Grootboom at Home and Abroad: Adventures in the construction of a Global Constitutional Cannon

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Introduction

With the post-cold war explosion of new 'justiciable' constitutions and the inclusion in some cases of social and economic rights, the revitalized field of comparative constitutionalism has included a renewed interest in the question of whether courts are suited to the enforcement of 'positive' rights. It is in this context that the South African Constitutional Court's decision in *Government of the Republic of South Africa v Grootboom* has become canonical. In exploring the life of "Grootboom" at home and abroad, I hope in this ticket to reflect on both the ways in which the case has become part of a new global cannon of comparative constitutional law cases – literally becoming the "big tree" in our imagining[1] of how 'positive' or 'affirmative' rights might be justiciable – while simultaneously serving as merely the first branch in what is a 'living tree' of judicial interpretation of social and economic rights in post-apartheid South Africa.

Imaging the 'big tree' – *Grootboom* abroad

While South Africa's democratic transition coincided with, and was in part enabled by, the end of the cold war,[2] the inclusion of social and economic rights in the country's new Constitution at the end of the constitution-making process in 1996 was contested both politically and among academic commentators. Opposition parties challenged the inclusion of these rights as justiciable rights in the *First Certification Case* in which the Constitutional Court was called up on to verify that the Constitutional Assembly had abided by the constitutional principles included in Schedule 4 of the negotiated 'interim' 1993 Constitution that guided South Africa's transition, and among others Cass Sunstein had called on East European constitution-makers to limit their efforts to the protection of property rather than include the 'positive' rights that had been the markers of their prior constitutions.[3]

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[1] See, Clifford Geertz (1983), Local Knowledge: Further Essays in Interpretative Anthropology p. 184 [concluding that, "law," here, there or anywhere, is a distinctive manner of imaging the real.].

[2] See, Klug, Heinz (2000), Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction.

[3] See, Sunstein, Cass (1996) Against Positive Rights, in Western Rights? Postcommunist Application (Andras Sajo, ed).

The *Grootboom* decision, the first case in which the South African Constitutional Court upheld a 'positive' right was decided at the very moment in which the new wave of constitutions and constitutional decisions around the globe was being embraced by activists and academics in a revitalization of the tradition of comparative constitutional law. In the growing field of comparative constitutional law *Grootboom* looms large as a standard reference for the justiciability of social and economic rights as well as a form of implementation that is conducive to the development of a sustainable role for courts in this arena. In the Jackson and Tushnet text on comparative constitutional law the authors use *Grootboom* together with its immediate successor, the *Treatment Action Campaign* case, to highlight both the judicial enforcement of social and economic rights as well as the inherent limits to judicial enforcement *Grootboom* seems to reveal. Significantly, it is this second aspect of the decision that seems to be the mark of its cannonization.

This is most obvious in the Dorsen et al text which uses *Grootboom* to focus on the nature of the obligations recognized by the Constitutional Court and the relationship of these obligations to the problem of limited state resources. Noting that the Court "does not create direct individual claims for access to adequate housing," but rather confers "on the government a duty to establish and maintain a system that provides adequate access to housing," Dorsen et al conclude that "*Grootboom* is more important for what it does not say about social rights; in fact it refuses the claim of petitioners to recognize a substantive social right."[4] In a similar vein *Grootboom*, and most specifically its remedy, has come to represent an acceptable approach to the problem of the judicial implementation of social and economic rights. Despite his earlier concerns Cass Sunstein seems to have been persuaded and has embraced the Court's remedy as a form of administrative law which he describes as "a novel and highly promising approach to judicial protection of socio-economic rights."[5] Others have embraced Grootboom as an example of democratic experimentalism and Mark Tushnet uses the case as one model of weak-form judicial review in his development of a taxonomy of judicial review that accepts "the proposition that the state action/horizontal effect doctrine, social welfare rights, and background rules of property and contract are equivalent."[6]

The case has also been adopted in international law discussions of the incorporation and enforcement of those social and economic rights contained in the International Covenant on Economic, Social and Cultural Rights. Even though *Grootboom* explicitly declines to adopt the approach of the United Nations Committee on Economic, Social and Cultural Rights which defines the '"minimum core obligations" to assure "minimum essential levels"[7] both major international human rights texts, authored by David Weissbrodt et al and Henry Steiner et al respectively, present *Grootboom* as an example of the impact or implementation of the International Covenant on

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[4] Dorsen et al., p. 1373.

[5] Sunstein, Cass (2001), Designing Democracy: What Constitutions Do.

[6] See, Tushnet, Mark (2002) State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations, 3 Chicago Journal of International Law 435.

[7] See Jackson, Vicki (2010) Constitutional Engagement in a Transnational Era, p. 78.

Economic, Social and Cultural Rights. While the Weissbrodt text uses *Grootboom* to explore the debate over the justiciability of economic, social and cultural rights, the Steiner text argues that *Grootboom* and its immediate successor, the *Treatment Action Campaign* case, show the way forward for the implementation of social and economic rights (SERs). It is this focus on the role of *Grootboom* in finding a means of addressing the inherent difficulty of imaging a Court dictating the allocation of scarce resources in circumstances that raise obvious problems of judicial enforcement, separation of powers and concern over the capacity of Courts more generally, that has in my view brought cannonical status to the case.

Grootboom at home – the context of delivery jurisprudence

While many South African academics did question whether the new constitution should include social and economic rights and have continued to debate whether the included rights are truly justiciable and enforceable by the Constitutional Court, the line of jurisprudence that began in earnest with *Grootboom* has become a central part of ongoing struggles to gain access to scare social and economic resources in South Africa.

Delivery, or the failure to deliver social and economic resources, has become the dominant mantra of South African politics over the last decade. Despite fifteen years of democracy the legacies of apartheid, including poverty, unemployment, limited government capacity as well as criminal and domestic violence remain an ever present reality. In addition the country has faced new challenges including a devastating HIV/AIDS pandemic and increasing inequality.[8] At the local government level this is reflected in extraordinary levels of inequality between and within municipalities[9] producing an uneven landscape in which contestation over resources, unfulfilled expectations and governance failures are reflected in ongoing—and at times violent—service delivery and other protests. Local protests increased after the 2004 national elections, grew to a crescendo of around 6000 in 2006,[10] and have continued sporadically since then. While these forms of public resistance are clear evidence of local anger and disenchantment with ineffective delivery or unpopular government decisions— such as the redrawing of municipal and provincial boundaries—the vast majority of municipalities have been engaged in a protracted process of transformation with decidedly mixed results. Analysts have identified three underlying problems that they argue are the main causes of public anger: 'ineffectiveness in service delivery, the poor responsiveness of municipalities to citizen's grievances, and the conspicuous consumption entailed by a culture of self-

[8] See, Seekings, Jeremy and Nicoli Natrass, Class, Race and Inequality in South Africa, Scottsville, South Africa: University of KwaZulu-Natal Press (2006).

[9] See, Neva Seidman Makgetla, Local government budgets and development: a tale of two towns, in State of the Nation: South Africa 2007, HSRC Press, pp. 146-167.

[10] See, Sydney Letsholo, Democratic Local Government Elections in South Africa: A Critical Review, EISA Occasional Paper Number 42, September 2006 p.6.

enrichment on the part of municipal councillors and staff'.[11] Tackling these issues and thus delivering the benefits of democracy are viewed by government and social movements as both addressing a pressing need as well as a constitutional imperative.

While the government has remained publicly committed to addressing these legacies, debates over government priorities and policies have led some activists to stress the Constitution's provision of justiciable social and economic rights and the duty of government to promote and fulfill these rights. Increasingly, this has led activists to seek redress in the courts with the hope of redirecting government policies and resources. The most successful of the new social movements to emerge in the post-apartheid era have adopted a multilayered strategy of: appeals to government, public mobilization and legal strategies. These questions of 'delivery' are reflected in a multitude of legal challenges involving a range of government programs and obligations from the distribution of social grants and other government benefits to challenges over the provision of housing and access to water. Significantly, the constitutional issues that have arisen in this arena have implicated both the negative and positive aspects of social and economic rights, demonstrating the intimate relationship between and even the entanglement of these different dimensions of constitutional rights.

Responding to these cases the Constitutional Court has steadily built and refined its social and economic rights jurisprudence. It has also been called upon to decide cases that impact service delivery through claims that government action or inaction has interfered with property rights or has violated the obligation to perform its duties diligently and without delay. The developing 'jurisprudence of delivery' is most evident in a series of cases from *Machela*, *Joe Slovo* and *Abahlali baseMjondolo* involving evictions and housing to *Reflect All 1025*, *Nokotyana, Joseph* and *Mazibuko* that address broader issues of service delivery including: property rights, infrastructure planning, procedural fairness and access to electricity and water services. Significantly these cases all reflect the struggles of urban dwellers, from high-rise apartment blocks to informal settlements, for access to essential social and economic resources and reveal both the limited capacity of government to deliver the services it promises at each election cycle and the gross inequalities that continue to mark the lives of so many people in the country. The Constitutional Court's engagement with these cases presents an extraordinary window into the lives of these communities and has required the Court to confront both the limits of its very early social and economic rights jurisprudence as represented by *Grootboom* – by looking beyond policy to the failure of implementation – while at the same time seeking to formulate a clearer understanding of the role of the Court in this arena.

The one set of cases within this 'delivery jurisprudence' that is of enormous importance to understanding the relationship of the negative and positive dimensions of social and economic rights in the Constitution are those cases in which the right to housing and processes of eviction have

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[11] Doreen Atkinson, Taking to the streets: has developmental local government failed in South Africa? in State of the Nation: South Africa 2007, Human Sciences Research Council Press: Pretoria, p. 53.

become entangled.[12] The first case decided in this series was *Machele* which involved an appeal against a court ordered eviction of the residents of Angus Mansions, a building owned initially by a company (Philani) established by the Gauteng Department of Housing as part of a scheme for the use of a national government subsidy to provide security of tenure to the residents. While the High Court decided the building had been transferred to a new owner and granted the eviction order at the request of the owner, the judge of the High Court also granted leave for Philani to appeal the question of ownership and failed to consider either the constitutional rights to housing of the residents or the requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) in making the decision to grant the eviction order. It seems that for Willis J, this was a simple case of private law in which the established owner had a right to occupy their property. The response of the Constitutional Court was to pounce on this failure, castigating the High Court's behavior as "inexcusable" for authorizing "the eviction without having regard for the provisions of PIE" and asserting the importance of PIE "given that there are still millions of people in our country without shelter or adequate housing and who are vulnerable to arbitrary evictions."[13]

While PIE is a statutory provision Justice Skweyiya proceeds to imbue it with constitutional authority by drawing on the history of forced removals to declare that "[i]n my view, an eviction from one's home will always raise a constitutional matter."[14] He also relies upon the Court's own precedent which held that PIE was adopted to ensure that evictions would take place in a manner consistent with the values of the new constitutional order[15] to declare that the:

> application of PIE is not discretionary. Courts must consider PIE in eviction cases. PIE was enacted by Parliament to ensure fairness in and legitimacy of eviction proceedings and to set out factors to be taken into account by a court when considering the grant of an eviction order. Given that evictions naturally entail conflicting constitutional rights, these factors are of great assistance to courts in reaching constitutionally appropriate decisions.[16]

This decision gives all housing or residential evictions constitutional standing but also draws on the legislative framework adopted by democratic institutions to shape the role of the courts and thus provide a 'democratic interpretation' of the constitutional requirement that only courts may order evictions "after considering all the relevant circumstances" and the prohibition against arbitrary evictions.[17] If in this case the Court was able to protect the residents from imminent eviction pending the appeal over the ownership of the building, the two subsequent cases reveal a much more

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[12] This interaction has been identified in comparative constitutional law discourse through the work of Gregory Alexander who focuses on this in his chapter on Property in Global Perspectives on Constitutional Law (ed. Vikram David Amar and Mark Tushnet, 2009).

[13] *Machele* [16].

[14] *Machele* [26].

[15] See, *Port Elizabeth Municipality v Various Occupiers* [11].

[16] *Machele* [15].

[17] Constitution, Section 26(3)

complicated landscape in which the process of delivery and evictions is more intimately entangled.

In the first of these two cases, *Joe Slovo*, the Constitutional Court was confronted with a decision by the Western Cape High Court granting an eviction order that authorized the mass relocation of approximately 20,000 people. The order had been sought by and was granted to a housing company that was attempting to implement a government contract to "facilitate the development there of better quality housing than the informal housing presently in use."[18] From this perspective the eviction process was merely a required step in the redevelopment of an informal settlement and the building of housing units as part of the process of delivery explicitly required by the government's housing policy. In the Constitutional Court there was agreement among the judges that there were two legal issues to be addressed: first, whether the respondents had made a case for eviction in terms of the PIE Act based on whether the applicants were "unlawful occupiers" and that it was "just and equitable to issue an eviction order"[19]; and, second, whether the respondents had acted reasonably within the meaning of Section 26 of the Constitution in seeking the eviction of the applicants."[20] While the Court agreed in its fractured decision on the disposition of the specific legal issues there was an important difference of opinion over the specific contours of the Court's right to housing jurisprudence.

Justice Yacoob proceeded in his opinion to cite the Court's decision in *Grootboom* to make the argument that the measures undertaken by the respondents – the public housing company and the City – in a context in which the evictions were deemed necessary to proceed with the housing development, were reasonable."[21] The premise of Justice Yacoob's argument is that the obligation on the government is to have, in the language of *Grootboom* a "coherent public housing program directed towards the progressive realisation of the right of access to adequate housing within the State's available means."[22] His only acknowledgment of the evolution of the Constitutional Court's Section 26 jurisprudence is his assertion that in this case "there has been reasonable engagement all the way,"[23] fulfilling the duty to consult first announced in *Grootboom* and developed in subsequent cases into a requirement that there by meaningful engagement[24] with the effected communities. While the engagement requirement emerges from the argument in *Grootboom* that the government has a duty to consult, the emphasis on human dignity and the obligation that government has "to

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[18] *Joe Slovo* [8].

[19] *Joe Slovo* [3].

[20] *Joe Slovo* [3].

[21] *Joe Slovo* [115].

[22] *Grootboom* [41] cited by Yacoob in *Joe Slovo* [115].

[23] *Joe Slovo* [117].

[24] See, *Occupiers of 51 Olivia Road* (2008) [10] - [21]; and, *Port Elizabeth Municipality* (2004) [39] and [43]-[47].

consult meaningfully with individuals and communities affected by housing development"[25] that Justice Yacoob recognized in *Grootboom* seems to have been reduced in his analysis, under the circumstances of 'delivery,' to a more formalistic conception of consultation with the legal representatives of the community.[26]

While the four other members of the Court who wrote separate opinions in *Joe Slovo* all accepted Justice Yacoobs final order, they differed from him in their conception of the relationship between a just and equitable eviction and whether the residents of the Joe Slovo informal settlement had always been 'unlawful occupiers' given the prior actions of the government in providing some facilities to the residents before the question of redevelopment of the area arose. In contrast to Justice Yacoob's formalistic interpretation of 'unlawful occupation' Deputy Chief Justice Moseneke adopts an purposive interpretation of 'consent' and embeds the idea of 'unlawful occupation' within the "dark history of spatial apartheid and forced removals from land."[27] Emphasizing the landlessness that is at the center of the problem of 'informal settlements' Justice Moseneke states that barring the Court's Order requiring that 70 percent of the new housing go to existing or past residents of Joe Slovo he would not have considered it just and equitable to grant the eviction order since the "eviction and relocation order would have made the residents of Joe Slovo sacrificial lambs to the grandiose national scheme to end informal settlements when the residents themselves stood to benefit nothing by way of permanent and adequate housing for themselves."[28] Justice Moseneke concludes that in cases where there is a long settled community and especially if that community is on state land:

> different and more stringent considerations may well apply given the obligations under section 26(2) of the Constitution. The state, alive to its onerous constitutional obligations to facilitate access to housing and to prevent and protect people from arbitrary eviction, cannot lightly escape these obligations by simply resorting to treating occupiers who have nowhere else to go as mere unlawful occupiers liable to eviction. Also, the longer the occupation upon state land, the greater the state's obligation to afford occupiers due and lawful processes consistent with constitutional protections on eviction and access to housing.[29]

The four concurring opinions also seem to reject Justice Yacoob's formalistic conception of 'engagement' and instead imply that the acceptance by the respondents, memorialized in the court's order, that 70 percent of the new housing would be made available to those who had, or will have to, leave the area, is indicative of an effective engagement. The consultation required in *Grootboom* and which evolved into a requirement of engagement in the Court's subsequent jurisprudence is in this way linked to the specific needs and demands of the community, indicating not only that the

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[25] *Grootboom* [84].

[26] See, *Joe Slovo* [117].

[27] *Joe Slovo* [147].

[28] *Joe Slovo* [138].

[29] *Joe Slovo* [148].

government has 'consulted' but also that it has heard and responded reasonably to those it has engaged.

Justice Moseneke's concern that residents of informal settlements will be "sacrificial lambs to the grandiose national scheme to end informal settlements" and the entanglement of evictions and the delivery of housing became the core issue in the final evictions case of the 2009 term. In *Abahlali baseMjondolo* the Court was confronted with a new statutory scheme, the KwaZulu-Natal Elimination and Prevention of the Re-emergence of Slums Act that both the majority decision and the dissent recognize as "experimental pilot legislation which may be duplicated in other provinces if it is effective."[30] Claiming a fictive distinction between 'informal settlements' and 'slums' the legislation would empower the Provincial MEC to compel municipalities and property owners "to evict certain categories of unlawful occupier"[31] in the name of effective housing delivery. The case also saw a further crystallization of the different approaches of Justices Yacoob and Moseneke, with a clear indication that the majority of the Court have rejected the formalism inherent in Justice Yacoob's willingness to accept vague assurances in the legislation that its goal is the delivery of decent housing when in substance it undermines constitutional guarantees and the protections given in the PIE Act. Unlike the divided opinion in *Joe Slovo* the Court united in *Abahlali* to reject Justice Yacoobs defense of this legislation and Deputy Chief Justice Moseneke explicitly contrasts this legislation with the "dignified framework that has been developed for the eviction of unlawful occupiers" and finds that section 16 of the Slum Act is incapable "of an interpretation that does not violate this framework."[32] Instead the majority points to the Constitution, the national Housing Act and the PIE Act as the source of protections for unlawful occupiers and argue that these sources of law "ensure that their housing rights are not violated without proper notice and consideration of other alternatives."[33]

The difference in interpretative approaches between Justice Yacoob and the majority in the *Abahlali* case provides an important lens through which to observe the interplay of the 'internal' and 'external' dimensions of the Court's jurisprudence. While Justice Yacoob focused on the formal statements in the provincial legislation claiming that there was no inconsistency between the coercive requirements of section 16 and fealty to the national housing laws, PIE and the Constitution, the majority of the Court refused to rely on the plain wording of the statute and instead took cognizance of the broader context in which provincial legislation was being seen as a tool by local authorities in their struggles to 'deliver' housing over the contention of residents in informal settlements who are organized and intent on having some say in the fate of their communities. Already in *Joe Slovo* the majority of Justices were less willing to blindly accept that the goals of local authorities to redevelop informal settlements and 'deliver' housing should be assumed to be

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[30] *Abahlali* [16] and [126].

[31] *Abahlali* [1].

[32] *Abahlali* [122]

[33] Id.

reasonable, especially when the question of eviction, which invokes a negative obligation against state action, becomes a central mechanism in the 'delivery' of the positive obligation to provide housing. In *Abahlali* the Court becomes increasingly concerned that a formalistic interpretation of the legislation would simply gloss over the allocation of coercive power to government which seems increasingly willing to override local concerns in the name of delivery.

A purely doctrinal approach based upon the plain meaning of the words would seem to support Justice Yacoob's argument that the Court should assume the constitutionality of the provincial legislation, especially in a case of abstract review when the wording of the statute asserts that it should be interpreted in conformity with national law and the Constitution.[34] In fact Justice Yacoob defends his argument for the constitutionality of the Slums Act by arguing that his fellow justices in their majority opinion do:

> not give full weight to (in fact it virtually ignores) the words "in a manner provided for in section 4 or 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act" contained in section 16(1) as well as the obligation on the municipality to "invoke the provisions of section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act" prescribed by section 16(2) of the Act.[35]

Here Justice Yacoob is clearly calling for an 'internal' reading of the law and the Court's jurisprudence and criticizes his colleagues for looking outside and beyond the words by quoting the statement on constitutional interpretation made by Acting-Justice Kentridge in *S v Zuma*, the Constitutional Courts first reported case, reminding them that:

> [t]his Court has made it plain that "if the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination." It does not matter whether the words of a law are simply ignored or whether they are ignored in favour of a general resort to values. Words should not be ignored.[36]

In contrast to this 'internal' orientation the majority evoke an 'external' understanding by recognizing the purpose of this legislation and highlighting its coercive form. Justice Moseneke argued that "an appropriate construction is one that recognises the coercive import of section 16. This means that owners and municipalities must evict when told to do so by the MEC in a notice."[37] These compulsory evictions also mean that section 16 does not in fact reflect the "provisions of the national Housing Act and of the National Housing Code which stipulate that unlawful occupiers must be ejected from their homes only as a last resort."[38] While concurrent provincial legislation does not need to be in conformity with national legislation, Justice Moseneke argues that the "courts must give legislation a purposive and contextual interpretation" and must through their

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[34] *Abahlali* [43].

[35] *Abahlali* [61].

[36] Id.

[37] *Abahlali* [111].

[38] *Abahlali* [113].

interpretation promote the "spirit, purport and object of the Bill of Rights."[39]

Applying this approach requires a view of the Court's role that incorporates not only the internal language of jurisprudence but also the consequences of the law in action so as to give real content to the notion that eviction be resorted to only as a last resort and that evictions only go forward after reasonable engagement with the community. The substantive consequences of this approach are evident in the emergence of the idea of engagement which has been transformed from an initial commitment to consult to a prerequisite for any legal eviction, thus placing real constraints on the coercive power of the state. According to Justice Moseneke:

> "no evictions should occur until the results of the proper engagement process are known. Proper engagement would include taking into proper consideration the wishes of the people who are to be evicted; whether the areas where they live may be upgraded *in situ*; and whether there will be alternative accommodation. The engagement would also include the manner of eviction and the timeframes for the eviction."[40]

Significantly the majority relies on the distinction between the "coercive import"of section 16 and the "fact that the PIE Act does not compel any owners or municipality to evict unlawful occupiers," to find this key element of the Slums Act unconstitutional. Here the Court is concerned more with the coercive power of the state and less with the impact their decision might have on resource allocation and in this sense the case falls well within the realm of a defensive response to government decision-making despite the consequences for the 'delivery' goals of local authorities and the national government.

Socio-economic rights jurisprudence in a post-*Grootboom* era

If the Constitutional Court has continued to develop its housing jurisprudence, specifically addressing the entanglement of the positive and negative obligations that are implicit in the context of the delivery of adequate housing in informal settlements – where the process of redevelopment might in some cases require the eviction of residents – it has also now gone beyond *Grootboom* in confronting the demand that the Court set minimum standards for the delivery of social and economic rights. This confrontation arose most dramatically in a case involving claims of rights to access water in which the lower courts – both the High Court and the Supreme Court of Appeal – ordered the delivery of specific amounts of water as the appropriate means of enforcing the right. Much to the disappointment of many activists, the Court, in a unanimous opinion by Justice O'Regan, not only refused to uphold the lower courts determination of a minimum core as an aspect of the right to sufficient water, but instead "concluded that neither the Free Basic Water policy nor the introduction of pre-paid water meters in Phiri [Soweto] as a result of Operation Gcin'amanzi

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[39] *Abahlali* [119].

[40] *Abahlali* [114].

constitute a breach of section 27 of the Constitution."[41] In this case the Court is unanimous, relying on the "text of the Constitution" and "from an understanding of the proper role of courts in our constitutional democracy"[42] to conclude that while social and economic rights contain both negative and positive dimensions the difference between negative obligations that restrain government and the positive obligations requiring 'delivery' is quite distinct.

While defining the realm of legal restraint seems to fit easier into the Court's conception of its role, the enforcement of positive rights places courts, the decision argues, in a secondary role. On the one hand the Court argues that "ordinarily it is 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 realization of the right,"[43] while on the other hand, the Court argues that "social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement"[44] of these rights.

It would be a mistake to conclude that on its face this opinion indicates that the Court is retreating from the struggle over 'delivery' or is simply overwhelmed by the complexity of 'polycentric' decision-making. While the Constitutional Court does indeed reverse the 'strong' decisions of the lower courts – by refusing to adopt a minimum core approach to the definition of positive obligations – it does, for the first time, lay out exactly what it sees as the role of the courts in upholding the positive obligations of the state to 'realize' social and economic rights and makes it clear that this is not simply an administrative law standard of reasonableness. Significantly the courts approach now ties together three strands of constitutional analysis that are all important for locating the role of the court as much as providing a basis for the review of social and economic rights achievement. First, the Court makes it clear that it is the legislature and the executive who must define the manner in which these rights are delivered as "it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subject to democratic popular choice."[45] Second, the Court points to a combination of context and circumstances to highlight the variability of options and even the degree of positive obligation, arguing that the courts are "ill-placed to make these assessments for both institutional and democratic reasons,"[46] and to assert that the decisions of the Court in this realm – *Grootboom* and *TAC No. 2* – demonstrate the "court's institutional respect for the policy-making function of the

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[41] *Mazibuko* [169].

[42] *Mazibuko* [57].

[43] *Mazibuko* [61].

[44] *Mazibuko* [59].

[45] *Mazibuko* [61].

[46] *Mazibuko* [62].

two-other arms of government."[47] Finally, even as the Court asserts this classic separation of powers argument it seeks to clarify its own role by defining the purpose of social and economic rights litigation concerning positive obligations as being to "hold the democratic arms of government to account."[48]

But defining the role of the Court as holding the government to account for the substantive delivery of social and economic resources surely begs the question – what content do these rights have? Here the Court proceeds to explain how it sees its role in upholding the promise of the Certification judgment's holding that social and economic rights are indeed justiciable by proceeding to define the minimum level of enforcement required of the courts. First, "if government takes no steps to realise the rights, the courts will require government to take steps."[49] Second, if "government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness."[50] Third, if "government adopts a policy with unreasonable limitations or exclusions . . . the Court may order that those are removed"[51] and finally, "the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised."[52]

A recent decision, *Moonlight*, goes even further in requiring a municipal government to provide alternative accommodation to persons being legally evicted from private property before the City may implement the eviction order. These requirements definitely go way beyond the scope of a reasonableness analysis of government decisions and actions as required by administrative law and are clearly a crystalization of the Constitutional Court's prior experiences in *Grootboom* and its immediate progeny. They also reflect the tension between an internal logic of jurisprudential development that was leading inexorably towards the conclusion that there must be some minimum content to these rights and an external or sociological understanding of the role of judicial review in the struggle over delivery in post-apartheid South Africa.

Conclusion

If *Grootboom* has entered the global comparative constitutional cannon as an example of judicial restraint in the implementation of social and economic rights, its domestic transformation requires us to distinguish between the "big tree" of the cannon and the living tree of local jurisprudence.

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[47] *Mazibuko* [65].

[48] *Mazibuko* [160].

[49] *Mazibuko* [67].

[50] Id.

[51] Id.

[52] Id.