

# JUST TICK THE BOXES? JUDICIAL ENFORCEMENT IN SOUTH AFRICA

Malcolm Langford\* and Steve Kahanovitz\*\*

Think Piece/Emerging Paper, May 2010



## 1. Introduction, Tentative Conclusions and Methodology

South African jurisprudence on economic, social and cultural rights<sup>1</sup> is regularly promoted as a global model for judicial interpretation. While attention is beginning to turn elsewhere due to the comparatively low volume of cases (Alston, 2008), its' Constitutional Court judgments continue to exert a strong influence on emerging

---

\* Research Fellow and Director, Socio-Economic Rights Programme, Norwegian Centre for Human Rights, University of Oslo. The authors would particularly like to thank Evan Marcus for research assistance on the cases.

\*\* Senior Lawyer, Legal Resources Centre, South Africa.

<sup>1</sup> For a comprehensive overview of these decisions, see Liebenberg (2010).

Anglo-American scholarship<sup>2</sup> and proposals to make the rights justiciable in different jurisdictions (see UK Joint Committee, 2004; Porter, 2009).

However, the *impact* on policy, practice and the legal system of these jurisprudential gains is the subject of a growing debate. Part of the dissensus is clearly attributable to methodology. Disparate evaluation methods, interpretations of court orders, expectations of litigation outcomes and time periods under investigation dominate the literature on South Africa.<sup>3</sup> Systematic evaluations with extensive field work and use of statistics are rare (although that is changing<sup>4</sup>) and most of the focus has been on two early landmark decisions of the Constitutional Court in the context of housing and health rights – *Grootboom*<sup>5</sup> and *Treatment Action Campaign*.<sup>6</sup> Attention has also been drawn, albeit to a more limited extent, on the specific enforcement challenges posed by the social security grant cases.<sup>7</sup> Even when researchers might find consensus on lack of impact of a particular case, the causal reasons often differ. Some point to the weak form of judicial review and cautious court orders (Pieterse, 2007), others to the lack of effective enforcement mechanisms (Mbazira, 2008), and still others contend that an inherent feature of public interest litigation is its inability to effect political change (see overview of critiques in Madlizonzi, 2007).

Turning to the variable of *enforcement*, there is a widespread perception that it constitutes a major problem. Although one has to be careful that the issue is not confused with broader impact since South African court orders are often narrowly drafted.<sup>8</sup> This perception of non-implementation is largely justifiable. Despite having a fairly robust democracy and rule of law (particularly in urban areas), all levels of the South African government have come under fire for ignoring completely their court-ordered obligations or for paying nominal ‘lip service’ to decisions. This has applied to all forms of remedies such as declaratory orders, interdicts against state action, orders for compensation or mandatory orders to revert to a ‘status quo’. And it has applied regardless of the strength of the order.<sup>9</sup> It is not limited to positive obligations

---

<sup>2</sup> Sunstein (2002), Tushnet (2004) and Waldron (2009).

<sup>3</sup> Compare Pieterse (2007); Berger (2008); Robins (2009), Liebenberg (2008), Svart (2005), Heywood, (2003), Gilbert and Budlender (2008) and Hirschl, 2004).

<sup>4</sup> See for instance Berger (2008), Robins (2009), Liebenberg (2010) – to a certain extent -, and the current research project, *Symbols or Substance?*:

[http://www.jus.uio.no/smr/english/about/programmes/south-africa/Symbols\\_substance.html](http://www.jus.uio.no/smr/english/about/programmes/south-africa/Symbols_substance.html)

<sup>5</sup> *Government of the Republic of South Africa and Ors v Irene Grootboom and Ors* 2001 (1) SA 46 (CC) [*Grootboom*]. Revision of the national housing policy to provide temporary relief for those most desperately in need.

<sup>6</sup> *In re Min of Health and Ors v Treatment Action Campaign and Ors* 2002 (5) SA 717 (CC) [*TAC*]. Provision of antiretroviral drugs in public hospitals to reduce mother-to-child HIV/AIDS transmission.

<sup>7</sup> There have been a significant number of judgments dealing with attempts by aggrieved applicants to enforce payment by the State of social security grants: see, for example, *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Ors* 2001 (4) SA 1184 (SCA); *Khosa and Ors v Minister of Social Development and Ors* 2004 (6) SA 505 (CC); *Cele and Ors v South African Social Security Agency* 2009 (5) SA 105 (D).

<sup>8</sup> The *Grootboom* case is perhaps a classic example of this since the specific rights of the *Grootboom* community were part of a settlement while the Constitutional Court ruled on the broader obligations of the State: see Liebenberg (2008) and Gilbert and Budlender (2008) and contrast with the arguably mistaken interpretation in Berger (2008).

<sup>9</sup> Compare for example the weak orders in *Grootboom* (2001) and *TAC* (2002) with the strong orders in *Westville* and *Kate*. This result is interesting given theoretical discussions on whether weak or stronger

The vast majority of successful ESC rights cases in South Africa have actually involve ‘negative’ obligations<sup>10</sup> and non-discrimination. For example, in the field of urban housing and basic services, ten Constitutional Court cases have addressed forced evictions and disconnections – eight were successful and set different groundbreaking precedents.<sup>11</sup> Only three cases have addressed the provision of housing or services, and only one could be classed as largely successful.<sup>12</sup>

When reviewing socio-economic rights cases in South Africa, one is left with a distinct feeling that non-enforcement is, but not always, the *immediate* and *default* position. Follow-up litigation seems to be a regular feature of almost all socio-economic rights cases (see overview in Berger, 2008). However, there are four exceptions to this possible general rule of immediate non-enforcement:

- In some recent cases, particularly on forced evictions (such as *Olivia Rd* and *Modderklipp*), the decisions and settlement orders have been implemented in a very short space of time, often beyond the terms of the order.
- It is possible to see depth and breadth of implementation improving in a significant number of cases over longer time periods, particularly where policy reforms are required.
- There are markedly varying levels of enforcement amongst the cases, particularly once a period of three to five years has elapsed since judgment.
- Part implementation is common due to the range of orders within a judgment.<sup>13</sup> Many decisions contained a number of orders or were directed to a range of beneficiaries, e.g. the applicant plus all others in their current or future position. Thus, it is not uncommon to find one part of the order implemented and another not.

In explaining these different results, the key and consistent variable appears to be the degree of pressure from the applicants or civil society. Indeed it is regularly is often claimed in discussions of impact (and enforcement) in South Africa that the presence of a social movement or possibly NGO supporting the applicant is the decisive

forms of orders may induce higher levels of compliance. See Tushnet (2008); Berger (2008), Mbazira (2008).

<sup>10</sup> Note that many of these decisions contain positive elements such as reconnecting services or providing compensation.

<sup>11</sup> Successful cases were: (1) *Minister of Public Works v Kyalami Ridge Environmental Association* (‘Kyalami Ridge’) 2001 (7) BCLR 652 (CC); (2) *Ndlovu v Ngcobo; Bekker & Another v Jika* [2002]4 A11 SA384; 2003(1)SA113 (SCA); (3) *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (1) BCLR 78 (CC) (‘Jaftha’); (4) *President of RSA and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC); (5) *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), ; (6) *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) [*Olivia Road*]; (7) *Abahlali baseMjondolo Movement SA v Premier KZN and Others* (2009) and (8) *Leon Joseph and Others v City of Johannesburg and Others*, Case CCT 43/09, Date of Judgment: 9 October 2009. Unsuccessful cases were (1) *Residents, Joe Slovo Community, Western Cape v Thubeiisha Homes & Ors* (2009) and (2) *Lindiwe Mazibuko and Others v City of Johannesburg and Others Case CCT 39/09* [2009] ZACC 28 (*Mazibuko*, 2009).

<sup>12</sup> The successful case was *Grootboom* (2001) and the unsuccessful cases were *Nokotyana and Ors v Ekurhuleni Metropolitan Municipality and Ors* [2009] JOL 24609 (CC) [*Nokotyana*, 2009] and *Mazibuko* (2009)

<sup>13</sup> See discussions below of *Grootboom* (2001) and *Jaftha* (2005) in particular.

variable. The differing outcomes in *Grootboom* (perceived as negative) and *TAC* (seen as positive) is commonly the source of this view. And Berger's (2008) wider review of cases generally supports the thesis on the primacy of civil society pressure. Indeed, Treatment Action Campaign attributes its temporary failure to enforce the neviropane order due to its attention being diverted by other issues. This emphasis on the civil support structure also accords with some international research (e.g. Epp, 2009).

However, caution needs to be exercised in pressing this explanation too far or too narrowly, particularly if used as a strategic template. First, it doesn't necessarily accord with all comparative experience. The design of the legal system or the nature of the jurisprudence and orders can be more influential – for example the immediate, individualised and minimum *tutela* orders in jurisdictions like Costa Rica and Colombia seem to produce relatively high levels of compliance (Wilson, 2009). Thus, supply-side factors such as the level of support within the *bureaucracy* and *government* for the judgment, the *complexity* and *cost* of the orders, the extent of soft and hard *judicial power* and the power of relevant *non-state actors* may be equally as important. A good example is the *Westville* prison case in South Africa that has been the subject of some of the strongest judicial orders and the target of the most powerful national social movement, yet prison officials and their lawyers have remained obstinate. This suggests that strategies for enforcement need to look beyond civil society mobilisation to deeper reforms, and the *Nyathi* litigation on enforcement of compensation claims is a good example of this.<sup>14</sup>

Second, it is important not to overly conflate different civil society actors. The degree of mobilisation of broader social movements or attentiveness by NGOs may affect broader enforcement but the role of applicants in enforcement should not be overlooked – particularly in more focused cases. There may be different comparative incentives and costs for the applicants to continue pressing enforcement and, additionally, applicant communities often experience different levels of organisation and unanimity. For example, highly organised communities facing eviction in the *Modderklipp* (2005), *Bardale*,<sup>15</sup> *Olivia Rd* (2009), *Valhalla* (2003) and *Joe Slovo* (2009) cases have been arguably able to achieve more than the more divided *Grootboom* community. While these communities worked closely with lawyers and social movements in some cases, they appear to have well-organised, representative and hard-working governance structures. Some social security cases (see Berger, 2008) and health cases (e.g. *Nyathi*, 2008) appear to be driven by individuals with a clear sense of injustice beyond the material deprivation making compliance possibly more likely. Likewise, the constellation and calibration of social movements and NGOs in a particular case can also be decisive. Sometimes, it is not a question of *more* civil society but *better* civil society.

Third, singular causal comparisons across different rights could be problematic. The ability to mobilise for some rights may be more difficult due to their localism (e.g. housing), remoteness (e.g., litigation in rural areas) or unpopularity (e.g., migrants). For example, while health litigation has largely been driven by national movements,

---

<sup>14</sup> *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Ors* 2008 (5) SA 94 (CC) [*Nyathi*, 2008].

<sup>15</sup> This case was settled before it went to court:

almost all housing rights cases have been commenced by local and impoverished communities. This localism is not unsurprising given the localism of many housing struggles and the lack of national housing rights social movements in South Africa. While largely provincial-based social movements focused on housing are now emerging, it is not clear yet whether they can exert the same influence on national policy as their counterparts in health and social security. Although the potential threat of one urban movement, Abahlali baseMjondolo, has led to severe repression by some arms of government (Amnesty, 2009). In the case of social security, early litigation has often been commenced by individuals but its quantitative and national character has lent itself to the engagement of national NGOs and movements. Later litigation has often been driven by civil society actors. These differences suggest that strategies for improving compliance should take account of these power differentials: thus arguments for supervisory jurisdiction by the court might be stronger in cases without strong social movement backing.

This paper takes a largely inductive approach by examining a range of case studies across the rights to housing, health and social security in order to find if there are particular patterns with regard to enforcement and whether the above theses are substantiated. The paper will also look briefly at different strategies used by groups to successfully enforce decisions. A separate paper in this series by Stuart Wilson on the *Olivia Rd* (2008) judgment looks in-depth at the strategies employed by residents and lawyers to ensure a high level enforcement in a short period of time. The conclusion of this paper will therefore focus on the recent *Nyathi* decision by the Constitutional Court, which opened the door to compensation claims being made directly against the state, and provides some seeds for thoughts for institutional innovation in the judicial system for enforcement.

The research method includes analyses of selected judgments and court orders, semi-structured interviews with key stakeholders, on-site visits and informal surveys, and reviews of policy documents, legislation, secondary literature, and mass media sources. We are still in the process of engaging with, among others, actors from the State, civil society, and the legal profession, in an effort to expand further the coverage and to fill in the details of this survey paper. In the case of housing rights, there will be considerable primary research. But we will primarily rely on existing and forthcoming research for health rights cases. The remainder of this think piece briefly describes the judicial order in each case and the situation regarding enforcement in housing rights.

## 2. Housing Rights Cases

This section analyses a range of urban housing rights cases at different levels of detail. It begins with the well-known *Grootboom* case and analyses enforcement of its three ‘orders’ and two ‘follow-up’ decisions, the 2004 Cape Town case of *Valhalla* and the 2009 *Nokotyana* decision of the Constitutional Court. A series of forced eviction cases, which successfully used the *Grootboom* precedent, are then analysed. On their face, these cases seem to provide the opposite enforcement result than *Grootboom* with high levels of local enforcement but mixed broader enforcement. However, their broader *impact* has possibly been significant with a seeming rapid decline in large-scale evictions even though small-scale evictions continue apace.

## 2.1 Positive access to housing

### *Grootboom*

The ‘Grootboom’ settlement emerged after a group of residents, many of whom had been waiting in the queue for formal low-cost housing, left a waterlogged settlement in September 1999 and moved their shacks onto vacant private land.<sup>16</sup> An eviction order was granted against them on 8 December 1998 and, as Budlender and Marcus (2008), have recently noted, the community with a lawyer did try to negotiate a settlement, particularly with the municipality. However, the municipality only advised that they should return to the former settlement (but this was now occupied by others). The result was forcible eviction from their homes by the private owner, their shacks were bulldozed and burnt, and their meagre possessions were destroyed. Rendered homeless, the respondents took shelter on the Wallacedene sports field.

The community<sup>17</sup> launched an urgent application in the then Cape of Good Hope High Court and the resulting judgment was appealed by the government to the Constitutional Court. Before the decision was given, the Court issued an order pursuant to an agreement between the parties regarding immediate funding for materials and delivery of temporary toilet and sanitation facilities, as well as materials to waterproof residents’ shacks. A unanimous judgment then addressed the broader issues and Justice Yacoob held that the nationwide housing program fell short of the obligations on the national government under s. 26 of the Constitution – which provides that everyone has the right of access to adequate housing. There was a failure to take into account or make provision for the immediate temporary amelioration of the circumstances of those in desperate need. A declaratory order was issued to that effect, including that Section 26 of the Constitution imposes on the national government obligations to devise, fund, implement, and supervise measures to provide relief to those in desperate need.<sup>18</sup>

The Court also noted that the *amicus curiae*, the South African Human Rights Commission “will monitor and, if necessary, report in terms of these powers on the efforts made by the state to comply with its section 26 obligations in accordance with this judgment.”<sup>19</sup> This was prompted by the Commission’s submission to the Court that were constitutionally bound to undertake such a role. Whether this statement by

---

<sup>16</sup> The Wallacedene informal settlement is located on the edge of the municipality of Oostenburg on the eastern fringe of the Cape Metropolitan Area. Based on an assessment of the Wallacedene community commissioned by the municipality in December 1997 and relied on by the Constitutional Court in its October 2000 judgment, 25% of the Wallacedene households had no income at all, and more than 66% earned less than R500 per month. Approximately 50% of the settlement’s inhabitants were children, and the entire population lived in shacks. They had no water, sewage, or waste removal services, and only 5% of the shacks had electricity. Moreover, the area was waterlogged and prone to flooding, and was located dangerously close to a busy thoroughfare.

<sup>17</sup> The first respondent, Ms. Irene Grootboom, was joined by 900 other respondents (390 adults and 510 children) from the Wallacedene informal squatter settlement.

<sup>18</sup> The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

<sup>19</sup> Grootboom (2001), para. \_\_\_\_

the Court constituted an order is disputed. Berger (2008) holds that it was while Liebenberg (2010: 402-3) is doubtful and she notes that the Chief Justice later advised the Commission that its' monitoring reports should be directed to the legislature.

*a. Settlement Agreement*

As to the first successful leg of the case, the settlement was immediately breached by the municipality (Berger, 2008). This required a follow-up application to have the agreement made an order of court.<sup>20</sup> The materials and facilities were provided but complaints emerged over the quality of the water and sanitation facilities and overall conditions improved little (Langford, 2003). However, it also appears to have been tacitly amongst the parties that the community could reside on the sportsfield despite complaints from sporting associations (Liebenberg, 2010). Thus, the pattern of eviction was halted by the court case and settlement agreement.

*b. Emergency Housing Assistance*

Two and half years after the judgment, the national and provincial ministers approved a new programme called *Housing Assistance in Emergency Situations*. It was incorporated in the National Housing Code in April 2004<sup>21</sup> and the new Chapter 12 provided for assistance to people who, for reasons beyond their control, find themselves in an emergency housing situation (e.g. destruction or major damage to an existing shelter) or a situation which poses an immediate threat to their lives, health and safety, or eviction (or the threat of imminent eviction). Assistance is rendered under Chapter 12 "only in emergency situations of exceptional housing need". Shortly thereafter Chapter 13 was also added for the (*in situ*) upgrading of informal settlements, with the acknowledgment that the policy of building formal low-cost housing was making only a small dent in the housing shortage.<sup>22</sup>

Moreover, although it was not expressly ordered to do so by the Court, the National Treasury Department undertook to allocate a certain fixed percentage of the annual national housing budget specifically for the provision of emergency housing services.<sup>23</sup> This 'Grootboom allocation' can be seen in Figure 1.

FIGURE 1. HOUSING ALLOCATION FUNDING: 1990 -2010

The development of Chapters 12 and 13 in the Housing Code was recently recognised by the Constitutional Court as *Nokotyana* (2009) as implementation of *Grootboom*. However, it is worthwhile to note the inherent limitation on the ability of these policies to remedy the immediate plight of those desperately in need of relief. Only municipalities may apply for funding and Chapter 12 can be invoked only where an

---

<sup>20</sup> *Grootboom v Government of the Republic of South Africa* (unreported order in Case no. CCt/00) , 21 September 2001. The order is available at:

<http://www.constitutionalcourt.org.za/Archimages/2874.PDF>.

<sup>21</sup> Section 4 of the *National Housing Act No 107 of 1997* provides for the publication of a *National Housing Code* by the Minister of Housing.

<sup>22</sup> It relates to the provision of grants to a municipality to enable it to upgrade informal settlements in its jurisdiction in a structured way on the basis of a phased development approach.

<sup>23</sup> Approximately 0.8% of the annual national housing budget was allocated by the National Treasury Department to the provision of emergency housing services.

emergency situation can be demonstrated, while Chapter 13 can be relied on only once the local MEC for Housing has made a decision to upgrade the informal settlement. Accordingly, where no emergency situation exists, government can forestall the provision or improvement of basic services simply by delaying the decision of the MEC for Housing regarding the *in situ* upgrade. The process of application, accessing land, applying relevant standards is often lengthy and drawn out (Van Wyk, 2007). It is thus not particularly appropriate for ‘crisis’ situation and as since the level of services provided under the scheme is extremely basic, it suggests that it may not address ‘intolerable conditions’ as provided for by *Grootboom*. Liebenberg (2010) thus suggests that Chapter 12 may not be fully compatible with *the* judgment.

In *Nokotyana*, the Constitutional Court only partly agreed with the critique although the Applicant’s case was admittedly poorly argued. The MEC for Housing had still not made a decision three years following the submission of the application for a Chapter 13 *in situ* upgrade. Despite chastising the MEC for Housing for such a lengthy delay, the Constitutional Court nonetheless permitted an additional 14 months for the decision to be made.<sup>24</sup> However the court refused to address claims for temporary sanitation facilities beyond pit latrines or high mast lighting, particularly important for safety and access by emergency vehicles.

*c. Independent Monitoring by SAHRC*

The SAHRC quickly moved to report on the implementation of the decision and to a larger extent than suggested by Berger (2008). Pillay (2002) and Liebenberg (2010) note that the Commission was involved in extensive efforts to monitor local and provincial plans to provide permanent accommodation to the community. A report was also sent to the Constitutional Court on 14 November 2001 by the Commission which noted that the dispute between branches of government for responsibility and the lack of clarity over the content of the declaratory order. However, all three commentators are critical of Commission’s failure to monitor the broader declaratory order although apparently many letters were sent to the national housing department (Pillay, 2002). Berger (2008: 77) asks why “no one has taken the SAHRC to task for its failure to do the limited role it ascribed to itself”.

*Upgrading for Grootboom community*

As Liebenberg (2008) points out, there was no order for the community to be given housing. Criticisms of the judgment for failing to quickly provide permanent housing cannot be seen as a problem of enforcement, although obviously one of impact. And there has been no shortage of criticism of the delay in upgrading the Wallecedene area and providing the Grootboom community with permanent housing.

However, the entire story is slightly more complicated. Once upgrading eventually began, problems emerged over the formal low-cost housing development scheme at Wallacedene, which encompasses both contractor-built housing and personal housing

---

<sup>24</sup> It must be noted that the correctness of the Constitutional Court’s decision in *Nokotyana* has been called into question. Specifically, it has been argued that Chapter 13 does not preclude the provision of interim services to informal settlements prior to the decision by the MEC regarding the *in situ* upgrade: see Huchzermeyer, Marie (2009). However, since this issue has not been litigated post-*Nokotyana*, the decision in *Nokotyana* reflects the current state of the law.



project options. Although infrastructure and bulk services have indeed been delivered, timely progress in housing construction has been stymied repeatedly by a myriad of bureaucratic quagmires, most notably, the cancellation of a contractor's tender due to allegations of corruption.<sup>25</sup> Moreover, the process has been mired by engagements with Wallacedene residents in an attempt to address their concerns regarding the quality of construction, type of building foundation, location of houses, and availability of alternative accommodation during the construction process.<sup>26</sup> These problems in implementation and delivery of housing unfortunately continue to date but some of the community has now been relocated to permanent housing.

### ***Valhalla***

The enforcement of the *Grootboom* decision was also raised in a 2004 case concerning another informal settlement in Cape Town and has arguably led to a better result. In 2002, the City of Cape Town brought an urgent application to evict and demolish the homes of almost 50 individuals who were living unlawfully in shacks in a public park in the suburb of Valhalla Park. The City argued that it had a housing policy in place, with which it was complying, to ensure the progressive realization of the right of access to adequate housing for those within its jurisdiction who had applied for formal low-cost housing. However, given its limited financial resources and the fact that demand greatly exceeded supply, there was a significant delay. According to the City, by resorting to self-help, the respondents had effectively "jumped the queue" and obtained an unfair advantage over the thousands on the waiting list. The residents and a local civic action group, United Front Civic, opposed the eviction request and responded with a counter-application claiming that the City had failed to deliver adequate housing in Valhalla Park and that the City's housing policy did not satisfy the City's constitutional obligations.<sup>27</sup> All of the residents faced desperate housing situations, many were unemployed and could not afford to pay nominal rent, and many of them had actually been on the housing waiting list for over a decade.

Justice Selikowitz dismissed the City's urgent eviction application on the basis that it did not meet four pre-requisites under the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act*<sup>28</sup> ('PIE'). In particular, there was no real and imminent danger of substantial injury or damage to any person or property from the occupation, the balance of hardship did not favour the granting of the order; and there were other effective remedies available to City. He then considered the counter-application and found that the City had failed to fulfil its constitutional obligations, as set out in *Grootboom*, in that it had failed to implement a program to address the immediate situation of people in crisis situations. Holding that a declaratory order alone would not suffice, as the City had already failed to comply with the declaratory order made in *Grootboom*, a structural interdict was made. The City was ordered to deliver within 4 months a report under oath stating what steps it had taken and would take in order to comply with its constitutional obligations.

---

<sup>25</sup> Reference?

<sup>26</sup> Reference?

<sup>27</sup> Valhalla Park United Front Civic Organisation and Environment and Geographical Science Department – UCT (2007).

<sup>28</sup> *No 19 of 1998 [PIE]*.

The City delivered four reports outlining the steps it was undertaking to comply with the order. The residents of Valhalla Park, however, remained dissatisfied and, in accordance with the original order, returned to court and submitted that the City was still failing to comply with its constitutional obligations. The City, on the other hand, steadfastly maintained that it was making policy and program improvements and was fulfilling its constitutional and statutory obligations. Selikowitz J found that although the reports did indeed show, albeit inconsistently, recognition by the City of what it needed to do, the City had nonetheless failed to implement measures to achieve full compliance.<sup>29</sup> In particular, there was no evidence of any program in place intended to deal with the short-term plight of the applicants or those in similarly desperate circumstances. However, in fashioning a remedy, Selikowitz J noted that having already granted a structural interdict which achieved recognition by the City of the applicants' rights and some action – albeit falling short of full compliance – it would be inappropriate for the court to further supervise compliance. Accordingly, Selikowitz issued a declaratory order that the City was still failing to comply with its constitutional obligations.<sup>30</sup>

Following this declaratory order, the City developed a new housing policy in an effort to ensure compliance with the order and its constitutional obligations. Interviews with the City in February 2010 indicated that this early phase of housing rights litigation was helpful in reforming their housing policy although they were resistant to having particular directions from the court on content or allocation. Moreover and, most importantly, none of the occupants of Valhalla Park were evicted. The settlement was partly improved by residents and interviews in 2007 indicated a certain pride by what they had achieved but frustration they could not go further in improving conditions.<sup>31</sup> In 2008, the City budgeted for the upgrading of the settlement and has now begun development in the area of a formal low-cost housing project comprising approximately 500 houses. A number of the applicants in *Valhalla* have been allocated housing in this development. As a follow-up to these developments, we will conduct further research into the housing delivery now underway in Valhalla Park.

## 2.2 Eviction cases

Despite some weaknesses in enforcement and impact, *Grootboom* (2000) is nonetheless regarded as a groundbreaking decision for socio-economic rights litigation and enforcement in South Africa, at least from a jurisprudential standpoint both for positive obligations and protection from forced evictions. Although socio-economic rights were constitutionally entrenched in the Bill of Rights in 1996, it was only in the *Grootboom* decision that the Constitutional Court fully acknowledged the justiciability of the rights, paving the way for subsequent litigation. In this section, we examine a selection of the many forced eviction decisions.

---

<sup>29</sup> *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C).

<sup>30</sup> He noted that the applicants could, of course, always approach the court in the future to assert their rights if they were dissatisfied with the City's compliance and could show an unjustifiable disregard for those rights.

<sup>31</sup> Valhalla Park United Front Civic Organisation and Environment and Geographical Science Department – UCT (2007).

### *Jaftha*

In *Jaftha* (2004), the appellants, Ms Jaftha and Ms Van Rooyen, were poor and unemployed women who suffered from ill-health. Both had children and lived with them in homes, which they had previously obtained through government subsidies. Both women borrowed small sums of money (R250 and R190, respectively) to be repaid in instalments to their respective creditors. When they were unable to repay their respective debts, proceedings were initiated against them in the Magistrate's Court, resulting in judgments in favour of their respective creditors and ultimately in the sale in execution of their homes in satisfaction of their outstanding debts. Both women lacked suitable alternative accommodation and, having lost their homes pursuant to sales in execution, both women were precluded as previous beneficiaries of State subsidies from applying again for State-subsidized housing. In response to the sales in execution, both women initiated proceedings in the Cape Town High Court requesting orders that the sales in execution be set aside and that the respondents be interdicted from taking transfer of their homes.

The High Court refused to grant them relief on the basis that if the debtor chooses to vacate the premises, the effective loss of his/her home is caused by the exercise of the debtor's own free will and not by the execution process.<sup>32</sup> The appellants appealed to the Constitutional Court on the basis that the legislation was constitutionally overbroad to the extent that it permitted a person's security of tenure, inherent in the right of access to adequate housing under s. 26, to be removed even where it would be unjustifiable to do so. In a unanimous decision, Mokgoro J held agreed to the extent that it allowed sales in execution in unjustifiable circumstances – for example, where a person could be rendered permanently homeless due to his/her failure to pay a trifling debt – without judicial intervention. The legislation was declared unconstitutional in that it failed to provide for judicial oversight over sales in execution.<sup>33</sup> In order to 'save' the impugned legislation, Mokgoro J read language into it requiring judicial oversight at the point of sale in execution of immovable property of judgment debtors, thereby enabling a court to determine whether to order sale in execution having considered all relevant circumstances, including: the circumstances in which the debt was incurred; any attempts made by the debtor to repay the debt; the financial situation of the parties; and, the amount of the outstanding debt. The Court also made what appeared to be an order requesting the Western Cape Law Society to investigate the behaviour of the lawyers for the creditors in the case.

Following the decision in *Jaftha*, although not ordered to do so by the Court, the Minister of Justice established a task team to draft new legislation setting out a procedure to govern the sales in execution process; to date, however, despite multiple drafts, no such legislation has been passed. In the absence of such a unified procedural

---

<sup>32</sup> Similarly, the Court held, that if the debtor chooses to remain in occupation, he/she would be "holding over" and the purchaser would be required to use the provisions of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* to secure eviction, in which case the eviction would be caused by the separate legal proceedings instituted by the new owner and not by the execution process.

<sup>33</sup> It is critical to note that prior to the decision of Mokgoro J in *Jaftha*, default proceedings were overseen simply by a clerk of the court who, in effect, 'rubber-stamped' the default judgment which provided for sales in execution in satisfaction of outstanding debts. The decision in *Jaftha*, however, drastically altered the nature of default proceedings by expressly requiring oversight by a judicial officer prior to granting default judgment.

framework and in light of a number of subsequent court decisions dealing with the procedure relating to applications for default judgments and the issuing of warrants for attachments of immovable property in pursuance thereof, some procedural aspects remain confusing (Smith and van Niekerk, 2010).

Indeed, it would appear that there are variable practices in the High Court and the Magistrate's Court, as well as disparate practices within these courts in different jurisdictions. Interviews with officials in the Western Cape High Court and with the National Sheriff's Office indicated that the judgment may have been simply proceduralised. Lawyers representing creditors submit an affidavit indicating why eviction was justified in the circumstances, and given that home owners often did not file legal defences, the executions proceeded.

The evidence that the practice continues is evident in a recent public hearing conducted by the South Africa Human Rights Commission in Gauteng (SAHRC, 2008). After complaints from residents in Katrhorus, Ennerdale and Lawley (and later from Eastern Cape) and public hearings with different stakeholders, the Commission found that "although many of the role players are following the letter of the law, more can be done". The Sheriffs and the South African Police Service "acknowledged that illegal evictions are taking place" and the Commission was particularly critical of the Department of Housing, for only focusing on 'low-income first-time homeowners' and not also evictions. It also criticised the private sector and "unscrupulous buyers", with allegations that law enforcement and local government officials were involved.

The Commission made an enormous range of recommendations to different actors indicating the potential complexity in addressing the problem, and potentially indicating that the reading-in order, a favourite of the Constitutional Court, might not have been appropriate since a broader policy and legislative effort could have been catalysed by some sort of deadline for a clear response. More importantly, it appears the issue has been largely overlooked by NGOs and social movements and the failure of different government agencies could justify strategic litigation.

We intend to conduct further research in relation to default proceedings and the sales in execution process. In particular, we have arranged to interview a lawyer who acts frequently for landlords in both the High Court and Magistrate's Court in such matters in order to ascertain more clearly the varying practices in different jurisdictions. We are also in the midst of obtaining information from the Sheriff's Office so as to enable us to examine whether the number of warrants for attachment of immovable property has increased or decreased and, to what extent, since the decision in *Jaftha*. We also hoped to find out the effect of the judgment on the two applicants and whether the Law Society took any action.

*Modderklipp*

*Olivia Road*

### **3. Health Rights Cases**

*TAC*

*Westville*

*Nyathi*

### **4. Social Security cases**

*Ngxuza/Jaiya/Kate*

*Black Sash*

*Khosa*

### **5. Conclusion**

#### **Bibliography**

Amnesty International (2009), *South Africa: Failure to conduct impartial investigation into Kennedy Road violence is leading to further human rights abuses*, Public Document AI Index: AFR 53/011/2009, 16 December.

Berger, John (2008), 'Litigating for Social Justice in Post-apartheid South Africa: A Focus on Health and Education', in Varun Gauri and Daniel Brinks (ed.), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (New York: Cambridge University Press), pp. 38-99.

Ballard, Richard, Adam Habib, Imraan Valodia (eds) (2006) *Voices of protest: social movements in post-apartheid South Africa*. (Scottsville: University of KwaZulu-Natal Press).

Epp, Charles (2009), *Making Rights Real: Activists, Bureaucrats and the Creation of the Legalistic State* (Chicago: University of Chicago Press).

Foss Hansen, Hanne and Olaf Rieper (2009), 'The Evidence Movement: The Development and Consequences of Methodologies in Review Practices', *Evaluation* Vol. 15, pp. 141-163.

Heywood, M (2003) 'Contempt or compliance? The TAC case after the Constitutional Court judgment', *ESR Review*, Vol. 4, No. 4, pp. 7-10.

- Hirschl, Ran (2004), *Towards Juristocracy* (Cambridge: Harvard University Press).
- Huchzermeyer, Marie (2009), 'The Constitutional Court's misunderstanding of Chapter 13 of the Housing Code, with regards to interim servicing of informal settlements under this Programme', Email, 19 November.
- Liebenberg, Sandra (2008), "South Africa: Adjudicating social rights under a transformative constitution", in Malcolm Langford (ed.) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press),
- Liebenberg, Sandra (2010) *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Pretoria: Juta Press).
- Madlingozi, Tshepo (2007), 'Post-Apartheid Social Movements and the Quest for the Elusive 'New' South Africa *Journal of Law and Society*, Vol. 34, No. 1, pp. 77-98.
- Gilbert, Marcus and Budlender, Stephen (2008), *A Strategic Evaluation of Public Interest Litigation in South Africa*, prepared for the Atlantic Trust.
- Mbazira, C. (2008), 'Non-Implementation of court orders in socio-economic rights litigation in South Africa', *ESR Review*, Vol. 9, No. 4, pp. 2-7.
- Petticrew, M. and H Roberts (2003), 'Evidence, hierarchies and typologies: horses for courses', *Journal of Epidemiology and Community Health*, Vol. 57, pp. 527-29.
- Pieterse, M. (2007) 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited', *Human Rights Quarterly*, Vol. 29, No. 3, pp. 796-822.
- Pillay, Karisha (2002), 'Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights', *Law Democracy and Development*, Vol. 6, pp. 255-277.
- Porter, Bruce (2009), 'The Reasonableness Of Article 8(4) – Adjudicating Claims From The Margins', *Nordic Journal of Human Rights*, Vol. 27, No.1, Special Issue: *Perspectives on a New Complaint and Inquiry Procedure: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, pp. 39 – 53.
- Robins, Steven (2008), *Revolution to Rights in South Africa: Social movements, NGOs and Popular Politics after Apartheid* (London: James Currey).
- Roux, Theunis (2004), Pro-Poor Court, Anti-Poor Outcomes: Explaining the Performance of the South African Land Claims Court, *SAJHR* (2004) pp. 511-543.
- Rosenberg, Gerald (1991), *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press).
- Scheingold, Stuart (1974), *The Politics of Rights: Lawyers, Public Policy and Social Change* (Ann Arbor: Yale University Press).
- Smith, Christo and van Niekerk, SJ (2010), 'Execution Against Immovable Property: Negotiating the Tightrope of s 26'. *DeRebus*, Jan/Feb 2010, pp. 32 – 33.
- South African Human Rights Commission (2008), *Report on the Public Hearing on Housing, Evictions and Repossessions*, Pretoria.
- Sunnstein, Cass (2004), *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (New York, Basic Books).

- Swart, M (2005) 'Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor', *South African Journal of Human Rights*, Vol. 21, pp.\_\_\_\_.
- Tushnet, Mark (2008), *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press).
- UN Habitat (2008), *State of the World's Cities Report 2008-2009* located at <http://www.unhabitat.org/content.asp?cid=5964&catid=7&typeid=46&subMenuId=0>.
- UK Joint Committee on Human Rights of the House of Lords and House of Commons (2004) *Report on the International Covenant on Economic, Social and Cultural Rights*, Twenty First Report of Session 2003-2004 (20 October 2004)
- Valhalla Park United Front Civic Organisation and Environment and Geographical Science Department – UCT (2007), *My 7 de Laan*, Report, University of Cape Town.
- Van Wyk, J. (2007), 'The complexities of providing emergency housing assistance in South Africa', *TSAR*, No. 1, pp. 35-55.
- Waldron (2007), 'Socio-Economic Rights and Theories of Justice', in Thomas Pogge *Freedom from Poverty as a Human Right*, Vol. 2 (Oxford: Oxford University Press).
- Wilson, Stuart (2009) "Litigating Housing Rights in Johannesburg's Inner City" in C Jenkins, M du Plessis and K Govender (eds) *Law, Nation building and Transformation* (Intersentia).
- Wilson, Bruce (2009), 'Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics', *Comparative Political Studies*, Vol. 20, No. 10, pp. 1-27.