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Linda Stewart

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Adjudicating Socio-Economic Rights Under a Transformative Constitution

Linda Stewart*

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I. INTRODUCTION

It is tremendously exciting to be a scholar of constitutional law in South Africa. Not only do we have an extremely progressive Constitution¹ and renowned Constitutional Court jurisprudence on rights analysis, we also have highly analytical and critical academic discourse on different constitutional issues. Academic discourse is an aspect that I find extremely necessary for the development of constitutional law in a constitutional democracy.

The aim of this article is to focus on the socio-economic rights jurisprudence of the South African Constitutional Court and some of the academic discourse and commentary on the subject of the positive

* Professor of Law, North-West University (Potchefstroom campus) South Africa. This paper was first presented on invitation at the *Constitutional Law Conference of the International Association of Law Schools* 11 & 12 September 2009, Washington D.C., USA. I wish to thank my colleague, Debra Horsten for her valuable inputs and deliberations on this subject.

1. See S. AFR. CONST. 1996.

adjudication of socio-economic rights. Constitutionally entrenched socio-economic rights have the potential to transform South African society as envisaged in the preamble which *inter alia* states that the Constitution is aimed at healing the divisions of the past, 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.²

My argument on the transformative potential of socio-economic rights is based on the research done by Professor Sandra Liebenberg.³ Drawing on the work of philosopher and political theorist, Professor Nancy Frazer, Liebenberg examines the concepts of social justice and transformation and argues that the conception of social justice should inform our interpretation of rights claims.⁴ She refers to former Chief Justice Moseneke who describes social justice as “the premier foundational value of our constitutional democracy.”⁵ He is of the opinion that the creative jurisprudence of equality and substantive interpretation of the content of socio-economic rights should restore social justice in South African society.⁶ He also emphasizes 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.⁷

Liebenberg further suggests:

The winning of affirmative social benefits through litigation can create a favourable terrain for broader mobilisation around deeper reforms. A substantive jurisprudence on social rights can facilitate “nonreformist reforms” and advance transformation in South Africa. In particular, it can serve to enhance the participatory capabilities of those living in poverty and expose the socially constructed nature of poverty and inequality. At its best it should constantly remind us of our constitutional commitment to establishing a society based on

2. *See id.* at PMBL.

3. *See generally* Sandra Liebenberg, *Needs, Rights and Transformation: Adjudicating Social Rights*, 17 STELLENBOSH L. REV. 5 (2006) [hereinafter Liebenberg, *Needs, Rights and Transformation*].

4. *See id.* at 6.

5. *Id.* at 3.

6. *See id.*

7. *Id.* at 6. Liebenberg further refers to the distinction made by Frazer between two broad strategies to remedy injustices that cut across the redistribution-recognition divide. The first is “affirmative strategies for redressing injustice aim to correct inequitable outcomes of social arrangements without disturbing the underlying social structures that generate them”. The second is transformative strategies which aim “to correct unjust outcomes precisely by restructuring the underlying generative framework.” *Id.* at 9.

social justice, and facilitate the inclusion of marginalised voices in the debate on what is required to achieve such a society.⁸

To summarize, Liebenberg stresses that the conception of social justice should inform our interpretation of rights claims.⁹ She perceives the litigation process as a platform from which the poor and marginalized are given an opportunity to voice their hardships.¹⁰ She stresses that socio-economic rights adjudication does not have to bring about structural reform.¹¹ All that is needed is affirmative strategies (or so-called nonreformist reforms) which also have the capacity of transformation and change if consistently pursued.¹²

The South African Constitutional Court has dealt with socio-economic rights on a number of occasions. Almost ten years has passed since the eminent Constitutional Court judgment of *Grootboom*¹³ where the court pronounced that socio-economic rights are justiciable and the essential question before the court is not whether but how socio-economic rights should be adjudicated. This question remains highly contested and poses critical challenges to the judiciary, as occurred in the *Treatment Action Campaign* (“TAC”) case¹⁴ where the Court was confronted with the question of whether the policy of government on the provision of anti-retroviral drugs to pregnant women was reasonable or not. The state argued that the Court does not have the institutional capacity or mandate to interfere in policy matters.¹⁵ The Constitutional Court replied by stating:

The Constitution requires the state to “respect, protect, promote, and fulfil the rights in the Bill of Rights.” Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. *In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.*¹⁶

8. Liebenberg, *supra* note 3, at 36.

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.* at 10.

13. The Gov’t of the Rep. of S. Africa and Others v. Grootboom and Others 2000 (11) BCLR 1169 (CC).

14. Minister of Health and Others v. Treatment Action Campaign and Others 2002 (5) SA 72 (CC) [hereinafter *TAC*].

15. *See id.*

16. *Id.* at ¶¶ 98 & 99 (emphasis added).

This discussion commences with a short exposition on how socio-economic rights are perceived and adjudicated in South Africa by referring to case law that concerns the failure of the state to comply with positive duties in terms of socio-economic rights and the consequent adjudication thereof. Along with this discussion, I will focus on the criticism by leading academics directed towards the content of these judgments. Special focus will be placed on the reluctance of the Constitutional Court to provide normative clarity on specific socio-economic rights¹⁷ and the abstract and formal approach adopted by this Court by examining the *reasonableness* of the measures. I will finally attempt to illustrate that the application and/or implementation of alternative suggestions made by academics on the manner in which socio-economic rights should be adjudicated may possibly place an even more rigorous task on the courts but that this should not prevent the court from considering these recommendations.

To illustrate the complex nature of socio-economic rights adjudication and the possible implications of applying academic thinking and suggestions, reference will be made to the *Mazibuko* cases.¹⁸ The *Mazibuko* cases concerned the right of access to sufficient water in terms of section 27 of the Constitution.¹⁹ The case was brought before the High Court²⁰ by a number of extremely poor residents of Phiri, a township in Soweto, against the City of Johannesburg, Johannesburg Water and the Minister of Water and Forestry Affairs. After the High Court made an order in favor of the applicants, ruling that every resident is entitled to 50 liters of water per person per day, the respondents appealed the entire decision. The Supreme Court of Appeal then reduced the quantity of water to which the residents were entitled, to 42 liters per

17. This stands in direct contrast with the view of former Chief Justice Moseneke who argues (as indicated above) that the substantive interpretation of the content of socio-economic rights should restore social justice and bring about transformation in South African society.

18. See *Mazibuko & Others v. The City of Johannesburg & Others* (Centre on Housing Rights and Evictions as amicus curiae) 2008 JOL 21829 (W) (S.Afr.) [hereinafter *Mazibuko W*]; *City of Johannesburg v. Mazibuko* (Centre on Housing Rights and Evictions as amicus curiae) 2009 JOL 2337 (SCA) (S. Afr.) [hereinafter *Mazibuko SCA*]; *Mazibuko & Others v. The City of Johannesburg & Others* (Centre on Housing Rights and Evictions as amicus curiae) Case CCT 39/09 2009 ZACC 28 (S. Afr.) [hereinafter *Mazibuko CC*].

19. See S. AFR. CONST. § 27(1)(b). Section 27(1)(b) of the Constitution states that “everyone has the right to have access to sufficient food and water.” Section 7(2) places an obligation on the state to respect, protect, promote and fulfil the rights in the Bill of Rights including section 27(1)(b). Section 27(2) however limits the right to access to adequate water by providing that the state only has to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

20. See *Mazibuko W* 2008 JOL 21829 (W).

person per day provided that residents register at the City's Register of Indigents.²¹ Unhappy with the order made by the SCA and especially with the reduction of the quantity of water, the residents of Phiri turned to the Constitutional Court as highest court in constitutional matters.²² This case was heard before the Constitutional Court on the 2nd of September 2009 and judgment was delivered surprisingly early on 8th of October 2009.²³

II. CONSTITUTIONAL COURT JURISPRUDENCE AND ACADEMIC DISCOURSE ON THE POSITIVE ADJUDICATION OF SOCIO-ECONOMIC RIGHTS

The Constitutional Court has positively adjudicated socio-economic rights in the cases of *Grootboom*, *TAC* and *Khosa*.²⁴ The *Grootboom* case raised the issue of the extent of the state's obligations under section 26 of the Constitution, which entrenches everyone's right of access to adequate housing.²⁵ The Constitutional Court emphasized that section 26(1) did not give any of the respondents the right to claim shelter immediately.²⁶ The Court reasoned that the housing programme of the Cape Metropolitan Council fell short of the obligations imposed upon the state because it failed to provide for any form of temporary relief to those in desperate need, with no roof over their heads, or living in crisis conditions.²⁷

The *TAC* case dealt with the provision of anti-retroviral drugs to pregnant mothers who could not afford the drugs themselves.²⁸ The case was based on section 27(1)(a), which states that everyone has the right of access to health care, including reproductive health care.²⁹ The Court stressed that sections 27(1) and 27(2) should "be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the state to 'respect, protect, promote and

21. *Mazibuko* SCA.

22. *See Mazibuko* CC. This discussion was initially written and delivered before the Constitutional Court delivered its judgment. I however, felt it necessary to incorporate parts of the Constitutional Court judgments in this discussion to stress the unwillingness of the Constitutional Court to engage in the normative content of socio-economic rights.

23. *See id.*

24. *See Grootboom* 2000 (11) BCLR 1169 (CC) (S. Afr.); *TAC* 2002 (5) SA 72 (CC) (S. Afr.); *Khosa & Others v. Minister of Social Development & Others* 2004 (6) BCLR 569 (CC) (S. Afr.); *Mahlaule and Another v. Minister of Social Development & Others* 2004 (6) BCLR 569 (CC) (S. Afr.).

25. *See Grootboom* 2000 (11) BCLR 1169 (CC) (S. Afr.).

26. *See id.* at ¶ 34.

27. *See id.* at ¶¶ 52-53, 69.

28. *See TAC* 2002 (5) SA 72 (CC) at ¶ 39 (S. Afr.).

29. *See id.*

fulfill' such rights."³⁰ The Court found that the State policy was inflexible and unreasonable within the meaning of section 27(2) of the Constitution and was therefore in "breach of the State's obligations under section 27(2) read with section 27(1)(a)."³¹ The Court stated that, in order for the State's policy to be in line with the Constitution, it must be reformulated to meet the "constitutional requirement of providing reasonable measures within available resources for the progressive realization of the rights" of women and newborn children.³²

The *Khosa* case concerned the exclusion of permanent residents from the social assistance system in South Africa.³³ The applicants challenged certain sections of the Social Assistance Act 59 of 1992 because it only reserved grants (especially the old age grant, child support grant and care-dependency grants) for South African citizens thereby excluding permanent residents from accessing such grants.³⁴ The Court used the purposive approach to ascertain the meaning of "everyone" in section 27(1).³⁵ Referring to section 7(1) of the Constitution, the Court came to the conclusion that the term includes "all people in our country" and reasoned that it might be reasonable to exclude citizens from other countries who are visitors and illegal residents, because they have only a tenuous link with South Africa.³⁶ Permanent residents, on the other hand, have resided in the country for some time, they have made South Africa their home and, in most cases, their children are born here.³⁷

In all these cases the Constitutional Court refused to recognize an immediate, direct and individual entitlement to a specific socio-economic right. Although the outcome of these cases has been widely welcomed, the manner in which the outcome was reached did not escape severe academic scrutiny. Most of the criticism³⁸ directed at the Constitutional

30. *Id.* at ¶ 39.

31. *Id.* at ¶ 80.

32. *Id.* at ¶ 122.

33. *See generally* *Khosa* 2004 (6) BCLR 569 (CC) (S. Afr.); *Mahlaule* 2004 (6) BCLR 569 (CC) (S. Afr.).

34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.* at ¶ 59.

38. IAIN CURRIE & JOHAN DE WAAL, *THE BILL OF RIGHTS HANDBOOK* 166 (5th ed. Juta 2005); I. M. Rautenbach, *The Limitation of Rights and Reasonableness in the Right to Just Administrative Action and the Right to Access to Adequate Housing, Health Services and Social Security*, 2005 J. S. AFR. L. 627, 628 (2005); Stu Woolman & Henk Botha, *Limitations, in CONSTITUTIONAL LAW OF SOUTH AFRICA* 1, 3-4 (Stu Woolman et al. eds., 2nd ed. Juta 2006); Kevin Iles, *Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses*, 20 S. AFR. J. HUM. RTS. 448, 453 (2004); Carol Steinberg, *Can Reasonableness Protect the Poor? - A Review of South Africa's Socio-Economic Rights Jurisprudence*, 123 S. AFRICAN L.J. 264, 267 (2006); D.M. Davis, *Adjudicating*

Court relates to the reluctance of the Constitutional Court to provide normative clarity to the content of the different socio-economic rights.³⁹ This goes hand in hand with the criticism that the court side steps an explanation of the content of the right by immediately turning to an examination of the obligations on government by enquiring into the reasonableness of the measures.

Marius Pieterse criticizes the court for not providing normative clarity on a particular right.⁴⁰ He indicates that “courts are experts in interpretation and are ideally suited to lend content to social rights and the standards of compliance that they impose.”⁴¹ In a similar vein, David Bilchitz proposes that the court should first attempt to understand the content of the right and then engage in an inquiry into the reasonableness of the measures.⁴² He further emphasizes that it is not expected that the courts should give a final and complete definition of the particular right but calls upon the courts to formulate the international concept of minimum core for South African circumstances.⁴³ Marinus Wiechers even goes so far as to remark that the Constitution is a policy document against which all policies of the state must be evaluated and it is inevitable that the courts have a secondary policy making function.⁴⁴ In line with this reasoning, the Constitutional Court itself acknowledged that the courts are only required to set an invariable universal standard and not specific measures that the state has to take.⁴⁵

the Socio-Economic Rights in the South African Constitution: Towards ‘Deference Lite’?, 22 S. AFR. J. HUM. RTS. 301, 312 (2006); David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and its Its Importance*, 119 S. AFRICAN L.J. 484, 496 (2002) [hereinafter Bilchitz, *Giving Socio-Economic Rights Teeth*]; Marius Pieterse, *Coming to Terms with Judicial Enforcement of Socio-Economic Rights*, 20 S. AFR. J. HUM. RTS. 383, 387 (2004); David Bilchitz, *Towards a Reasonable Approach to the Minimum core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence*, 19 S. AFR. J. HUM. RTS. 1, 7 (2003) [hereinafter Bilchitz, *Towards a Reasonable Approach*]; Craig Scott & Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney Legacy and Grootboom’s Promise*, 16 S. AFR. J. HUM. RTS. 206, 260 (2000); Anashri Pillay, *Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction*, 122 S. AFRICAN L.J. 419, 419 (2005).

39. The Court is furthermore criticized for the its outright refusal to recognize a minimum core entitlement of each right and for not developing a universal standard for each socio-economic right.

40. See generally Pieterse, *supra* note 38.

41. *Id.* at 395.

42. See generally Bilchitz, *Towards a Reasonable Approach*, *supra* note 38.

43. See *id.* at 7-8; Bilchitz, *Giving Socio-Economic Rights Teeth*, *supra* note 38, at 484; DAVID BILCHITZ, *POVERTY AND FUNDAMENTAL RIGHTS* 158 (Oxford University Press 2007) [hereinafter Bilchitz, *Poverty and Fundamental Rights*].

44. Marinus Wiechers, *Quo Vadis Geregtelike Hersiering van Administratiewe handelinge?*, 2005 J.S. AFR. L. 474, 474-475 (2005).

45. *Bato Star Fishing (Pty) Ltd. v. Minister of Environmental Affairs & Tourism*, 2004 (7) BCLR 686 (CC), ¶ 104 (S. Afr.). It was also indicated above that the former

The arguments presented above suggest that the courts should firstly define a socio-economic right. It is not expected that the court rewrite policy or prescribe specific measures. The court needs only to set an invariable universal standard. I have argued previously that in the absence of such a universal standard the court will be unable to establish whether or not the measures taken by the state are reasonable. The content of the right provides the referent against which the measures should be examined.⁴⁶

So far the Constitutional Court has employed the reasonableness inquiry in all socio-economic rights cases which concerned the positive adjudication of these rights.⁴⁷ In the first case before the Constitutional Court, the *Soobramoney* case, the Court used the standard of rationality to evaluate the state programme.⁴⁸ In *Grootboom*⁴⁹ the standard of reasonableness expected by the Court required that the measures be comprehensive, coordinated, flexible, inclusive, and sensitive to various degrees of deprivation and reasonably implemented and conceived.⁵⁰ In *TAC* the Court further expected the measures (as described in *Grootboom*) to be transparent.⁵¹ An even stricter standard of scrutiny was applied by the Court by making detailed findings of fact, interrogating the wisdom of government's policy choices, and finding the policy option proposed by the respondents to be superior in a number of respects to government's position.⁵²

To describe this shifting standard of reasonableness, Danie Brand argues that the question in *Soobramoney* was whether the policy, at face value, was rationally linked to the goal, while *Grootboom* was concerned with the question of whether the policy was likely to achieve the goal, and in *TAC* whether the policy would achieve its constitutionally mandated goal.⁵³ Theunis Roux, with reference to the *Grootboom* case,

Chief Justice of the Constitutional Court also called for the substantive engagement with the content of socio-economic rights.

46. Linda Stewart, *Interpreting and Limiting the Basic Socio-Economic Rights of Children in Cases where they Overlap with the Socio-Economic Rights of Others*, 24 S. AFR. J. HUM. RTS. 472, 472-494 (2008).

47. Positive adjudication refers to those cases where the court was expected to provide a remedy which obligated the state to act positively.

48. *Soobramoney v. Minister of Health (KwaZulu-Natal)* 1997 (12) BCLR 1696 (CC), at ¶¶ 27 and 29 (S. Afr.).

49. *Grootboom* 2000 (11) BCLR 1169 (CC), at ¶¶ 39-45 (S. Afr.).

50. See Danie Brand, *The Proceduralisation of South African Socio-economic Rights Jurisprudence or 'What are Socio-economic Rights for?'*, in RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION 33, 41 (Henk Botha, André van der Walt, & Johan van der Walt eds., Sun Press 2003) [hereinafter Brand, *What are Socio-economic Rights For?*].

51. See *TAC* 2002 (5) SA 72 (CC), at ¶¶ 38 and 123 (S. Afr.).

52. See Brand, *What are Socio-economic Rights For?*, *supra* note 50, at 41.

53. See *id.* at 40-41.

argues that the Court stops short of a full-blown proportionality test by only enquiring whether the claimant group has an equal or better claim to inclusion than another group that has been catered to.⁵⁴ In *Khosa*, however, the Court intensified the standard of review by applying a stricter proportionality test.⁵⁵ The Court asked whether the measures taken by the state could be achieved through measures less restrictive to permanent residents' rights. One reason why the Constitutional Court employs this shifting standard of scrutiny is the fact that the context of each particular case differs.

Factors influencing the standard of scrutiny that the Court will employ are *inter alia* the position of the claimants in society; the degree of deprivation they complain of and the extent to which the breach of the right affects their dignity; the extent to which the breach in question involves undetermined policy; complex policy questions; and whether the breach also amounts to a breach of other rights.⁵⁶

I agree with Brand, who argues that the Court only enquires whether the policies and programmes are rational, coherent, inclusive, and comprehensive.⁵⁷ This approach of the Court in socio-economic rights cases so far has been considered to be formal, abstract and procedural; the measures (action or inaction) taken by the state to realize the rights are arguably only evaluated against good governance principles.⁵⁸

Supporters of the reasonableness enquiry have argued that a possible reason why the court engages with the reasonableness of the measures instead of defining a particular right is to avoid arguments on the institutional incapacity of courts to make policy choices and the possible infringement of the separation of powers. It has been argued that the reasonableness inquiry allows courts to exercise more discretion, which means that the court does not substitute its decision for that of the executive or legislative bodies.⁵⁹

54. Theunis Roux, *Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court*, in DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES 92, 92 & 97 (Siri Gloppen, Roberto Gargarella and Elin Skaar eds., Frank Cass 2003). Liebenberg contends that the test entails more than "relative inclusion." Sandra Liebenberg, *The Interpretation of Socio-Economic Rights*, in CONSTITUTIONAL LAW OF SOUTH AFRICA § 33.5(f)(iv) (Stu Woolman *et al* eds. 2d ed. Juta, 2006). It also makes provision for cases where the state has failed to adopt measures to realize socio-economic rights. *See id.*

55. *See generally* *Khosa* 2004 (6) BCLR 569 (CC) (S. Afr.). *See also* Mahlaule 2004 (6) BCLR 569 (CC) at ¶ 82 (S. Afr.).

56. Brand, *What are Socio-Economic Rights For?*, *supra* note 50, at 39 & 41.

57. *Id.* at 49.

58. *Id.* at 37. Brand argues that the court has proceduralized its adjudication of socio-economic rights. *See id.*; *see also* Liebenberg, *Needs, Rights and Transformation*, *supra* note 3, at 22.

59. Pillay, *supra* note 38, at 439.

Despite these points of criticism, the *Grootboom*, *TAC* and *Khosa* cases undoubtedly reveal a cautious, context-sensitive approach to the transformative potential of socio-economic rights jurisprudence by considering the position of the weakest members of society when deciding whether policies of government are reasonable.⁶⁰

Taking into consideration what has been said, I will now evaluate the approach followed by the High Court and Supreme Court of Appeal in the above-mentioned case of *Mazibuko*. Lindiwe Mazibuko was a thirty-nine-year-old woman who passed away in May last year after a lengthy cancer-related illness. She, along with approximately twenty other people, shared a stand in a suburb called Phiri, in Soweto. The High Court describes the residents of this township as “poor, uneducated, unemployed and ravaged by HIV/AIDS.”⁶¹ Lindiwe, her two sisters, their mother and their thirteen children lived in the main dwelling while six boarders shared two shacks⁶² in the backyard. No one in Lindiwe’s house was employed. Their income consisted mainly of social assistance grants⁶³ and the rent⁶⁴ from the two backyard shacks.⁶⁵

On January 28, 2004, the residents of Phiri received notice that a prepaid water system would be put in place.⁶⁶ The notice further indicated that if the residents decided on such an installation of the prepaid water system, their debts in arrears would be cancelled.⁶⁷ Lindiwe did not receive this notice and lived without water on her property for about six months. During this time she walked three kilometers twice daily to fetch water. On October 11, 2004, she finally surrendered to the prepayment water system. Under the terms of the prepayment water system, once the six kiloliters of free water per household per month (or twenty-five liters per person per day for a maximum of six people) had been consumed, the water supply was automatically shut off, and the consumer had to buy water credits in order to be supplied with water again.⁶⁸

The prescribed free six kiloliters for each stand had almost never been enough for Lindiwe and her extended family. She indicated that the

60. Liebenberg, *Needs, Rights and Transformation*, *supra* note 3 at 23 & 30.

61. *Mazibuko v. City of Johannesburg* 2008 ZAGPHC 106 (HC) at ¶ 5 (S. Afr.).

62. A shack is a small, crude shelter used as a dwelling.

63. The mother’s old-age grant was about \$110 per month, and two child-support grants were \$26 per month.

64. The rent from each shack was about \$25 per month.

65. Jackie Dugard, *A Pro-Poor Critique of Prepayment Water Meters in South Africa: The Phiri story*, 2 CRITICAL HEALTH PERSPECTIVES 1 (2007), available at <http://www.phmovement.org/files/CHP%202007%20No2%20Water%20Rights1.pdf>.

66. *Mazibuko v. City of Johannesburg* 2008 ZAGPHC 106 (HC) at ¶ 108 (S. Afr.).

67. *Id.*

68. *Id.* at ¶ 3.

water would last for ten to fifteen days if they worked extremely carefully with the water.⁶⁹ In her founding affidavit Lindiwe explained

In our household of 20, we would only be able to flush the toilet less than once every two days; each person could only have a “body wash” every four days; 2 kettles of water, 1 sink full of dishes and half a clothes wash per day would have to be used by 20 people. After all the free basic water budgeted for that day was used, no water would be left for anything else, such as drinking, cooking, cleaning the house and watering my food garden.⁷⁰

If they wanted more water they had to sacrifice other basic essentials such as food. This situation fundamentally compromised their health and human dignity.⁷¹

The applicants⁷² contested the constitutional validity of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water of the third respondent (The Minister of Water Affairs and Forestry) as well as the water policies of the first (City of Johannesburg) and second respondents (Johannesburg Water).⁷³ The policy decisions challenged as unconstitutional and unlawful were the disconnection of unlimited water supply at a fixed rate and the installation of the prepayment meters, the introduction and continued use of prepayment water meters and the amount of free water of twenty-five liters per person per day or six kiloliters per household per month.⁷⁴ This discussion is restricted to the question of whether the City’s policy on the supply of free water per month to every account holder was constitutional and focuses on the approach adopted by the courts in the interpretation of the right to access to adequate water.

III. *MAZIBUKO*—AN EVALUATION OF THE HIGH COURT AND SUPREME COURT OF APPEAL JUDGMENTS

A commendable feature of the High Court and Supreme Court of Appeal cases was the courts’ willingness to provide normative content to the right to access to adequate water as contained in section 27(1)(b) of South Africa’s Constitution before moving on to the reasonableness inquiry in terms of section 27(2). This is in line with the arguments

69. Founding Affidavit before the High Court at ¶¶ 101 & 114, *Mazibuko v. City of Johannesburg*, No. 489-08, (CC Apr. 2009), available at <http://www.constitutionalcourt.org.za/Archimages/13516.PDF>.

70. See *id.* at ¶¶ 115-17.

71. Dugard, *supra* note 65.

72. Lindiwe and five other residents of Phiri and other similarly situated areas.

73. All respondents are organs of state.

74. *Mazibuko v. City of Johannesburg* 2008 ZAGPHC 106 (HC) at ¶ 9 (S. Afr.), available at <http://www.saflii.org/za/cases/ZAGPHC/2008/106.pdf>.

presented above that the courts should first try to define the right before inquiring into the reasonableness of the measures.⁷⁵

The interpretation clause in section 39(1) of the Bill of Rights in the South African Constitution prescribes that when a court interprets a specific fundamental right it should promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law.⁷⁶ This calls for not only a generous⁷⁷ and purposive⁷⁸ approach to constitutional interpretation but also includes a strong element of comparative⁷⁹ interpretation. In *S. v. Makwanyane and Another*,⁸⁰ the Constitutional Court held that, in the context of comparative interpretation, international law refers both to binding and non-binding international law.⁸¹ For example, South Africa signed the International Covenant on Economic, Social and Cultural Rights on October 3, 1994.⁸² To date, the treaty has not been ratified, which implies that the Covenant is not yet binding on South Africa. This, however, does not imply that the courts should ignore the ICESCR. International law of whatever kind is particularly important in interpreting socio-economic rights because there is a dearth of comparable jurisprudence from international instruments and observations of international committees for South African courts to draw on. In *Grootboom*, the Court remarked:

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.⁸³

In accordance with this constitutional imperative, both courts examined international law in an effort to define the right of access to

75. Bilchitz, *Towards a Reasonable Approach*, *supra* note 38, at 9.

76. S. AFR. CONST. § 39(1).

77. The Constitution must be liberally construed to take into account its terms and spirit, the intention of the framers and the objectives of and reasons for the legislation. *See generally* *Shabalala v. Attorney General* 1994 (6) BCLR 85 (T) and *Nyamakazi v. President of Bophuthatswana* 1992 (4) SA 540 (B).

78. Purposive interpretation of the Constitution is necessary since it enables the court to take into account more than legal rules.

79. The principles of international human rights and foreign law must be applied with due regard for the South African context. *See generally* *S. v. Zuma* 1995 (2) SA 642 (CC).

80. *S. v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/1995/3.pdf>.

81. *Id.* at ¶ 35.

82. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) at 49, 1496th plen. mtg., U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR].

83. *Grootboom* 2000 (11) BCLR 1169 (CC), at ¶ 26 (S. Afr.).

adequate water.⁸⁴ The High Court also referred to *Residents of Bon Vista Mansions v Southern Metropolitan Council*, where the High Court indicated that considering international law may be particularly helpful where the language in the Bill of Rights is the same as in the international document.⁸⁵ The High Court concluded that where the language of a provision in the Constitution correlates with international documents, considering international law may be instructive and imperative.⁸⁶

Both courts emphasized General Comment No. 15, which concerns the right to water, of the United Nations Committee on Economic, Social and Cultural Rights.⁸⁷ The High Court indicated that water should be available and accessible, and that this requires continuous and progressive state action.⁸⁸ The High Court and the Supreme Court of Appeal emphasized the interdependence of fundamental rights in terms of General Comment No. 15, which provides that

[t]he human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.⁸⁹

The Supreme Court of Appeal therefore describes adequate water as:

84. *Mazibuko v. City of Johannesburg* 2008 ZAGPHC 106 (HC) at ¶¶ 31-40 (S. Afr.), available at <http://www.saflii.org/za/cases/ZAGPHC/2008/106.pdf>; *City of Johannesburg v. Mazibuko* 2009 (3) SA 592 (SCA) at ¶ 17 (S. Afr.), available at <http://www.saflii.org/za/cases/ZASCA/2009/20.pdf>.

85. *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council* 2006 (6) BCLR 625 (W) (A previous case relating to the discontinuance of water supply by the same Court).

86. *Mazibuko v. City of Johannesburg* 2008 ZAGPHC 106 (HC) at ¶ 34 (S. Afr.), available at <http://www.saflii.org/za/cases/ZAGPHC/2008/106.pdf>.

87. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cult. Rts., *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights (General Comment No. 15)*, ¶ 1, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter General Comment No. 15]. This Comment directly concerns the right to water and the content of this right.

88. *Mazibuko v. City of Johannesburg* 2008 ZAGPHC 106 (HC) at ¶¶ 36-37 (S. Afr.), available at www.saflii.org/za/cases/ZAGPHC/2008/106.pdf. The High Court further refers to other international documents such as the Convention on the Right of the Child (¶ 38) and the African Charter on Human and Peoples' Rights (¶ 39). See also Linda Jansen van Rensburg (Stewart), *The right of access to adequate water [Discussion of Mazibuko v The City of Johannesburg Case No: 06/13865]*, 19 STELLENBOSCH L. REV. 415, 418-19 (2008); Siyambonga Heleba, *Realising the Right of Access to Sufficient Water in South Africa*, 10 ECON. & SOC. RTS. REV. 7, 7-9 (2009).

89. General Comment No 15, *supra* note 87, at ¶ 1. See also *Mazibuko v. City of Johannesburg* 2008 ZAGPHC 106 (HC) at ¶ 124 (S. Afr.), available at <http://www.saflii.org/za/cases/ZAGPHC/2008/106.pdf>; *City of Johannesburg v. Mazibuko* 2009 (3) SA 592 (SCA) at ¶ 17 (S. Afr.), available at <http://www.saflii.org/za/cases/ZASCA/2009/20.pdf>.

[a] commitment to address a lack of access to clean water *and to transform our society into one in which there will be human dignity and equality*, lying at the heart of our Constitution, it follows that a right of access to sufficient water cannot be anything less than a right of access to that quantity of water that is required for dignified human existence.⁹⁰

In this passage the Supreme Court of Appeal explicitly acknowledged the transformative potential of the right to access to water as a socio-economic right, stressing that the aim of transformation is to create a society based on human dignity and equality. The Supreme Court of Appeal then describes the right to sufficient water by specifically referencing the constitutional values of equality and human dignity.

After considering these relevant international provisions, both courts turned to the examination of expert evidence to shed further light on the content of the right. The High Court preferred the expert evidence presented by Dr. Peter Gleick, an international expert on water rights, and decided that fifty liters of free water per person per day was the quantum of water needed for health and to live with human dignity.⁹¹ The Supreme Court of Appeal also considered the expert evidence of Dr. Gleick but opted to follow the expert evidence presented by Ian Palmer on behalf of the appellants. The Supreme Court of Appeal stated that the amount of forty-two liters per person, as Palmer suggested, was still adequate under section 27(1) of the Constitution for a dignified existence.⁹²

Liebenberg and Dugard commend the Supreme Court of Appeal for its effort to give normative content to section 27(1) of South Africa's Constitution:

There are certain positive features of the Court's reasoning in relation to this aspect. These include its willingness to engage with the substantive interests and values that affect water as a human right, and to articulate normative standards against which the sufficiency of the water supply to an impoverished community must be measured. The Court was also unambiguous in affirming that the right of "access to" water was not equivalent to access through exclusively commercial mechanisms. It included a constitutional obligation to ensure that water is economically accessible to the poor, including an

90. *City of Johannesburg v. Mazibuko* 2009 (3) SA 592 (SCA) at ¶ 17 (S. Afr.) <http://www.saflii.org/za/cases/ZASCA/2009/20.pdf>

91. *Mazibuko v. City of Johannesburg* 2008 ZAGPHC 106 (HC) at ¶¶ 170-78 (S. Afr.) <http://www.saflii.org/za/cases/ZAGPHC/2008/106.pdf>

92. *City of Johannesburg v. Mazibuko* 2009 (3) SA 592 (SCA) at ¶¶ 21-24 (S. Afr.) <http://www.saflii.org/za/cases/ZASCA/2009/20.pdf>

obligation to supply free water to meet basic needs. The serious consideration which the Court gave to leading international law standards on water rights in interpreting section 27 of the Constitution and its engagement with expert evidence on the water needs of the Phiri community are also positive features of the judgment.⁹³

The High Court and the Supreme Court of Appeal further referred to the significance of other fundamental rights in strengthening the importance of the positive adjudication of the right of access to water. The High Court especially focused on the international recognition of the interdependence of fundamental rights by referring to the fact that no dignified existence is possible without water and that water is crucial to maintain health.⁹⁴ This highlights the interrelatedness of the right to health care⁹⁵ and human dignity⁹⁶ to strengthen the importance of recognizing the right of access to adequate water.

As pointed out above there are various positive features about the manner in which both the High Court and the Supreme Court of Appeal handled the *Mazibuko* case. The most positive feature in my view is the approach of the Supreme Court of Appeal in the provision of normative content to the right to access to adequate water and the envisaging of the transformative potential of such an approach in achieving a society based on human dignity and equality.

I am however of the opinion that both courts went too far in their effort to provide normative clarity to this specific right by prescribing a specific quantified amount of water per person per day to which a person is entitled instead of using a broader universal standard based on the values in the Constitution. The danger of this approach lies in the possibility that it may be unattainable for government to implement the order made by the Court which will automatically bring the credibility of the Court in the transformation of society into disrepute.

For example, what may be sustainable (and accessible) in one part of South Africa may be totally unsustainable in other parts. It is clear that water is accessible and available in the City of Johannesburg. The City of Johannesburg falls within the province of Gauteng that is the smallest and wealthiest in South Africa. In the First and Second

93. Jackie Dugard & Sandra Liebenberg, *Muddying the Waters: The Supreme Court of Appeal's Judgment in the Mazibuko case*, 10 ECON. & SOC. RTS. REV. 11, 15 (2009) (emphasis added).

94. *Mazibuko v. City of Johannesburg* 2008 ZAGPHC 106 (HC) at ¶ 124 (S. Afr.) www.saflii.org/za/cases/ZAGPHC/2008/106.pdf.

95. Section 27(1)(a) reads: "Everyone has the right to have access to health care services, including reproductive health care." S. AFR. CONST. § 27(1)(a).

96. Section 10 reads: "Everyone has inherent dignity and the right to have their dignity respected and protected." *Id.* § 10.

Respondents' Heads of Argument before the Constitutional Court in the *Mazibuko* case, the City of Johannesburg indicated that changes have already been made to the City's policy on the provision of water to indigent persons. These policy changes were already implemented on 1 July 2009 prior to the applicants launching proceedings before the Constitutional Court.⁹⁷ It entails the revision of the Expanded Social Package in terms of which those on the highest band of the City's Poverty Index receive 50 liters of free basic water per person per day.⁹⁸ Unlike in the City of Johannesburg, there exists no similar access and availability in other parts of the country. An example is Kamiesberg in the Northern Cape Province of South Africa where water is extremely scarce and there exists no infrastructure to supply water.⁹⁹ A recent report on Water Service Delivery by the Department Water Affairs and Forestry explicitly recognizes that the local municipality of Kamiesberg is only able to supply indigent households with a free basic water supply of 2 kiloliters per household per month.¹⁰⁰

The availability of water as a scarce resource and the situation described above furthermore require that the court considers the environmental right in section 24 of the South African Constitution. Section 24 states:

Everyone has the right—(a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—(i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The environmental right also strengthens the importance of access to clean water to maintain health (and well-being) but further implies that scarce resources such as water should be dealt with carefully and that due

97. The fact that the City already amended its policy in accordance with the amount prescribed by the High Court questions the necessity of taking the matter to the Constitutional Court.

98. See *Mazibuko* CC Case CCT 39/09 2009 ZACC 28, First and Second Respondents' Heads of Argument ¶¶ 6.2, 12.1, and 18.1 (S. Afr.). Other revised policy changes include special mechanisms which allow individuals to make representations based on special needs for further allocations. Such extended benefits are based on special needs including, amongst others, households with a history of abuse, pensioner-headed households, single-parent households, households with chronic illness, and households with members living with HIV/AIDS.

99. See Department of Water Affairs and Forestry, *Water Services Planning Reference Framework—Northern Cape WSAs Kamiesberg Presidential visit to Namakwa* (22-23 November 2008).

100. See *id.* at 8.

regard should be given to the protection thereof for future generations. Neither the High Court nor the SCA directly addressed the issue of the sustainability of water as a natural resource.¹⁰¹ I suggest that the courts should either consider sustainability when interpreting the right to access to adequate water or when the court employs the reasonableness inquiry in terms of section 27(2). This simply implies that the courts should consider not only economic or financial availability but should also consider environmental and social availability of a scarce resource such as water.

Another example of the complexity of the adjudication of socio-economic rights relates to the *actual* availability of water for the exclusive use of domestic and sanitation purposes. The agricultural sector in South Africa is responsible for more than 60% of the total water usage available in South Africa. A further 15% of the total water resources is consumed by industry and manufacturing pooled with mining and energy. Less than 25% of the available water resources go to domestic supply and sanitation.¹⁰² Although the South African Constitution prioritizes access to water for domestic purposes as a fundamental right¹⁰³ it is difficult to foresee that a court will interfere with the allocation of water in different sectors.

The last example highlighting the complex questions faced by courts occurs when adjudication of socio-economic rights relates to the environmental concern of the preservation of water. Although the Constitutional Court should recognize the need to preserve water (to guarantee environmental, economical and societal sustainability) this should not fundamentally compromise the health and well-being of any vulnerable and poor community in South Africa and their special needs.¹⁰⁴ The Constitutional Court should inform local governments that

101. Chairporn Vitheessonthi, *Corporate Ecological Sustainability Strategy Decisions: The Role of Attitude Towards Sustainable Development*, 6 J. ORGANISATIONAL TRANSFORMATION & SOC. CHANGE 49, 49-64 (2009). Sustainability refers to the ability of one or more entities either individually or collectively to exist and flourish (either unchanged or in evolved forms) for lengthy time frames, in such a manner that the existing and flourishing of another collectively of entities is permitted at related levels and in related systems.

102. Tewari, D.D., *Free Water and Economic Development—Can They Co-Exist?*, 1(8) THE WATER WHEEL 33, 35 (2009).

103. This implies that courts should give priority to the human right to water above other water uses. See *Residents of Bon Vista Mansions v. S. Metropolitan Council* 2006 (6) BCLR 625 (W) (ruling in favor of the residents and restoring the water supply where the residents of the block of flats' water was disconnected due to their non-payment). This case indicates that the right to water use was regarded as priority over the contractual right to water use.

104. See *Grootboom* 2000 (11) BCLR 1169 CC; *TAC* 2002 (5) SA 72 CC; *Khosa* 2004 (6) BCLR 569 CC (S. Afr.) (revealing a cautious, context-sensitive approach to the transformative potential of socio-economic rights jurisprudence by taking into

when they formulate policy on water service delivery, the needs of the poor and vulnerable should receive special attention. When local governments only adhere to the needs of their more affluent customers who can afford to pay and subsequently use a limited resource to any extent, such a water service delivery programme cannot be conceived as being reasonable.

IV. MAZIBUKO CONSTITUTIONAL COURT: TWO STEPS BACK?

On the 8th of October 2009 the Constitutional Court¹⁰⁵ delivered a unanimous judgment on the *Mazibuko* case. In the introductory statement the Court recognizes the importance of the right of access to water¹⁰⁶ and stresses the existing inequalities in the provision of water to the poor.¹⁰⁷ The Court remarks that “[t]he achievement of equality, one of the founding values of our Constitution, will not be accomplished while water is abundantly available to the wealthy, but not to the poor.” The Court also acknowledges the fact that South Africa is an arid country and providing access to water to everyone requires careful management of water services in a sustainable manner.¹⁰⁸

Notwithstanding the recognition of the inequalities in the provision of water and water services and the transformative vision of the Constitution to rectify these inequalities, the Court explicitly restricts its role in the “interpretation” process under the rather ironic heading “[t]he role of the courts in determining the *content* of social and economic rights: the *proper interpretation* of section 27(1)(b) and 27(2) of the Constitution”¹⁰⁹ by arguing that the nature of a right can only be understood if the context of the obligations imposed by it. O’Regan J observes

The Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights. Thus it places a positive obligation upon the state to respond to the basic social and economic needs of the people by adopting reasonable legislative and other measures. By adopting such measures, *the rights set out in the Constitution acquire content, and*

consideration the position of the weakest members of society when deciding whether policies of government are reasonable.).

105. *Mazibuko* CC Case CCT 39/09 2009 ZACC 28 (S. Afr.).

106. *Id.* at ¶ 1.

107. *Id.* at ¶ 2.

108. *Id.* at ¶¶ 3 and 23.

109. *Id.* at ¶ 46 (It will be asserted that the court did not interpret the right to water at all.) (emphasis added).

*that content is subject to the constitutional standard of reasonableness.*¹¹⁰

As predicted above the Constitutional Court again denies the existence of a directly enforceable obligation on the state to provide sufficient water on demand to every person.¹¹¹ The Court argues that similar arguments were presented to the Court in the cases of *Grootboom* and *TAC* in respect of a minimum core or basis content which must be provided by the state.¹¹² Referring to the *TAC* case the Court argues

Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way, the judicial, legislative and executive functions achieve appropriate constitutional balance.¹¹³

The Court indicates that the applicants in this particular case expressly rejected a minimum core and expected the Court to determine a higher amount than the legislatively prescribed 25 liters per person per day.¹¹⁴ The Court also rejects the acceptance of a higher quantified amount for the same reasons it denies the existence of a minimum core.¹¹⁵

The Court bases its decision to abstain from giving content to the right to access to sufficient water on two grounds. The first ground arises from the text of the Constitution and the second from the understanding of the proper role of courts in the South African constitutional democracy.¹¹⁶ Along with the latter ground the Court insists that it is not institutionally equipped to define a particular socio-economic right.¹¹⁷

Referring to the text of the Constitution, the Court reasons that reference to the phrase “progressive” realization in section 27(2)

110. *Mazibuko* CC Case CCT 39/09 2009 ZACC 28, at ¶ 67 (S. Afr.) (emphasis added).

111. *Id.* at ¶¶ 48-50.

112. *Id.* at ¶¶ 52-55.

113. *TAC* 2002 (5) SA 72 CC ¶ 38. See also *Mazibuko* CC Case CCT 39/09 2009 ZACC 28, at ¶ 55 (S. Afr.).

114. *TAC* 2002 (5) SA 72 CC, at ¶ 56.

115. *Id.*

116. *Id.* at ¶ 57.

117. *Mazibuko* CC Case CCT 39/09 2009 ZACC 28, at ¶ 62 (S. Afr.).

indicates an implicit recognition that the right cannot be realized immediately.¹¹⁸ The Court further reasons that fixing a quantified fixed amount would be rigid and counter-productive and would prevent an analysis of the context.¹¹⁹ This argument is in line with the reasoning presented above,¹²⁰ where I argued that the High Court and SCA went too far in their efforts to provide normative clarity to this specific right by prescribing a specific amount of water per person per day, to which a person is entitled instead of using a broader universal standard which may not necessarily have to be quantified.¹²¹

Referring to the proper role of the court in a constitutional democracy, the Court argues:

Secondly, ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.¹²²

In this statement the Court loses track of the fact that although it is the primary role of the legislature and executive to realize socio-economic rights, the courts also have a quasi law-making role to translate these constitutional rights into enforceable legal claims.¹²³

The reasoning of the Court discussed above and the recognition by the Court that legislative and other measures should inform the content of rights is, to say the least, extremely disappointing.¹²⁴ Liebenberg correctly argues that

118. *Id.* at ¶¶ 57-59.

119. *Id.* at ¶ 60.

120. *Id.* at ¶ 90.

121. It is not expected that the Court determine a precise quantity or give a final and complete definition of a particular right. See Bilchitz, *Giving Socio-Economic Rights Teeth*, *supra* note 38, at 484; Bilchitz, *Towards a Reasonable Approach*, *supra* note 38, at 7-8; DAVID BILCHITZ, POVERTY AND FUNDAMENTAL RIGHTS, *supra* note 43, at 158.

122. *Mazibuko* CC Case CCT 39/09 2009 ZACC 28, at ¶ 61 (S. Afr.). In a way the Court is saying “you voted for the ruling party, so bear the consequences if they do not deliver on their promises.”

123. Danie Brand, *Introduction to Socio-Economic Rights in the South African Constitution*, in SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA 1, 17-18 (Danie Brand & Christof Heyns eds., PULP 2005).

124. *Mazibuko* CC Case CCT 39/09 2009 ZACC 28, at ¶¶ 46-68 (S. Afr.).

[t]he Constitutional Court's failure to give meaning to the right of access to sufficient water in section 27 of the Constitution significantly limits the ability of poor communities to hold the state accountable for meeting a basic human need.¹²⁵

By merely asking whether the measures formulated by government are reasonable, the court defeats the aim of contextual, purposive and generous constitutional interpretation as prescribed by section 39 of the Constitution.¹²⁶ The first part of section 39 deals with constitutional interpretation and prescribes the manner in which a fundamental right should be interpreted. It is firstly expected from the court when interpreting a fundamental right to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. It is secondly imperative that the court consider international law and thirdly a court may also consider foreign law.¹²⁷

The method employed by the Constitutional Court in the *Mazibuko* matter reflects strong elements of legal positivism. The Court focuses mainly on the literal meaning of the words in section 27 of the Constitution.¹²⁸ In my view, the Court overemphasizes¹²⁹ the text of the

125. Sandra Liebenberg, *Water Rights Reduced to a Trickle*, LEGALBRIEF, Oct. 21, 2009, <http://www.legalbrief.co.za>.

126. S. AFR. CONST. § 39. Section 39 states:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum -
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) 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.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

127. CHRISTO BOTHA, STATUTORY INTERPRETATION: AN INTRODUCTION FOR STUDENTS 114 (4th ed. Juta 2005). The second part of section 39 deals with statutory interpretation and requires that a court when interpreting any legislation must promote the spirit, purport, and objects of the Bill of Rights. *Id.* It is clear that constitutional and "ordinary" statutory interpretation also demand a purposive approach. *Id.*

128. During the *apartheid* regime (prior to the 1993 and 1996 Constitutions) parliament reigned supreme and no court could challenge the substantive content of parliamentary legislation on grounds such as fairness or equality. *Id.* at 8. This restricted the role of the courts to an orthodox literal approach to the interpretation of statutes. This meant that the courts followed the meaning of the words if the meaning was clear and equated it with the intention of the legislature. Only in cases where the meaning was ambiguous, vague or misleading would the courts employ secondary aids to interpretation such as the preamble, headings and long titles of the act. If this still proves to be insufficient the court could lastly rely on tertiary aids such as common law presumptions. *Id.* at 47-48. This approach is no longer acceptable where the Constitution is the supreme law of the Country. Section 2 of the Constitution: "This Constitution is the supreme law

Constitution and completely loses sight of the reality that no text can have only one meaning.¹³⁰ Furthermore, in placing too strong a reliance on its previous judgments (in *Grootboom* and *TAC*) the Court implicitly denies that the meaning of a text over time may evolve to have an extended or different meaning. For example, it has been illustrated above that the requirement of “reasonableness” for purposes of socio-economic rights has become more stringent over time. Despite the brief reference to the inequalities in the provision of water in South Africa and the explicit reference to the founding values in the Constitution, the Court does not engage with the meaning of these values and the manner in which they should be used to inform socio-economic rights. Botha argues

The fundamental values in the Constitution form the foundation of a normative constitutional jurisprudence during which legislation and actions are evaluated against (and filtered through) those constitutional values.¹³¹

Unlike the High Court and SCA, the Constitutional Court furthermore disregards a thorough analysis of international and foreign law. No attention is paid to the valuable comments made by the United Nations Committee on Economic, Social and Cultural Rights and specifically General Comment No. 15 concerning the right to water or the very fact that foreign systems in Brazil, Argentina, France and the United Kingdom prohibit the automatic shutdown of water.¹³²

of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” S. AFR. CONST. § 2.

129. LOURENS MARTHINUS DU PLESSIS, RE-INTERPRETATION OF STATUTES 223 (Butterworths 1996). I am in no way suggesting that the text should be ignored but a grammatical interpretation is but one of various methodologies a court may employ in the interpretation process.

130. *Id.* at xv.

131. BOTHA, *supra* note 127, at 122-23.

132. Rensburg, *supra* note 88, at 426 (2008). In this article I observed that an interesting point, which is not mentioned in the founding affidavit or judgment, is the fact that the prepayment system was outsourced to a company called Johannesburg Water Management Company (JOWAM) (a multinational company), which signed a five year contract with the second respondent, Johannesburg Water, for the installation of prepayment meters in two of the poorest suburbs in Soweto, namely Phiri and Orange Farm. The majority shareholder of JOWAM is a United Kingdom company, Northumbrian Water. Although prepayment water meters were outlawed in the UK, this company nevertheless applied double standards by agreeing to implement these systems in South Africa. Damon Barrett & Vinodh Jaichand, *The Right to Water and Access to Justice: Tackling United Kingdom Water Companies' Practices in Developing Countries*, 23 S. AFR. J. HUM. RTS. 543, 552 (2007).

V. THE (LAST) WORD?

I have attempted to illustrate the difficult task with which the Constitutional Court (and other courts) are confronted when dealing with the adjudication and especially interpretation of socio-economic rights. I further acknowledged the work done by scholars of constitutional law on this subject and the importance of these contributions for building a clear and logical jurisprudence on socio-economic rights adjudication and the transformative potential of these rights.

The interpretation of socio-economic rights demands a careful balancing act. On the one hand, courts should be careful not to (over)formulate government policy.¹³³ On the other hand, courts, and especially the Constitutional Court, should engage in a process of formulating the meaning of a specific socio-economic right. All that is expected from the courts is to set an invariable universal standard to bring about what Liebenberg calls “nonreformist reforms” which still have the potential to transform South African society. As argued earlier it is not the task of the courts to prescribe the exact measures that the state has to take. All that is needed is for the court to formulate a universal norm.

Describing the right as nothing less than a right of access to that quantity of water that is required for dignified human existence is a normative standard that still allows for context sensitive matters. It furthermore makes provision for an approach which could allow that poor, marginalized and specific vulnerable people in urban areas which are dependent on waterborne sanitation may possibly need more water than people in rural areas.

I suggest that the courts employ a comprehensive methodology¹³⁴ in the interpretation of socio-economic rights which includes grammatical, contextual, teleological, historical and comparative interpretation methods. Shared constitutional interpretation such as appointing fact-finding commissions to gather the necessary information or call for additional expert evidence may also further assist courts in the difficult task of interpretation.¹³⁵ The courts could even go so far as to invite the political branches of government or other organs of state to suggest alternative normative content when defining a specific socio-economic right.¹³⁶

133. By prescribing a fixed amount of water (for example 42 or 50 liters water per person per day) the courts over-formulate policy.

134. See S. AFR. CONST. § 39.

135. Pieterse, *supra* note 38, at 395-96.

136. Woolman & Botha, *supra* note 38, at 8.

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