

KEY CHALLENGES IN THE PROGRESSIVE REALIZATION OF CONSTITUTIONALLY MANDATED BASIC SERVICES (CMBS) IN AN IGFR SYSTEM

THE COURTS VS POLICY MAKERS: WHO SETS THE PACE?

The Courts as Policy Makers in the Realisation of Socio-Economic Rights: Implications for the Doctrine of Separation of Powers

Introduction

The preamble of the Basic Principles on the Independence of the Judiciary states, amongst other provisions, that ‘judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens.’¹ In a democratic state founded on the promotion and protection of human rights, the judiciary certainly has an important role to play in ensuring that the rights of citizens are indeed realized and protected. In this regard, the Vienna Declaration and Programme of Action provides:

“Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development.”²

Our Constitution³ has made several provisions pertaining to the role of the judiciary in the promotion and protection of human rights. The courts, in terms of section 165(2) of the Constitution, are ‘independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.’ The Bill of Rights of our Constitution also applies to all law and binds the judiciary.⁴ The judiciary in carrying out its constitutional mandate to interpret the Bill of Rights and any legislation and in developing our common law or customary law, is required in terms of sections 39 and 233 of the Constitution, to:

- promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- promote the spirit, purport and objects of the Bill of Rights; and

¹ Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

² Para 27 of Part 1 of the Vienna Declaration and Programme of Action. Adopted on 25 June 1993 by the World Conference on Human Rights.

³ Constitution of the Republic of South Africa, Act 108 of 1996.

⁴ Section 8(1) of the Constitution.

- consider international law including preferring a reasonable interpretation that is consistent with international law

The entrenchment of economic and social rights, such as rights pertaining to housing, health care, food, water, social security, education and the environment, that binds the state and natural and juristic persons, is one of the unique features of our Bill of Rights. The inclusion of these rights, largely influenced by social injustices of the past and the aspiration of our people to establish a society based on social justice and fundamental human rights,⁵ require that the state in meeting its constitutional obligation to ‘respect, protect, promote and fulfil’⁶ these rights, should achieve a progressive realization of these rights by taking ‘reasonable legislative and other measures within its available resources.’⁷

One of the concerns in the realization of economic and social rights in the context of a constitutional state where the judiciary is required to pronounce on the constitutionality of measures taken by other branches of government, especially legislative and policy measures; is the extent to which the judiciary can discharge its constitutional mandate without unduly interfering with the functions of the other branches of government. The issue of who makes policies and laws in the realization of economic and social rights is thus an important issue and the role the judiciary plays in this regard, especially in the context of the separation of powers between the three branches of government, this being, the legislative, executive and judicial branches of government needs to be explored, more so when the judicial branch is composed of persons who are not elected by the electorate and thus not directly accountable to them.⁸

The purpose of this paper therefore, is to discuss the role played by the judiciary in the realization of economic and social rights from a policy making and implementation perspective and the challenges facing the judiciary in this regard. The paper will also discuss how these challenges, these being the extent to which the judiciary can influence or shape policy formulated by the executive branch of government, impact on the realization of economic and social rights.

The paper will be divided into three main parts. Part 1 focuses on how the judiciary envisages its role in ensuring the realization of economic and social rights from the perspective of pronouncing on the constitutionality of government policy and the implementation thereof. Part 2 analyses the actual role played by the judiciary in policy formulation and implementation. Part 3 discusses some of the key challenges facing the judiciary in its role of policy making and how these challenges could be addressed. These challenges include the position of the court on the issue of “availability of resources” when adjudicating over socio-economic rights matters, the implementation of court

⁵ See the Preamble of the Constitution.

⁶ See section 7(2) of the Constitution.

⁷ See wording of sections 24(b), 25(5), 26(2), 27(2) and 29(1) of the Constitution.

⁸ See Thomas J Bollyky ‘ R If C > P + B: A Paradigm for Judicial Remedies of Socio-Economic Rights Violations’ (2002) 18 *SAJHR* p 161 (outlining some of the debates around judicial function and the doctrine of separation of powers).

orders on socio-economic rights issues from the perspective of policy formulation and implementation and other related matters.

Part 1: Perspective of the Judiciary on its Role:

Constitutional Provisions

Section 1 of the Constitution provides for the supremacy of the Constitution and states that ‘law or conduct inconsistent with is invalid.’ This would apply, in the context of this paper, to policy measures that the state is required to take in order to achieve the progressive realization of socio-economic rights and for purposes of this paper - the achievement of the progressive realization of constitutionally mandated basic services (cmbs) such as access to housing, water and sanitation in the context of intergovernmental fiscal relations (igfr).⁹

The Constitution has assigned to the judiciary, the power to determine whether any law or conduct is inconsistent with its provisions and therefore invalid. In this regard, section 167(4) (e) accords, only to the Constitutional Court, the highest court on all constitutional matter,¹⁰ the power to decide whether ‘Parliament or the President has failed to fulfil a constitutional obligation’. This includes, on the part of the President where applicable, failure to adopt necessary policy measures towards the realization of basic services. Section 167(5) of the Constitution thus states:

“The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.”

The Constitution also provides to a court deciding a constitutional matter, the power to make appropriate orders upon a determination of unconstitutionality. Section 172(1) of the Constitution states:

- “When deciding a constitutional matter within its power, a court-
- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) may make any order that is just and equitable, including-
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

⁹ See *De Lange v Smuts No and Others* 1998 (3) SA 785 (CC) at para 44.

¹⁰ Section 167 (7) defines a constitutional matter as including an issue pertaining to the ‘interpretation, protection or enforcement of the Constitution. Therefore, policy making in the context of the realization of economic and social rights provided by the Bill of Rights would be a constitutional matter.

In addition to the above constitutional provisions, section 38 of the Constitution provides that where there is an infringement of a right in the Bill of Rights, including socio-economic rights, a court making such a determination could grant any appropriate relief, including a declaration of rights.

Part 2: Application of Constitutional Provisions by the Courts

The Constitutional Court has made numerous decisions on the constitutionality of laws; conduct and policy including those pertaining to the realization of constitutionally mandated basic services. On how it sees its role in this regard, the Constitutional Court, in *Government of the Republic of South Africa and Others v Grootboom and Others*, held that the state is obliged by the Constitution to give effect to socio-economic rights provisions in the Bill of Rights and that, it, the court, is mandated by the Constitution, in appropriate circumstances, to enforce the state's constitutional obligation.¹¹

A similar position was taken by the Constitutional Court in, *Minister of Health and Others v Treatment Action Campaign and Others (No 1)*, where the Court held:

“The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflicts our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable.”¹²

Indeed, the most significant position of the role of the Constitutional Court on making decisions on policy measures formulated and implemented by the state in the realization of socio-economic rights was in the *Treatment Action Campaign* judgment (supra) and as a response to the government's position through its lawyer, to the effect that the making of policy under the doctrine of separation of powers was ‘the prerogative of the executive and not the courts,’ and that ‘courts cannot make orders that have the effect of requiring the executive to pursue a particular policy.’¹³

The unanimous response of the Constitutional Court to the argument raised by the government was very firm and detailed. The Court responded as follows:

Separation of powers

“This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms

¹¹ 2000 (11) BCLR 1169 (CC) at para 94.

¹² 2002 (10) BCLR 1033 (CC) at para 36.

¹³ Ibid, paras 96 and 97.

of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy.”¹⁴

The Court further said:

Response to state policy

“The primary duty of courts is to the Constitution and the law, “which they must apply impartially and without fear, favour or prejudice.” The Constitution requires the State to “respect, protect, promote, and fulfil the rights in the Bill of Rights”. Where the State policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself. There is also no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of State can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so. Thus, in the Mpumalanga case,¹⁵ this Court set aside a provincial government’s policy decision to terminate the payment of subsidies to certain schools and ordered that payment should continue for several months. Also, in the case of *August*¹⁶ the Court, in order to afford prisoners the right to vote, directed the Electoral Commission to alter its election policy, planning and regulations, with manifest cost implications.”¹⁷

The Court went on to say:

“A dispute concerning socio-economic rights is thus likely to require a court to evaluate State policy and to give judgment on whether or not it is consistent with the Constitution. If it finds that policy is inconsistent with the Constitution it is obliged in terms of section 172(1) (a) to make a decision to that effect. But that is not all. Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant “appropriate relief”. It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of section 172(1)(a) a court may also “make any order that is just and equitable.”¹⁸

¹⁴ Ibid, para 98 (footnotes omitted).

¹⁵ Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 (2) SA 91(CC); 1999 (2) BCLR 151 (CC).

¹⁶ *August and Another v Electoral Commission and Others* 1999(3) SA 1 (CC); 1999(4) BCLR 363 (CC).

¹⁷ Above fn 11 at para 99.

¹⁸ Ibid, para 101.

The Court finally said:

“We thus reject the argument that the only power that this court has in the present case is to issue a declaratory order. Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a *mandamus* and the exercise of supervisory jurisdiction.”¹⁹

Implications for Policy Making Powers of the Judiciary for the Realisation of Socio-Economic Rights

Courts do not generally have the expertise to make policies, which is indeed, a main function of the executive branch of government. However, as shown above, the Constitution gives the courts the power to make decisions that could have a major impact on government policies, such as declaring government’s policies invalid or unconstitutional, changing such policies and even substituting such policies.²⁰ Our Constitutional Court has done so in many instances.²¹ In the *Treatment Action Campaign* case, the Constitutional Court declared the government’s policy on HIV/AIDS to be unconstitutional in that the policy failed to meet constitutional standards by excluding from receiving treatment to combat mother-to child transmission of HIV, those that could be reasonably included.²² The Court thus, as one of its orders, ordered the government ‘without delay’ to ‘remove the restrictions that prevent Nevirapine from being made available for the purpose of reducing the risk of mother-to child transmission of HIV in public hospitals and clinics that are not research and training sides.’²³

In one of its recent judgments, the Constitutional Court in *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*,²⁴ declared as unconstitutional, provisions of the Social Assistance Act 59 of 1992 which prevented eligible permanent residents from receiving social grants and used its power to interpret (read in) the Act as

¹⁹ Ibid, para 106.

²⁰ However, the socio-economic monitoring mandate of the South African Human Rights Commission in terms of section 184 of the Constitution can be of assistance to the courts in this regard. The Commission has constitutional powers to request for information from organs of state measures, including policy measures they have taken towards the realization of socio-economic rights. The Commission in pursuance of its constitutional mandate to monitor and assess the observance of human rights, including socio-economic rights, can critique policy measures taken by relevant organs of state when giving effect to socio-economic rights entrenched in the Bill of Rights. For a more detailed discussion of the monitoring of social and economic rights by the Commission, see Dwight G Newman ‘Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda’ (2003) 19 *SAJHR* p 189.

²¹ See *Fose v Minister of Safety and Security* 1997(3) SA 786(CC); 1997(7) BCLR 851 (CC) and *Dawood and Another v Minister of Home Affairs and Others* 2000(3) SA 936(CC); 2000(8) BCLR 837(CC) and many others.

²² Above fn 11 para 125.

²³ Ibid, para 135.

²⁴ 2004(6) BCLR 569(CC).

allowing such permanent residents to benefit from such grants with immediate effect.²⁵ This thus had the effect of changing the immigration policy of the government, though through an interpretation (reading in) of an Act of Parliament.

This is another example of a decision that has an impact on the realization of socio-economic rights, even though the government had pleaded poverty in this case, that being that the provision of social grants to eligible permanent residents would ‘impose an impermissibly high financial burden on the state.’²⁶ However, this contention was rejected by the Court due to lack of clear evidence from the state.²⁷

The Court has, however, acknowledged that the judiciary when playing the role of a policy maker should exercise caution. In this regard the Court said:

“South African courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to roles of the legislature and the executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, courts may-and if need be must-use their powers to make orders that affect policy as well as legislation.”²⁸

The Court concluded by saying:

“A factor that needs to be kept in mind is that policy is and should be flexible. It may be changed at any time and the executive is always free to change policies where it considers it appropriate to do so. The only constraint is that policies must be consistent with the Constitution and the law. Court orders concerning policy choices made by the executive should therefore not be formulated in ways that preclude the executive from making such legitimate choices.”²⁹

Part 3: Challenges facing the Judiciary

One challenge the judiciary is likely to face in its constitutionally mandated policy making role is the delay by the executive branch of government in implementing decisions of the judiciary that have the impact of changing its policy. The *Grootboom* and the *Treatment Action Campaign* judgments are such examples. There have been numerous reports that the *Grootboom* judgment has made no significant difference for the Wallacedene Community. On this issue, a report in the Sunday Times, entitled ‘Treated with Contempt’, stated:

²⁵ Ibid para 98. There was a dissenting judgment supported by one another judge.

²⁶ Ibid, para 60.

²⁷ Ibid para 62.

²⁸ Above fn 11 para 113.

²⁹ Ibid para 114.

“Grootboom is a part of Wallacedene, a large shantytown on the eastern side of Kraaifontein, a working-class area about 30 km inland from Cape Town along the N1. Grootboom is named after Irene Grootboom, a woman who made legal history and then apparently disappeared.

Grootboom and 900 other applicants successfully contested in their 1998 eviction from a site in Wallacedene when the Constitutional Court ruled in their favour in October 2000.

Today, all that the site of Grootboom has to show is the smelly ablution block, built in a donga that had served as a latrine for the squatters who went to court.”³⁰

Many provinces also took a long time to implement the *Treatment Action Campaign* judgment even though the Constitution Court had ordered that its order should be effected “without delay.”

However, the involvement of bodies like the South African Human Rights Commission and various organs of civil society could address these delays.³¹ These bodies could investigate and highlight the delays in the implementation of judgments of the court and bring this to the attention of appropriate structures such as Parliament,³² the public and the media. Contempt of court proceedings against organs of state that do not implement court orders can also be considered by these bodies as well. On the other hand, the courts should probably link their policy orders with supervisory orders where the executive branch of government will have to appear before a court of law and account for the implementation of a court order in question.

Parliament and respective provincial legislatures should also be more active in holding the executive branch of government to account for delays in implementing decisions of the judiciary in this regard.

Conclusion

What is clear is that our Constitution has provided the judiciary to make policy in the furtherance of socio-economic rights and the delivery of basic services in instances where the executive branch of government does not do so within acceptable constitutional parameters. Though this might be seen in some quarters as a departure from a narrow definition of the doctrine of separation of powers,³³ it is a useful and a necessary mechanism in instances where the executive fails to meet its constitutional mandate of formulating and implementing reasonable and effective policy measures to ensure the

³⁰ The Sunday Times, 21 March 2004.

³¹ See Dwight Newman above fn 20 p 201.

³² The South African Human Rights Commission tables its annual economic and social rights to the National Assembly and sometimes briefs relevant portfolio committees of Parliament of its report and concerns.

³³ See for example, *S v Dodo* 2001 (5) BCLR 423 (CC) at paras 12-26.

realization of socio-economic rights and thus the delivery of basic services for our people.

It is important, nevertheless, that policy formulation should still be a major focus of the executive due to its technical know how and should thus set the pace in this regard. But where the executive branch of government fails to do so or formulates unconstitutional policies, the judiciary is mandate by the Constitution to set the pace. In so doing, however, the judiciary should exercise this power in a very responsible manner,³⁴ taking into account the constitutional system of separation of powers between the three branches of government-the legislature, judiciary and the executive.

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³⁴ In the *TAC* judgment, above fn 12 at para 129, the Constitutional Court decline to confirm an order of the High Court to include a structural interdict against the government on the basis that it was unnecessary to do so as the “government has always respected and executed orders of this Court [and that] there is no reason to believe that it will not do so in the present case.”