

Practical Obstacles to Public Interest Litigation: Progress and Pitfalls in South Africa's Socioeconomic Jurisprudence

South Africa has been declared a winner since day one. With the advent of the South African Constitution and free and fair elections in 1994, resulting in the election of President Nelson Mandela, South Africa and the South African Constitution were popularly seen as the start of a new direction for the human rights movement. With the conclusion of the Cold War, and the victory of the view that civil and political and socioeconomic rights needed to be treated as equally valuable, South Africa seemed to encompass the wide ranges of hopes for human rights going forward. Many claimed that oppression was over in South Africa and the country was merely a successful and peaceful transition away from leaving behind an abusive government-something rarely seen before. The model of the South African Constitution was to be utilized subsequently in a number of African states. Boutros Boutros-Ghali, UN Secretary-General at the time of transition, welcomed South Africa back into the world community and paid tribute to President Nelson Mandela and FW de Klerk at Mandela's presidential inauguration lunch, saying that "today South Africa regained its rightful place in Africa, in the UN, and the family of nations. South Africa has earned the respect and admiration of all; tireless in search of understanding, and vigorous in pursuit of peace. You have refused to let difficulties defeat you."¹ The transition, the Constitution, and the government were hailed as victorious before it had even begun to undertake the daunting task of governing a deeply divided country.

¹ 72 Days That Shaped South Africa." *Southafrica.info*. Big Media, n.d. Web. 5 Feb. 2014. <<http://www.southafrica.info/about/history/72days11.htm>>.

The country today faces a number of economic, racial, religious, and political issues that have undercut the hope many people had at the end of apartheid. Youth that were born after the end of apartheid see a country that is still divided along many economic and racial lines. Though these divides exist in many countries across the world South Africa was thought to have a great chance at remedying them, due to its liberal constitution, robust civil society, and prominent human rights figures.

In 1996, South Africa was transformed under a constitutional order with a fundamental commitment to human rights. Notable about the South African Constitution is the extent to which it reaches beyond civil and political rights to include social and economic rights such as: rights to housing, health care, food, water, social security environmental protection, education and equitable access to land. By including these rights, the Constitution reaches towards what the Preamble describes as “freeing the potential of each person”² and rectifying the economic inequality that plagued the country. In doing so it also identified socioeconomic issues of inequality as one of the most formidable obstacles South Africa faces.

In order for these protections to be more than merely a hope, the 1996 Constitution does three particularly important things to ensure rights are realized. First the Constitution requires the State to “respect, protect, promote and fulfill the rights in the Bill of Rights.”³ Even if some social and economic rights are subject to progressive realization, the state is in any case under a specific legal obligation to respect, protect, and fulfill them. Second, the Constitution makes the rights in the Bill of Rights justiciable. If the state does not fulfill its duty, the citizens have

² Preamble to the Constitution of the Republic of South Africa (1996)." *Thepresidency.gov.za*. South Africa Government, n.d. Web. 11 Mar.2014. <<http://www.thepresidency.gov.za/docs/reports/annual/2008/preamble.pdf>>

³ Constitution, *The Department of Justice and Constitutional Development*. Department of Justice, n.d. Web. 28 Apr. 2014. <<http://www.justice.gov.za/legislation/constitution/constitution.htm>>.

recourse to an independent judiciary, which includes the Constitutional Court. Third the Constitution also creates several government entities and strategies aimed at strengthening constitutional democracy and helping citizen's address human rights grievances. Among these are chapter nine institutions such as the South African Human Rights Commission, an independent body meant to promote and monitor the realization of rights (among these socioeconomic rights).⁴ While touching on some of these other measures the Constitution implemented, this paper concerns itself primarily with the Constitutional Court.

The Constitutional Court is the highest court of the independent judiciary through which individuals can seek recourse if their rights are violated. It is the body through which laws and policies are judged to be in accordance with the South African Constitution. This court was tasked with the burden of developing the jurisprudence around socioeconomic rights, which had traditionally been thought of as non-justiciable. During the transition the African National Congress came to power, and has subsequently dominated government, with part of their platform being the reconciliation of the economic divide between blacks and whites. The Constitutional Court has faced questions, concerns, and skepticism about whether it and other institutional bodies can deliver on the multitude of promises made in the Constitution.

Today many of the aforementioned institutions such as the Human Rights Commission, various government economic programs aimed at redevelopment, and the government itself has come under criticism because they have proved ineffective at delivering on their promise to help rectify economic inequality. The change in government economic programs from the Reconstruction and Development Program (RDP) to the Growth, Employment, and

⁴ Newman, Dwight. "Institutional Monitoring of Social and Economic Rights:A South Africa Case Study and a New Research Agenda." *ESCR-Net*. International Network for Economic, Social & Cultural Rights, 2003. Web. 1 Apr. 2014. <http://www.escr-net.org/usr_doc/Newman_Institutional_Monitoring.pdf>

Redistribution (GEAR) program largely abandoned the idea of development for the poor, the ANC dominated government has become increasingly criticized for corruption and ineffectiveness in lessening the inequality gap in the South Africa, and the Human Rights Commission has become largely impotent. Because of these factors, the Court has unfortunately been thrust to the center of the debate around socioeconomic rights. As other institutions and programs have failed or fallen short of the expectations around them, the Court has been forced to shoulder much of the burden of realizing socioeconomic rights and along with this the blame for failing to do so. In this way, the Court is more central than perhaps it should be in the debate around these rights, and may have been asked to do things that courts traditionally do not do. That being said, the Court must reimagine how its approaches its jurisprudence around socioeconomic rights so as to better provide institutional redress for socioeconomic rights violations.

The impact of poverty on millions of South Africans cannot be understated and warrants a brief exploration. The Court recognized the detrimental impact that economic inequality has on the country. In the Court's inaugural socioeconomic rights case of *Soobramoney*, it observed that:

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”⁵

Written 12 years ago, it is important to note how little progress has been made in regards to inequality in spite of this sentiment.

⁵ *Soobramoney v. Minister of Health (Kwazulu-Natal)*. Southern African Legal Information Institute. Constitutional Court of South Africa. 1997. Para 8

Inequality and abject poverty persist in the post-apartheid period of South African history. While the level of income poverty has fallen in the last two decades this decrease is not significant. In fact in 2005, almost a quarter of South Africans lived under the lowest level of the poverty line, 174 rands per month, the equivalent of about 16 USD, while almost half of the population live on under 322 rands a month, or 30 USD.⁶ It can also be observed that while racially defined income inequality has been falling, the average black worker still earns only a quarter of what the average white worker does and regardless, class based income inequality has increased exponentially. All of this has detrimentally affected South Africa's ranking on the Human Development Index (HDI), which also takes into account measures of things like life expectancy, literacy, and educational quality. In 2009 South Africa, while ranked 78th in terms of per capita income, was 129th under the HDI.⁷

As can be seen, poverty is intimately affecting millions of South African citizens. The lack of tangible progress on the economic front has detrimentally impacted the legitimacy of institutions intended to ensure every individual has the basic services to ensure human dignity. With a lack of effective institutions, in the end it is easy to ask the question-where has this left individuals looking for institutional means of redress for socioeconomic violations? In many instances, they have gone to the judiciary, specifically the Constitutional Court one of the few tools left in a shrinking toolbox.

The Constitutional Court has undertaken a number of actions in an attempt to carry out its mandate and develop a jurisprudence of socio economic rights so that it can continue on the path

⁶ Hirsch, Alan. "The Unemployment Challenge in South Africa." *Journal for Economic Development and Cooperation* (2008): n. pag. Print

⁷ *Human Development Reports*. United Nations Development Program, 20010. Web. 28 Apr. 2014.
<<http://web.archive.org/web/20061027013029/http://hdr.undp.org/statistics/data/indicators.cfm?x=10&y=1&z=1>>

of transformative constitutionalism. One of the most important tools in this regard is the reasonableness standard, a review mechanism through which the Court evaluates state policies. It also has shown a strong tendency to protect encroachments upon individual's socioeconomic rights by the state. Additionally, a stipulation of meaningful engagement has been developed so as to provide more dialogue and communication between parties the hope that a solution can be found and alleviate the need to go to the Court.

However, in light dearth of further institutional support for the Court, its jurisprudential approach falls short of what is needed in the current environment. The Court today stands alone to tackle the vast array of socioeconomic issues as it is possibly the only institution with the capacity and legitimacy to do so. Because of this the Court must expand its jurisprudential approach to take up some of the tasks that were originally placed on other institutions in order to provide a more holistic approach to realizing socioeconomic rights as well as serving as a more open medium for institutional redress. Public opinion seems to be ripe for a more assertive and active Court. People are taking to the streets and engaging in illegal service reconnection to have their socioeconomic needs met. Issues of poverty and basic services have been identified as the most important issue of the upcoming 2014 elections.⁸ The economic situation in South Africa is not good, yet it is possible to envision how the Court, the one institution left substantively standing, might engage with socioeconomic rights differently in the future given the lack of institutional support around it.

⁸ Gigaba, Malusi. "Soapbox: Radical Economic Change Should Be The Focus Of This Election." *Mail and Guardian Africa's Best Read*. Mail and Guardian, 23 Apr. 2014. Web. 28 Apr. 2014. <<http://mg.co.za/article/2014-04-23-soapbox-radical-economic-change-should-be-the-focus-of-this-election>>

As perhaps the strongest institution in the country of South Africa today, the Constitutional Court is one of the few places for people to pursue institutional redress. In adjusting its approach, the Court must first look the practical obstacles that stop people from accessing it, such as issues with direct access, court costs, and improving the lived situation of individuals. If it does not recognize the expanded actions it must take, it runs the risk of standing on the sidelines while poor individuals walk away from its chambers, into the streets, and out of the institutional methods of redress altogether.

The three practical barriers to public interest litigation that most stand out in how they affect the Court's role as an institutional voice for the poor are issues with direct access to the Court by individuals, how the costs of Court cases are decided, and the lack of returns that litigants see, even when cases are ruled in their favor. These three issues combine to produce substantial technical and practical obstacles to pursuing public interest litigation as a strategy for having rights realized. This is an important human rights strategy, and therefore these obstacles should not be overlooked.

The Constitution empowers the Constitutional Court to function as the Court of first instance by allowing direct access “when it is in the interests of justice and with leave of the Constitutional Court”⁹ Yet even though poor people generally pursue two means of getting their rights realized, protest and litigation, there are incredibly few poor people that bring cases before the Court in relation to the number of decisions that the Court hands down each year. The Court has only granted direct access eight times from 1995-2006 and even so, has never allowed and

⁹ Section 167(6)(a) of the Constitution, *The Department of Justice and Constitutional Development*. Department of Justice, n.d. Web. 28 Apr. 2014. <<http://www.justice.gov.za/legislation/constitution/constitution.htm>>

‘off the street’ complaint by a poor person to be heard or voiced.¹⁰ Jackie Dugard, a lawyer at the Socioeconomic Rights Institute, observed that:

“While spending two weeks in the Registry conducting archival research during February 2005-poor people who came to the Court registry window were sent away with a copy of the Court rules, regardless of whether their complaint raised substantive Constitutional issues. Such severe gate-keeping occurred in the context of a low caseload, which suggested to me that the Court could hear a number of direct access cases each year, if these were appropriately screened for raising Constitutional issues in the public interest.”¹¹

How could this be pursued differently, and what might Dugard mean by appropriate screening? For examples one can look to Latin America, another place at the forefront of progressive judiciaries, and see how courts there have handled this issue. The Constitutional Court of Costa Rica accepts any sort of direct claim, written in a variety of forms, and in doing so, considers around 17,000 direct claim cases each year.¹² Another place to look for an example is Columbia, where the Constitutional Court of Columbia has generally considered around 800 direct access cases each year.¹³ If the Court continues hear a paltry number of direct access cases, it risks losing levels of legitimacy and recusing itself from the important debate around socioeconomic rights.

¹⁰ Dugard, Jackie. "Courts and Structural Poverty in South Africa." *Cambridge Books Online*. Cambridge Publishing, n.d. Web. 28 Apr. 2014. <<http://ebooks.cambridge.org/ chapter.jsf?bid=CBO9781139567114&cid=CBO9781139567114A016&tabName=Chapte>>

¹¹ Dugard, Jackie. "Courts and Structural Poverty in South Africa." *Cambridge Books Online*. Cambridge Publishing, n.d. Web. 28 Apr. 2014. <http://ebooks.cambridge.org/ chapter.jsf?bid=CBO9781139567114&cid=CBO9781139567114A016&tabName=Chapte> p.11

¹²Dugard, Jackie. "Courts and Structural Poverty in South Africa." *Cambridge Books Online*. Cambridge Publishing, n.d. Web. 28 Apr. 2014. <<http://ebooks.cambridge.org/ chapter.jsf?bid=CBO9781139567114&cid=CBO9781139567114A016&tabName=Chapte>>

¹³ Dugard, Jackie. "Courts and Structural Poverty in South Africa." *Cambridge Books Online*. Cambridge Publishing, n.d. Web. 28 Apr. 2014. <<http://ebooks.cambridge.org/ chapter.jsf?bid=CBO9781139567114&cid=CBO9781139567114A016&tabName=Chapte>>

To allow greater access and facilitate the hearing of constitutional matters that might not make it through the traditional judicial system, the Court would be wise to adopt a more ably and appropriately staffed Court Registry office. Such a system can be seen once again in the Constitutional Court of Costa Rica, which is only able to consider the massive number of direct access cases due to the intensive use of trained legal clerks who typically screen direct access applications for merit while the Court hands down concise rulings on the applications that do make it through. The Court would be wise to adopt a similar system in which interns, volunteers, or law students might scan the applications of direct access applicants for substantive constitutional issues before moving them onto the Court registry. Additionally, in cases that seem to be particularly contentious or substantial in relation to the Constitution, Court Registry employees or volunteers might refer the case to a relevant civil society or public interest organization that might consider representing the applicant in a direct access case. In this vein, the Court should also encourage and allow these organizations to access the direct access route. In doing so, it would be encouraging more people or organizations to bring cases forward because it would greatly reduce the costs and time involved in litigating the issues in question. By pursuing a more open process of direct access, the Court would have greater contact with the very people it aims to help, be fostering a dialogue around socioeconomic rights, and pursuing a transformative vision.

The issue of cost that was briefly raised in the previous paragraph brings us to the second barrier at issue here- the way that cost orders are currently carried out. The general practice of litigation is that “the successful party should be given their costs”,¹⁴ which occurs at the judge’s

¹⁴ Dugard, Jackie. "Courts and Structural Poverty in South Africa." *Cambridge Books Online*. Cambridge Publishing, n.d. Web. 28 Apr.

discretion. That being said there is usually an exception made for public interest matters, due to the potentially disastrous consequences to public interest organizations if they experience one adverse order and are forced to therefore pay their own costs as well as those of the party they took to court. Therefore it is critical that the judiciary holds to this exception and does not just burden an organization that loses a public interest case with all the costs of the litigation. If judges choose not to adhere to this strictly, then there is the ever present threat that one adverse ruling could bankrupt an organization, a threat that will discourage many individuals and NGO's from bringing their issues before the Court at all. This is unacceptable for litigation that seeks to uplift people, and further develop South Africa's transformative constitutionalism. Yet the Constitutional Court, while having made several proclamations reinforcing the idea that judges should adhere to the aforementioned exception, continues to see this as a secondary concern to the more common law approach that costs should be awarded at the discretion of the judge¹⁵ This is despite the Court recognizing that costs and the awarding of them play an important role in litigation, stressing that:

“One can think off-hand of at least one reason why this general rule[that costs follow the results] might not apply to constitutional litigation, mainly that it could have a chilling effect on litigants, other than the wealthiest, desirous of enforcing their constitutional rights. It might also not apply where the constitutionality of a statute is challenged, a matter which would usually be one of public interest”¹⁶

Due to this apparent awareness of the issues such a practice could promote, it is surprising that the court has not been more decisive in establishing binding orders or rules in relation to the

2014. <<http://ebooks.cambridge.org/> chapter.jsf?bid=CBO9781139567114&cid=CBO9781139567114A016&tabName=Chapter>

¹⁵ Makhalemele, and Sorensen. "Costs in Public Interest Litigation: The Biowatch Case." *De Rebus- The South African Attorneys' Journal* (2005): n. pag. Print.

¹⁶ Ferreira v Levin NO and Others; Vryenhoek and Others v. Powell NO and Others. 95 Southern African Legal Information Institute. Constitutional Court of South Africa. 1996. Print. para 155

awarding of costs in public interest litigation. One case that represents the fears of all parties is that of *Biowatch*, in which the NGO Biowatch took Monsanto South Africa to court in order to gain access to information about genetically modified organisms. After a long and drawn out battle in the courts, the case was ruled in favor of Biowatch, who was then awarded with its own court costs, as well as Monsanto's. Though it appealed this decision a number of times (the Constitutional Court chose not to hear this case) it was eventually ruled that Biowatch would pay the court costs of itself and Monsanto. This resulted in the liquidation of Biowatch because the organization could not in fact do so. This is the worst case scenario and a visible deterrent to public interest litigators or organizations unless the Constitutional Court takes further measures to make explicit and binding the guidelines and exceptions around costs.

Finally there needs to be a greater return on substantive relief for individuals who come to the Court seeking relief from the hardship of their current situations. At its onset, the Court recognized that:

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”¹⁷

Yet many, including the applicants in *Grootboom*, see little tangible change in their immediate lives from Court rulings. In *Grootboom*, many of the applicants are still waiting on viable housing. In *Thabelisha Homes*, the victory was merely not being evicted, in spite of the Court ruling it was legal to do so, and the proposals to upgrade the existing settlement have not yet

¹⁷ Soobramoney v. Minister of Health (Kwazulu-Natal). Southern African Legal Information Institute. Constitutional Court of South Africa. 1997. paragraph 8

been put into effect. Certainly there are benefits to each ruling, and in some where the Court ruled against the applicants, such as *Mazibuko*, the legal mobilization around the Free Water Policy of Johannesburg actually applied enough pressure to the city that it changed the policy, providing more water of their own accord. However, the fact that legal mobilization was carried out is a testament to the organization and steadfastness of the applicants, because as in the previously noted cases, the tangible returns to them had the potential to be nonexistent. Specifically, the Court needs to make it a point, in its orders, to address the lived situation of the people coming before it, especially when it finds in favor of them. While changes to national housing policy or an inadvertent stay to evictions is beneficial, the Court needs to take a more supervisory role in seeing that its orders are carried out, because as noted before in *Grootboom*, the government dragged its feet and this resulted in the suffering of citizens. While this might seem a secondary issue, the hope to improve their own lives is what brings people to the Court in the first place. When they win a case, the result should not be that they die “homeless and penniless”¹⁸ in a shack in Wallacedene, as was the case with the lead applicant in the *Grootboom* case, Irene Grootboom.

In conclusion, the Court has done many great things in guiding a new South Africa through the past 20 years of freedom that the country has enjoyed. It has been at the forefront of developing a jurisprudence of socioeconomic rights and will more than likely continue to do so in the future. But the situation has changed from when the Court initially started functioning. Institutions and economic programs have changed or fallen away, the government has lost much of the trust it had immediately after negotiating the end of apartheid,

¹⁸ Joubert, Pearlie. "Grootboom Dies Homeless and Penniless." *Mail and Guardian Africa's Best Read*. Mail and Guardian, 8 Aug. 2008. Web. 28 Apr. 2014. <<http://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless>>.

and many poor people have taken to the streets in desperate protest. There is still a vast economic divide between the privileged and the un-privileged in South Africa, one that bears a deadly burden of poverty for those who are not among a lucky few. In a hallway of Old Fort Prison in Johannesburg, where Gandhi and Nelson Mandela were once held, there is a proverb inscribed in the stone wall that states, “If you want to walk fast walk alone, if you want to walk far walk together.” As the country moves forward, the Constitutional Court must shoulder a greater load of responsibility and take more holistic jurisprudential approach as it works to enforce the Constitution. It can do so by changing its current approach, and in doing so, attempting to ensure that millions are not left behind in poverty as the country hopes to realize the lofty potential of its Constitution.