</sup> 2004 (6) BCLR 569 (CC).

child support and care-dependency grants and would all have qualified for receipt of such grants had they been South African citizens. The CC ruled in favour of applicants with regards to the issue of equality by agreeing that section 27 (1) vests the right to social security in “everyone”. It ruled that since the applicants were indigent, their human dignity would have been affected by the exclusion and the State had failed to prove that inclusion of permanent residents would lead to a significant bulge in its budgets.

In terms of implementation of the *Khosa* judgment it was established from the South Africa Social Services Agency (SASSA) guidelines that permanent residents just as South African citizens are eligible for grants such as the old age, war veterans and care dependency grants while in addition to South African citizens and permanent residents, refugees are eligible for disability and foster care grants. The shift in policy towards access to social assistance shows that the Department of Social Development implemented the *Khosa* judgment. There are still some teething challenges in realising full implementation of this policy. A study by the University of Western Cape’s Community Law Centre argues that in reality, refugees still experience difficulties with claiming social assistance, as reflected in the tables 4 and 5 below.<sup>109</sup>

	Citizenship Status	OAG	WVG	DG	CDG	FCG	CSG	Total
2013/14	South African	2,932,390	421	1,111,613	116,932	350,426	6,053,519	10,565,301
	Permanent residence	14,337	1	1,080	208	422	11,543	27,591
	Refugees	148	0	157	63	17	3,455	3,840
	<b>Total</b>	<b>2,946,875</b>	<b>422</b>	<b>1,112,850</b>	<b>117,203</b>	<b>350,865</b>	<b>6,068,517</b>	<b>10,596,732</b>
2014/15	South African	3,084,016	326	1,114,288	124,126	347,996	6,450,896	11,121,648
	Permanent residence	15,852	1	1,124	222	408	12,039	29,646
	Refugees	180	0	237	99	18	5,558	6,092
	<b>Total</b>	<b>3,100,048</b>	<b>327</b>	<b>1,115,649</b>	<b>124,447</b>	<b>348,422</b>	<b>6,468,493</b>	<b>11,157,386</b>

**Table 4: Experience of refugees.**

**OAG= Old Age Grant; WVG=War Veteran's Grant; DG= Disability Grant; Care Dependency Grant; FCG=Foster Care Grant; CSG= Child Support Grant**<sup>110</sup>

<sup>109</sup> Khoza, S. (ed.) (2007) *Socio-Economic Rights in South Africa: A Resource Book*.Cape Town: Community Law Centre).

<sup>110</sup> Source: Statistics provided by SASSA Legal Department from the SASSA, Annual Statistical Report (2014/15) (statistics remain confidential as per request of the SASSA legal department and only with written consent can they be published)

		South African	Permanent residence	Refugees	Total
2013/14	CDG	507,576	712	25	508,313
	FCG	119,280	217	67	119,564
	CSG	10,974,407	27,137	8,337	11,009,881
	<b>Total</b>	<b>11,601,263</b>	<b>28,066</b>	<b>8,429</b>	<b>11,637,758</b>
2014/15	CDG	126,601	232	104	126,937
	FCG	500,845	658	27	501,530
	CSG	11,685,757	28,037	12,788	11,726,582
	<b>Total</b>	<b>12,313,203</b>	<b>28,927</b>	<b>12,919</b>	<b>12,355,049</b>

**Table 5: Experience of refugees**

**CDG= Care Dependency Grant; FCG= Foster Care Grant; CSG= Child Support Grant<sup>111</sup>**

Interviews with some of the beneficiaries of the *Khosa* case revealed that the ruling made it easier for community members in Bushbuckridge to access social assistance than before. A community leader stated that:

“Yes I was very pleased because we got what we had applied for and something that we had always wanted. But like any other happy ending, there will always be some hiccups here and there. So I can confirm that most people are receiving pensions, child support and disability grants. I was also pleased with the outcome because it symbolised hope for the community as things were getting better compared to when we arrived in South Africa.”

The same respondent felt that there has been progress in ensuring that the once excluded Mozambican citizens in his community who have permanent residency can gain access to social grants but this is marred by the lack of ID documents. Some permanent residents in the community have been waiting for many years for their South African ID books to be issued by the Department of Home Affairs. Without the IDs they cannot be registered for social assistance and now face a different kind of exclusion which is rather technical in nature.

“It’s been about ten years now, and I would say the procedure is getting manageable because we are now experienced and know who exactly to contact. As the years progress the better the implementation becomes. However, it doesn’t cater for the poorest of communities i.e. those without IDs. So the government says the delay is caused by those without IDs, but I feel they have the power to intervene and help those without IDs via Home Affairs. The solution would be for government to come here and talk to us and we share our problems with them and they should show commitment to our problems by coming with the feedback and clear strategies on how they will assist the community.”

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<sup>111</sup>Source: Statistics provided by SASSA Legal Department from the SASSA, Annual Statistical Report (2014/15) (statistics remain confidential as per request of the SASSA legal department and only with written consent can they be published).

The source of challenges in gaining access for the aforementioned respondents would require closer and more co-operative intergovernmental relations between 2 national departments, namely, Home Affairs and Social Development to co-ordinate and ensure that eligible persons are registered and can then be able to receive the grants for which they qualify.

The Legal Resources Centre (LRC), which was responsible for bringing the case, estimated that the judgment would impact on at least 250 000 people in South Africa (LRC Annual Report 2004, p. 7). One of the primary issues in the case was whether to adjudicate the “reasonableness” of government measures as part of the enquiry into the internal limitation contained in section 27(2), or whether the enquiry should revolve around section 36, the general limitation clause. The judgment seems to imply that concerns about equality are implicated in the realisation of social rights generally (Wesson, 2007, p.78). The link between equality, dignity and social justice is therefore established in this case.

#### **5.4.6 Customary practices and social well-being**

In the case of *Shilubana and Others v Nwamitwa*<sup>112</sup>, the Constitutional Court's decision was received differently by various stakeholders. The CC judgment did not pronounce on the succession issue. It only ruled that Ms Shilubana could not be discriminated against on the basis of gender. In the aftermath of the CC decision, security around Ms Shilubana had to be strengthened, but within a year the community fully accepted her appointment.

According to an interview with senior official from Department of Traditional Affairs (DTA), the case had minimal impact on traditional communities and issues of gender and traditional leadership. The case has also not had much impact on the role and functions of the Department of Traditional Affairs. There has not been a flurry of claims from other women in traditional communities who might be in a similar situation as Ms Shilubana. The issue is that the *Shilubana* case is unique to her circumstances. The senior official interviewed further outlined that the difference between Ms Shilubana's situation and other female queens, especially in Limpopo, is that Ms Shilubana is a fully-fledged *Hosi* and the others are serving in an acting capacity as traditional leaders who are holding the mantle for their sons who are still young, but are the rightful heirs to the throne in terms of customary law.

Thus Ms Shilubana's case seems to be unique to her community, as well as that of the past *Kgosigadi* (Queen) *Modjadji*. The Department with its progressive legislation also

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<sup>112</sup> 2009 (2) SA 66 (CC).

remains unaffected by the judgment in the *Shilubana* case. For instance, the Traditional Leadership and Governance Framework Act 41 of 2003 prescribes that the National House and the Traditional Council must have one third female representation. However, almost all the women making up that one third representation are acting regents.

The CC judgment was welcomed by the majority of community members in the Nwamitwa village.<sup>113</sup> In the same way, traditional leaders were specifically happy with *Hosi* Nwamitwa living out her birth right as the heir of the Valoyi Royal family. *Hosi* Nwamitwa II has been lauded as instrumental in bringing and creating change with a range of community projects. She has implemented notable projects which intervene in youth problems as well as women empowerment. Community members were in awe over the impact of development projects that she brought into the community such as *The Fit for Life*, and *Fit for Work* development projects that are funded from the *Ford Foundation*. These development projects assisted most school drop-outs to prepare for life and have a greater awareness on issues such as sexual education. Crèche's were also opened for small children. There have also been other tangible outcomes such as the repossessing of farms belonging to the Nwamitwa community through land claims, the establishment of cultural villages, amongst others, which bring change to the lives of the community.

*Hosi* Nwamitwa II has also been instrumental in restructuring the pillars of her governance structures. The governance structure of the traditional council has already changed with women representatives also being included. Perhaps being a former parliamentarian, *Hosi* has introduced a 3 tier governance structure with a Traditional Council (standard requirement from legislation), Royal council and an additional Stakeholders' Council which includes community interest groups that can interact with the traditional leadership on matters of concern. One interesting lesson for most community members was that they learnt a lot about the functioning of South Africa's court system. It exposed them to a world they had never known before and boosted their confidence in the justice system.<sup>114</sup> This attitude is also reflected in interviews conducted for Theme 4 (below).

Members of the neighbouring traditional communities are impressed with the kind of developments that are taking place in Nwamitwa, and indicated that they want to

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<sup>113</sup> The proceedings of the court case were a drain to the community members who were in support of Mrs Shilubana, now *Hosi* Nwamitwa II. It generated a lot of interest in anticipation for the prospect of the first female leader in the Nwamitwa village. Community never lost hope that *Hosi* Nwamitwa was to become *Hosi*. Here was so much support among community members that they hired buses to attend the court proceedings. At one time they hired three full buses to travel from Nwamitwa which is almost 400km from Pretoria High Court. It is reported that in many of the court proceedings there was seldom any space to sit inside the courtroom with a number of the community members having to sit on the floor.

<sup>114</sup> *Ibid.*

become citizens of their community and also that similar projects could be introduced in their areas. According to the *induna*'s interviewed, *Hosi* Nwamitwa acted as a role model to traditional leaders in surrounding communities. A traditional leader interviewed commented that: "According to our culture women cannot lead a community, but *Hosi* Nwamitwa II has proven that she leads the community successfully".

The success of the *Shilubana* case is well captured by Mireku (2010, p. 523) when he argues that

"Shilubana empowers appropriate traditional authorities to effect incremental developments which are necessary to keep customary law in line with the dynamic and evolving fabric of an egalitarian society as envisioned by the South African Constitution."

## 5.5 Summary of emerging issues and discussion

The analyses of CC and SCA judgments on issues of housing, water and sanitation, electricity, education, health, environmental concerns and social welfare services have shown the complexities associated with progressive realisation of these socio-economic rights. A number of structural and operational factors have led to the partial implementation and/or non-implementation of court judgments, leading communities into further desperation. Hereunder, there are some of the key messages emanating from the interviews.

- In some cases, especially the *TAC*, the impact has been widespread as significant strides have been made in ensuring that millions of HIV positive South Africans receive ARVs and this signalled successful implementation of the court decision despite mammoth health challenges, and an initial reluctance to comply.
- It emerged from the empirical findings that State departments which have a mandate to implement court decisions must fully engage citizens by conducting meaningful public participation before rolling out their remedial programmes.
- In cases where rights of children are concerned, the priority should be on acknowledging the best interests of the learners in any school enrolment policies, rather than "turf wars" on authority between school principals/SGBs and the HODs of Basic Education. Thus a balancing act between the admission policies and the best interest of the learners should pass constitutional muster. Children were also placed at the centre of housing policies as a result of the outcome of the *Grootboom* case<sup>115</sup>.

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<sup>115</sup> 2000 (11) BCLR 1169 (CC).



- Cases such as *Nokotyana*<sup>116</sup> reveal the importance of ensuring that competing interests do not lead to further alienation of the communities that desperately require transformation in their lives. Municipalities tend to apply a blanket approach to solving housing challenges by resettling communities while the same communities want to continue dwelling in the informal settlements because they are usually situated conveniently to amenities such as work and schools. The communities' rights to health, safe environment, and dignity need to be respected in the implementation phase of court judgments. This case is an unfortunate example of lack of implementation of a CC judgment, where the MEC has as yet not upgraded the informal settlement into a township. To this day the residents do not have access to basic services such as sanitation and lighting.
- It also emerged that the accountability, oversight and monitoring mechanisms have to be strengthened to ensure that there is progressive realisation of the socio-economic rights so that court decisions are implemented with efficiency and expediency.
- There is a need for the civic education that empowers communities to understand how the State machinery functions, especially where competencies that concern them lie, as well as important bureaucratic structures and systems which are meant to implement those policies or court decisions. The complexities of IGR should be explained, but this should not stand in the way of provision of basic services when ordered by the courts to do so.
- State officials should also avoid complacency at all costs because it leads to frustration of communities which have been waiting for service delivery for so many years prior to (and after) a given judgment. Communities should be empowered to hold the State accountable. It should be noted, contrary to popular opinion, that communities do not immediately run to the courts for assistance. The legal process is usually the last resort, after numerous other attempts have been made to attract attention to their plight.
- There is a need to maximise bureaucratic efficiencies in the delivery of services with optimal utilisation of resources, be it financial, material and/or human capital.
- Intergovernmental relation failures emerged several times in the implementation of the SER court decisions. This is because; there is interplay of the national provincial

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<sup>116</sup> *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* (CCT 31/09) [2009] ZACC 33.

and local spheres of government which have different – and sometimes overlapping - competencies like water, electricity, land rezoning, mining and mineral licencing etc. At some point, there are poor relations and “goal post shifting” amongst the spheres of government which stalled the system, and this frustrated the community, especially *Nokotyana*, *Chiawelo* and *Mazibuko* cases.

The issues raised were discussed at a project colloquium that took place on 4 June 2015. Discussions ensued about the lack of information as to why government projects were not implemented at once, but only five years after the judgment, for example. This is largely because the State departments operate on yearly budgets within a three year Mid-Term Budget Framework and there may not be sufficient funds to implement any additional projects, even if ordered to do so by the courts. One participant (a former DG) noted that NGOs often take cases to court without taking into account whether the court order is implementable or not.

It is thus important to underscore that the State (National Parliament, Provincial Legislatures or Municipal Councils) operates on an approved budget. A State department must operate within the limits of the approved budget. Any action which is not budgeted for is unlawful and is therefore determined to be unauthorised expenditure. In terms of the PFMA or MFMA, any such expenditure exceeding 2% of the budget of the said department is a crime punishable by a five year prison term. This could result in officials becoming extremely careful due to the restrictions of stringent financial requirements of the PFMA/MFMA. Under- or overspend will land officials in trouble. This may explain the over-cautiousness of government officials. Implementation of court decisions may be delayed because of the fear of transgressing the PFMA/MFMA financial requirements, especially if there is no flexibility built into the system. On the other hand, there are case studies, such as *Nokotyana*, where money was budgeted for implementation, but was not spent.

This project’s research draws attention to a broader question: to what extent has the judiciary taken into account issues such as the multiple levels of State dysfunction, lack of resources and incapacity to implement court orders which is unlikely to change in future. Admittedly, however, this should not prevent the courts from ensuring that rights are realised. It is important to distinguish between implementation and general State departmental problems. Does the State have problems rolling out deliverables or does the State simply ignore court orders? Or are State departments not understanding the content of court orders? Should court orders be articulated more clearly and in more detail? To what extent can one say that the State is willing to implement if it takes more than five years to implement a court order?

In some instances the State is seemingly ignoring court orders, for example in Ekurhuleni where people were illegally moved from land. Judgment was passed that they have to be returned to their homes, but the court order was not implemented: the reason given was that the State lawyers were moving offices, so papers were displaced. In all these cases frustration levels are heightened. Courts are also becoming stricter by issuing Contempt of Court orders when there is an *unreasonable* failure to comply.

Lack of implementation of court orders is sometimes closely related to lack of capacity of government officials to implement court decisions, due to poor skills, ignorance or intergovernmental failures. However, the State as a whole should take responsibility as the affected communities are not concerned about internal bureaucratic and intergovernmental institutional challenges of government, but perceive the State itself (whether is a national or provincial department or the municipality) as failing them.

## 5.6 Concluding implementation and impact issues

Many public discussions of the non-implementation, partial implementation and poor implementation have tended to reflect lack of knowledge of how government operates:

**Firstly** many people do not know that the government operates in a clearly defined environment that is characterised by a plethora of rules, regulations and laws, hence it is perceived as highly bureaucratic. This is because any action by government must be taken within and in terms of the rules.

The **second factor** that is usually not taken into account by the public is that any action by government must take into account the availability of human, material and financial resources. The availability of financial resources is the most critical for any action government intends to take or implement. This is because government operates on the basis of “cash in hand”, just like any individual or private organisation. Thus no government department can implement any decision or activity if it has no money, as it does not operate on a credit basis. This is one of the reasons that the courts tend to be reluctant to interfere unduly with government policy as most SERs must be reasonably and progressively realised “within available resources”.

The **third factor** is that the State operates on a budget approved by National Parliament, Provincial Legislatures or Municipal Councils. A State department must operate within the limits of the approved budget. Any action which is not budgeted for is unlawful and is therefore generally called an unauthorised expenditure, as explained above.

Non-implementation (or partial implementation) of the decisions of the CC and SCA has sometimes been the result of the action not having been budgeted for, or the departmental budget could not accommodate the demands set out in the decisions of the courts, because of competing priorities. However, in many instances the Constitutional Court has taken funding into consideration, and is sensitive to the fact that government is constrained by limited resources (see Theme 1 above for a discussion of this matter).

**A final factor** includes availability of requisite skills. It is a known fact that the country as a whole is suffering from skills shortages in almost all sectors. South Africa has some of the best laws and policies in the world, but some of these have not been implemented. In addition, in certain instances such skills exist, but they are of poor quality. In a number of instances officials may not be implementing the decisions themselves, but are doing so through a private contractor. These officials may then lack the skills to monitor implementation by private contractors. This does not, however, absolve government departments from accountability to the public or the courts. In other instances poor legal advice is provided by departmental legal teams, or the legal advice is not understood or considered to be impractical.

Overall, an assessment of why the decision, of the CC and the SCA of Appeal have not been implemented must go beyond what some people think is the reluctance by government not to implement such decisions, or just sheer arrogance.



## 6 THEME 3: DIRECT AND INDIRECT ACCESS TO THE CONSTITUTIONAL COURT

### 6.1 Introduction and Rationale

The question of direct access to the Constitutional Court (CC) has become increasingly topical. It has been argued by some academics and activists, notably SERI's Jackie Dugard, that the CC has failed to live up to its transformative potential and has thus failed to become an institutional voice of the poor as a result of its restrictive interpretation of SERs.

It has also been argued that this restrictive interpretive approach, combined with the CC's disinclination in practice to approve applications for direct access, has largely excluded the disadvantaged from bringing matters to the CC. This is in contrast to other developmental States such as Brazil, India and Colombia, where direct access to the apex courts is actively solicited and simplified (discussed below).

At the project's first colloquium, the main arguments *in favour* of direct access were determined to include that it:

- Provides easier access to the CC as the ultimate authority in these matters;
- Reduces the cost of proceedings;
- Reduces the duration of proceedings – i.e. quicker answers and certainty; and
- Lowers emotional and other indirect costs.

The main arguments *against* direct access included that:

- Direct access might flood the CC;
- Issues might not be properly ventilated if lower courts were bypassed;
- Direct access to the CC could contradict the traditional rules of precedent and thereby hinder the transformation of jurisprudence across all levels of the court system; and
- Do not automatically assume that direct access will decrease costs.

### 6.2 Desk-top study on direct access

#### a. Introduction

Despite a relaxation of the current Rules of Court in 2003 there are few cases that are granted direct access to the CC. This is in contrast to other developmental States such as Brazil, India and Colombia, where direct access to the apex courts is actively solicited. On the other hand, it has been argued that mere access alone – let alone direct access – may

not be an appropriate or adequate measure of a justice system's effectiveness; of equal or greater significance may be the quality of legal representation or of the judiciary, or the capacity of the bench to consider matters expeditiously.

In terms of the current legislative and administrative framework, cases may ordinarily be brought to the CC as a court of last appeal on constitutional matters only after the cases have progressed through the judicial system from the High Court to the Supreme Court of Appeal (SCA). However, members of the public do have the right, in terms of Constitutional Court Rule 18 (2003), to apply for direct access to the CC, either from the High Court (i.e. after a hearing) or even before that.

Nevertheless the CC has continued to evaluate applications for direct access in terms of the criteria of "urgency" and "exceptional circumstance" established in earlier Court Rules. The result has been a very limited number of instances where direct access has been granted to the CC and even fewer that involve poor people. The situation is exacerbated with regard to cases relating to socio-economic rights, as these are particularly complex to argue and adequate legal representation is a necessity for success in such cases.<sup>117</sup> Due to the highly technical nature of legal argument in constitutional matters, and of legal proceedings generally, as well as because there is currently very limited provision for legal aid for constitutional and civil matters, poor South Africans do not in reality have access to the CC. The most common exception is when support is provided free of charge by a public interest law clinic, usually based at a university or in an NGO, or, less often, by legal representatives acting *pro bono* (i.e. without charge).

Although it has been argued that legal and personal costs may be reduced, and time saved, by reducing or removing obstacles to direct access, it may not be a *panacea* - a number of drawbacks can be identified surrounding direct access. These may indicate that this route is appropriately used cautiously and sparingly.

Firstly, it undermines our hierarchy of courts and the system of legal precedent (*stare decisis*), in terms of which issues and legal argument are carefully made and thoroughly refined through a series of legal *fora*. In these *fora*, the number of experienced legal minds applied to consideration of an application increases, from one in a High Court, to about five in the SCA, to eleven in the CC. The advantages of this progressively more thorough sifting, narrowing and clarifying of the actual issues may be lost, reduced or diminished if direct access is granted too easily.

Secondly, there is an associated risk of "flooding" the CC with cases, thereby reducing the time available to consider such cases.

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<sup>117</sup> One aspect of complexity in SER matters is the potential for significant budgetary implications.

Thirdly, direct access could reduce the exposure of the lower courts to the opportunity and necessity of giving careful consideration to disputes and legal problems within the context of a Constitution that is designed to be applied to all facets of our shared existence as a nation in formation, and to all areas of the law. Opportunities to develop the law in a transformative manner could, thereby, be reduced. This is transformation understood in its broadest sense: a transformation of values.

Fourthly, while the CC's rules of procedure envisage the hearing of oral evidence in certain circumstances,<sup>118</sup> other procedures in the CC would have to change significantly, which may ultimately drive up costs. Oral evidence is a vital tool for gathering, testing and evaluating evidence, but is complex and time-consuming. Procedures in the CC are largely limited to the submission of written evidence and argument, supplemented by oral argument. Entirely removing the High Court from the process of constitutional litigation may, therefore, diminish the number and types of matters that could be heard by the CC. The full bench of eleven judges ordinarily hears every matter, while a minimum of eight judges is permitted.<sup>119</sup> If enhanced direct access to the CC entails an increased caseload, it may be necessary to consider whether it is advisable to permit smaller benches, or a "circuit" court.

In a research paper commissioned for the CJP,<sup>120</sup> Jackie Dugard accurately observes that access to courts is typically a key concern for any society seeking to advance access to justice.<sup>121</sup> Around the world and especially in Latin American countries, in recognition of the high costs of litigation, one of the structural mechanisms adopted to facilitate access to courts is enabling direct access to the highest court. In South Africa, "with its history of profound injustice and deep social and economic divisions, both the right to access a court and the right to directly access the highest court are recognised as ways to transform society".<sup>122</sup>

Although there has been no comprehensive study of the costs of litigating, it is trite that in South Africa – with its extremely high levels of unemployment, poverty and inequality – litigation is too expensive for poor South Africans.

Dugard acknowledges that increasing access to justice will require more than a single strategy. Ideally, State-provided legal representation should be expanded *and* the courts should strive to do all they can to advance access. In countries such as Colombia, Costa Rica and India, the judiciary has attempted to redress exclusion from the ordinary courts by

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<sup>118</sup> Constitutional Court Rule 18(2).

<sup>119</sup> Section 167(2) of the Constitution.

<sup>120</sup> Dugard J (June 2014). *Direct Access research paper*.

<sup>121</sup> Key points from her paper are summarised here.

<sup>122</sup> Dugard *Ibid*,



allowing direct access to the highest court (the Supreme Court in India, and the Constitutional Courts in Colombia and Costa Rica).

For example: the Indian Supreme Court, without formal rules enabling direct access, has famously creatively interpreted the rules to allow direct access by any means, including hand-written petitions on scraps of paper, and “actively invites (or induces)” cases to be brought to it as the court of first and last instance; the Constitutional Court of Costa Rica hears approximately 17,000 direct access applications (called *amparos*) each year; and the Constitutional Court of Colombia, which considers approximately 450 direct access applications (called *tutelas*) each year. In contrast, despite formally permissive rules allowing direct access, the South African Constitutional Court has interpreted its own direct access rules very restrictively and has granted direct access in only approximately 18 cases between 1995 and 2013.

#### **b. Rules and principles governing direct access to the South African Constitutional Court**

Recognising that one of the pernicious legacies of the *apartheid* legal system was the inability of the majority of South Africans to access the courts, and that one of the ways to rectify this injustice was to open up access, the Constitution provides for direct access to the CC when it is in the interests of justice. Thus, section 167(6)(a) of the Constitution stipulates that “National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court to bring a matter directly to the Constitutional Court”. Rule 18 of the 2003 Constitutional Court Rules rendered the CC Rules consistent with this stipulation. Accordingly, rule 18(1) and (2) requires simply that any application for direct access be brought on notice of motion supported by an affidavit, setting out the grounds “on which it is contended that it is in the interests of justice that an order for direct access be granted”.

Dugard argues that, instead of taking its cue from the broadening of terms implied by the wording of section 167(6) of the Constitution (as compared to a narrower provision in the interim Constitution), “it seems that the CC’s formative years were heavily influenced by the restrictive wording of [the old] rule 17 rather than the inclusive ideal expressed in section 167(6) of the Constitution”.

The CC’s jurisprudence on direct access has not reflected the more generous provisions of the Constitution and the new court rules. On the contrary, Dugard asserts that:

“...most of the energy around direct access [has been] focused on developing (and then maintaining) a set of four broad principles that appear to have had the practical effect of limiting direct access applications.”

These four principles are:

- Exceptional circumstances;

- Undesirability to sit as court of first and last instance especially where there are disputes of fact;
- Urgency/desirability of an immediate decision; and
- reasonable prospects of success based on the substantive merits of the case.

She concludes that:

“...[b]etween 1995 and 2013, these principles have been used by the Court – usually in combination – to refuse the majority of direct access applications.”

Over these nineteen years, the CC has used these principles to ensure that, in its own words, its power to grant litigants direct access is a competence the Court “rarely exercises”.<sup>123</sup>

### **c. Examining the Constitutional Court’s direct access practice from a “pro-poor” perspective**

Closer examination of the details of the 18 cases in which direct access has been granted since 1995 reveals further insights about the CC’s approach. First, half of these 18 applications are not authentic direct access cases in the sense that the issues have already been aired in some court. Second, it is striking that all but 2 of the remaining “authentic” direct access cases relate to classic civil and political rights rather than to socio-economic rights. Further, “almost all the cases revolve around maintaining institutional coherence”. Third, it is striking that very few cases involve a poor person who otherwise would risk not having their matter taken up by the courts.

“The Court’s conservative record on granting direct access, and particularly the low number of instances where the Court has used the direct access mechanism to grant access to a poor person struggling to access justice, raises a number of issues related to the Court’s transformative potential...”<sup>124</sup>

Dugard concedes that direct access on its own is unlikely to resolve the issue of access to justice in South Africa, not least as, in fact – and contrary to the initial “floodgates” fears – relatively few formal applications of any kind are brought to the Court.<sup>125</sup> However, she points out that:

“...it remains the avenue over which judges have the most direct power to widen the doors of access particularly to socio-economically disempowered applicants, suggesting that there is great potential for the judges to more proactively select, and possibly even seek out, deserving direct access cases.”

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<sup>123</sup> *Women’s Legal Centre Trust v President of the Republic of South Africa & Others* 2009 (6) SA 94 (CC) para 27.

<sup>124</sup> Dugard *ibid.*

<sup>125</sup> See above.

If the Court continues to hear a relatively low number of cases each year, there is a risk that - outside of criminal cases in which there is legal representation at State expense – the Court’s roll will continue to be “dominated by cases brought by empowered groups with the funds to litigate through the various required stages to reach the Constitutional Court”.<sup>126</sup>

Greater use of the direct access mechanism to allow matters in the public interest to be brought directly to the Court by poor people who have been unable to secure legal representation, is one way for the CC to live up to its transformative promise. But it is also important to consider the arguments against direct access.

#### **d. Arguments against direct access**

Dugard’s paper considers four main arguments against direct access.

- **“Opening the floodgates”**

The two main arguments advanced in the literature against allowing widespread access to a court are the “floodgates” issue and the reduced quality concern. However, in the South African context, “it is clear that there has never been a flood of applications”. Dugard suggests that the Court could “make time to hear more than 30 or so cases each year” by having longer sessions and/or relaxing the rule that at least 8 judges have to hear every matter.

- **“Reduced quality”**

Turning to the second fear, that “more open access will lead to more claims of lower average quality”, she accepts that “the evidence does point to the validity of this argument in relative, economic theory, terms”. However, the risk that greater access might lead to a higher proportion of claims of a lower quality:

“...is often mitigated by the legitimate policy-related objective of maximising access in the hope of catching all possible meritorious claims. ... Critically, expanding access would allow the judges to identify greater numbers of cases brought by poor people, which could then be screened and sifted for merit during some preliminary process. Comparative experience appears to support the claim that where judges were focused on using public interest litigation ‘to hear poor litigants and neglected social issues, they seem to have succeeded.’<sup>127</sup>

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<sup>126</sup> The Court’s roll is already dominated by such groups, she suggests. Initial research regarding the Court’s 2005 judgments “revealed that the applicant was ‘poor’ in only 3 out of the 24 cases in which judgments were handed down for 2005.” See Dugard, J. (2006). Court of First Instance? Towards a Pro-Poor Jurisdiction for the South African Constitutional Court. *South African Journal on Human Rights*. 22. p.261, 275-276.

<sup>127</sup> Fowkes, J, fn 147, *supra*, p.434, 443.

- **“The need for evidence”**

The Constitutional Court has raised 2 further arguments against direct access – one concerning evidence and the other about the court acting as court of first and last instance as the CC’s rules do allow for oral evidence. However, argues Dugard, the number of cases that might necessitate oral evidence on the facts

“is probably minimal. Already, many Constitutional Court applications are more in the form of abstract than concrete reviews, regarding both the way the issue is framed and the relief granted, and the Court could further minimise its exposure to oral evidence and factual disputes by explicitly limiting argument to matters of law and constitutional interpretation.”

If a matter does involve oral evidence and/or complex disputes of facts, Dugard suggests that the practice by the Indian Supreme Court of using commissions may warrant closer consideration.

- **“Not in the interests of justice”**

The “pervasive” argument of the Court that it is “not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given”, “in some respects ... is the hardest argument to counter, mainly because it is also the hardest argument to substantiate”. The argument, says Dugard:

“...boils down to a matter of policy choices and balancing harms. In the end, it might actually be the easiest argument to abandon if the Court decided to prioritise access by poor people. Such a reorientation might not require excessively painful contortions by the Court. After all ... the Court has already been willing to act as a court of first and final instance in cases concerning the electoral system and inter-governmental relationships.”

**e. Is there an alternative?**

In view of these considerations, Dugard acknowledges that granting direct access to the Court by unrepresented poor litigants “might not be the optimal way in which to deal effectively with public interest matters”. However, she identifies a way forward that entails, in part, “a pivotal role for public interest litigation organisations and possibly the South African Human Rights Commission (SAHRC) in facilitating greater direct access”.

First:

“an appropriately-staffed CC Registry office (perhaps using volunteers or interns who have undergone relevant training) could scan complaints brought to the Registry office for possible merit as well as socio-economic profile (it might be necessary for hopeful applicants to briefly state their socio-economic status as well as any attempts to access legal representation). Complaints could still be screened and filtered using the existing criterion of merit but, in place of exceptional circumstances and urgency (which are relatively stringent

limiting criteria), perhaps a more nuanced concept of the public interest could be developed to determine deserving cases, focusing on issues of general application and particularly those affecting the basic rights of poor people (including socio-economic rights). Any potentially substantive matters could then be forwarded to the judges and/or to public interest litigation organisations for their consideration.”

Secondly, the Court:

“...could actively assist public interest litigation organisations wishing to take up public interest matters on behalf of poor people by allowing them to utilise the direct access route. If public interest organisations with relevant cases could bypass the normal judicial hierarchy, this would greatly reduce the costs and time involved in litigation and is likely to encourage additional organisations to take up public interest litigation.”

Thirdly, she suggests that:

“...such a facilitative role for the SAHRC may require the CC to re-orientate its approach to the litigation of public interest matters, casting it more as a problem-solving constitutional dialogue between stakeholders than an adversarial battle between lawyers”.

Dugard describes an “unanticipated consequence” of the Court’s conservative approach to direct access that risks the Court “becoming an elite institution in stark contrast to its progressive premise and innovative architecture”.

### **7.3 Comparative study of other jurisdictions on direct access**

It has been argued that systems of direct access to constitutional and supreme courts are important, as they supplement the existing avenues for access. If not properly designed, however, these systems are likely to result in the overburdening of apex courts due to the high number of petitions or applications submitted to them. The balance between effective protection of human rights, and an efficient and timely exercise of the superior courts’ functions, is organised differently in different jurisdictions. Some countries do not provide for a system of direct access at all, while others, like South Africa, have established relatively strict accessibility requirements.

In India, on the other hand, direct access to the Supreme Court is fairly easy in light of the concept of Public Interest Litigation (PIL) developed by the Indian Supreme Court in the late 1970s. According to Dasgupta (2002, p.3), PIL gives effective access to the Supreme Court and a public “voice” to groups and individuals with neither the education nor the economic means to use the legal system to their own benefit.

The first modern system of direct access to courts for the protection of human rights is a particularly important feature of the Latin American constitutional tradition. There, an extraordinary judicial procedure has been established for the protection of constitutional

rights from infringement by the State, and in some cases, by private individuals, which normally concludes with a judicial order or writ of protection (Gentili, 2011, p.710).

**a. Standing and access to the Indian Supreme Court**

According to article 32 of the Indian Constitution, citizens may petition the Supreme Court for the enforcement of their rights through “appropriate proceedings.” It is the primary mechanism in the Indian Constitution to redress violations of fundamental rights. Significantly, article 32 empowers the Supreme Court to grant a range of remedies as it deems appropriate in a given case. Article 32 also grants courts some discretion to determine the procedure through which citizens may bring petitions alleging fundamental rights violations.

Major developments in socio-economic rights litigation in India have occurred through public interest litigation. The substantive due process doctrine, considered important to the protection of civil and political rights enshrined in the chapter on fundamental rights, was also asserted in SER cases. A PIL concept was judicially developed to allow easier access to justice, particularly for the marginalised and less privileged members of society as part of the struggle for social justice (Muralidhar 2004, p.25). The upsurge in PIL led to article 32 standing requirements being relaxed in order to facilitate greater access to justice by disadvantaged and marginalised groups. This development has enabled any person to directly approach the Supreme Court on behalf of other individuals or groups who cannot themselves file petitions alleging violations of fundamental rights.

A second and more innovative theme in the Supreme Court’s reasoning is that standing rules had to be changed “because the very purpose of the law itself was undergoing a transformation. It was being used to foster social justice by creating new categories of rights”. The Supreme Court has entertained numerous letters, telegrams, and even postcards from the poor or disabled, and has sometimes even treated anonymous letters as writ petitions. The emergence and development of PIL has thus brought significant procedural innovations that give the Indian courts greater authority in monitoring and enforcing rights claims, including socio-economic rights.

**c. Direct Access under the Brazilian Constitution**

The adoption of the 1988 Constitution of the Federative Republic of Brazil (Brazilian Constitution) has helped to nurture judicial independence and has enabled broader access to the courts (Zimmermann, 2008, p.179). Following over two decades of authoritarian rule, the Brazilian Constitution was designed to restore the rule of law, the separation of powers, democracy and human rights norms in accordance with the overarching principle of human dignity.

The Constitution prohibits the adoption of any law that limits the judiciary's power to examine violations or threats to fundamental rights. The Brazilian Constitution specifically provides that "[t]he law shall not exclude any injury or threat to a right from the consideration of the judicial power".<sup>128</sup> Through this provision, the Brazilian Constitution granted critical powers to the judiciary as a whole, and to the Supremo Tribunal Federal (STF) in particular, specifically for the protection of fundamental rights (Vieira, 2013, p.88).

The STF has exclusive jurisdiction over constitutional matters related to direct actions of unconstitutionality; declaratory actions of constitutionality of federal and State laws or administrative acts and actions of unconstitutionality by omission.<sup>129</sup> The STF also has jurisdiction to decide whether actions by the legislative and executive branches of government pass constitutional muster, and, through the mechanism of *mandado de injunção* (writ of injunction),<sup>130</sup> to ensure order and "direct implementation of fundamental rights" (Vieira, 2013, p.89).

PIL developed by the Indian Supreme Court has given effective access to the Court and a public "voice" to groups and individuals with neither the education nor the economic means to use the legal system to their own benefit. The upsurge in PIL has led to increased direct access to the Supreme Court, and standing requirements have been relaxed in order to facilitate greater access to justice by disadvantaged and marginalised groups.

The Indian Supreme Court has, through the use of PIL and enabling poor and marginalised individuals and communities access to courts, positively contributed to the justiciability and realisation of rights claims, especially in the area of economic, social and cultural rights. Some of the key contributions of judicial intervention and adjudication in the area of economic, social and cultural rights include catalysing changes in law and policy in the area of socio-economic rights. The emergence and development of PIL in India has thus brought significant procedural innovations that give the Indian courts greater authority in monitoring and enforcing rights claims, including socio-economic rights.

In Brazil, the adoption of the 1988 Brazilian Constitution has helped to nurture judicial independence and enabled broader access to the courts, says Moyo. In its role as a Constitutional Court, the STF exercises its judicial power of constitutional review to rule on the constitutionality of laws and normative acts promulgated at both the federal and State level. Furthermore, the Court has jurisdiction to rule on the constitutionality of amendments to the Constitution, when such amendments appear to violate any of the key constitutional provisions such as federalism, the separation of powers, direct elections with universal suffrage, and individual rights and guarantees. The STF has exclusive jurisdiction over

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<sup>128</sup> Article 5, XXXV of the Constitution of the Federative Republic of Brazil, 1988 (Brazilian Constitution).

<sup>129</sup> Article 102(I)(a) of the Brazilian Constitution.

<sup>130</sup> Article 5 (LXXI) of the Brazilian Constitution.

constitutional matters related to direct actions of unconstitutionality; declaratory actions of constitutionality of federal and State laws or administrative acts, and actions of unconstitutionality by omission.

## 6.4 Fieldwork

### a. Introduction

Reflecting the views of those who are increasingly impatient for a noticeable and meaningful improvement in the quality of their lives, an attorney at a university law clinic says that:

“It makes perfect logical sense - without any legal basis - to just go directly there and have the matters adjudicated by the people who are deemed to be the best and the brightest ... people who’ve got extensive experience in constitutional issues.”

With our “young democracy”, he thinks:

“it’s important that people do get direct access to the Constitutional Court so that this democracy can be mapped out, the rights that are guaranteed in the Constitution can be clearly defined by the Constitutional Court without ... delay, without wasting time, so that these issues are quickly dealt with and disposed of, and our jurisprudence gets to grow.”

A senior attorney notes the most common argument in favour of direct access to the Constitutional Court as “speedier justice and access to justice; we always would want to see it being done in a faster way”. Secondly, direct access would significantly reduce costs. In the nature of our developmental State there are increasing tensions and pressures from the populace who want more rights to be advanced more quickly, whereas “service delivery is slowing down”. “People are protesting in much greater numbers, and any protest is an indication that someone’s right has been infringed or ... are being in some way undermined or not being addressed.” He warns of the implications of this growing trend: “disrespect for the law”.

He regrets that the Constitutional Court “is unfortunately a bit far removed from the ordinary citizen. That is where I think we do have to rethink mechanisms.”

He acknowledges, as do all respondents, that:

“...indirect access in certain cases too, has helped to settle some of the law, because if one gets to the CC via one of the appeal processes or review processes, it does help lawyers ... and I would imagine the Constitutional Court as well, to get the benefit of more input and more information. I don’t see it as a contradiction to direct access. I see it as complementing direct access.”

A leading legal academic warns of over-emphasising and even “romanticising” the idea of the CC, especially when justice can often be obtained at High Court level. A



prominent public interest litigator similarly believes that “the direct access thing is a complete red herring ...mostly the High Court does a decent job”.

An international constitutional law scholar commends a particular example of the perhaps unanticipated value of enduring the “long and winding road” that “takes a lot of energy” – as happened in *Mazibuko*<sup>131</sup>. She observes the positive, arguably transformative, impact (even if ultimately unsatisfactory to many) on policy development during the course of the litigation process in this matter. In this way, the litigation process itself can become a source of leverage for the litigants that can stimulate or encourage a trend in their favour.

A former CC Justice pointed to the potential value of a rule applied in the courts of the United Kingdom where a judge of the High Court can assess a matter and “certify” it for direct access to the apex court. This judge considers the papers filed, and on that basis, evaluates the merits, prospects and possible need for oral evidence before certifying its appropriateness for direct referral for argument and adjudication by the apex court.

#### **b. Main trends among judges and legal representatives**

Direct access to the Constitutional Court is limited, but views are divided as to whether it is necessary to allow more or easier access to the CC. Two prominent reasons against increasing direct access are that it may over-burden the CC and that it is not ideal for a court to be a tribunal of both first and last instance. Many respondents also asserted that the CC benefits from the narrowing of issues, from the insights of the lower courts, as well as from their evaluation of evidence, and “dress rehearsals” before lower courts assist legal representatives to refine their arguments.

However, strong views have emerged from some NGOs, civil society and public interest litigation organisations that, generally, access to justice should be broadened to allow for cheaper and faster results for those who live in desperate circumstances. This view found robust support from fieldwork respondents.

- Despite some strong academic support for direct access (as illustrated by Dugard), most respondents had reservations about the benefits of direct access to the CC as a general solution to a multi-faceted problem associated with access to justice, which Dugard also acknowledges.

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<sup>131</sup> *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC).

- Most respondents agree that direct access is valuable for exceptional and urgent matters, and where the decision will have broad relevance and application.
- Direct access may over-burden the CC and it is not ideal for a court to be a tribunal of both first and last instance. The CC also benefits from the insights of the lower courts.
- Most respondents believe that generalised improvements in access to justice, including greater flexibility in structural aspects of the CC (such as judges sitting in panels of fewer judges, or the CC sitting as a “circuit court” in the provinces in which claims originate), and the more effective implementation of judgments, are preferable to, or of more urgent priority than a relaxation of direct access criteria.
- In addition, strengthening High Court benches to include 2 or 3 judges in the more complex SER matters.
- Possible cost and time savings to clients were outweighed by most lawyers’ and all judges’ perceptions concerning the strategic jurisprudential value of indirect access (a careful but comprehensive, inclusive and therefore coherent development of the law), and its tactical value (such as in the availability of further appeals).
- While one respondent believes that the CC tends to “do its own thing”, virtually all others hold the firm view that the progress of litigation through the various levels of the courts serves several purposes (detailed above) useful to the CC if and when it ultimately hears the matter.
- The need to transform the judiciary (and the legal profession) suggests that encouraging and requiring judges in the High Courts and the SCA to consider constitutional claims, including the more complex SER matters, has “educative” value for judges and litigators, and is necessary in order to ensure that the Constitution “lives” in every courtroom, which are also closer and more accessible to ordinary people.
- In any event, while some interviewees emphasised the unpredictability of constitutional litigation through the various levels of the courts, most respondents are of the view that it is increasingly reasonable to expect to achieve “just” outcomes in the High Courts, including the realisation of SERs, especially in urgent matters.
- International experiences of broadened direct access (for example, in Brazil, India and Germany) indicate that significantly larger portions of apex judges’ time is spent

in sifting out the overwhelmingly larger percentage of cases that will not be heard – which is not likely to enhance perceptions concerning access to justice.

## 6.5 Suggestions<sup>132</sup>

There appears to be increasing optimism in the ability and capacity of High Courts to deliver appropriate decisions, and of crafting more effective remedies and orders. This may be due in part to the jurisprudence and precedents developed by the CC, as well as their growing experience with SER matters. In order to determine whether this is indeed a significant trend, and what impact it may have for the relative significance of direct access reform, it may be appropriate to give close consideration to the decisions of the High Courts in SER matters. The Portfolio Committee on Justice and Correctional Services has expressed a strong desire for this assessment to be expanded to include these decisions.

While consensus is lacking that direct access to the CC is a *panacea*, a sense of growing urgency emerges from the various components of the study. The fieldwork yielded a strong preference for a range of measures, which should preferably be used in combination, to extend and enhance general access to justice through the courts. Some are more readily open to consideration and adoption, while others (such as smaller panels consisting of fewer CC judges) may require an amendment to the Constitution. Still, others such as more effective implementation of court orders, are dealt with elsewhere in this report (theme 2). Those measures, possibly in combination with those that are more amenable to immediate consideration include:

- An increase in available public and private funding for public interest civil litigation of SER matters.
- A revision in the Legal Aid Board’s approach in order to allocate a greater proportion of its public funding available to civil litigation, specifically for socio-economic rights matters.
- Greater commitment by private legal practitioners to *pro bono* legal assistance.
- A modest – and possibly gradual – relaxation in the interpretation and application of the criteria for allowing direct access in deserving cases.
- Consider the potential value of a High Court judge assessing a matter on the basis of papers filed, evaluating the merits, prospects and possible need for oral evidence, and “certifying” it for direct access to the apex court.

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<sup>132</sup> These suggestions should be read in conjunction with those arising from the work of Theme 4 “Access: Costs, delays and ‘user perceptions’ of the process and its outcomes”.

- Creative administrative measures by the CC to “sift” applications, in whatever form they are received, to prevent and minimise the risk that greater direct access may “open the floodgates”.
- Reconsideration of an initial proposal (made during constitutional negotiations) that the CC spend some time as a “circuit court” sitting in the provinces in which claims arise, thereby creating a sense of greater accessibility; and
- The South Africa Human Rights Commission (HRC) considers adopting a more facilitative role, and the CC re-orientates its approach to the litigation of public interest matters, “casting it more as a problem-solving constitutional dialogue between stakeholders than an adversarial battle between lawyers”.
- Alone or in collaboration with the HRC, the CC could develop a practice of taking evidence “on commission” as is practiced in India, or facilitating public hearings as in Brazil.
- Focusing too much on the CC may not be wise. Rather than promoting direct access, to the CC, it will make more sense to strengthen the lower courts to which the poor can have easier access. It was further recommended that the Commission for Gender Equality, the SAHRC and the Public Protector and the involvement of *amici* need be better utilised (and strengthened) so that SER claims do not even need to go to court.
- Mediation as a form of alternative dispute resolution (ADR) is now being explored as a DoJ&CS pilot project, although this is currently limited to the Magistrates’ Courts. It was recommended that ADR should be utilised in SER cases, although mediation in the higher courts entails risks, such as uneven skills and the need to pay one’s own costs. Hence, mediation needs to be court-supervised so that there is some quality assurance.



## 7 THEME 4: ACCESS TO JUSTICE — COSTS, DURATION AND PROCESS

### 7.1 Introduction

Section 34 of the Constitution guarantees the right of access to courts for the “fair public hearing” of justiciable disputes. The research in this section seeks to understand empirically what this right means in practice, in terms of the realisation of socio-economic rights (SER) in the country’s apex courts. The focus has been on class actions around SER rights. According to Klaaren, “Class actions hold out the promise of addressing legal matters on a cost-efficient basis by litigating on behalf of hundreds of persons at once” (2014, p. 5).

This study investigates the question of access to justice in terms of issues related to costs, duration and the experience of litigants of the process of litigation. The overarching research question for this study has been:

***“What has been the impact of the decisions of the SCA and CC on the transformation of society?”***

The extent to which SCA and CC decisions are able to impact on society is at least partially dependent on access to justice issues i.e. the degree to which South African citizens are able to bring SER cases before the courts. Self-evidently if there was no access to justice there would be no decisions that could impact on the transformation of society.

This theme therefore focuses on examining the transformative potential of access to justice in SER cases in the country’s apex courts. While there is no doubt that the conditions in South Africa’s apex courts are somewhat, although not entirely different, to those in the lower courts, access to justice is a universal principal, which poses challenges in terms of its realisation at all levels of South Africa’s court system. Therefore this analysis is located within the broader context of the civil justice system as a whole, of which SER litigation forms an essential component.

The quantitative element of the analysis of access to justice addresses this broader context, through seven questions that were included in the South African Social Attitudes Survey (SASAS) in 2014<sup>133</sup>, which provide a national overview of issues related to access to justice such as who uses which courts, the ease with which people are able to access the courts, people’s perceptions of their treatment in courts, the reasons they feel that access to courts may be impeded and their opinions on whether the State should fund legal representation.

Access to courts is crucial to the enforcement of constitutional rights and the delivery of remedies for the breach of rights. In the South African context access to courts is

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<sup>133</sup> SASAS 2014 Survey, Data Analysis: Constitutional Justice Project. HSRC. Unpublished Report.

particularly important as it creates the space for citizens to claim rights and acquire agency in a context of marginalisation and socio-economic deprivation.

In a constitutional order, the State is under an obligation to make available to its citizens the means for the enforcement of their constitutional rights. Courts of law are one of the means that are provided to that end. The Justice Minister's discussion document on the transformation of the justice system asserts that "access to justice" is a "fundamental value for the attainment of social transformation" (Department of Justice and Constitutional Development (DOJ&CD), p. 27). The document also argues that, "[a]ny discussion of transformation of the judicial system should encompass a study of the levels of access the indigent have to justice, and how accessible courts are to ordinary citizens" (DOJ&CD, p. 27).

This study takes place against the background of an ongoing process of civil justice reform that seeks to improve access to justice in civil matters. In 2003, the then Chief Justice Ngcobo identified some of the problems with the civil justice system, as follows:

"Our civil justice system suffers from a number of weaknesses: it is expensive, it is slow, it is complex, it is fragmented and overly adversarial. These weaknesses combine to produce a system that is gradually becoming inaccessible to the average person. In a country like South Africa where there are gross disparities in wealth and education, the system becomes unequal for those who are wealthy and those who are poor and the result it produces is similarly unequal....Citizens have a right of access to -vindicate their constitutional rights. The civil justice system in a constitutional State is therefore to facilitate that access and not to obstruct it."(Ngcobo, 2003)

Recognising these problems the Cabinet approved a Civil Justice Reform Programme on 5 May 2010. The Terms of Reference (TOR) for the Civil Justice Reform Programme (CJRP) stated that the primary objective of the CJRP was to provide speedy, affordable and simple processes for the resolution of civil disputes, which it stated necessitated, "The alignment of the civil justice system with Constitutional values" and "The simplification and harmonization of legislation, rules and procedures." (DOJCD, 2012, p.20)

This study has therefore been guided by the problems that have already been identified by the DOJ&CD for investigation. It sought to canvas the views of a variety of stakeholders including litigants, attorneys, advocates, justices, law clinics and legal NGOs about their perspectives on:

- a) legal costs, duration;
- b) access to legal representation;
- c) expanding the mandate of the LAB;
- d) pro bono legal representation;
- e) the role of civil society;

- f) alternative dispute resolution;
- g) enhancing access to justice through the simplification of rules and procedures and
- h) case management.

In addition the study has investigated the context in which litigation occurs through a focus on a) the rule of law and b) awareness of rights. A vital part of the study has been the analysis of various aspects of procedural justice through focus groups with litigants. These procedural aspects have included the issues of:

- a) dignity
- b) fairness
- c) legal representation
- d) information flow
- e) voice

It is these procedural aspects of justice, which have been shown to have the most profound impact in terms of the transformative potential of access to justice in SER cases.

## 7.2 Methodology

This study, which is part of the broader CJP, adopted a mixed quantitative and qualitative methodology. Each method has its strengths and weaknesses and therefore, used together, they complement each other and strengthen the research findings. Ragin (1994, 93) explains the value of each methodology:

“Most quantitative data techniques are data condensers. They condense data in order to see the big picture. Qualitative methods, by contrast, are best understood as data enhancers. When data are enhanced, it is possible to see key aspects of cases more clearly.”

For the quantitative analysis seven questions on access to and experience of the courts were fielded in the 2014 SASAS survey<sup>134</sup> as part of a 13 question module. The SASAS survey has been administered by the HSRC on an annual basis since 2003. It is a nationally representative sample survey of adults aged 16 and older that investigates public’s attitudes, beliefs, behaviour patterns and values in the country. This survey was therefore able to give a picture of the entire universe of South African citizens’ perspectives on the courts as well as a sub-set of questions for South Africans who had actually had *direct contact* with the courts. Because the quantitative method condenses information to give a broad, generalisable picture, it is less able to investigate specificity, in particular the specific experience of litigants in SER matters who took cases to the country’s apex courts.

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<sup>134</sup> *Ibid.*



This is where the qualitative methodology, that included focus groups with litigants and interviews with a number of key stakeholders involved in SER litigation, was critical to address the *whys and hows* of the experience of SER litigation. Qualitative research has been defined as the process of “making sense” of data gathered from interviews, on-site observations, documents, etc., then “responsibly presenting what the data reveal” (Caudle 2004, p.417).

While these interviews do not represent the entire universe of litigants or of stakeholders, we were able to hold focus groups with litigants from the majority, but not all, of the landmark cases identified in this study and we interviewed stakeholders from most NGOs who conduct PIL litigation. Landmark case where we were unable to access litigants include *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others*<sup>135</sup> and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another*.<sup>136</sup>

Significant challenges were experienced in gaining access to litigants who had been involved in landmark cases. In most instances this required months of following up before a focus group actually took place. In order to facilitate access to several litigants from one case, the HSRC made use of key community leaders or a leading litigant who still had contact with other litigants who had been involved in a case, on a number of occasions, to gather these individuals together and assist with facilitation of focus groups. Although it is possible that in some instances the presence of a community leader or powerful litigant may have inhibited open discussion, in general it appeared to have facilitated discussion as the result of the presence of a trusted leadership figure who knew the details of a particular case.

<b>NGOs interviewed</b>
1. Community Law Centre
2. Centre for Applied Legal Studies
3. Wits Law Clinic
4. Woman’s Legal Centre
5. Law Reform Commission
6. Section 27
7. Centre for Child Law
8. SERI
9. ProBono.Org
10. Legal Aid South Africa

*Table 6: NGOs interviewed*

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<sup>135</sup> 2008 (5) BCLR 475 (CC).

<sup>136</sup> 2012 (2) SA 104 (CC).

Focus groups on landmark cases
1. <i>Residents of the Joe Slovo Community, WC v Thubelisha Homes &amp; Others</i>
2. <i>Abahlali baseMjondolo Movement of South Africa and Another v Premier of the Province of KwaZuluNatal &amp; Others</i>
3. <i>Johnson Matotoba Nokotyana &amp; Others v Ekurhuleni Metropolitan</i>
4. <i>Modder East Squatters &amp; Another v Modderklip Boerdery (Pty)Ltd &amp; Others</i>
5. <i>Governing Body of the Juma Masjid Primary School and Others v. Essay N.O. &amp; Others</i>
6. <i>Khosa and Others v Minister of Social Development and Others, Mahlaule &amp; Another v. Minister of Social Development</i>

Table 7: Focus Groups interviewed

### 7.3 Rule of law

In 1994 South Africa placed law at the centre of its constitutional democracy. As Michelman notes, “the judicially enforceable claim to legality inhabits South African law... as a norm sourced directly in the Final Constitution” (2006, p.2). Krygier has argued that the most important, condition for the rule of law is that the, “the institutionalised norms need to *count* as a source of restraint and a normative resource, usable and with some routine confidence used in social life.” In sum, “a rule-of-law culture is a living, breathing social and political phenomenon in which what matters ...is how the law affects subjects.” Therefore the rule of law is not simply about institutions but about creating particular types of subjects, i.e. citizens who see themselves as judicial subjects, as makers and agents of law.

Crucially, the empirical investigation for this study has revealed a particularly complex South African legal subjectivity, in which litigants who come from contexts of illegality, and sometimes even commit illegalities in order to participate in the legal process (such as forcibly boarding trains), at the same time hold a significant faith in the notion of Law standing above all. As a participant from the *Abahlali baseMjondolo*<sup>137</sup> case explained, “We can have meetings and make decisions in different ways, but then the Courts and the Law is left standing.”

What the most recent module on courts included in the 2014 SASAS survey<sup>138</sup> indicates however is that citizens’ perception of the law and the courts, are primarily just that, perceptions. Only a small minority of South African citizen have any contact with the South African court system, and inevitably, even less with the apex courts. An overall question asking to what extent South African citizens or their friends and family had had direct experience with the courts revealed that only 16% of the national sample had any contact with the courts at all since 1994. The majority (41%) had had exposure to the Magistrates’ Courts. Of the total of 16% who had any contact with the courts, 18% had had

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<sup>137</sup> *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal & Others* 2010 (2) BCLR 99 (CC).

<sup>138</sup> See fn 163, *supra*.

contact with the Constitutional Court, 5% with the Supreme Court of Appeals and 12% had contact with the High Court.

#### 7.4 Awareness of rights

*“There is no greater frustration than being born in a place, and to grow up and old still without rights.” (Nokotyana)*

The barriers to accessing justice are not only about issues internal to the court system such as costs and time, but are also related to a prior process in which citizens become aware of their rights as well as the possibilities for social and legal mobilisation around their rights: “Lack of knowledge about laws and legal rights” were cited by 26,5% of SASAS respondents as a significant factor inhibiting access to justice from the courts. Those in traditional tribal areas (32,3%) felt this strongly as did young people between the ages of 16-19 (30,6%). Of the different population groups, Indian/Asian respondents (28,3%) thought that lack of legal knowledge was an important factor in access to justice, followed by Black/African respondents (27,9%).

Q 116 What are the most important reasons that might make it difficult for someone like you to get access to justice from the courts in South Africa in times of need?														
116.c. Lack of knowledge about laws and legal rights	All	Black/African	Coloured	Indian/Asian	White	Urban, formal	Urban, informal	Traditional authority area	Rural, formal	16-19 yrs	20-29	30-39	40-49	50-59
Percentage	26.3	27.9	25.6	28.3	15.6	24.9	23.7	32.3	23.8	30.6	27.9	25.1	27.7	21.1

*Table 8: Reasons for difficulty in accessing justice from courts (SASAS 2014 Survey, Data Analysis: Constitutional Justice Project. HSRC.Unpublished Report)*

Budlender (2004, p.341) notes in this regard:

*“In order to be able to bring his or her case before a court, a prospective litigant must have knowledge of the applicable law; must be able to identify that she or he may be able to obtain a remedy from a court; must have some knowledge about what to do in order to achieve access; and must have the necessary skills to be able to initiate the case and bring it to court. In South Africa, the prevailing levels of poverty and illiteracy have the result that many people are simply unable to place their problems before the courts.”*

Interviews with litigants for this study indicated that most respondents had been compelled into litigation as a result of immediate dangers to their life circumstances such as the threat of evictions. Madlingozi (2013) notes in the South African context, the turn to litigation has in a number of instances happened as a result of State repression which closed

other avenues for social mobilisation. Litigants in this study noted that they were not always fully aware of their rights or the fact that these rights were justiciable prior to the case they were involved in. However the process of bringing a case to court had an important educative effect in terms of their awareness of their rights and legal procedures for pursuing those rights. As one respondent from the *Juma Masjid*<sup>139</sup> case outlines:

“Let me tell you, this was actually a whole new life for me in terms of getting myself schooled in the legal fraternity if you call it ... Prior to being involved in this case, I had absolutely no knowledge of the legal system, except for the simple things.”

Litigants from the *Abahlali baseMjondolo*<sup>140</sup> case explained the important role the organisation had played in creating their awareness of their housing rights:

“So we then meet in *Abahlali*. That’s when we [were] educated that we’ve got a right that is protecting us from being evicted...There is a right that protects me from...someone [who] wants to move me from a certain house that I’m residing at the moment, he must provide me with an alternative...That’s when we started to resist evictions...we had then to educate other people in the community, and even the ward councillor... “

Sometimes, however the question of realising rights is not only about simple awareness and reveals another complexity about legal subjectivity in the South African context i.e. the extent to which people are discouraged or encouraged from seeing themselves as rights-bearing citizens by fellow citizens, in a context where the entitlement to rights has not yet embedded itself as a norm. Litigants from the *Joe Slovo*<sup>141</sup> case explained how they encountered resistance from other residents of the informal settlement, who felt that they had no right to challenge local authorities and make any claims regarding housing, “People were thinking that we are stupid that we are against the councillor, Sigcau. It was said that you cannot oppose the chief because we are illiterates, we don’t know anything but we resisted and we did not go [from their shacks].” Another litigant explained:

“It was not easy, it was bad and it was hurting because people who were not part of this case were seeing us as people who are not in a good state of mind, who are mad. They were telling us we will never get what we want because no house was ever built on an informal settlement. Now on those utterances what is amazing is that we swam and crossed to the other side of the river.”

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<sup>139</sup> *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. & Others* (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC).

<sup>140</sup> See fn 167, *supra*.

<sup>141</sup> *Residents of Joe Slovo Community Western Cape v Thubelisha Homes & Others* 2010 (3) SA 454 (CC).

On the other hand an Advocate also pointed to the importance of realising the limitations of SER litigation in realising the rights of residents and noted that it is not always the most effective way of pursuing rights that could sometimes be addressed through much more mundane means, such as helping someone apply for a grant. He instead contended that SER litigation should be seen as one weapon in an array of methodologies used to pursue citizens' rights, which should be combined, for example, with mobilisation around a case:

"Litigation gets a bad rap and it sometimes deserves a bad rap when people see it as a panacea, when people see it as the starting point and the end point. It's neither the starting point nor the end point nor the best way of dealing with these issues. It is one valuable weapon in a whole arsenal of weapons, but it's only valuable when it's combined with the others. So you've got to start by making people aware of their rights, and when the decisions come down you've got to tell people what's happened so that they can enforce their rights."

A former justice also noted the importance of realising that even as a judge, "There's only so much you can do. The limitations of the law...I don't think you can change societal structures and its essentials solely through court cases. Absent of political will we really can do very little."

He noted that the key issue in realising rights is often the nitty-gritty of effective bureaucratic systems rather than major policy issues when one is addressing citizens' SER:

"We've run out of oxygen, we've run out of aspirin, you know, elementary stuff. Why? Because they didn't pay the supplier. It's that kind of admin...small admin...it's not the major policy issues. Its actually making things work on the ground. That's where the real problem lies. And, I'm greatly in favour of policy research, but as long as one remembers that it has... its limitations."

The comments of a litigant in the *Nokotyana*<sup>142</sup> case points to the fundamental importance of a sense of the "rule of law", which can make rights justiciable for citizens in South Africa, in order for frustrated and impoverished communities to turn away from violence as a means to assert their citizenship rights:

"...in this community we are model citizens, well mannered. We do not toy-toy, burn or kill. We do everything in order to abide by law...in our efforts to abide by law, we did not want to misbehave. We wanted to respect people. This frustration now will cause us to want to do what we see other people doing in various other places; looting and burning. There is no greater frustration than being born in a place, and to grow up and old still without rights."

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142 *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* [2009] ZACC 33; 2010 (4) BCLR 312 (CC).

## 7.5 Procedural Justice

*... they themselves...they came, these humble people, and they realised that my voice counts, and that is something that is [on its] own beautiful. (SERI)*

A key aspect of interpreting the question of access to justice involves the question of procedural justice i.e. the extent to which citizens feel that the legal process was fair and equitable. These judgements have been shown to be linked to a broader sense of institutional legitimacy, which in turn impacts on the extent to which citizens use the courts. If people do not trust the courts as a legitimate institution, they are unlikely to turn to it as a resource when they face individual or social problems.

Some of the factors characterising perceptions of procedural justice or fairness of judgements have been described as including issues of participation and voice such as an acknowledgement of litigants as valuable members of society, whether they are treated politely and with respect and whether the process provides them with an opportunity to present their cases. Other issues relating to procedural justice comprise procedures that are consistent and are based on accurate information.

Procedural justice emerged as crucially important in the empirical research. In particular the study appears to affirm the participation model of procedural justice i.e. a procedure which ensures parties an opportunity to participate in the process of making decisions that affect them might be counted as a just procedure for this reason, independently of the correctness of the outcome that results from the procedures.

Research has shown that quality of treatment issues as an aspect of procedural justice are particularly important in the South African context, no doubt as a result of a long history of unfair discrimination. The recognition respondents received through the legal process appeared to have a profound impact in countering this history of non-recognition. Thus through the process of litigation, respondents began to perceive their value and constitute themselves as full citizens and judicial agents who could claim rights.

This meant that despite the fact that the outcome of many cases was ambiguous, litigants interviewed appeared to remain convinced of the value of the *process* of litigation. It is important to note however, that the “gratitude” expressed by litigants, cannot only be seen as a reflection of the success of the judicial process but is also a reflection of many citizens’ extreme sense of subjection within a context of historical marginalisation and disempowerment. In this environment, respondents saw the most basic institutional acknowledgment of their rights as an extraordinary recognition rather than an entitlement or the routine expectation of a citizen in a fully entrenched democracy. Nevertheless, this sense of empowerment through the legal process is a critical resource that the legal system, in ideal circumstances, can offer to South Africans.

Recent research in the South African context on perceptions of procedural justice in the criminal justice system (Roberts *et al.* 2013) using South African Social Attitudes (SASAS) survey data, showed that 52% of respondents indicated that the courts were respectful on a regular basis, with slightly more than a third (35%) indicating that the courts seldom or rarely treat people with respect. However, what the investigation found is that there were significant racial differences between respondents in their perceptions of procedural justice with less than a fifth (19%) of White South Africans believing that courts treated people disrespectfully, compared with 30% of Coloured respondents, 39% of Black/African respondents, and 40% of Indian/Asian respondents.

Significantly, however, there is a difference between these 2013 results and the most recent module on the courts included in the 2014 SASAS survey, which posed procedural justice questions only to those who had *actually had a concrete experience of the courts*.

Q114. How satisfied or dissatisfied are you with the way you were treated the last time you visited a court?		Number	Percentage
Q114. How satisfied or dissatisfied are you with the way you were treated the last time you visited a court?	Very satisfied	73	20.4
	Satisfied	261	45.7
	Neither nor	72	13.1
	Dissatisfied	74	14.3
	Very dissatisfied	39	6.2
	Do not know	4	.3
	Total	523	100.0

*Table 9: Satisfaction with treatment in court (SASAS 2014 Survey, Data Analysis: Constitutional Justice Project. HSRC.Unpublished Report)*

When asked how satisfied they were with the way they were treated when they last visited a court Black/African respondents were the most satisfied with their treatment (21% very satisfied), followed by Coloured respondents (18,8% very satisfied) and White respondents (18,1% very satisfied). Indian/Asian respondents were the least satisfied with their treatment, with only 6.,4% stating they were very satisfied with their treatment.

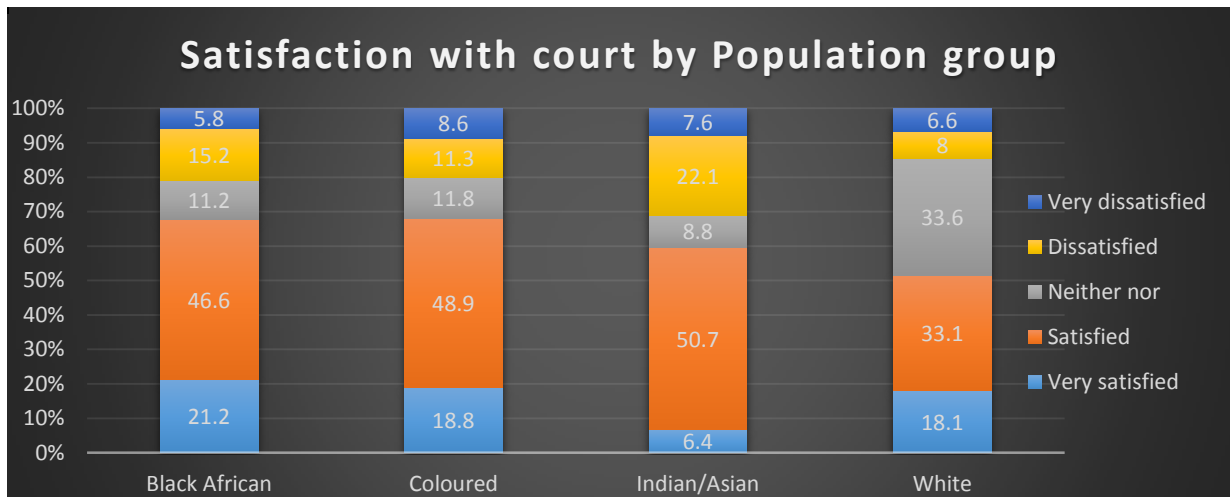


Chart 1: Satisfaction with court by population group (SASAS 2014 Survey, Data Analysis: Constitutional Justice Project. HSRC.Unpublished Report)

Another notable finding concerned a question that asked respondents if they thought one of the barriers to accessing justice was the possibility that, “The courts would not be fair to someone like me” i.e. the impartiality aspect of procedural justice. While previous SASAS studies of the entire South African population’s perceptions of the courts indicated poor, black and young respondents felt that poor and black people were most likely to be found guilty in a court of law, this survey of those who had had contact with the courts seems to indicate that only a small percentage (6%) believed that the courts would not be fair to someone like them. A breakdown of the 6%, while containing very small numbers and therefore only indicative, does show that young people between the ages of 20-29 (8,8%) and Black South Africans (7,1%) indicated that they felt that access to justice would be impeded because courts would not be fair to someone like them.

Q 116 What are the most important reasons that might make it difficult for someone like you to get access to justice from the courts in South Africa in times of need?														
116.g. The courts would not be fair to someone like me	All	Black/African	Coloured	Indian/Asian	White	Urban, formal	Urban, informal	Traditional authority area	Rural, formal	16-19 yrs	20-29	30-39	40-49	50-59
Percentage	6.4	7.1	2.1	5.6	4.8	5.8	10.4	7.1	4.5	1.9	8.8	5.2	6.9	4.1

Table 10: Reasons for difficulty in getting access

Jaichand has noted that, “the law is often a daunting and befuddling business, which never seems to see things from the view of the marginalised, vulnerable or indigent person” (Jaichand, 2004, p. 128).

Mzonke Poni, chairperson of *Abahlali BaseMjondolo* Western Cape, cited by Madlingozi, 2014 points to the fact that courtroom processes can be culturally and politically alienating and thus disempowering:



“When you go to court, let’s say you go to the High Court, you [are] not allowed to speak ... [W]hen they speak, they speak the language that we don’t understand. You are inside the court, but you don’t understand what is been said inside the court while you [are] inside the court with the issue that affects you and the community.”

A litigant from the *Nokotyana*<sup>143</sup> case expressed this sense of alienation in relation to an “apology” offered by the municipality at the Constitutional Court for failing to make a decision on the upgrading of the Harry Gwala informal settlement, “I got lost at that instance when the court ordered them to apologize....and they did so in English. We responded in Zulu saying that we forgive him...and I think that we should have not said that we forgive him”. This is particularly poignant considering the fact that at the time of writing – more than 5 years after the hearing of the case - the MEC has not fulfilled his promises to this community.

*Abahlali* associated activist, Richard Pithouse, highlights the potential for elitism in legal processes:

“I have been part of processes where lawyers (a) they don’t want to take instructions from poor people, they want some kind of middle-class mediation, they want some NGO or academic to give them instructions; (b) they make their own decisions. They make deals that communities wouldn’t want to accept. (cited in Madlingozi, 2013, p. 114)”

Despite the cautions above, it does appear that many litigants interviewed for this study did feel that the process of bringing SER litigation met many of the requirements of procedural justice.

### 7.5.1 Dignity

For many respondents the mere fact of being acknowledged and recognised in the courts was significant, creating a levelling effect and sense of equality. In general litigants seemed to believe that their dignity was respected by the Constitutional Court in particular. Litigants from the *Joe Slovo*<sup>144</sup> case felt that the experience of being acknowledged at this level had a fundamental impact on transforming their sense of themselves as “lesser” human beings with no entitlement to rights:

“our feeling was that we were of course too inferior to challenge the Government to the highest court of all land. But I can tell you...we are actually human beings that counts [sic] the same in the eyes of the law, especially that the Concourt took us seriously.”

It seemed that it was the processes of the CC as well as the behaviour of its judges that made an important impact on these feelings of dignity, “when our lawyers were talking, eleven judge were sitting there, listening carefully, taking into consideration each and

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<sup>143</sup> *Ibid.*

<sup>144</sup> See fn 171, *supra*.

everything that they were saying. The questions that were posed to our advocate was not intimidating but was to find out the truth.” Moreover, “We were happy to get greeted by the chief justice. He even greeted us in our own language...and we were so pleased.”

### 7.5.2 Fairness

Most litigants stated that they felt that the court process was fair. Litigants from the *Modder East*<sup>145</sup> case interpreted fairness as being “allowed” to be present in court and to be represented by their community leadership:

“What they are basically saying is that they were treated fairly in the process, because they were allowed to access to get into the courtroom, even though...they did not allow all of them to testify...so they feel that the process was fair to them, because they did allow them to be represented by their own leadership even though they did have a legal representative...their leadership was also valued in that process. So they feel that they were treated fairly.”

Litigants from the *Nokotyana*<sup>146</sup> case however, felt the restriction that only community leadership could be present in the court had created exclusion. “In the beginning they did not want us to enter the court room all at one and wanted to divide us into groups, and so we forced our way in....We said to them that there are no leaders here, that we are all one.”

### 7.5.3 Legal representation

To a large extent litigants reflected very positive sentiments about their legal representation, primarily from various legal NGOs and law clinics. Respondents in the *Joe Slovo*<sup>147</sup> case argued of their lawyer, “Steve, he really represented us.” Another litigant explained, “I was very excited. Lawyers who represented us did not let us down and we also did not let them down. We were always following them, going together with them.”

Respondents from the *Abahlali*<sup>148</sup> case also expressed appreciation for the legal representation that they had received, “We are grateful that there are legal NGOs, such as Legal Aid Board, LRC, SERI...and of course there are those Pro Bono individuals...advocates that are doing work... this case would not have been done without the support of CALS at the time.”

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<sup>145</sup> *Modder East Squatters & Another v Modderklip Boerdery (Pty) Ltd; President of the RSA & Others v Modderklip Boerdery (Pty) Ltd* (187 / 03 and 213 / 03) [2004] ZASCA 47; 2004 (8) BCLR 821 (SCA); [2004] 3 All SA 169 (SCA).

<sup>146</sup> See fn 172, *supra*.

<sup>147</sup> See fn 171, *supra*.

<sup>148</sup> See fn 167, *supra*.

#### 7.5.4 Information flow

In most cases the flow of information between litigants and their legal representatives seemed to have worked effectively even when large numbers of people were involved in a case. The exception to this trend was the *Nokotyana*<sup>149</sup> case, “During the process they should have explained to us what was required of us, but no one made mention of that up to this day.”

In general, however, the information flow between whole communities and legal representatives was very much a reflection of local grassroots democracy, as communities involved in most cases elected a team of community leaders to represent them. In the *Joe Slovo* case the “task team” who represented the community when the case was initially dismissed at the High Court was disbanded because it was seen to have failed to represent the interests of litigants. As one litigant explained, “a new committee...it revolted against the previous one. We followed this one because it was the team that represented us. Not the one that led us previously that betrayed us.”

Generally, community leadership who represented litigants played a key role in ensuring litigants were kept up to date and were consulted on developments in the case. In the *Joe Slovo*<sup>150</sup> case litigants stated that the task team, “informed us about everything.” Another litigant explained, “Every time when we went to court we would come together and we would be given feedback on everything that happened in court, where it has stopped and where it is going to start again.” In the *Modder East*<sup>151</sup> case litigants outlined a similar process and comparable sentiments about the process:

“There were communications between the...leadership of the informal settlement as well as the Informal Settlement Network leadership and the lawyers who were representing them in the court. So there were those communication lines that always kept them up to speed of what was happening inside the courtroom. So they are confirming that things were being explained to them through along those lines, either by the representative or the leadership of the Informal Settlement Network through to the community themselves who had applied for this interdict.”

A focus group participant explained, “When they got back [from court], they would blow the whistle and we would gather together and give us feedback. He would tell us how things are going.” (*Modder East*)

Litigants from the *Juma Masjid* also felt that the LRC had communicated well with them:

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<sup>149</sup> See fn 172, *supra*.

<sup>150</sup> See fn 171, *supra*.

<sup>151</sup> See fn 175, *supra*.

“They actually did a good job ... I think Mr Chetty had about three or four assistants with him, explaining to us the processes as well, and they were quite helpful in explaining and telling us what the processes will be and the way forward ... They explained why we couldn’t do that, you don’t have enough proof or evidence, or this is a stronger route to take, and you’ve got evidence of this and ... So, actually we were very glad for the way they introduced us into the legal system of explaining to us the legalities and that.”

### 7.5.5 Voice

The question of litigant’s “voice” in the legal process has been shown to be vital. In order to ensure that the voice of litigants help shape legal claims rather than the formulation of claims being imposed on them, Porter argues, “It is critical...to ensure that the analysis of violations of ESC [economic and social rights] begins with the situation of the claimant and affected constituencies, assesses issues such as dignity from the perspective of the claimant, and ensures that the analysis of reasonableness is framed around the interest that the right is meant to protect” (2005, p. 55).

Most litigants interviewed argued that they felt they had a “voice” in the legal process. As litigants from *Abahlali* noted, “we feel that our voice was really expressed, especially...the fact that we were able to instruct our legal team, because that’s the first thing, how does a shack dweller instruct a highly educated people?” Litigants from the *Juma Masjid*<sup>152</sup> case expressed similar sentiments, “Yes, we were able to express our views and feelings. Actually, while the processes were going on, we were able to liaise with Mr Chetty of the LRC to say, no, but what he’s saying is incorrect etc. So we were well accommodated. We had a voice. The LRC provided a voice for us.”

Litigants from the *Nokotyana*<sup>153</sup> case, however, did not feel that they had been given a voice in the legal process, “No, we did not have an opportunity to answer because our advocate ended up doing everything. After that they did not give us a chance for us to share our feeling to hear what we have to say exactly what is that cause us our unhappiness.” These litigants also stated that the CC had failed to listen or empathise with them, “Firstly, emotionally the court has hurt us, the Constitutional Court because it never felt our policies and our intentions.”

Part of respondents’ unhappiness appeared to about the lack of a right to speak directly in court and a sense of alienation from the court process brought about by language barriers, although they acknowledged that their legal representative had managed to mitigate some of these barriers, “he [the advocate] was able to help because there in court they spoke in English, and we do not speak English. He did represent us well and made known our wants to the court the way we wanted him to.”

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<sup>152</sup> See fn 169, *supra*.

<sup>153</sup> See fn 172, *supra*.

Litigants from *Joe Slovo*<sup>154</sup> explained that initially when the case first went to the High Court they felt they were excluded from the legal process, “We went to town for the court case. On our arrival at the court we protested outside. We were called as residents to get inside. When we entered, arguments were presented in court. We were not given chance to present our case ... We were told to move out.”

Litigants from the *Modder East Squatters*<sup>155</sup> case felt that they were given voice in the process through the consultation process with community leadership whom they saw as having been given the “mandate” to represent them in the court proceedings:

“Yes, we can say, they treated us well because they chose to speak to our leaders, as you know that not all of us would get an opportunity to speak going forward. We can all talk in our forum but when moving forward, one person has to speak. We can say they treated us well because they addressed us in a right matter and took the details correctly.”

#### 7.5.6 Outcome of the case

While procedural justice is important, the quality of the outcome expected by litigants, is also an important factor. A key component of this is the functionality of the outcome i.e. the extent to which outcomes are useful or functional from the perspective of litigants. Arguably, at the stage when conflicts emerge, people do not immediately think in terms of rights they may or may not have. Rather, people are facing a real world problem that they seek to solve, and that triggers them into taking action. This dimension of the quality of the legal process considers the usefulness of the outcome in the light of these problems. (Barendrecht *et al*, 2006)

As one legal academic noted:

“So constitutional litigation is...might be precedence setting, but it doesn’t always fix everyone’s problems. It fixes a small number of qualified persons’ problems. If you consider the amount of money you put into public interest litigation and effort and time and all the other things, would that perhaps not be better spent somewhere else? I am only asking the question. I don’t know the answer. For the effect that it has.”

Nevertheless as noted above despite the fact that in a number of instances litigation did not solve the problem that propelled people into the courts, most litigants appeared to remain convinced of the value of the *process* of litigation even where the outcome was ambiguous.

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<sup>154</sup> See fn 171, *supra*.

<sup>155</sup> See fn 175, *supra*.

The response of litigants in terms of the outcomes of their cases was more equivocal than their perspectives on the legal process itself. Litigants from the *Joe Slovo* case were the least cautious in their opinion of the outcome of their case. One litigant remembered a sense of joy on the day the CC judgment was delivered:

“From Johannesburg we were very happy, it was very exciting. We did not sleep the whole night that day, shouting on top of our voices. We went early to meet people from Johannesburg. It was very exciting, I will never forget that day.”

Most litigants appeared satisfied with the outcome of the *Joe Slovo* case, “as a result we ended up getting houses in *Joe Slovo* after a big struggle... We finally managed to get houses and we are now living in our own houses because our task team or our leaders represented us well.” After the decision of the CC, “we come up with a solution on the type of houses that needed to be built so that everybody is accommodated.” Another litigant concluded:

“We are very happy because health has improved. It is unlike when we used to live in informal settlements because when we were staying in informal settlements health was very bad. There were diseases and a lot of flies. Now we are living a happy life and we know how to look after our houses so as to be free from germs.”

The opinion of litigants in the *Juma Musjid*<sup>156</sup> case was understandably more ambiguous:

“Well look, justice was done but [it didn’t succeed]...to have the school open, which we were fighting for, but at the same time we need to understand, respect the rights of other people i.e. the landlord himself, which was asking for a fair rental of which the Department of Education didn’t want to sign. If anything, I think the Department of Education has let us down the most because they were actually supposed to have defended the matter.” This litigant concluded, “It wasn’t the desired outcome, but the process was fair, I would say.”

Litigants from the *Nokotyana*<sup>157</sup> case, however felt that the result of their case had actually undermined their belief in the Court, “I know that many people think that the Constitutional Court is on our side, but I tell you that it isn’t because we had long made a clear list of services that we needed here in Harry Gwala.”

Despite the CC’s order that a decision on the upgrading of Harry Gwala should occur within 14 months of the court ruling, to date, nearly 5 years later, no decision has been made. This has impacted on the way in which litigants view the legal process, “on our way back from the Constitutional Court, we imagined that things would speed up, but from thence we got upset because there was no speedy development.”

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<sup>156</sup> See fn 169, *supra*.

<sup>157</sup> See fn 172, *supra*.

For *Modder East* respondents the court decision established an important procedural principle i.e. that the State has to engage with communities they plan to evict:

“...the processes were fair and unbiased... even the arguments in court and even when it went to making an order, it was fair and just, because they feel that in the first place when everything was done, the court ruled that they [the government] were supposed to have communicated with them before they could even take a decision of evicting them in that case. So they feel based on that, that the court... was fair to them because they were able to uncover all that.”

However while a principal had been established about removals the practical outcome for *Modder East* residents was more uncertain. Although they had been allowed to stay, promises that the conditions in the informal settlement would be improved had not been realised 10 years later:

“They feel that it [the outcome] was unfair because they were also expecting that maybe the court would rule, when it ruled in their favour it would also order municipality to also provide them with basic amenities, sanitation and clean running water. But right now they were given a bucket system in terms of sanitation that is used by a group of households ... So they feel that they are still living in even worse conditions.”

Moreover, “they feel that they are side-lined or they are not being taken care of by the municipality after the court ruling, “nobody is communicating with them to just give them an update of what is happening... So they feel they are still in the dark, nobody is giving them an update of where their futures lie.” In addition these residents also face continued eviction, “he is saying there has been evictions again, and of which they feel that...the municipality are becoming in contempt of order because there was an order that said there must be no more evictions, but they have experienced that again after that.”

Litigants from *Abahlali* expressed similar sentiments, “So we can say justice only happened inside the Courtroom but outside, no.” Another litigant elaborated further that the case had led to legal precedents that had not materially changed conditions on the ground:

“...the Constitutional Court declared the Slums Act invalid and unconstitutional...So that’s number one which was good. Justice was done. But also...the lesson out of that is that you can win in Court but still fail in reality. Now, the question is what’s the point of winning in Court but in reality there is no difference?”

Another litigant responded, “I’m saying its ok because the law is on our side, the Court is on our side. It is up to us how we use this ruling as a tool to our own advantage.”

One of the litigants from the *Juma Masjid*<sup>158</sup> case also articulated a sense of futility about the legal process, “So all the views of the school and the support that we got came to nothing. So it was just a exercise in futility that was done. The MEC had even made up her mind to close the school.”

It is notable, as one advocate pointed out, that none or few of the communities where decisions have not been implemented by the State attempted re-litigation to enforce CC decisions.

### 7.5.7 Trust in the courts

Citizen’s general trust in the justice system and their belief in the legitimacy of its institutions have been strongly linked to judgments about both its procedural aspects and its effectiveness in addressing a legal problem. These interviews indicate that despite difficulties around the outcome of the cases, litigants generally appeared to feel that the process had increased their trust in the judicial system. A litigant from *Joe Slovo* explained, “I trust the court, I trusted it even more this time.” Even residents from *Modder East*<sup>159</sup> who hadn’t had such a successful long-term result expressed confidence in the system as a result of the fact that they had simply been acknowledged by that system:

“Merely because poor as they are as a community, they were able to be represented in the highest court in this country and they came out victoriously due to the court proceedings and the ruling that ruled in their favour. So, they didn’t have that kind of a confidence before they had this experience. So he now trusts that the judicial system is fair to everyone.”

However, the trust of litigants from the *Nokotyana*<sup>160</sup> case seemed to have been significantly undermined by what was perceived to be the unfavourable decision of the Constitutional Court. One litigant argued, “the courts of South Africa have no reason”. Another respondent stated, “Justice has taken a decision that does not improve upon our lives.” A third litigant appeared to conflate the State and the court as one untrustworthy system:

“I would say that I do not trust them. There is nothing that would make me to say that I trust them. One trusts something that presents itself as trustworthy. Because, the same lights that you see now only showed up after having appealed for them. I can’t say that I trust this country’s high courts... “

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<sup>158</sup> *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. & Others* (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC).

<sup>159</sup> *Modder East Squatters & Another v Modderklip Boerdery (Pty) Ltd; President of the RSA & Others v Modderklip Boerdery (Pty) Ltd* (187 / 03 and 213 / 03) [2004] ZASCA 47; 2004 (8) BCLR 821 (SCA); [2004] 3 All SA 169 (SCA).

<sup>160</sup> *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* [2009] ZACC 33; 2010 (4) BCLR 312 (CC).



This sense that the courts were tainted by a relationship with the State was reflected in another litigant's response, "Justice is subject to the government. The way things are going, and if justice did not fear the government, then the Justice system would have sent envoys to come here and see what is happening. This shows that Justice is afraid of the government."

On the other hand, litigants from the *Abahlali*<sup>161</sup> case emphasised, "we respect and we have belief in the judicial system in this country. That is the only thing that is on our side." These litigants saw the Constitutional Court in particular as a site where equality between citizens and the State could be realised and excessive power blocked, "I think what we can say is that in the Concourt everyone is equal. It doesn't matter whether you have money or...I think the assumption by Government is that if we lose in the High Court we will not be able to take that to Concourt, because they know they've got connection in the High Court, but they can't have eleven judges."

Thus these litigants see the "rule of law" as a shield against the exercise of arbitrary power:

"We can have meetings and make decisions in different ways, but then the Courts and the Law is left standing. The last decision that needs to be taken seriously is the Court. So in some cases we always rely on courts or the law, because in most of the places you find that the Government is ruling...as all the challenges that we are facing they are very political, instead of following the processes that are in place. So, in order to reclaim those processes and those procedures you have to go to Court then they will be followed."

## 7.6 Legal costs

*"There's no question that that's the problem [high legal costs]. There's no question. I mean, it's a problem when your constitutional dispensation is based upon the notion of access to the Courts and justice is based on the notion of access to the Courts, but affordability...drastically limits access. So the question is, what do we do about it?" (Section 27)*

Costs are an essential issue in relation to access to justice in all legal matters. Fifty nine percent of SASAS respondents in the most recent survey on courts in 2014 indicated that they felt that "lack of funds to pay" legal expenses were a significant barrier to accessing justice from the courts.

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<sup>161</sup> *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal & Others* 2010 (2) BCLR 99 (CC).

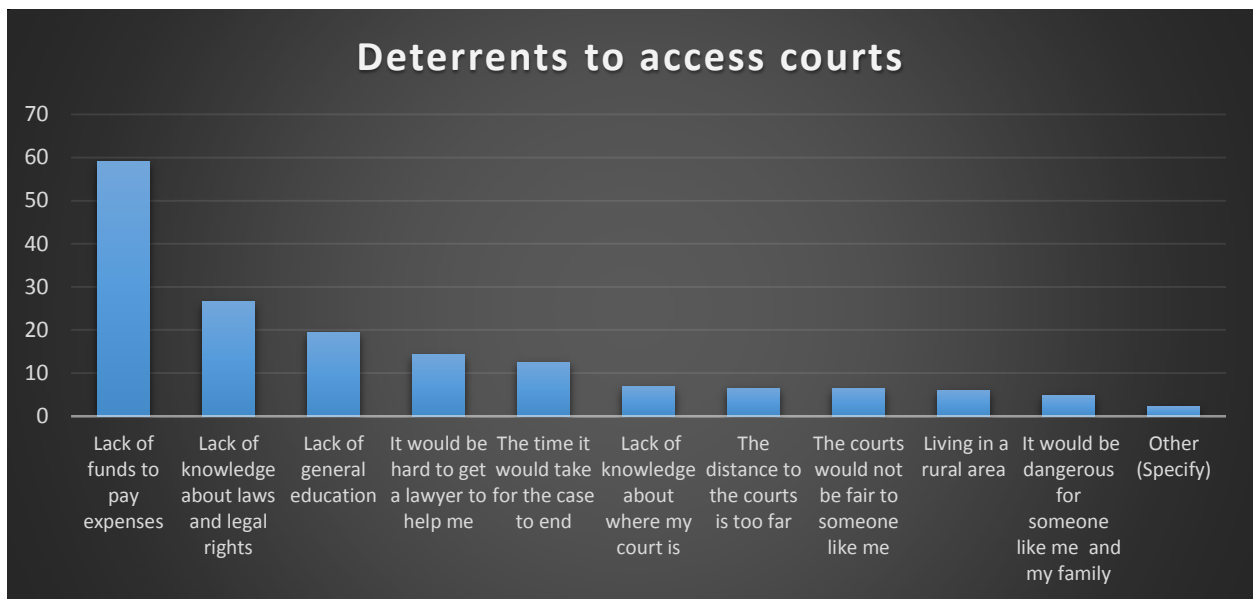


Chart 2: Deterrents to access courts (SASAS 2014 Survey, Data Analysis: Constitutional Justice Project. HSRC.Unpublished Report)

People in traditional authority areas indicated the highest agreement (63,9%) with this, followed by respondents from rural formal areas (59%), which is perhaps indicative of the barrier that rural poverty may pose to accessing the legal system. Young people between the ages of 16 and 19 (66,7%) were the most emphatic of all age groups that legal costs are a significant barrier to justice, potentially indicating the need to support minors in particular to access the court system. Unsurprisingly it was Black/African respondents (61,4%) and Coloured respondents (66,6%) who felt that funds were a significant issue in accessing justice from the courts, followed by Indian/ Asian respondents (44,6%) and White respondents (36,6%). Sixty eight percent of respondents with no schooling felt that lack of funds were an important issue compared to 47,6% of those with a tertiary education. It is likely that those with the lowest education are also the most impoverished South Africans.

Jaichand (2002) argues that “one of the single greatest problems facing South Africa’s legal system today is the fact that indigent persons cannot afford the prohibitive costs of legal services.” This effectively constitutes a barrier to access to justice. Justice Malcolm Wallis of the Supreme Court of Appeal has argued that, “The costs regime we have in place is riddled with perverse incentives that reward delay and over-servicing of clients. The system is universally criticised and regarded as unsatisfactory”. In particular, the practice of billing by the hour puts a premium on slowness and inefficiency (Wallis, 2011, p. 36). An advocate noted in relation to costs, “You know, for most private individuals in this country the courts are completely inaccessible because of cost.” Klaaren also confirms the barriers to justice posed by costs, particularly for civil litigation, which is largely not funded by the State, with fees ranging from R800 for an hour for a consultation with a newly qualified legal practitioner to R4 000 per hour for senior counsel (2014). The recently passed

Legal Practice Act 28 of 2014, recognises the problem of costs and mandates the SA Law Reform Commission to investigate “the manner in which to address the circumstances giving rise to legal fees that are unattainable for most people” (s 34(5)(a)).

The Legal Practice Act 28 of 2014, which was under negotiation for 15 years, was signed into law in September 2014. The Bill includes provisions to regulate the fees of the legal profession by putting in place “a mechanism to determine fees chargeable by legal practitioners for legal services rendered that are within the reach of the citizenry” (Chapter 1 3b(i)). The Bill provides for the South African Law Reform Commission (SALRC) to conduct an investigation into fees charged by the legal profession within 2 years after the promulgation of the Act. In the interim the Bill states that legal fees must “be in accordance with” tariffs made by the Rules Board for Courts of Law.

State responses to the question of costs and delays also needs to be seen within the context of an ongoing process of restructuring of the judiciary in order to facilitate its alignment with the Constitution and to make changes intended to increase efficiency and effectiveness in the court system. A significant component of this process has been the gradual institutionalisation of judicial control of court functioning, which was previously the responsibility of the DOJCD. Thus, in 2010 the Office of the Chief Justice (OCJ) was established. This office has recently been given the responsibility of the running of South Africa’s courts, thus transferring their management to the judiciary, with a separate budget being allocated to the OCJ for the first time in 2015.

The vast majority of SER cases that are pursued are taken up by public interest law firms who do not charge applicants fees directly. Instead these costs are carried within the funding, often provided by overseas donors, for programme litigation. This however, does not mean that costs are not a vital issue in SER litigation. On the one hand the financial burden of litigation which falls to PIL firms could be a disincentive to taking up SER cases. In addition the fact that legal costs are generally prohibitive means that it is virtually impossible for ordinary citizens to take up their matters directly without the assistance of PIL firms.

On the other hand an Advocate interviewed for this study argued that it is not costs *per se* that are the barrier to entry to the justice system but the lack of properly funded organisations who undertake PIL on behalf of economically disadvantaged communities and those communities lack of awareness of the avenues that are open to them to pursue their rights:

“...what causes the problem is people’s access to lawyers and access to justice. Now that is partly about costs, but it’s not pre-eminently about costs. It’s about having sufficient organisations on the ground that provide skilled advice as SERI and others do, and about making sure that people are aware that they exist. I think it’s fundamentally about people

being made aware of what their rights are and how they can enforce them. I think if you did that, the costs and duration point would be neither here nor there.”

Another former justice was also adamant that costs are not the key issue in publically funded SER litigation:

“Expensive? Like hell it’s expensive. To who? How many litigants in the SCA or in the CC, let’s say in the CC, how many of those litigants paid for their litigation themselves?...You know, I think cost in the CC is more a political slogan than a reality... But I don’t think for an Apex court, I don’t think it’s really is an issue. Those cases get funded publicly.”

However the experience of the majority of litigants in this study appears to contradict this assertion. Many struggle to find the money to take transport to meeting venues for legal consultations or to courts. The National Development Plan has noted in this regard that, “Many poor people cannot afford the cost of transport to courts” (2011, p. 409). Litigants from the *Khosa* case described how a number of them had to walk long distances to the nearest town for consultations and give up a full day’s work:

“...they didn’t have enough money, for those who can... in the morning walk to Kobokane and then in the evening they would take a taxi. So the other thing that they are saying, that because they knew about this and they wanted to have assistance, if they hear about the meeting or if they were informed that on this day we’ll have the meeting...they have to leave sometimes...and walk to Kobokane.”

Despite this, these respondents remained committed to the legal process, “they knew that whatever they are sweating for, it’s for them to get a document and at least to receive grants.”

As respondents from the *Juma Masjid*<sup>162</sup> case explained, “we had to fly up to the Constitutional Court on two or three occasions...So we had to book our own flights and we had really sacrifice but we were prepared to do that for the longer term, you know, and obviously hotel fees and flights, telephone calls, all these kind of things.”

In addition litigants in this case initially had to fund their own legal costs before receiving assistance from the LRC, “initially we took the matter and we had to start the case off so we paid like about two...eighty or ninety thousand rand before we got help from the LRC.”

The success of socio-economic rights cases has been seen to be closely linked to the level of mobilisation around them. Many litigants in these cases assumed that public mobilisation was an essential part of the legal process that they had to cover the costs for. A

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<sup>162</sup> See fn 188, *supra*.

litigant from the *Juma Masjid* case explained that they had to “mobilise protest marches and all those things that cost. We had a couple of protest marches to the city centre.”

Another litigant from the *Joe Slovo*<sup>163</sup> case explained how they spent money travelling to support other litigants who had been arrested in connection with protests around the case, “And we had to contribute some monies for people who were imprisoned because we had to use money for transport to take us to Bishop Lavis where some of us were imprisoned. We used money to be able to go to all those places.”

Litigants from the *Joe Slovo* case felt that attending court and mobilising around the case had had a significant financial cost, “A lot of people lost their jobs because we just gave up on going to work. We would wake up and go to court.” Also, “Money was therefore used because we used taxis to go the court.” Uncomfortable physical conditions were endured in order to attend court, “I was among the group that went to Johannesburg. We slept on chairs in a hall and as a result we were singing protest songs until the morning in Johannesburg because we didn’t have beds there.”

Litigants from the *Modder East*<sup>164</sup> case negotiated with metrorail to subsidise their transport:

“We did not have transport, we went and asked Mtshantshi (Metrorail), they gave us a coach to use. We did not mingle with other people because we did not have tickets. They gave us a small paper to use it whilst travelling to and fro.”

Litigants from the *Nokotyana*<sup>165</sup> case appear to have used illegal means to ensure that they got to the court despite lack of transport money, “three of us went there and we took a train by force because we were motivated to go and fight for our cause and we did not spend money that day at all.”

Litigants from the *Modder East* case also outlined similar hardships:

“They had to make sacrifices in terms arranging for the filing of their cases in the Courts as well as...they were constantly called to Court when their case was sitting in Court, they had to make sacrifices, they had to make requests from their employers not to go to work some of them, so to make those kinds of sacrifices. So in that case they were losing because in terms of salary or income...they were not getting anything when they went to Court.”

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<sup>163</sup> *Residents of Joe Slovo Community Western Cape v Thubelisha Homes & Others* 2010 (3) SA 454 (CC).

<sup>164</sup> *Modder East Squatters & Another v Modderklip Boerdery (Pty) Ltd; President of the RSA & Others v Modderklip Boerdery (Pty) Ltd* (187 / 03 and 213 / 03) [2004] ZASCA 47; 2004 (8) BCLR 821 (SCA); [2004] 3 All SA 169 (SCA).

<sup>165</sup> *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* 2009] ZACC 33; 2010 (4) BCLR 312 (CC).

Litigants from *Abahlali*<sup>166</sup> explained the cost, monetary and otherwise of bringing a case to court:

“There were a lot of costs starting with ours. Obviously this was not just about the organisation *Abahlali*, the lawyers and the Court. It was more about *Abahlali*, about communities. It was more about mobilisation, it was more about advocacy, human rights, understanding the law amongst ourselves, before even involving lawyers. That is why I said we had series of meetings even before taking a decision before even inviting, resource people into conversation amongst ourselves. So that cost us..”

A recent case that went to the Constitutional Court in 2012, *Camps Bay Ratepayers’ and Residents’ Association and Another v Harrison and Another*<sup>167</sup> confirmed the problem of costs in general litigation. In this case the Camps Bay ratepayers succeeded in having a legal bill reduced from R700 000 to R300 000. The court wrote:

“The Court expressed its disquiet at its observation that counsel’s fees have “skyrocketed” in recent years. In a country with high levels of inequality and poverty, the Court stated that it could find no justification for advocates charging hundreds of thousands of Rands to argue an appeal.”

The Court emphasised that, in South Africa, “the legal profession owes a duty of diffidence in charging fees that goes beyond what the market can bear” (2012). The question of costs relates therefore not only to changes in procedures and rules but also a change in legal culture (Antonie, 2010, p.7).

In recent years, the Constitutional Court, the Land Claims Court and the Labour Courts have adopted the principle that persons should not be deterred from enforcing their rights because they fear that they will have to pay their opponent’s costs, on top of their own, if they do not succeed, which is the conventional practice in civil litigation.

As a former CC Justice explained in an interview for this project:

“...the implication of the Constitutional Court’s approach to costs, which I think has been hugely important to enable people to being able to litigate all the way up the Court system...You don’t have to risk...you know, if you’re a small organisation, you don’t have to risk that you’re gonna get a cost order that’s gonna basically ... destroy you ... I think in terms of being a progressive decision by the Court, you know, I’d say that ... sort of without wanting to sound self-satisfied, I do think that was very important.”

In these courts judgments are often given with no order as to costs, or with an order that each party should pay its own costs. The most recent example of this was the case of

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<sup>166</sup> *Abahlali Basemjondolo Movement SA & Another v Premier of the Province of KwaZulu-Natal & Others* 2010 (2) BCLR 99 (CC).

<sup>167</sup> (CCT 76/12) [2012] ZACC 17; 2012 (11) BCLR 1143 (CC).

The *Trustees for the Time Being of the Biowatch Trust v Registrar of Genetic Resources & Others (Centre for Child Law, Lawyers for Human Rights and Centre for Applied Legal Studies as amici curiae)*<sup>168</sup> case, in which an order for costs against the NGO Biowatch was overturned by the CC after Biowatch had successfully won access to information about genetically modified foods from the State.

## 7.7 Duration

The duration of legal proceedings has been cited in the Civil Justice Reform Programme as a significant issue driving up costs. However one Advocate offered an alternative viewpoint arguing that he did not believe the duration of cases were a significant factor influencing communities' decisions to litigate and that the barriers to entry were far more about lack of awareness of rights and the means to pursue them:

"I don't think that costs and duration are the reasons that litigation doesn't happen, or that poor people don't enter the legal process. I don't think that a poor community on the whole says, well, I'm worried that this will take a year to get me my houses, or two years, and therefore it's not worth it. I think if they thought that there would be relief at the end of the day, they would happily take the two years. People have been waiting for far longer than that."

Recent SASAS data may confirm this perspective with only 12,5% of respondents indicating that, "The time it would take for the case to end" was a significant impediment to accessing justice from the court system. It appears that duration is a more significant issue for people in urban formal areas (14,9%) followed by those in rural formal areas (9,8%). Coloured respondents (20,9%) were the most likely to cite duration as a barrier to accessing justice, followed by White respondents (15,5%). Black respondents expressed the lowest belief that duration was a barrier to accessing justice at 10,6%. Those with matric or equivalent appeared to be the educational group that thought duration was a significant issue (19,7%).

On the other hand a representative from the Wits Law Clinic argued that duration is a crucial issue in terms of access to justice:

"Duration is a huge issue and our Chief Justice has been very critical about that lately. They actually issued a directive to the Courts to try and expedite finalisation of matters, so the Courts are slowly implementing rules which force parties to expedite finalisation of matters. Because, it does happen, you know, you do get those matters that just drag on for a very long time...."

One advocate argued that part of the reason for the extended duration of many cases is that there is a serious deficit in the number of judges to adjudicate matters,

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<sup>168</sup> 2009 (6) SA 232 (CC).

particularly at SCA level, “if you had more judges in the overworked High Courts and you had more judges in the SCA which is a dramatically overworked court at the moment...” there would be fewer delays. He argued that as a result of the burden on judges in appeal courts, there is no will to enforce compliance with time limits:

“...you have judges who have such a vast case load that they’re only too relieved when there’s a need for a postponement or, you know, when a party hasn’t delivered in time so the case can’t go ahead, because they can’t...they simply can’t do justice to...the volume of work that they have to do ...”

This respondent suggested an “alternative system of an intermediate court of appeals, or a kind of circuit court appeals.” A judge suggested “one could explore having some kind of socio-economic rights [clearing house] that could deal with a large volume of cases very, very swiftly”.

Although a number of respondents argued that the duration of the proceedings is a barrier to poor applicants entering the legal system, a number argued that this was an unavoidable aspect of the legal process. A judge stated:

“...there is no magical formula that can deal with duration. I think generally Courts are providing judgments in good time. There are exceptional cases of course, but I’m aware that Heads of Courts are taking more responsibility and being more astute and aware about the need to deliver judgments timeously. Although I don’t have particular information, I think that Heads of Courts are taking that kind of initiative to make sure that judgments are rolling over at a reasonable pace.”

Some academics and advocates also emphasised the issue of quality of the legal process:

“with litigation there is no shortcut. It has to be done properly, and that takes time. It wouldn’t be so if we had effective alternative means of redress, perhaps through the administrative process or something else, but at the moment we don’t.” (Advocate)

A representative from LASA also argued that the government is making an effort to address the problem of delays but is hampered by lack of court personnel, “there will always be delays because more and more cases are coming up in Courts. I don’t think there’s enough staff in Courts to deal with the workload”.

Several respondents asserted that a key reason for delays in SER cases is the government itself, which will defend any matter, regardless of the merits and pursue it up to the CC rather than settling. An advocate argued, “government departments need really to be able to distinguish between a bad judgment and a good judgment...and to let go...Government is quite willing on a routine basis just to litigate these sorts of issues all the way, irrespective of whether the case is good or bad. And that’s part of the problem.” This Advocate explained, “Government often just ignores...don’t take time limits seriously. So,



you know, an application...government should be filing its answer in six weeks which is quite a long time, you know. Six months down the line they won't have an answer."

An interviewee from SERI recounted a similar experience, "Well, I think one of the issues for poor people when dealing with those kind of matters is that the State and...So at every opportunity the State says, we are not going to give an answer. We'll give it on the next occasion." Both the advocate and the respondent from SERI noted that there appears to be very little accountability when government fails to respond to matters.

A representative from CALS argued similarly, "I feel like there's really little control that you have over how (long) it will take for a decision to be arrived at. You must remember, by the time you're lodging an application in the Court, it's already been quite a lengthy process beforehand."

Respondents from NGOs noted the disappointment which comes with prolonged litigation. They argued that delays are detrimental to those seeking justice. Not only do prolonged proceedings result in higher costs, frustration and anxiety due to the uncertainty of the outcome but delays may also make evidence more difficult to obtain. One of the interviewees substantiated these views by noting that, "the longer a case takes the more despondent at times the parties get. So to some degree it feels like the litigation process is not moving ahead, and I feel that this creates a great deal of despondency on the client, and also to some extent limits the mediation that can actually be provided." (CALS)

## **7.8 Access to legal representation in SER cases**

Critical to the question of costs is the right to legal representation at State expense. As has been noted, the Constitution contains an express provision for legal representation at State expense in criminal cases but not in civil matters, including by implication SER matters. This has led to some ambiguity regarding the State's obligations in terms of legal representation in civil cases.

The exception is with regard to children in civil suits. Section 28(1)(h) of the Constitution guarantees a child's right to "have a legal practitioner assigned to the child by the State, and at State expense, in civil proceedings affecting the child, if substantial injustice would otherwise result."

Notably SASAS respondents appear to feel that the question of funding for legal services (59%) is a more important issue than the fact that it would "be hard to get a lawyer to help" them (14,2%) i.e. respondents seem to feel that they can access legal representation but the major obstacle would be funding for litigation. This is interesting because according to international figures, South Africa has a low number of lawyers to citizens at 24 356 lawyers for a population of 52,9 million, which is an average of 2 000 people per lawyer. In the US the ratio is 265 people per lawyer and in Brazil it is 326 people

per lawyer (Klaaren, 2014). When asked on a scale of 1 to 10, how easy or difficult respondents felt it would be to get legal help, most people responded with a 5 i.e. they did not think it would either be particularly difficult or easy. However, when this global figure is broken down it is possible to see variations in perception along demographic lines with people in rural traditional areas (11,7%) expressing the highest belief that accessing a lawyer would be “extremely difficult”. It appears that respondents in the youngest age group of 16-19 were the most concerned about the difficulty of getting a lawyer with 13,1% rating this difficulty at 2 where 1 is the most difficult. Generally White South Africans appear to be the most confident they can access legal representation, with very few stating that this would be “extremely difficult”(1,3%).

When asked whether, given the range of social needs in the country, taxpayers’ money should be utilised to fund legal representation, the majority of respondents were in favour of this, with 40,9% strongly in favour and 35,7% somewhat in favour. This sentiment was most strongly expressed in urban informal areas (47,7%) followed by rural traditional areas (42,4%). Young people between the ages of 16-19 were the age group who were most strongly in favour of taxpayers funding legal representation (46,5%). Black/African respondents (43,4%), followed by Coloured respondents (32,7%), White respondents (32,2%) and Indian/Asian respondents (29,4%) felt that legal representation should be tax funded.

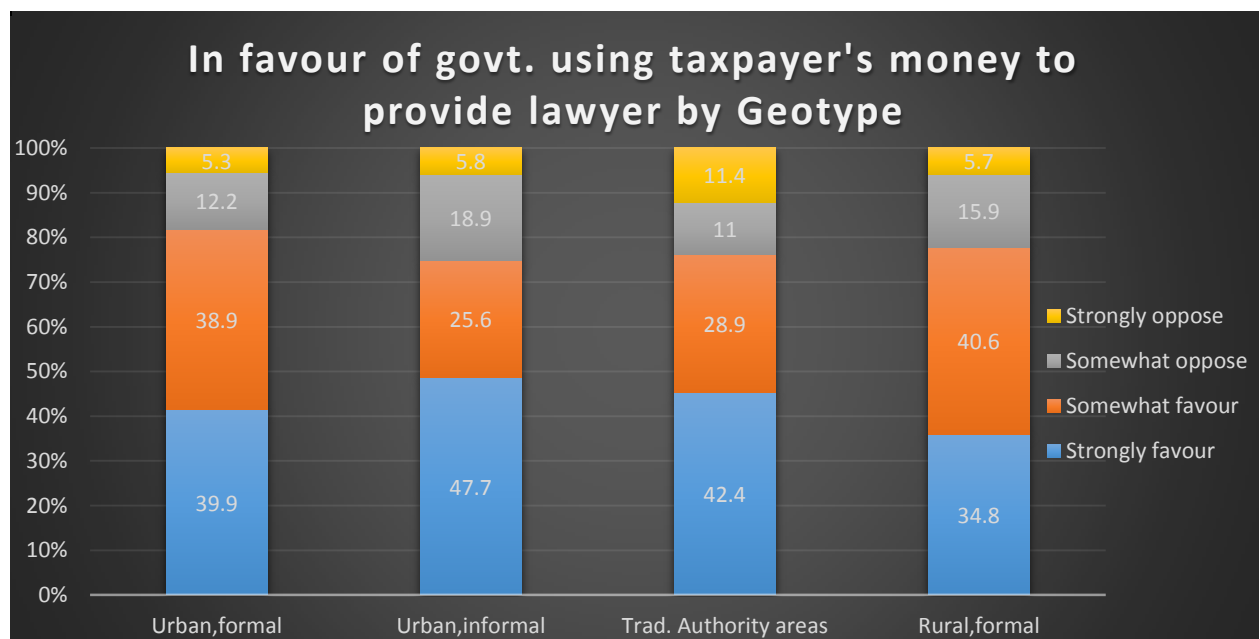


Chart 3: In favour of government using taxpayer’s money to provide lawyers by geotype (SASAS 2014 Survey, Data Analysis: Constitutional Justice Project. HSRC. Unpublished Report)

### **7.8.1 Expanding the mandate and funding of Legal Aid South Africa (LASA) to include SER litigation**

The key avenue for citizens with low incomes to attain legal representation is Legal Aid South Africa, formerly, the Legal Aid Board (LAB). In 2012, LASA stated that it provided legal assistance to approximately 420 000 persons per annum and legal advice to over 200 000 persons per annum across South Africa (Klaaren, 2014). However, since 1994, the focus of legal aid has primarily been on criminal defence. According to Klaaren, “criminal cases remain at least 90% of LASA’s docket” (2014).

However, Budlender argues that support for the right to representation in civil cases can be drawn from the general provisions in the Constitution that the State not only protects the rights of its citizens, i.e. a negative duty, but also “fulfils” those rights, which requires a positive obligation to realise rights (Budlender, 2004, p. 346). While the realisation of socio-economic rights is subject to limitations in terms of the principle that they will be “progressively realised”, the right to access the courts is not subject to any such qualifier.

Budlender (2004, p. 351) cites Canadian and Indian case law to support the assertion that a Constitutional right cannot be limited simply because the government states that it does not have the resources to meet that constitutional obligation., which would “stand the risk of making the realisation of constitutional rights dependent on budgetary allocations made by the government”. However, budgetary constraints can be taken into account in the determination of a remedy for this breach of a right, for example a programme that over a specified time will lead to the realisation of a particular right, such as free legal representation in civil cases.

While there is ambiguity about the State’s obligation to fund representation in civil matters, there does appear to be a recognition of the need to fund SER litigation through the establishment of the Impact Litigation Unit within LASA, which, according to an interviewee from the unit, was established in terms of an impact litigation policy articulated in the Legal Aid Guide. The Impact Litigation Unit as its name implies was established in order to take up precedent setting cases that would benefit classes of people rather than individuals. The unit has in particular focused on housing matters. Despite the existence of the Impact Litigation Unit, most interviewees indicated that the LASA focus on SER litigation needs to be extended. A representative from SERI also argued that despite the shift in LASA’s focus to deal with more civil matters, “they’d rather not actually.” An advocate also noted that, “the Legal Aid Board does take on some [SER] cases I understand, but on an *ad hoc* basis...It’s not part of its core mandate, even with the amended Bill before Parliament.”

Interviews indicate that there seems to be widespread agreement between legal NGOs, civil society, advocates, attorneys, judges and legal academics canvassed here that

the mandate of LASA should be extended to include support for SER litigation. A respondent from the Wits Law Clinic pointed out that, “not enough is going towards socio-economic rights litigation” and that although there are a number of donor funded civil society organisations taking up these cases, these organisations face funding constraints particularly in the light of the cost of litigation. Another advocate argued, “I think anything that does more...anything that puts more money into the litigation of socio-economic rights in this country is a good thing. And I think if the money came from Government via the Legal Aid Board I think that would be a very good thing.” This advocate also argued that State funding for SER litigation would demonstrate commitment to transformation:

“You know, it’s all very well to say people criticise the Court for not being pro-transformation and for not doing this and not doing that, but if you really want to see it, if you put funding into running these cases, that would be a huge way of doing it.”

On the other hand a former justice had a radically opposed view about the entire mandate of LASA:

“I would close down the Legal Aid Board. I don’t think they do good work, I don’t think they produce good legal representation. I do think that the quality of work delivered by Legal Aid South Africa is not what it should be. I don’t believe in state lawyers being good lawyers. I think good lawyers are people who make a living out of it...if they’re bad lawyers they go and work for Legal Aid.”

The question of expertise led one judge to suggest that efforts in relation to SER litigation should focus on ensuring that organisations that have built up a wealth of experience in public interest litigation are properly funded:

“So perhaps the best way to do it is to leave the Legal Aid Board doing what it does... and to focus on the bodies in the private sector that have the expertise already, and ensure that they are adequately funded. Whether that’s an obligation that falls on Government or the private sector, the NGO sector, is another matter. I’m not sure what the answer to that is.”

Another judge raised questions about the current direction of the LASA, which he argued, is moving towards a “business model” of operation that explicitly excludes civil society actors focused on transformation. Speaking of recent submissions by the LASA to the Parliamentary portfolio committee on the new Legal Practice Act, this judge argued:

“They presented arguments for the new amended Legal Aid Act and Board composition and functions to be almost business-like, even excluding public interest groups of lawyers like the National Association of Democratic Lawyers (NADL), and the Black Lawyers Association (BLA) from having seats on their Board ... Their comments are that we have to run a business operation and they are not interested in the kind of external influences.”

A number of interviewees also raised the issues of “independence” and “objectivity” should a State institution such as LASA take up SER cases when the State is often the defendant in these cases.

The former justice mentioned above had this to say:

“I would not like to give government anymore responsibilities than it has. I happen to think it is not doing so well on the things that it does have already. Particularly when you get down to individual litigation against government, I would be very reluctant for government to have a say in who gets finance and who doesn’t.”

Delegates at a colloquium hosted by the HSRC in November 2014 articulated similar concerns about the need for independent funding of SER litigation. The delegates generally felt that it was clearly in the interests of the constitutional project that socio-economic rights litigation be funded, but that this was complicated by the fact that the government was often a defendant in such matters. In this regard it was mentioned that this tension was recognised by the Constitution and gave rise to the establishment of the Chapter 9 institutions. Delegates argued that the role of the South African Human Rights Commission (“SAHRC”) in this respect needs to be better formulated and articulated. Some delegates felt that the SAHRC was the primary institutional body tasked with ensuring the actualisation of socio-economic rights, and as such should play a more pro-active role to ensure the adequate funding of relevant litigation.

Respondents from the organisation *Abahlali baseMjondolo* also argued that Chapter 9 institutions should play a key role in SER litigation and that they need more support:

“Chapter 9 institutions really need more support in the Constitutional democracy for it to work. Because you cannot have these institutions, you don’t give them money but expect them to really stand in the democracy especially by supporting the vulnerable group of our society.”

Importantly for *Abahlali* the role of Chapter 9 institutions in supporting SER litigation is critical to facilitating a “rule of law” society in which conflicts are resolved through the courts rather than on the streets:

“They [Chapter 9 institutions] need to be in communities...in cases where they [communities] are talking about their rights, so that when we resist as we do today, they resist within the premises of the law but also with confidence that the law is on our side. They are not just making noise, but as a law-abiding citizens, because democracy needs active citizen participation.”

A representative from Section 27 also emphasised the importance of Chapter 9 institutions in pursuing SER rights, however he also raised the funding constraints that some institutions such as the Human Rights Commission face:

“We have very important Chapter 9 institutions which are also a vehicle for access to justice and are more accessible to people. I mean, access to justice in the Constitution isn’t only through the Courts, let’s also just make that point clear. So, the Human Rights Commission has offices in the nine provinces, the Public Protector has offices in the nine provinces, but the Human Rights Commission doesn’t have a budget, frankly, that allows it to fulfil its Constitutional mandate.”

### **7.8.2 Pro Bono legal representation**

An important option in terms of reducing costs in civil and criminal litigation is *pro bono* legal representation. A recent positive development in relation to *pro bono* work has been the co-ordination of free legal services through the NGO *ProBono.Org* which was founded in 2007 and plays a role in matching clients with private legal practitioners who are prepared to take cases *pro bono*. The Legal Practice Act 28 of 2014 signed into law in September 2014 aims to create a greater responsibility on the part of lawyers in private practice to devote a portion of their time to *pro bono* work. The Act provides for regulations to prescribe the requirements for “community service”, which “may” include “community service as a component of practical vocational training by candidate legal practitioners” or “a minimum period of recurring community service by practising legal practitioners upon which continued enrolment as a legal practitioner is dependent”.

A legal academic argued strongly in favour of *pro bono* work, “So I spoke of the idea of *pro bono* work as being soul food for the lawyers, and an opportunity for us to reconfigure why we’re doing what we are doing”. He noted the historical role that lawyers have played in the South African context that extended beyond their role as legal practitioners, “And if you consider that in the days of Mandela and earlier, lawyers were much more than individuals who go to Courts to find cases. They were advisers to a community, they were leaders within that.”

Another advocate expressed strong support for the idea of community service for young law graduates, “Do I support community service for lawyers? Absolutely.” However he noted that these graduates would not be equipped to take on complex Constitutional law matters, although there are a number of ways they could assist in facilitating access to justice in relation to SER:

“You can’t take a law student or a law graduate who is in their two year community service and make them argue a case in the Constitutional Court. But what you could do is you could have them going out into the communities and explaining to people what their rights are and you could have them providing legal advice and funnelling cases through to the LRC or the Legal Aid Board or someone else, or you could have them writing letters to enable them to claim their social grants or you could have them telling them the options.”

One judge sounded a cautionary note about the importance of ensuring that those who deal with complex socio-economic cases have the skills to take them on:

“The problem that one faces though, is that socio-economic rights cases are often very complex, very big and very costly to put together, because they do require a lot of legal work and a lot of expert evidence and analysis of budgets and all sorts of things like that, that sort of one off *pro bono* work probably can’t accommodate, but there’s a place for it. ... So I think it is important and I think it’s encouraging that at least some of the bigger firms have taken it up seriously.”

Although skills and expertise in the field of SER litigation have been limited to a relatively small number of well-known “experts”, an advocate argued that:

“It’s changing because of the number of...new advocates who come to the Bar having been at the Court as a clerk for the judge...who have an understanding of socio-economic rights because they’ve been at the Courts...I think more effort needs to be made by the attorneys in the organisations who brief counsel to ensure that other people get a look in and get the exposure that’s necessary.”

Although there appears to be widespread support among interviewees for the idea of *pro bono* work, a number of concerns about the way in which the current system is functioning, were raised. Several interviewees indicated that they thought there was some resistance among legal professionals to meeting even the minimal obligation of 24 hours per annum. One legal academic who organised the first *pro bono* conference in the country, noted that he “received quite a number of sharp reactions to it from practitioners” who felt he had not taken into account the realities and costs of running a legal practice.

Another respondent from the Impact Litigation Unit of LASA noted similar resistance, “There is a lot of resistance, as you said, private law firms don’t want to do *pro bono* because it takes them away from fee earnings.” A respondent from Section 27 noted that sometimes the resistance related to a conflict of interest between corporate interests and socio-economic rights, “So when you walk in there the first thing they’ll say to you is, do you want to deal with a case of a miner, but Goldfields is our client, we can’t take on the case.”

A key challenge seems to be the monitoring and organisation of the *pro bono* hours that members of the Bar are supposed to contribute. A number of respondents noted the fact that there is significant latitude for legal professionals to choose what constituted their *pro bono* hours, which seems to have given rise to a considerable amount of box-ticking that can be very detrimental to citizens. As one respondent from LASA explained, “Let’s say you have three consultations in three days, by then you finished your 24 hours and what people do then, I’ve completed my 24 hours, I don’t have to deal with you further.”

In order to address such problems a few large firms have set up dedicated *pro bono* departments so that *pro bono* hours can be utilised in ways that support those who need legal assistance. One advocate however mentioned that he had faced resistance in his firm to setting up such a unit as members reportedly argued that this would violate Bar rules and be “touting for business”. Another problem mentioned by the representative from LASA is

the difficulty in enforcing a relationship of accountability between attorneys and advocates when they are both working for an organisation such as *ProBono.Org*. Because advocates are volunteering and do not have a financial relationship with attorneys as would ordinarily be the case, in some instances, attorneys struggle to ensure that instructions are followed and the needs of the client are met.

Another important problem concerns the lack of mechanisms to monitor whether legal professionals are meeting their *pro bono* obligations as well as the absence of any sanction for non-compliance. As one attorney explained:

“I’ve never seen what happens to people who don’t comply, it’s there as an encouragement. It’s not there as a mandatory...it’s supposed to be mandatory, but it’s not...I’m not aware of it being enforced and I’m not aware of any lawyer being charged by discipline...for not having complied with it.”

Several respondents noted the need for *pro bono* work to be more efficiently managed by Bar Councils and Law Societies. An advocate argued, “the legal profession can be more interventionist *viz a viz* its members as to what kind of *pro bono* work it should be doing. Harness its resources better, manage it better, because now we at the moment, we can do what we want, and we comply with the requirement.” He observed that, :

“...for example, the Bar Council could easily say, we’re going to need members to spend however many hours [on a particular issue]... so please, can we have...or actually allocate it. Say, G, we want you to spend your twenty hours *pro bono* work doing that. That shouldn’t be too difficult to manage actually.”

### **7.8.3 The Role of Civil Society**

McQuoid-Mason notes that:

“...[o]ne of the rare benefits of the oppressive apartheid system was the development in South Africa of a vibrant NGO community, which included several organisations engaged in public interest lawyering. The most successful of these have been the Legal Resources Centre, the Centre for Applied Legal Studies at the University of the Witwatersrand, Lawyers for Human Rights, university law clinics, community law centres and advice offices (McQuoid-Mason, 1999, p. 8).”

In the last 2 decades civil society organisations (CSOs) that mobilise particular communities in order to pursue their socio-economic rights have been essential to the process of public interest litigation and ensuring that where legal strategies could win some advantage for communities these are pursued. Bentley (2013) notes in this regard that:

“...in the absence of civil society initiatives aimed at facilitating access to justice for the poor, these kinds of cases would be unlikely to arise, because poor and marginalised communities lack the resources to instigate these cases without assistance (Bentley, 2013, p. 51).”



An attorney argued that the role NGOs have played is not simply facilitating access to justice but that they have also helped uphold vital Constitutional principles:

“I think that NGOs and CBOs have a critical role to play in the litigation. In fact, I’m gonna go broader here, and say that our Constitution actually mandates a system of openness, accountability and transparency, and I think that over these past twenty years NGOs and CBOs have ensured that these principles are advancing and I think huge strides have actually been made in relation to socio-economic rights litigation...”

She argued however, that NGOs should not always see themselves in an adversarial relationship to the State but should work in partnership to realise a Constitutional order:

“So for me it would be NGOs working with government to make sure rights are deepened and protected and I take the point that sometimes we have to disagree and we have to go the route of litigation, and obviously the adversarial nature of litigation puts people on opposite sides of the debate. But I think it’s a celebration that our democracy actually provides the space for this engagement to happen and it’s always open to us.”

Many of the public interest law firms that take on SER litigation are funded from outside the country, which potentially gives them more independence than State institutions like the LASA. However, this also poses a problem in terms of ensuring continued funding as external donors have, since 1994, increasingly channeled their funding towards bilateral agreements with the DoJ&CD, in the belief that under a democratic government the onus for providing legal services should fall to the State. The financial crisis of 2008 has also led to the drying up of funds, leaving organisations like the TAC vulnerable.

Partly as a result of constraints on funding and resources for SER litigation, public interest litigation has necessarily been strategically focused, leaving the question of access to justice for SERs in the broader community unanswered.

An interviewee from CALS outlined the consequences of this strategic approach, “So you cannot take every single client. So that’s where the lack of resources actually is going impact quite negatively on poor clients is when...it’s not significant enough of a matter, and I think that’s probably been the most heart-breaking thing for me.”

The most effective litigation around SER therefore has been that which is located within the context of broader social mobilisation by civil society organisations. The Treatment Action Campaign’s (TAC) concerted efforts to make anti-retroviral (ARV) medication available to all South African citizens is a classic example of this combination of mobilisation and strategic litigation. A Foundation for Human Rights and South African Commission of Human Rights report (2004) on public interest litigation therefore found that:

“The best and most effective PIL, is that which is located in a broader social and political context and which works with social movements to identify issues to mobilise support around

them, to place pressure on the political system, to use the legal system as a means to achieving this and to monitor and enforce the favourable laws and orders by the courts (Foundation for Human Rights & South African Human Rights Commission, 2004, p.18)”

Litigants in a number of cases articulated the importance of community mobilisation around their particular case. Respondents from the *Juma Masjid*<sup>169</sup> case explained:

“Once the media started getting involved, the amount of moral support that we had from...students...who said, shame man, we feel sorry for this and this [the school] is part of our heritage as well, and we schooled here and we grew up here, you know, and you’ve got all our support for your fight, and that kind of thing. It made quite a big difference.”

Litigants from the *Joe Slovo*<sup>170</sup> case describe a more forceful type of community mobilisation that pushed the boundaries of legality at the same time as the respondents were using the court system, “We were thousands, not thirty, forty, fifty when we went to court. Thousands of people went to court...We boarded trains and stand owners were afraid of us but we did not touch any stands.”

A legal academic noted: “Access to justice in South Africa is the role and function of civil society organisations.” A respondent from Section 27 observed the important role that CSOs play in actually identifying pertinent problems and intervening, for example, in budgetary planning around school text books. A representative from the Wits Law Clinic underlined the important advocacy role of civil society organisations. In addition, this interviewee emphasised, “the big need for socio-economic rights litigation in rural areas” since, “people aren’t getting their basic needs” met in rural parts of the country.

Several NGOs interviewed emphasised how important civil society and community based organisations are to facilitating meaningful engagement between government, the judiciary and civil society. One interviewee noted that the CC emphasised this role in the *Olivia Road* case by stating:

“...that civil society should be the facilitator of meaningful engagement ... the Constitutional Court recognises the importance of the civil society in defending the rights of the vulnerable and disadvantaged groups...the Constitutional Court said that we should play an important role, especially in negotiating meaningful engagement between the community and governmental institutions (LRC).”

A respondent from Section 27 saw meaningful engagement as an important aspect of participatory democracy, “the way meaningful engagement, although it has its problems, is evolving is about creating this dialogue between government, the judiciary, and civil society”.

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<sup>169</sup> See fn 188, *supra*.

<sup>170</sup> *Residents of Joe Slovo Community Western Cape v Thubelisha Homes & Others* 2010 (3) SA 454 (CC).

Some NGOs defined the roles of civil society/community based organizations in respect of SER litigation in terms of “mobilising, educating and advocacy in respect of people’s socio-economic rights. We need to get the people together, we need to educate them, and we need to be their voice.” For SERI civil society organisations have an important role to play in providing rights literacy since people are not always “aware of their rights, what their rights are and what the boundaries of those rights are.” The LRC equally regards the education of communities about their socio-economic rights as an important role of civil society.

Section 27 highlighted the significant role of civil society organisations in ensuring that court decisions are implemented and commented as follows regarding government officials’ failure to implement court decisions: “There’s a sense of apathy that sets in and the role of organisations like this, is to address that sense of apathy. And people feel paralysed in government, but then the point is to start thinking through these issues and finding solutions.”

NGOs have been the champions for many major socio-economic rights cases. A legal academic and representative of the Law Reform Commission commented as follows: “I can’t think of one of the major cases, from *Grootboom*<sup>171</sup> to *Nokotyana*<sup>172</sup> who didn’t have an NGO involved in it, all the way through. So we have a great un-praised source of wealth, and that’s the civil society organisations who do incredible work.” However, “they all do specialist work, but they do it on the best cases that are most likely to succeed and set the precedent.” Furthermore, the respondent ascribed the success of the civil society organisations in litigation to available capacity and funding, and “pockets of willingness”.

Despite the fact that civil society organisations play an important role in SER litigation, various NGOs emphasised the lack of funding for these organisations to fulfil their roles in SER litigation. LASA, for example, noted that since the democratisation of the country donors are not as generous as in the past in terms of funding of civil society organisations. This results in a shortage of capacity for civil society organisations as some of their employees may join private practices which then impacts negatively on their ability to assist the poor with SER litigation. Furthermore, Wits Law Clinic highlighted the high cost of litigation and the financial burden on civil society organisations since these organisations are mainly donor funded. In addition, there is also a lack of funding for civil society organisations to assist indigent people in rural areas with litigation. A former justice argued strongly that civil society organisations, rather than the LAB needs to be funded with State

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<sup>171</sup> *Govt of the RSA & Others v Grootboom & Others* CCT11/00 [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (CC).

<sup>172</sup> *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* 2009] ZACC 33; 2010 (4) BCLR 312 (CC).

money in order to ensure that SER litigation continues, “I would be strongly in favour of State subsidies for the NGOs whose funding has been diminished by the foreign donors.”

## 7.9 Enhancing access to justice by changing current rules and procedures

In February 2014 *Draft Norms and Standards for the Performance of Judicial Functions* were issued by the OCJ under Chief Justice Mogoeng. The document seeks to regulate a variety of judicial functions including court sitting times, length of civil and criminal trials, time periods for the delivery of judgments following the conclusion of cases and systems of performance monitoring. The stated objective of the Norms and Standards document is to enhance access to quality justice for all, affirm the dignity of all court users and to ensure the “effective, efficient and expeditious” processing of cases through the court system (OCJ, 2014, p.3). The proposed norms and standards have met with some opposition from members of the legal profession, and the document is still undergoing discussion and consultations before finalisation.

In 2012 the current Chief Justice Mogoeng Mogoeng argued that, “our Rules of Procedure, especially in civil matters both at the High Court and at the Magistrate Court leave a lot to be desired, they offer endless opportunity to the wily litigant or representative to drag a matter almost endlessly” (p. 10).

Most of the respondents interviewed for this study described the State of current rules and procedures as very complex and a barrier to accessing justice. A CALS representative noted that the rules “can get very, very complicated, even for me with a law degree”. A State attorney representative reported that “if one looks at the complexities of rules and regulations, and the barriers for people to state their case without having to laboriously put up hundreds of pages of argument...it’s actually monumental. If you talk to any lawyer, forget talking to a layperson, it’s almost too specialised, there is a small body of lawyers in South Africa that are regarded as specialist, it’s become an elitist area of work, and that should never be.”

An advocate noted that the inflexibility of rules in the SCA to bring urgent applications meant that many SER cases went straight from the High Court to the CC, “the SCA Rules and the approach of the SCA in general make it harder to get an urgent appeal heard, and make it harder to get an appeal heard against an interim ruling.” This is a result of the different procedures that are followed in the SCA and the CC:

“SCA takes a long time to hear appeals because they’ve got a different structure. The way it happens is that the High Court delivers a judgement, then you go to the SCA, then you have multiple filings of various documents, and only thereafter does the SCA set it down for hearing. The Concourt works in reverse. The judgement goes to a Constitutional Court on appeal, and if the Court decides to hear it, they set a timetable with that in mind. So appeals get heard more quickly in the Constitutional Court than the SCA.”

He concludes, “it would be helpful to find a way of streamlining the Rules for appeal in the SCA.”

A number of the comments made with regard to rules and procedures hinged on the notion of simplifying and streamlining legal processes. More than one suggestion was made on the use of technology and how rules and procedures should allow for this. It was proposed by the CALS representative that access to justice may be enhanced should rules and procedures allow for the lodging and monitoring of the progress of court applications online to ensure that the loss of documents can be minimised. To contextualise this problem, the representative from Wits Law Clinic had the following to say:

“You go to Court, the court file’s missing. At the High Court in Johannesburg, I know the rule is that you must make five attempts to uplift the file. I mean, that’s totally insane. And your five attempts are documented because your file requisition form is stamped on each attempt. So you go there and they stamp it...”

A respondent from Legal Aid added, “And you need people who can really...who really know how to deal with court files. You know, you have this thing about court files disappearing. I’ve had incidents where a court file has disappeared six times. So I’m working from a duplicate. But why should that be happening? But it’s happening.” The CALS representative also commented that the electronic system used by the CC Court could be replicated in High Courts.

On the point of “legal jargon” an academic believed that more effort need to be put into language translation services to ensure that people have a full understanding of court proceedings.

A CALS representative argued rules and procedures could be improved by consulting with the communities who need to understand them:

“I think that not only should people in the legal fraternity and in communities be consulted, but their consultations and their suggestions should be taken seriously. If there is a sound suggestion that makes, you know, that really does improve access to courts, those should be in the rules if and when they’re eventually changed. So just making sure that they’re transparent and accountable and responsive systems that’s also inclusive of everybody.”

It was also proposed by *ProBono.Org* that pleadings, time frames and rules for services need to be more user-friendly and more accommodating and that the wording of rules and procedures need to be simpler and more understandable for the lay person. The poor application of rules was also reported to be problematic. Rules and procedures were generally regarded as formalistic and often discriminating against the poor.

A representative from Section 27 drew attention to the need for increased legal literacy, knowledge and awareness of the legal system. This respondent said: “Very few

people actually understand the Court system, and in a country where justice is so important, you know, people need to understand what is out there.” The representative further commented that:

“I don’t see legal education in the curricular of basic education, and it should be, frankly. There’s very limited knowledge of rights. Research that has been done shows that people...most...it’s shocking, but most people don’t even know the Constitution exists, never mind the Bill of Rights. So, to get the demand you have to create that knowledge, but then you also have to look at what are the procedures that you can do to then facilitate people who seek access to the justice system.”

A representative of the LRC suggested that a bit more flexibility should be allowed with socio-economic rights cases when it comes to introducing new evidence and bringing special applications to the court.

The Constitutional Court was mostly singled out for praise, with one advocate commending the Constitutional Court rules which allow for the inclusion of *amici curiae*. The interviewee noted that this permits the Court to take into account a wide range of information that is relevant to the outcome of the decision it reaches.

An SCA judge drew attention to the fact that courts may not be completely rigid in their application of rules by recounting his own experience:

“You know, in the Supreme Court of Appeal we’ve got Rules as to how you get to the SCA, but sometimes I get letters from prison and from prisoners, you know, who want to appeal and...if a document...letter that I get sort of sets out why the person would want to appeal and so forth, sometimes I accept that as an application for leave to appeal. And I, you know, direct the office...it happens very rarely, but it does happen, then I direct the office to make copies and give that to two judges to deal with it as an application for leave to appeal.”

Another judge, while confirming the need for changes of the rules, emphasised the necessity to do this judiciously after proper diagnosis of the underlying problem and understanding of the way forward:

“I believe that, if you take access to justice in its widest sense, the rules of court as they are at the moment are not conducive to facilitating access. I think the procedures are too slow, I think they’re in many respects antiquated, but I said a long time ago that I believe the law should be conservative ... in the sense that I don’t believe you change something unless you know what you are going to change to; that you are satisfied that you have identified the mischief that is the cause of your particular problem; that you have identified where the problem really lies and how you’re going to resolve that.”

Another judge noted that rules serve an important purpose, “We don’t make rules for the sake of making rules. We make rules to facilitate effective and orderly dispensing of justice.” The *caveat* however is that the same rules can be used to impede access to justice.

Another judge said that “You need rules of court that are comprehensive and fairly complex unfortunately, so that proceedings, generally, can run according to set rules and set timetables and so on.”

## 7.10 Case management

A key purpose of harmonising and standardising rules of procedure in courts is to support judicial case management, which the 2011 Access to Justice Conference resolved to implement in South Africa. Judicial case management refers to the process through which the judiciary, particularly judges, take responsibility for managing cases from inception to conclusion, in order to ensure that cases are brought to a speedy and cost-effective resolution. Thus, instead of litigation being driven by litigants and their advocates, who may engage in unnecessary delaying tactics and other strategies which impede the resolution of a case, the judge drives the litigation process. Currently only the Constitutional Court rules make provision for judicial direction.

The objectives of case management include early resolution of disputes, reduction of trial time, more effective use of judicial resources, the establishment of trial standards, the monitoring of case loads and the development of information technology support. Other objectives include increasing accessibility to the courts, facilitating planning for the future, enhanced public accountability and the reduction of criticism of the justice system by reason of perceived inefficiency. (Kellam, 2010)

Case management is thus essentially about simplifying and identifying the key issues in a dispute early in the litigation process, “at its heart, every dispute that is litigated has one or a few central, and generally, simple elements” (Rares, 2011, p. 4).

Therefore, according to the current South African Chief Justice, the judicial officer should drive a case to resolution and “set and enforce time limits specific to the case to ensure that there are no unnecessary delays” (Mogoeng, 2012, p. 6). As a result of their knowledge of a case the judicial officer should be able to identify the key issues in a dispute in order to facilitate the effective resolution of the matter (Mogoeng, 2012, p. 7).

Despite a number of initiatives, however, the current Chief Justice has argued that:

“Our present case flow management is totally unsatisfactory. Cases take too long to reach trial. Judgments are delayed once the trial has been held. In-between inception and delivery of judgment, there are numerous opportunities for delaying the matter.” (Mogoeng, 2012, p. 4)

In the current South African legal system, the first time the judicial officer can look at a case is when it has reached the adjudication stage, well after the pre-trial processes that identify the key issues at stake. This means that “there is little room for judicial

intervention” and the judges “do not drive the matter to finality”. Instead judges rely on the actions of litigants and their legal representatives (Mogoeng, 2012, p. 6).

Interviewees drew attention to the fact that initiatives are underway to expedite proceedings in civil trials in the High Courts through a more “hands-on” case flow management system in an attempt to enhance access to justice. Pre-trial hearings were listed by a judge as a possible way of improving processes. He argued:

“You only go to trial on issues that have actually crystallised; you have control of the litigation by the presiding officer, you don’t let the lawyers drag it out and play it as they wish to play it. But you’ve got to train people to be able to do that. Justice Training [College] can’t do it. It hasn’t got the capacity to do it.”

A representative of the Johannesburg bar had a similar line of thought and believed that an interventionist role need to be played by a judge or judges in advance of actual hearings to enable proceedings to be speeded up, particularly in SER cases:

“I’d like to see more... some judicial management of trials, which means that early on the judge gets involved and the judge directs when things have got to be filed and what’s gonna happen, and tries to crystallise the issues and those sort of things. I think that would be very helpful in public interest cases, because I think what you might see is, you might see a far greater response from the State..”

## 7.11 Conclusion and findings

Theme Four has investigated the question of access to justice. It has looked at this issue in a broad sense through the analysis of quantitative data from the most recent SASAS survey, which included a module on access to the courts, and through a qualitative analysis which focused more specifically on the questions of cost, duration and process in the context of SER litigation. It asked about the transformative potential of access to justice in SER cases and what changes in the civil justice system may transform the process, costs and duration of SER litigation.

- The empirical investigation for this study has revealed a particularly complex South African legal subjectivity in which citizens both hold a significant faith in the Law as an independent bulwark against the abuse of power, but at the same time may engage in various illegalities as a means to an end.
- The barriers to accessing justice are not only about issues internal to the court system such as costs and time, but are also related to a prior process in which citizens become aware of their rights as well as the possibilities for social and legal mobilisation around them. “Lack of knowledge about laws and legal rights” were cited by 26,5% of SASAS respondents as a significant factor inhibiting access to justice from the courts.



- It has found that the processes of justice or procedural justice are critically important in terms of the transformative potential of access to justice in SER cases, with many litigants in SER cases gaining a significant sense of empowerment through the process of litigation, particularly at CC level. This gave them voice, recognised them as equals and acknowledged their dignity. This is not so say that this has been the experience of all litigants in SER cases or all litigants who have dealt with the CC. Indeed litigants in the *Nokotyana* case held a contrary view.
- Therefore despite the fact that the outcome of many cases was ambiguous, most litigants interviewed appeared to remain convinced of the value of the *process* of litigation. The recognition respondents received through the legal process seemed to have a profound impact in countering a history of non-recognition based on discrimination and marginalisation.
- The response of litigants in terms of the outcomes of their cases was more equivocal than their perspectives on the legal process itself. Litigants from *Abahlali* expressed these sentiments, “So we can say justice only happened inside the Courtroom but outside, no.”
- The investigation found that there was general consensus that costs are a critical issue in SER litigation despite the fact that most of this litigation is funded by PIL firms. This is a result of the limited funding sources for these organisations, which may impact on which litigation is pursued. Litigants themselves made clear the sacrifices they had to make to participate in litigation even where legal costs were covered. Their extreme poverty meant that they struggled to meet ancillary costs such as transport to venues for consultation and the court itself, which could be particularly difficult for litigants living in rural areas or away from urban centres.
- The question of access to legal representation was also canvassed. Interestingly SASAS respondents appear to feel that funding for legal services (59%) is a more important issue than the fact that it would “be hard to get a lawyer to help” them (14,2%).
- There appeared to be widespread support for the idea of State funded legal representation for SER litigation through extending the mandate of LASA. Of SASAS respondents 40,9% were strongly in favour of State funded legal representation and 35,7% were somewhat in favour. However, cautions were raised about ensuring the quality of representation afforded if this was done as well as concerns around the independence of a State funded body when the State is often a defendant in SER

cases. A number of role players emphasised the role that Chapter 9 institutions in general, and the South African Human Rights Commission in particular, should play in proactively ensuring funding for SER litigation.

- SASAS findings of court users seemed to support this view with only 12.5% of respondents indicating that, “The time it would take for the case to end” was a significant impediment to accessing justice from the court system. Advocates and justices in particular noted that the duration of proceedings is an inevitable part of a quality legal process.
- There was widespread in principle agreement among a variety of stakeholders about the value of *pro bono* legal representation as a means to improve access to justice in general and for SER litigation in particular. However, concerns were raised about both the current organization of *pro bono* work within the legal profession. It is asserted that there is little organization or accountability for *pro bono* work and some resistance among legal professionals to carry out minimum obligations.
- The critical role of civil society in making SER litigation possible since 1994 was emphasised. Civil society has played an indispensable role on legal representation for SER cases and has played a major role in assisting to mobilise communities around SER. This, in combination with litigation has been highly successful in instances such as the *TAC*<sup>173</sup> case. They have also helped to uphold critical constitutional principles. Civil society is primarily dependent on external donors which makes it potentially more independent but at the same vulnerable to changes in funding flows. It also means a strategic focus on litigation which may disadvantage some litigants. Civil society organisations have played a variety of roles in relation to SER from raising awareness, providing direct legal services, facilitating meaningful engagement between the State and other parties and mobilising to ensure court decision are implemented.
- Alternative dispute resolution (ADR) was explored as a means to potentially avoid costly litigation in SER cases. While there was general in principle support for ADR, including for SER cases, there was a lack of clarity about what this might mean or how it could work in the case of SER litigation. Overall, respondents felt that any form of mediation or dispute resolution should be court supervised rather than independent arbitration. Reference was made to the CC’s recent focus on the notion of court-supervised “meaningful engagement”. However, this process does not

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<sup>173</sup> *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* CCT 8/02 [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC).

divert cases from a long road through the legal system. A key tension inherent in the idea of ADR for SER cases is the concern that this would mean that precedent would not be set in a young democracy where the law is still being developed. On the other hand some stakeholders emphasised the need to at all times put the interests of the client first and accept settlements where clients' needs had to be urgently met. This would have very little impact on policy-making.

- On the issues of enhancing access to justice by simplifying rules and procedures most stakeholders believe that the current rules, particularly in the SCA and lower courts are “archaic” and from a “bygone era” and therefore need to be significantly reformed. The CC rules appear, however, be less subject to criticism with its provision for the standing of amici curiae, being mentioned as an important innovation in terms of rules. Suggestions were made that information technology should be used to streamline the system and, for example, prevent the mislaying of dockets and complex procedures to recover them. It was also suggested that communities themselves should be consulted in the process of reforming rules to ensure that they are genuinely accessible and that pleadings, time frames and rules for services need to be more user-friendly.
- Different suggestions were made as to how case management may be most effectively implemented. A justice argued that the key issues for litigation should be crystallised before trial in pre-trial hearings so that the presiding has control over the litigation rather than the lawyers for each party, who may unnecessarily extend litigation. An advocate argued that judges need to get involved early on in the process and assist to direct matters as well as crystallise the issues for litigation.

## **8 FINALISATION OF THE PROJECT**

### **8.1 Reference Group**

The Service Level Agreement for the Constitutional Justice Project made provision for the establishment of a Reference Group by the DOJ&CD. The responsibilities of the Reference Group would be:

- familiarise itself with the project SLA and project requirements;
- advise the research team on key aspects of the research project, and particularly on methodology, selection of key informants, publication and dissemination strategies and reporting;
- critically assess the Concept Report, the Mid-Term Report and the Final Report, and make suggestions based on these reports in their draft State in order to ensure the highest quality product;
- make critical input into deliberations of the research team on the project and its possible extensions.

Partly due to the change in Administration of the Justice Department in 2014 after the national election, this Reference Group has not been appointed.

### **8.2 Call for Written Submissions**

Taking into account the large number of people and organisations that have been involved in SER cases, and the limited resources for the research, not all stakeholders can be personally interviewed. In order to provide a platform for such stakeholders, the project makes provision for a call for written submissions. The DoJ&CD has accepted the responsibility for issuing the call for written submissions. Participants in the colloquia were also invited to submit written comments afterward. The formal call for written submissions is scheduled to be issued during and immediately after the formal launch of the Final Report.

## **9. PUBLICATIONS**

The Service Level Agreement for the project makes provision for academic publications on the issues that were addressed in the research. One objective of the publications is the increased democratisation of the project, enabling other academics and stakeholders to respond to the findings. The other objective is to promote the debates

around the key issues addressed in the research. The following publications have been completed as part of or following the research:

- **Journal articles:**

- Bohler-Muller, N and Bó, Boróka. 2015. Transformative constitutionalism, power and consensus: Are the courts in charge? In: Plaatjies, D. et al. 2015. *State of the Nation 2015*. Cape Town: HSRC Press. Forthcoming.
- Bohler-Muller, N, Kanyane, MH, Pophiwa, N and Dipholo, M Life after Judgment: Re-visiting the Nokotyana case on the provision of water and sanitation (submitted to *Politica*)
- Chiumbu, S, Bohler-Muller, N, Reddy, V and Goga, S. Framing of socio-economic rights in South African newspapers (submitted to *Journal of African Media Studies*)
- Chiumbu, S, Reddy, V, Bohler-Muller, N and Goga, S Discursive construction of constitutional jurisprudence and socio-economic rights by South African newspapers (to be submitted to *Law and Society Review* by the end of June 2015)
- Dugard, J. (2015) 'Closing the Doors of Justice: An Examination of the Constitutional Court's Approach to Direct Access, 1995-2013', 31(1) *South African Journal on Human Rights*. pp. 112-134.
- Pienaar, G and Bohler-Muller, N. Have the apex courts been transformative in contract law jurisprudence? (submitted to *Journal for Juridical Science*)
- Wilson, S, Dugard, J and Clark, M. (2015). Conflict management in an era of urbanisation: Twenty years of housing rights in the South African Constitutional Court, *South African Journal on Human Rights*, vol. 31(3) pp to come in production)

- **CC Statistics**

- Ongeso, J., Wentzel, M., Ndebele, C. et al. (2014). Constitutional court statistics for the 2009 term. In: *South African Journal of Human Rights* (SAJHR). 30(3). p.572-590.
- Viljoen, J; Magaya, I; Ongeso, JP; Ndebele, C; Tungay SJ; Samaradiwakera-Wijesundara, Cooke, M & Chamberlain, L. (2015). Constitutional Court Statistics for 2011. *South African Journal on Human Rights*. 31(1). p 219-233.
- Wentzel. Constitutional Court statistics for the 2012 term. Article submitted to CALS, Feb 2014, to submit to SAJHR for publication.
- Wentzel, Viljoen, et al. CC statistics for the 2013 term. Article submitted to CALS in Aug 2014 to submit to SAJHR.

- **HSRC Review Articles**

- Bohler-Muller, N. (2014). The highest courts and socio-economic rights. 12(4). p.2.
- Bohler-Muller, N. (2015). The Constitutional Court and justice. 13(1). p.2.
- Bohler-Muller, N., Viljoen, J., and Wentzel, M. (2015). An overview: Rights-based cases in the Constitutional Court. (13) Forthcoming.

## 10. FURTHER RESEARCH OPTIONS

Based on a number of stakeholder inputs from Key Informants, colloquia attendees and the Parliamentary Portfolio Committee on Justice, this study could be extended to include the following:

- High Court cases.
- Other human rights, such as language and culture, which influence issues around access to justice and the courts.
- Alternative dispute resolution mechanisms such as expanding the CC to regional or provincial branches. or adjudication on SERS in lower courts, especially Magistrates' cCourts.

In response to questions posed by the Parliamentary Portfolio Committee of Justice on 5 September 2014, the research team submitted that there is no doubt that decisions by the High Courts (HC) are relevant to a full understanding of the transformative impact of constitutional rights on the lived experiences of people in South Africa. The HCs are usually involved in initial stages of constitutional rights litigation that proceeds to one or both of the apex courts. However, HCs are sometimes also the fora that deliver a final decision *de facto* (i.e. in practice) or *de jure* (in law) that adequately resolves a question of constitutional law. This may be for one of several reasons. Firstly, it might be that both parties are satisfied with the decision and accept it, with neither party wishing to appeal it to a higher tribunal. Secondly, even though a party may be dissatisfied with the HC's decision it may nevertheless decide not to appeal the decision, for reasons associated with lack of time or financial resources, or because the relevant facts may have changed in some way.

Moreover, in the system of legal precedent, HCs are obliged to follow and apply decisions by the apex courts. The manner in which they do so can provide valuable insights into the extent to which constitutional rights are understood, interpreted and applied by the HCs, providing an important perspective regarding the jurisprudential transformation of the judiciary and the legal profession.

The challenge here is to locate, identify and categorise potentially hundreds of decisions, and then to select a representative sample for analysis in terms of the unique HSRC/UFH project methodology. A selection of possible methodologies is mooted below to identify appropriate HC cases for assessment:

- Existing analyses of landmark SER cases already include some discussion of the trajectory of the matter from the HC stage, as well as discussion of other relevant but indirectly related decisions, including by HCs.
- The research team can ask legal representatives and legal academics who were interviewees or were part of our various peer review teams, to identify additional relevant decisions – using “snowball” and “spider web” approaches to develop a targeted and representative set of relevant decisions.
- A further, more comprehensive, method is a key term search in SAFLII and other electronic law report databases.

In summary, this process will be far more complex and time consuming than was the process of identifying landmark decisions in the apex courts. It should and can be done, but would be possible only in a subsequent phase of the project.

The research team also feels strongly that the project should be engaged with by ordinary South Africans. Assessing the impact of apex court decisions on the lives of South Africans affects the wider society in South Africa. Such a relationship makes South Africans stakeholders in the project and its outcomes. In view of the constitutional imperatives for ‘democratisation’ of knowledge production and general research ethics, research affecting people should involve these people.

Further involvement in this project may be structured or incidental or a combination of the two. A structured involvement may be activated by the research team, the client or organisations, such as the Human Rights Commission. Incidental involvement may be actively promoted by the research team or originate from stakeholders in the project.

Options for further collaboration will be explored between the research team and the department.

## 11 ANNEXURES

- *Annexure A*: Research references
- *Annexure B*: Report on the first colloquium held on 6 February 2014, during which the draft Concept Report was discussed.
- *Annexure C*: Report on the second colloquium held on 26 November 2014, during which the Mid-Term Report was discussed.
- *Annexure D*: Report on the third colloquium held on 4 June 2015, which addressed the outcomes in the Fieldwork Report.
- *Annexure E*: The tabulation report for the SASAS Survey modules, including the questions.
- *Annexure F*: “Intestate Succession”, Chapter 9 of Chuma Himonga and Elena Moore, *Reform of Customary Marriage, Divorce and Succession in South Africa*, which will be published in 2015. The chapter deals in much detail with socio-economic rights of traditional women, and includes an analysis of the *Bhe* case, which was one of the landmark cases in the Constitutional Justice Project. Unfortunately, despite numerous efforts, the research team could not make contact with Ms Bhe, members of her family or her community. It is for this reason that the chapter has been annexed to the report. Prof Himonga is a member of the CJP Think Tank and we appreciate her assistance SASAS Survey results.
- *Annexure G*: DoJ&CD landmark case data and case summaries. This data can be referred to when mention is made of particular landmark cases in this report.