

1 INTRODUCTION

There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter.¹

Decades of apartheid denied the majority of South Africans human dignity and access to basic social and economic services. The legacy of poverty and inequality remains a major challenge for the country. Government's commitment to redressing the high levels of inequity and social injustice is enshrined in the Constitution of the Republic of South Africa² with explicit provisions for socio-economic rights. Chapter 2 of the Constitution – more specifically, sections 26, 27 and 28 – imposes obligations on all spheres of government to progressively realise socio-economic rights. According to the South African Human Rights Commission (SAHRC):

Section 7(2) obliges the State to 'respect, promote, and fulfil the rights in the Bill of Rights.' This implies that all the socio-economic rights be given priority status. Since many of the socio-economic rights are also internally limited by the 'availability of resources' the State is obliged to 'progressively realise' them over time. The inclusion of the socio-economic rights in the Bill of Rights obliges the State to take all the necessary steps to ensure maximum and effective use of all resources available to it.³

The fundamental obligation of the state is to "respect, protect, promote and fulfil the rights in the Bill of Rights".⁴ The socio-economic rights in the Constitution provide a legal basis for basic needs advocacy and are designed to strengthen the accountability of government and the public service. Providing constitutional legitimacy to socio-economic rights claims inevitably gives rise to a new type of relationship between the judiciary and executive⁵ that is designed to improve accountability.⁶ In three landmark cases the Constitutional Court

¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) (hereafter *Grootboom*), para. 23.

² References to 'the Constitution' in this paper refer to the Constitution of the Republic of South Africa, Act 108 of 1996.

³ South African Human Rights Commission (SAHRC) 2000: 416.

⁴ Section 7(2). In summary, this implies that the state must refrain from policies and practices that undermine human dignity, while the right to protect implies that it must ensure that no other party undermines the rights of its citizens. The state is also obliged to reasonably promote and fulfil the rights in Chapter 2 of the Constitution.

⁵ Liebenberg (in this volume) argues for a more flexible, "co-operative model" with continual interaction between the branches. "The primary purpose of the doctrine of separation of powers is to prevent a concentration of power in any one branch of government" and to strengthen accountability.

⁶ *Ibid.*

(hereafter the Court) has indicated its inclination to protect socio-economic rights as outlined in the Constitution.

In *Soobramoney v Minister of Health, KwaZulu-Natal* (hereafter *Soobramoney*),⁷ which concerned the right of access to health care services, the Court rejected the argument that the Constitution imposed a duty on the state to provide a dying applicant with access to kidney dialysis treatment at a state hospital. The Court held the view that this denial of treatment was reasonable as the decision was based on professionally determined criteria for determining access to dialysis within the context of severe budgetary constraints.

Second, the *Grootboom* case is an example of judicial scrutiny which tests the reasonableness of government's attempts to realise socio-economic rights in a particular context. In this judgment, the Court ordered the state to provide emergency accommodation for people in desperate need.⁸

In the third case, the Court faulted government's policy on mother-to-child transmission (MTCT) of HIV because it excluded a section of poor mothers and children, who did not have access to the pilot sites that provide the drug Nevirapine.⁹

This paper reflects on the public finance implications of the socio-economic rights in the Constitution and the evolving jurisprudence, with particular reference to these three related judgments. It is mindful of the specific context and the key challenges in realising these rights, which include the immense magnitude of the backlogs¹⁰ and inequity in socio-economic rights that must be realised with relatively limited resources in a transitional environment.

In its analysis of the Constitution and the three judgments, the paper acknowledges the importance and the success of the 'rights-based' approach in addressing developmental challenges. At the same time the analysis identifies limitations in this approach and suggests that the far-reaching commitment to social and economic rights in the South African Constitution should be viewed as one component of a multi-faceted development approach. A simple 'rights-based' approach to development and social justice is necessary, but is not sufficient to address the immense development challenges in South Africa. Tofique¹¹ argues

⁷ A 41 year old man, Thiagraj Soobramoney, a diabetic with ischaemic heart disease, claimed that in terms of sections 11 and 27(3) of the Constitution the state was obliged to provide him with access to kidney dialysis treatment at a provincial hospital. *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC).

⁸ *Grootboom*, *supra* note 1.

⁹ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) (hereafter *TAC*).

¹⁰ Backlogs refer to people and households that did not have access to adequate levels of services as defined in each specific instance (defined in some instances for at least three years). The quantum of infrastructure and services required to meet acceptable standards and equity across the country by the newly elected government of 1994 was immense, and is commonly referred to as the 'apartheid backlog'. The challenge of meeting this backlog within finite resource constraints, as well as additional needs generated by growth in the population, is spread progressively over a number of years to minimise fiscal shocks to the economy. Hence, in subsequent years there are a residual number of people and households that do not benefit from programmes which provide or restore adequate service levels.

¹¹ Tofique's (2001) analysis of 'rights-based' vs 'sustainable livelihoods' in Bangladesh

that the strength of 'rights-based' development approaches is enhanced by mutually reinforcing and complementary participatory 'people centred development'¹² strategies.

A positive feature of the judgments is that the Court rejected the view that socio-economic rights were not justiciable.¹³ These judgments advance the cause of 'rights-based' advocacy. The analysis includes the limitations of these judgments, mainly from an economic perspective. The latter also highlights the reluctance of the Court to evaluate the effectiveness of policy choices. In particular, the Court raised the lack of professional institutional capacity to effectively evaluate the appropriateness and risks of particular complex policy choices for realising specific socio-economic rights. The Court rejected the minimum core approach as argued by the *amici* because of a lack of institutional capacity "to make wide-ranging factual and political enquiries necessary for determining what the minimum-core standard called for by the first and second *amici* should be".¹⁴

To limit the scope of this paper, the analysis focuses on the most important public finance issues raised by the Constitution and the judgments. Five key issues have been identified:

- the challenges for socio-economic rights arising out of the social, historical and constitutional context;
- the policies influencing overall resource availability;
- the criteria for allocating resources in terms of the main principles raised in the judgments;
- budgetary trends and the factors underpinning progressive realisation and retrogressive patterns in allocation decisions; and
- institutional capacity constraints and their implications on budgetary decisions.

2 SOCIAL AND CONSTITUTIONAL CONTEXT

The provision of socio-economic rights must be understood in their historical and socio-political context. Since 1994 three phases characterise the core of economic and fiscal policy in South Africa. These are the Reconstruction and Development Programme (RDP) phase; the Growth, Employment and Redistribution Programme (GEAR) phase; and more recently, an expansionary programme that emphasises employment intensive microeconomic

concludes that a fusion of the approaches is preferable. His definition of the rights-based approach is limited to litigious strategies. However, the rights movement includes a much broader range of strategies that include social mobilisation.

¹² 'People centred development' is a development philosophy based on key principles of social justice, inclusiveness, sustainability and empowering people. A critical component of this approach identifies the need to ensure that people and their institution – civil society organisations – are at the centre of development and are its primary drivers. This approach also emphasises the need for people to set their development goals as well as to participate in, and shape, institutions that influence their lives.

¹³ *Grootboom*, *supra* note 1, para. 20.

¹⁴ *TAC*, *supra* note 9, para. 37.

interventions.¹⁵

The current levels of inequality and poverty are prime features entrenched by apartheid:

The final fifteen years of the apartheid era saw a massive transfer of wealth from the poor to the rich: between 1975 and 1991, the income of the poorest 60% of the population dropped by about 35%. By 1996, the gulf between rich and poor had grown even larger. The poorest quintile received 4% of the total income, compared to 65% received by the richest quintile and 46% by the richest 10%.¹⁶

South Africa ranks as one of the most unequal societies in the world, with about half its population living in households that earn less than R350 per month.¹⁷ An increasing number of poor people migrate from the former homeland regions to the peripheries of the major urban centres.

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 high level of unemployment, inadequate social security, and many more 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.¹⁸

The relevance to socio-economic rights is two-fold. The first is the link between poverty and lack of socio-economic rights, which suggests that poverty includes lack of access to human rights including basic socio-economic rights. The policy choices must therefore explicitly formulate measures to reduce inequality and poverty progressively.

Second, macroeconomic policy ultimately determines the resource envelope to finance the delivery of socio-economic rights. The pace and extent of the development is ultimately determined by the resource constraints.¹⁹ In practice this is a 'soft' constraint, in that the technical level of resource constraints is determined by policy choices. Rights based development activists have argued for the relaxation of tight restrictive policies to release more resources for the fulfilment of socio-economic rights.

The constitutional context includes section 214(2), which details the criteria for budgetary allocations.

The budget may be enacted only after considering, and taking into

¹⁵ The post-2000 phase is unlike the more clearly defined RDP and GEAR programmes. The description here reflects the increases in major public expenditure and the related objectives in the budgets for the 2001 and 2002 financial years. This budgeted expenditure trend has to be evaluated over time, given the fluctuations in inflation levels.

¹⁶ UNDP 2002.

¹⁷ UNDP 2002: 196.

¹⁸ *Soobramoney*, *supra* note 7, para. 8.

¹⁹ These resources include the range of physical, financial, intellectual and institutional capital. This paper is primarily concerned with the availability of public resources, mainly public access to financial resources.

account:

- (a) the national interest;
- (b) any provision that must be made in respect of the national debt and other national obligations;
- (c) the needs and the interests of the national government, determined by objective criteria;
- (d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;
- (e) the fiscal capacity and efficiency of the provinces and municipalities;
- (f) developmental and other needs of provinces, local government and municipalities;
- (g) economic disparities within and among the provinces;
- (h) obligations of the provinces and municipalities in terms of national legislation;
- (i) the desirability of stable and predictable allocations of revenue shares; and
- (j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.²⁰

Three related but distinct interest sets can be identified in section 214(2). The first set, namely (a), (b) and (c) above, make reference to national interests; the second set, comprising (d), (f), (g) and (h) above, make reference to the basic and developmental needs. The last set consists of (j) above, about emergency or temporary needs. The remaining elements refer mainly to the intergovernmental fiscal relations. The link between the provisions of section 214 and the sections on social and economic rights in the Constitution is analysed in this paper. The Court ruling in *Grootboom* declared that that policy was inadequate, as it did not cater for poor people in desperate conditions. This view is consistent with the provisions of section 214(2)(j).

The Constitution also distinguishes socio-economic rights that are not qualified by resource constraints, from those that are qualified by specific provisions such as resource constraints and progressive realisation. The first category places significant resource and implementation obligations on the state, and includes:

- children's socio-economic rights (section 28(1)(c), (d) and (e));
- the right of everyone to basic education, including adult basic education (section 29(1)(a));
- the socio-economic rights of detained persons, including sentenced prisoners (section 35(2)(e)); and
- protection of labour and cultural rights (sections 23, 30 and 31).

The second category of socio-economic rights in sections 26 and 27 entrenches the right of access to a range of infrastructure and services: housing, health care, food, water and social security. However, these rights are expressly qualified by resource constraints:

The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each

²⁰ Section 214 (2) of the Constitution.

of these rights.²¹

The availability of resources is discussed from two dimensions: first, the policy criteria that determine overall quantum of financial resources available to government to meet all its obligations; and second, the division of this revenue to address key socio-economic rights, with respect to housing and social expenditure.

3 POLICY FRAMEWORK: OVERALL RESOURCE AVAILABILITY

Government's ability to meet the socio-economic needs of the poor is constrained primarily by the availability of resources. While the Court has refrained from pronouncing on the adequacy of policies that influence overall resource constraints, civil society organisations have argued that government's policies limit the provision of basic services to the poor.²² Given the huge backlogs in the provision of basic services, the adequacy of resources is a critical determinant of government's overall ability to progressively meet the demand for basic needs provision.²³

According to the SAHRC:

it is incumbent that the state devises sound macroeconomic, fiscal and monetary policies so as to maximise the revenue pool earmarked for the delivery of socio-economic rights [and to] manage public finances in an efficient and accountable manner so as to maximise the ability of the service agencies to deliver services.²⁴

Fiscal policy²⁵ influences the overall magnitude of the resource envelope, underpins the key budget priorities and is a critical policy instrument that influences the provision of basic socio-economic rights, poverty reduction, growth and employment creation. It sets the overall constraints, stabilises fluctuations in the macroeconomy (given its relative position in the global economy),²⁶ aims to provide an environment with appropriate incentives for economic growth and employment creation, as well as aiming to maximise opportunities for disadvantaged people to participate meaningfully in economy and society. The ultimate effect is that these policies can either aid or retard the available resources for realising socio-economic rights.

²¹ See ss 26(2) and 27(2) of the Constitution.

²² This is the main element of the People's Budget submission.

²³ The *Grootboom* judgment stresses the indivisibility of all the rights in the Bill of Rights (*supra* note 1, paras. 23–25). Thus the total available resources must address all obligations outlined in Chapter 2 of the Constitution.

²⁴ SAHRC 2000: 416.

²⁵ This includes government's key economic policy position on taxation, expenditure priorities, incentive measures, budgetary management targets and fixed investment policies.

²⁶ South Africa's position in the global economy is now more vulnerable to fluctuations in that economy, both as a result of increasing globalisation and domestic policy options taken largely to foster investment and economic growth. Some opponents, such as Cosatu, argue that the conventional wisdom of opening up the economy hurts the country's ability to sufficiently resource its socio-economic development programme.

To address the extreme levels of poverty and inequality, the first democratic government introduced the RDP in 1994.²⁷ This was followed by GEAR²⁸ in 1996. The ability of these economic policy programmes to address the socio-economic needs of the poor are contested. The People's Budget Initiative²⁹ criticised GEAR for doing little to address stark levels of inequality, and argues that its austerity measures reduced investment in social development. Protagonists of GEAR point to the vast international literature and evidence that support its proposals for reducing poverty in a sustainable manner.³⁰

A third approach accepts the need for sensible macroeconomic management, but argues that the stringent targets set by GEAR can be relaxed without sacrificing its overall goals. Minor relaxation of the budget deficit and inflation target levels will yield additional resources without any significant negative impact on the economy. The theoretical basis for this argument is discussed by Cuttington & Stiglitz with specific reference to budget deficit and inflation levels.³¹

3.1 Implications for socio-economic rights

The views expressed in the three cases referred to above³² suggest that the Court will not consider the appropriateness of fiscal/economic policy choices. The Court refrained from examining the efficacy of state policies to raise additional resources to address the enormous backlog socio-economic rights.

The choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.³³

The Court has further argued that it does not have the capacity to make judgments on overall budgetary allocations and the division of revenue. Given the earlier comments on the justiciability of socio-economic rights, the Court sees a clear separation of roles when examining the policies that influence the overall resource availability.

It should be born in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining nor for deciding how

²⁷ The RDP was defined as "an integrated, coherent socio-economic policy framework. It seeks to mobilise all our people and our country's resources toward the final eradication of apartheid and building of a democratic, non-racial and non-sexist future." *The RDP* 1994.

²⁸ The programme outlined a series of measures aimed at addressing the imbalances in the macroeconomy, placing the country on a higher growth plane and addressing stagnation in employment through increasing competition. Department of Finance (DoF) 1996.

²⁹ The People's Budget Initiative is a joint initiative by the South African NGO Coalition (Sangoco), the Congress of South African Trade Unions (Cosatu), and the South African Council of Churches (SACC).

³⁰ Butler 2001, Jansen 2001, Taylor 2000, OECD 1998.

³¹ Cuddington 1996, Stiglitz 1998.

³² *Grootboom, Soobramoney* and the *TAC* case, *supra* notes 1, 7 and 9.

³³ *Soobramoney*, *supra* note 7, para. 29.

public revenues should be most effectively spent.³⁴

Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.³⁵

Economic and social rights cannot be fulfilled without higher and more equitable budgetary allocations for basic social services. A UNICEF publication estimates a shortfall of up to \$80 billion (in 1995 prices) to achieve universal provision of basic services, with around \$206–216 billion required and only \$136 billion being spent. In many instances these expenditures fall significantly short of what is required to provide the minimum package. In other instances the bias is towards richer people and men.³⁶

The Court's *a priori* acceptance of the overall resource constraints is a significant weakness in the constitutional jurisprudence on socio-economic rights. Tofique³⁷ argues that given this limitation of the courts, socio-economic development can be strengthened through complementary participatory approaches such as social mobilisation and advocacy. In numerous instances the latter approach has been more effective in influencing the magnitude of resources and budget prioritisation decisions.

With the exception of *Soobramoney*, the Court did not abstain from making decisions that have budgetary implications. These decisions are specific to each case. In *Soobramoney*, the Court argued that the demands on the budget are onerous, and accepted the state's view that resources are limited. Given these limited resources, it accepted that the state's criteria for determining access to dialysis treatment is reasonable.³⁸ In rejecting this claim, the Court in this instance upheld (or refused to make a judgment on) government's social policy and budgetary decisions.

Given the lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.³⁹

It would have the consequence of prioritising the treatment of terminal illness over other forms of medical care and would reduce the resources available to the state for purposes such as preventative health care and medical treatment for persons suffering from illnesses or bodily infirmities which are not life threatening.⁴⁰

In *Grootboom*, the Court made a judgment based on the specific

³⁴ *TAC*, *supra* note 9, para. 37.

³⁵ *Ibid.* para. 38.

³⁶ UNDP 2000: 79.

³⁷ *Supra* note 12.

³⁸ The Court held "that there was no suggestion that the guidelines drawn up by the hospital authorities for determining which patients qualified for dialysis treatment were unreasonable, or that they had not been applied 'fairly and rationally' in the applicant's case". Liebenberg, in this volume.

³⁹ *Soobramoney*, *supra* note 7, para. 11.

⁴⁰ *Ibid.* para. 19.

contextual issues.⁴¹ The Court stated that, “the budget allocated by national government appears to be substantial”.⁴² *This approach does not provide any guidelines or methodology for the assessment of resource adequacy.* The issue is dealt with on a ‘case by case’ basis⁴³ and the magnitude of resources required to address the Court order is small, relative to the overall housing budget. The Court’s reluctance to determine a minimum core makes it difficult to estimate the overall impact on the budget. Finally, the definition of people in desperate need is not clear, and it will be difficult to estimate the quantum of affected people as well as the impact on the budget.

In the *TAC* case the Court made its judgment in the context of increased resources. “But more importantly, we were informed at the hearing of the appeal that the government has made substantial additional funds available for the treatment of HIV, including the reduction of mother-to-child transmission.”⁴⁴ In addition, the Court argued that the cost of Nevirapine was not a factor⁴⁵ and the only additional costs were those of providing infrastructure, formula feed, vitamins and antibiotics, and of monitoring, where appropriate.⁴⁶ The Court avoided the issue of whether budgetary constraints provided a legitimate reason for not implementing a comprehensive policy of using Nevirapine, including testing and counselling, nor did it deal with arguments on cost effectiveness.

In these specific instances the judgments induce some resource implications, even if they are marginal. The latter two judgments (*Grootboom* and the *TAC* case) suggest that if, in the Court’s opinion, the specific programme is unreasonable and has a relatively small impact on the overall budget allocated to that sector, it will enforce the specific socio-economic rights claim. We can thus assume that the Court is unlikely to make a judgment in favour of a programme that has a significant budgetary impact.⁴⁷

4 CRITERIA FOR ASSESSING REASONABLENESS OF POLICY

The Court raised a number of additional factors for assessing the reasonableness of policy.⁴⁸ From a public finance perspective three can be highlighted: intergovernmental fiscal relations, balanced short- to long-term measures, and social exclusion.

⁴¹ *Grootboom*, *supra* note 1, para. 20.

⁴² *Ibid.* para. 47.

⁴³ *Ibid.* para. 20.

⁴⁴ *TAC*, *supra* note 9, para. 120. This paragraph indicates that the budget has increased from R350 million in the 2001/2 financial year to R1 billion for the 2002/3 financial year and R1.8 billion in 2004/5.

⁴⁵ The *TAC* case, *supra* note 9, para. 48, in which the state indicated that it would receive this drug free for five years.

⁴⁶ *Ibid.* para. 49.

⁴⁷ It may be argued that a programme with significant budgetary impact may not be sustainable, or may introduce other public finance risks and could be unreasonable.

⁴⁸ Refer *Grootboom*, *supra* note 1, paras. 39, 43 and 44.

4.1 Intergovernmental fiscal relations

A reasonable programme must clearly allocate responsibilities and tasks to different spheres of government and ensure that the appropriate financial and human resources are available.⁴⁹

Sections 214 and 227(1) of the Constitution require an Act of Parliament to provide for the equitable division of nationally raised revenue among national, provincial and local governments. The Division of Revenue Act (DORA) is enacted annually, with the Budget, to give effect to the requirements of the Constitution. DORA sets out the equitable allocations for each sphere of government, the division of revenue between the nine provinces, and detailed schedules of all other allocations from national departments to provinces and municipalities. The process of preparing the budget and DORA is a consultative one and includes consultation with the Financial and Fiscal Commission (FFC)⁵⁰ and the South African Local Government Association.

This framework is comprehensive and complies with the criteria set out in paragraph 39 of the *Grootboom* judgment.⁵¹ However, while provinces are entitled to determine their own spending priorities from their unconditional transfers, this has to be considered in terms of policy set by national departments. As a result, the spending on education, social security and health absorbs close to 90% of the equitable share allocations to provinces. Given provinces' limited opportunity to raise their own revenue, their ability to meet increased needs or finance province-specific programmes is severely constrained. These policies and practices have often compromised the ability of sub-national governments to meet their specific socio-economic obligations.

In addition, the lack of functional clarity between the various spheres of government has induced a range of unfunded mandates⁵² and contingent liabilities⁵³ for sub-national government. The lack of clarity is particularly acute for the two-tier non-metropolitan local governments.

4.2 Short-, medium- and long-term needs

In the *Grootboom* judgment, the Court argued that a reasonable programme will make provisions, or plan for, short-, medium- and long-term needs.⁵⁴ The introduction of the Medium-Term Expenditure Framework (METF) – a three year projection of budgetary allocations – provides a link between policy, planning and budgeting, predictable resource allocations over the medium-term, signals any desired change in the direction of spending, and facilitates multi-year public

⁴⁹ Ibid. para. 39.

⁵⁰ The FFC is an independent commission appointed by the President to advise on overall fiscal relations.

⁵¹ The *Grootboom* judgment states that a reasonable programme must clearly allocate tasks and responsibilities to the different spheres of government and ensure that the appropriate financial and human resources are available. *Grootboom*, *supra* note 1, para. 39.

⁵² These refer to functions that have been transferred to sub-national levels of government without the corresponding financial resources.

⁵³ These refer to the additional operational and maintenance costs associated with infrastructure investments, including housing projects.

⁵⁴ *Grootboom*, *supra* note 1, para. 43.

investment programmes. In the Budget speech of 1998 the Minister of Finance said the major reason for introducing the METF was to create a more predictable environment within which public sector organisations could develop clear medium-term programmes.⁵⁵

While some indicative figures are proposed for the two outer years – the fourth and fifth year – the dynamic nature of economic trends do not allow for accurate long-term projections and planning. Economists, public sector managers and investors have welcomed the METF as a transparent tool both to facilitate short- and medium-term planning and implementation, and for effective monitoring by civil society. While the METF is generated through high level planning and dialogue within government, the opportunity for participation by civil society in this process is absent.

4.3 Social exclusion and vulnerable groups

In the *Grootboom* and *TAC* judgments the Court clearly indicated that government's policies do not comply with the provisions on socio-economic rights, as they preclude access to these specific rights by certain groups. Therefore these policies were considered to be unreasonable. "A programme that excludes a significant section of society cannot be said to be reasonable."⁵⁶ The *Grootboom* judgment continued that the housing programme does not cater for the immediate needs of people in desperate need.⁵⁷ It also does not comply with section 214(2)(j).

The Court's judgment in *Grootboom* clearly has some resource implications. It clearly indicated that the state is obliged to provide resources for people in desperate need of housing:

The nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the state must provide for relief for those in desperate need. They are not to be ignored in the interests of an overall programme focussed on medium and long term objectives. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for the national government to decide in the first instance.⁵⁸

Apartheid policies were designed to socially exclude black people from basic political, economic and social rights. Social exclusion and poverty are likely to lead to increased socio-economic rights violations. Most development theorists strongly insist on policies that are inclusive and empowering in order to reduce poverty.

The severe lack of housing is clearly a critical development challenge. The broader implication of this judgment lies in the definition of people living in what the judgment termed "intolerable conditions". If the judgment is narrowly interpreted, the state's obligations in terms of sections 26, 27 and 28 will mainly be limited to developing and financing the implementation and supervision of a

⁵⁵ Minister of Finance, 1998

⁵⁶ *Grootboom*, *supra* note 1, para. 43.

⁵⁷ *Ibid.* paras. 63, 64 and 68.

⁵⁸ *Ibid.* para. 66.

programme to provide relief (shelter) for people in living in “intolerable conditions”. This interpretation restricts the state’s obligations to crisis/disaster management, and will have minimal economic and financial implications.

However, if people in desperate need or living in intolerable conditions are defined more broadly to include people without secure land tenure, the economic and financial costs, as well as the capacity to respond to the need, are significant and far-reaching. In this context, the needs of people living in desperate situations must be prioritised, and some form of immediate relief provided even if it falls short of adequate housing in its fullest sense. The short-term resource requirements will be substantial given the vast number of people living in informal settlements.⁵⁹ This does not detract from the obligation of the state to make adequate financial resources available as part of its overall plan for the progressive realisation of socio-economic rights, which must incorporate immediate, medium- and long-term goals for housing.

In the current socio-economic context the exclusion and vulnerability of the poor, particularly women and children, increases their vulnerability to socio-economic rights violations. Given these increased risks, we briefly discuss the specific resource implications of the judgment on children’s rights and the proposed basic income grant (BIG) as a comprehensive policy to minimise this risk.

4.3.1 Implications for children’s rights

Definitive elements of the judgment included the obligation to provide relief to those people in desperate need and the immediate obligation to provide for the socio-economic rights of children without parental care. The *Grootboom* judgment argues that the provision of basic services to children is the “primary responsibility”⁶⁰ of the parents. The state is obliged to support families through progressive realisation of socio-economic rights in sections 26 and 27. But where children lack parental/family care, the state has a direct duty to ensure that their basic needs are met. This is also reinforced in the *TAC* judgment, which allocates to the state a direct duty to provide socio-economic services in instances where parents are indigent.

The state is obliged to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the right to parental or family care is lacking. Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the state to make health care services available to them.⁶¹

Providing socio-economic rights to children without parental care will have a significant impact on the fiscus and the priorities of the responsible state

⁵⁹ Estimates by the Department of Housing in its *Annual Report 2001* suggest that the housing backlog is in the region of 2.1 million units.

⁶⁰ Sloth-Nielsen 2001: 17

⁶¹ *TAC*, *supra* note 9, para. 79.

departments. Additionally, these rights – at the policy level – are likely to reduce the vulnerability of children to human rights abuses.

4.3.2 Implications for indigents and social security

The UNDP's *Human Development Report* for 2000 argues that poor people are most susceptible to human rights violations.⁶² The People's Budget Initiative, in its analysis of GEAR targets, affirms an increase in unemployment and poverty between 1966 and 1999. Both the *Grootboom* and *TAC* judgments emphasise the needs for basic services for indigents and people in desperate need. In this context reasonable compliance with socio-economic obligations of the Constitution could include providing basic income support to people without an income. The report of the Taylor Commission⁶³ indicates that a significant section of people without any income do not qualify for any social security support. It is also clear that these people are in desperate need of basic services – food, clothing and shelter.

In the *Grootboom* judgment, the Court indicated that:

One of the ways in which the state would meet its section 27 obligation would be through a social welfare programme providing maintenance grants and other material assistance to families in need in defined circumstances.⁶⁴

The Taylor Commission recommends a comprehensive and integrated medium to long-term framework for income support.⁶⁵ In terms of the *Grootboom* criteria for reasonableness it addresses:

- the exclusion of children from seven to 18 years, and poor adults from 18–59 years (it is estimated that 13 million people live below the poverty line and have no access to social security);
- the absence of policy to address income poverty that limits access to socio-economic rights;
- clear implementation modalities; and
- the progressive implementation of the system in the medium- to long-term, to overcome financial and capacity constraints.

It estimates the nett financing burden for the BIG at R24 billion⁶⁶ and suggests that this could be funded by additional income potential of R17.1 billion for the 2002/03 financial year and R24.5 billion for the 2003/04 financial year. The additional income would be realised through increasing expenditure to GDP ratio by 1% and utilising the contingency and reducing debt servicing reserves. If implemented through the suggested phases, the resources will be adequate for the progressive implementation of the BIG. The report is not clear on the impact of increasing the GDP to expenditure ratio, nor on the tax, inflation and borrowing levels. The use of the contingency reserves increases the public finance risks as a result of unanticipated shocks. At the same time the increased distribution of

⁶² UNDP 2000: 56 .

⁶³ DSD 2002: 30

⁶⁴ *Grootboom*, *supra* note 1, para. 78.

⁶⁵ DSD 2002: 154.

⁶⁶ *Ibid.* p.134.

income is likely to stimulate economic growth through increased consumption.

The benefits of an inclusive developmental approach that minimises the political, social and economic marginalisation of vulnerable groups are well documented. Given the logic argued in the *Grootboom* judgment, policies that are not comprehensive and exclude children and/or significant number of people in desperate need are unlikely to comply with the provisions of sections 26, 27 and 28 of the Constitution. Progressive implementation of the Basic Income Grant, through phased implementation (e.g. by beginning with extending the child support grant) is a reasonable trade-off.

5 PROGRESSIVE AND RETROGRESSIVE MEASURES

Full realisation of social and economic rights cannot be easily attained, especially in poor countries with considerable development challenges and with limited capacity and resources. Given the resource constraints and the goal of the Constitution to “provide basic needs for all”,⁶⁷ the obligation of the state in this context is to optimise its efforts to promote the progressive realisation of socio-economic rights.⁶⁸ While the courts, under certain circumstances, may direct the state to meet its socio-economic obligations in terms of sections 28 and 29 of the Constitution,⁶⁹ in other circumstances they may be guided by the economic rationale of the state.⁷⁰ If the economic rationale provided by the state for the non-realisation of socio-economic rights is not challenged effectively, the state will monopolise the discourse on socio-economic rights.

In a budgetary context, increasing delivery implies an increase in expenditure. This must be measured in real⁷¹ terms, to discount the inflationary impacts on any investment and to assess the true purchasing power of the allocations. In examining the state’s commitment to progressively fulfil its socio-economic obligations and comply with the constitutional provisions, both resources and performance must demonstrate a progressive improvement.

Any deliberate retrogressive measure would require the most careful consideration and would need to be fully justified by the totality of the rights provided for in the Covenant and in the context of the full use of maximum resources available.⁷²

The judgments did not consider the trends in either resource allocations or

⁶⁷ *Grootboom*, *supra* note 1, para. 45.

⁶⁸ Progressive realisation here is derived from the constitutional provision in ss 26(2) and 27(2).

⁶⁹ Sections 28 and 29 clearly articulate the obligations that are binding on the state without recourse to the issue of resource constraints, especially in the area of the socio-economic rights of children without parents.

⁷⁰ Sections 27(2) and 28(2) provide that state must take reasonable legislative and other measures, *within available resources*, to achieve progressive realisation of this right. This clause is likely to be used by the state when it is unable to meet its obligations.

⁷¹ The concept ‘real’ reflects the actual quantum after neutralising the inflationary effects, during any comparison. The level of inflation reduces the value by the inflationary factor. The actual value of the entity (e.g. expenditure levels in Rands) is known as the nominal value.

⁷² General Comment No. 3 (Fifth session, 1990) *The nature of States parties obligations (art 2(1) of the Covenant)* UN doc. E/1991/23, para 9.

delivery outputs. At the same time the arguments presented by civil society suggest that the cuts in social expenditure cannot be justified. These trends are considered with specific reference to housing (in the context of *Grootboom*) and the overall expenditure and projections.

Seleoane outlines five grounds that justify deviation from the state's obligations:

The reasoning I propose to follow is that there is a clear constitutional injunction that the state shall fulfil certain socio-economic rights and that a deviation from this obligation can be justified on five grounds only. The said grounds are;

- That the state does not have the resources that are necessary in order to fulfil the rights;
- That, whilst the state might have the resources, it would nevertheless be unreasonable for it to embark on the action required for the fulfilment of the rights;
- That the rights have been fully realised already;
- That there was a crisis as a result of which the deviation was inevitable; and
- That the deviation was in pursuit of an overall improvement with regard to other ICESCR rights.⁷³

The latter two grounds are derived from an interpretation of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Seleoane argues that if they do not apply, the state's failure can be justified on two grounds: the availability of resources, and reasonableness.

5.1 Housing expenditure trends

The *Grootboom* judgment provided limited reference to the obligation for progressive realisation.⁷⁴ In extrapolating the underlying principles of the judgment, the full realisation of housing rights cannot be achieved in the short-term. It is therefore critical to ensure that these rights are progressively realised.⁷⁵

In examining the expenditure trends for housing, between the 1997/98 and 2000/01 financial years the nominal housing allocations dropped and will shrink further at real levels. Does this constitute a retrogressive measure, or can it be justified? Craven writes that the "progressive achievement of a right requires that its implementation should be continued without respite as quickly as possible".⁷⁶ This effectively implies that there should be no backward movement or decrease in the real expenditure levels for housing.

Table 1: Consolidated housing expenditure: Actual and estimates⁷⁷

Financial year	97/98	98/99	99/00	00/01	01/02	02/03	03/04

⁷³ Seleoane 2001: 99.

⁷⁴ *Grootboom*, *supra* note 1, paras. 36 and 45.

⁷⁵ The housing backlog is estimated at 2.2 million units. Department of Housing 2001.

⁷⁶ Seleoane 2001.

⁷⁷ National Treasury 2001c: 347.

R billions	4.5	3.7	3.5	3.4	3.7	3.9	4.0
Increase		-18%	-5.4%	-3%	8.8%	5.4%	2.6%

In addressing these justifications, the reason of insufficient resources does not apply as this cut was made in years during which the overall budget increased. The cuts can be justified by the East Asian financial crisis but this crisis did not have a sufficient impact on the economy to warrant a budget cut. In the Medium-Term Budget Policy Statement of the last three years, housing has always been listed as an important need, justifying the need for increased allocations. The only plausible reasons are that there are capacity constraints or that it is unreasonable to spend the resources on housing. However, in its Budget statement, the Department of Housing suggested that the capacity to deliver housing increased steadily over the same period, implying that housing expenditure would increase at the same ratio. It could be argued therefore that the cuts in housing expenditure are retrogressive, and that the state is in breach of meeting its obligations in terms of section 26(2) of the Constitution.

5.2 Overall expenditure trends

In accepting the macroeconomic arguments for the budget constraints, it is equally important to ensure that resource limitations are not used to justify retrogressive expenditure measures. Hence it is critical to examine the trends in expenditure against demographic and economic data. The overall trend of resource availability from 1997 to beyond 2002 can be divided into three phases, reflected by the expenditure patterns:

- The first phase before 1997/1998. The annual nominal expenditure increase was between 13% and 15.5% for the financial years 1994–1996⁷⁸. Note that this comes off a higher inflation base of between 9% and 7.4% between 1994 and 1996,⁷⁹ reflecting an underlying real increase in expenditure.
- The second phase from 1997/1998 to 1999/2000 saw the introduction of macro stabilisation policies. Expenditure increases were contained between 4.6% and 6.2%. In real terms, the overall expenditure levels have decreased, and real interest levels increased significantly as a result of the Asian economic crisis. Thus it can be argued that the cuts in real expenditure levels are retrogressive measures, limiting the resources available to finance socio-economic rights.

Justifications for these cuts are largely based on expenditure strategies to attain better macro stability, manage exogenous shocks and reduce fiscal imbalances, as well as matching resources to adequate capacity levels. It is difficult to predict if the courts will view this as limiting socio-economic rights, as the Constitutional Court did not provide any guidelines for assessing

⁷⁸ Derived from Department of Finance Budget Review 1999: 65

⁷⁹ South African Reserve Bank 1997.

the adequacy and availability of resources.⁸⁰

The third phase is the current period, beginning in 2000-2001. The proposed expenditure increase rises to between 7.4% and 9% – or a 3.7% increase⁸¹ in real terms for non-interest expenditure.⁸²

Table 2: Real per capita changes in expenditure, 1996/97 to 2004/05⁸³

Average annual	1996/97- 2000/01	2000/01- 2001/02	2001/02 - 2002/03	2002/3 - 2003/04	2003/04 - 2004/05
<i>1. Protection services</i>					
Defence and intelligence	1%	4.69%	-0.33%	-0.78%	-1.77%
Integrated justice system	4%	6.32%	0.13%	-1.13%	1.03%
<i>2. Social services</i>					
Education	-2%	3.96%	-0.46%	-0.20%	-0.71%
Health	-5%	1.22%	1.90%	0.73%	0.26%
Welfare	8%	4.66%	3.96%	0.96%	-0.72%
Other social services	10%	4.38%	0.95%	3.14%	-0.55%
<i>3. Economic services</i>					
Water schemes, related services	17%	-0.30%	-4.10%	-1.84%	-3.41%
Agriculture, fishing and forestry	4%	1.22%	3.07%	0.64%	-1.35%
Transport, communication	-14%	13.58%	1.17%	-0.14%	0.89%
Other economic services	-6%	6.95%	15.73%	2.32%	-0.28%
<i>4. Administration</i>	-10%	9.38%	-0.50%	1.60%	0.19%
TOTAL	-1%	5.11%	1.09%	0.31%	-0.35%

The table illustrates the key trends in expenditure for the various social and economic services outlined here in terms of the key expenditure requirements of sections 26, 27, 28, and 29 of the Constitution.

Note the decrease in the allocations to health and education. The cuts in real expenditure for education cannot be justified in terms of either declining enrolment rates⁸⁴ or major efficiency gains, and could be considered as a retrogressive measure. Given the Medium-Term Expenditure Framework priorities and the relative importance of water as a basic service, the decrease in expenditure for water services is inconsistent with national policies.

⁸⁰ *Supra* note 5.

⁸¹ National Treasury 2001: 62.

⁸² The figures are based on the 2001 Medium-Term Expenditure Framework (MTEF). However, the recent sharp increase in inflation rates as a result of the sharp decline in the value of the Rand shows a short-term decline in allocations in real terms. The 2002 MTBPS attempts to address this to some extent by increasing certain allocations over the 2001 MTEF baseline to accommodate the sharp increases in imported inflation (e.g. increased allocations for imports of medical equipment and drugs). Most analysts have argued that this is a short-term phenomenon and the external factors driving inflation will stabilise over the medium- to long-term.

⁸³ The People's Budget Initiative 2001.

⁸⁴ The data on HIV/AIDS infection do not point to declining numbers of school enrolments in any clear manner for the medium-term. The long-term projections point towards a declining population growth rate and this will have an impact on school enrolments.

Moreover, it is difficult to argue, in general, that the progressive realisation of socio-economic rights can coexist in the context of increasing income and consumption poverty. Critical to this debate is the rate of the increase in poverty (measured in terms of the average per capita income levels) and unemployment, as a measure of delivery of socio-economic rights.⁸⁵ Given the increasing levels of poverty and unemployment, the People's Budget Initiative argues that the level of investment in socio-economic rights does not contribute sufficiently towards the progressive realisation of these rights.⁸⁶

6 INSTITUTIONAL CONSTRAINTS

The *Grootboom* judgment clearly states that mere legislation is not enough, and the state must put into place reasonable implementation programmes. "An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations."⁸⁷ The obligation to devise programmes, allocate resources, coordinate and monitor the success of the programme lies with the national state, and the implementation arrangements with provincial departments or their agents. Implementation modalities must include policy synergy and effective coordination among all three spheres of government.

Implementation must also be seen contextually, and that includes the legacy of apartheid. South Africa inherited a fragmented budgetary system comprising 15 different budgets for the provinces and the independent homelands. The budgetary reform process included.⁸⁸

- integrating the budgetary systems and developing a single budgetary system for the country;
- establishing the MTEF;
- implementing a treasury and financial management system, including the Public Finance Management Act;
- rationalising the reporting and control systems in term of the generally acceptable accounting principles (GAAP);⁸⁹ and
- improving the efficiency of the revenue services.

The National Treasury argues that it is now better able to monitor expenditure patterns, financial management and efficiency measures. It has

⁸⁵ There is a very strong correlation between level of education and standard of living: the poverty rate among people with no education is 69%, compared with 54% among people with primary education, 24% among those with secondary education and 3% among those with tertiary education. There is also a correlation between poverty and ill-health, although this is more difficult to measure and access to effective health care is specific to particular social and environmental situations. However, it is clear that poor children suffer a much higher than average rate of stunting. RSA 1998: chapter 5.

⁸⁶ The People's Budget Initiative 2001.

⁸⁷ *Grootboom*, *supra* note 1, para. 42.

⁸⁸ Summary of the salient features in various reports provided by National Treasury in the past five years. These include estimates of national expenditure, adjusted estimates, medium-term policy statements and Budget speeches.

⁸⁹ GAAP is an accounting reporting standard, which allows for easy interpretation of financial statements and cross-sector comparisons.

instituted a training programme and has developed a centralised set of electronic systems to produce accounts, manage procurement of goods and manage the payroll.⁹⁰ A new information system has been developed to facilitate better financial management.⁹¹

While systems and capacity at the financial management level have improved significantly, capacity at the level of delivery is not optimal. Government, through the Department of Public Administration and Services, has conducted a skills audit at provincial level indicating capacity gaps in the public sector. These gaps are currently augmented by partnerships with private organisations and NGOs. The latter have argued that government resources could be more effectively used in the fight against poverty by drawing on the resources of civil society and the private sector. Additionally, the NGO sector has argued that it is under-resourced, given its existing capacity, and that the lack of funding for NGOs and civil society has led to the weakening of this sector.

In both the *Soobramoney* and the *TAC* cases the Court indicated that the assessment of capacity adequacy is primarily a professional one. In the *Soobramoney* judgment, the Court accepted the renal dialysis guidelines established by hospital management to assist in deciding who should receive treatment.⁹² In the *TAC* order, the decision to make assessments on capacity adequacy was deferred to hospital management.⁹³

Capacity building is a long-term development programme. Government has introduced the Skills Development Act⁹⁴ and targeted training programmes to enhance the capacity in the public sector. In the short term partnerships with the private sector and NGOs are crucial to augment capacity.

In the interim the need to monitor is essential. The serious weakness in the delivery cycle is that monitoring is left primarily to departments and to the National Treasury in the form of expenditure monitoring. While expenditure monitoring is critical, the assessment of whether a right is 'progressively realised' will be best assessed through independent monitoring of the outputs and outcomes, and of the precise nature of the institutional and capacity impediments to the effective realisation of socio-economic rights. In this regard the role of the SAHRC and civil society organisations (including the press) in monitoring is essential. The monitoring methodology should more rigorously test the progressive realisation of socio-economic rights.

7 CONCLUSION

The recent judgments take a meaningful step towards upholding the notion of socio-economic rights. The Court, despite its reluctance to interfere in the appropriateness of executive decisions, has upheld the claim that the state in

⁹⁰ The centralised systems are Basic Accounting Systems (BAS), PERSAL (a payroll system) and LOGIS (a procurement system).

⁹¹ The new system, Vulendela, provides management with key financial information to assist with making financial decisions.

⁹² *Soobramoney*, *supra* note 7, paras. 24 and 30.

⁹³ The *TAC* case, *supra* note 9, paras. 135(2)(c) and 135(3)(b).

⁹⁴ The Skills Development Act 97 of 1998.

particular instances has failed to meet its constitutional obligations. The Court elaborated at length as to what would constitute reasonable measures in the progressive realisation of the rights. These included the need for comprehensive policies and programmes that are reasonably implemented, and do not exclude any significant section of society.

Development activists have welcomed these judgments, claiming that the Court has held government accountable for the provision of basic services that restore human dignity. These include the principles that all policies must be flexible and comprehensive and must cater for the critical needs of the poor and vulnerable. This is a particularly powerful means of advancing pro-poor development.

While the Court did not specifically define how the criteria for assessing the adequacy of resources, the resource implications of these judgments have a marginal impact on the overall budget. If the Court accepted the minimum core arguments recommended by the *amici* the resource implications would be significant and this will have a direct impact on the expenditure prioritisation patterns and modalities. In future litigation and advocacy campaigns greater emphasis must be placed on integrated projects that cater for the immediate needs of people living in intolerable conditions, support children without parents and meet other urgent socio-economic needs of the poor.

The overall availability of resources is determined primarily by macroeconomic and fiscal policy. The divergence of views on the most optimal macroeconomic framework provides the basis for engagement on the optimal public finance solutions. The more recent changes in the MTEF signal a greater commitment to release more resources to address socio-economic rights. The institutional and delivery form will require some reconfiguration to increase the expenditure efficiency and improve targeting. Demand driven mechanisms can assist in improving gearing, targeting and monitoring.

The Court's reluctance to provide an opinion on the effectiveness of policy choices, including the policies that ultimately set the overall resource constraints to meet socio-economic obligations, limits acceleration of the provision of basic goods and services to the poor. This limitation is symptomatic of the limitations of an exclusive litigious approach to development, and is best overcome through complementary forms of advocacy and social action. In this regard civil society has a vital role to facilitate the provision of socio-economic rights to the poor and vulnerable.

More importantly, the discussion will be best informed by rigorous monitoring of progress in the delivery of social and economic services. This will be best achieved through a coordinated effort, building on the respective roles of the oversight institutions such as the SAHRC, the legislatures, and civil society organisations to monitor the adequacy of policy and the physical delivery of socio-economic services. Additionally, this will strengthen accountability and transparency. There is a critical need for oversight bodies to develop independent monitoring and verification mechanisms to demonstrate to the courts progress (or retrogression) in the delivery of socio-economic rights. This, complemented by appropriate litigation, will ultimately contribute towards

determining the adequacy and efficiency of budget performance and contribute towards ensuring human dignity for all.

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