ADJUDICATING SOCIO-ECONOMIC RIGHTS – TRANSFORMING SOUTH AFRICAN SOCIETY?: A RESPONSE TO LINDA JANSEN VAN RENSBURG'S PAPER*

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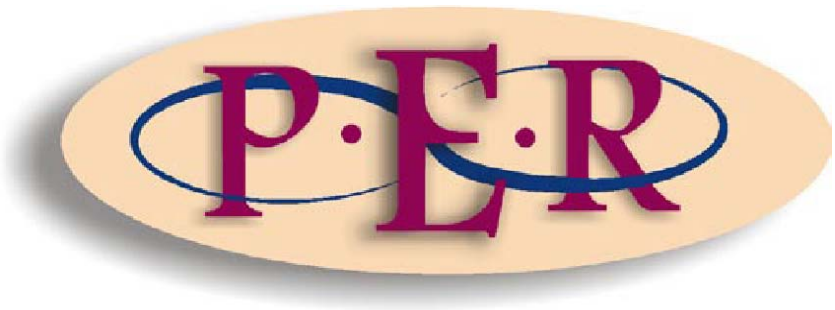

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ADJUDICATING SOCIO-ECONOMIC RIGHTS – TRANSFORMING SOUTH AFRICAN SOCIETY?: A RESPONSE TO LINDA JANSEN VAN RENSBURG'S PAPER*

Charles Ngwena**

1 INTRODUCTION

It is trite to say that the adjudication of socio-economic rights is a new enterprise in South African jurisprudence, as it is to the jurisprudence of many other jurisdictions. Professor van Rensburg's paper seeks to analyse the influence of political, socio-economic and cultural considerations on the interpretation and application of socio-economic rights in the Bill of Rights. The pivots for discussion are the decisions of the Constitutional Court in the Soobramoney,[1] Grootboom[2] and Treatment Action Campaign[3] cases which, thus far, are the only cases in which the Constitutional Court has substantively determined the nature and parameters of socio-economic rights and obligations under the South African Constitution. My response is somewhat deferential in that I largely concur with many of the observations that Professor van Rensburg makes. In some respects, however, I have attempted to bring into the analysis of Soobramoney, Grootboom and Treatment Action Campaign not so much new insights, but rather different emphases. Likewise, my response is constructed around the three cases. I begin with Soobramoney.

* Linda Jansen Van Rensburg 'Ajudicating socio-economic rights – transforming South African Society (2002).

** LLB, LLM (Wales), Professor, Department of Constitutional Law, University of the Free State. E-mail address: ngwenac@hum.uovs.ac.za

1 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 12 BCLR 1696 (CC).

2 The *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC).

3 Unreported. Case CCT 8/02.

2 SOOBRAMONEY

To a large extent, Soobramoney is a somewhat unfair template upon which to construct any analysis of the approach of the Constitutional Court to socio-economic adjudication primarily because it is the very first case that the Court, with virtually no institutional experience in socio-economic adjudication, was being asked to chart new territory. Nonetheless, the Court's interpretation of section 27 can scarcely escape criticism.

Professor van Rensburg is right in lamenting the extent to which the Court interpreted section 27(3). The Court unduly minimised the relevance of section 11 – the right to life – to the section 27(3) argument that the state had a duty not to refuse the appellant medical treatment.[4] The Court also categorically interpreted section 27(3) as a negative rather than a positive right to the extent of perhaps undermining the import of the duties of health care providers.[5] Even conceding that chronic renal failure of the type that the appellant was afflicted with did not constitute a medical emergency as contemplated by section 27(3),[6] the effect of the Court's interpretation was to cast the provisions of the Bill of Rights as atomistic elements rather than units of an interconnected web. Indeed, it is not inappropriate to interpret the Court's approach to section 27(3) as legalistic to the extent that it detracted from the generous purposive/contextual approach to constitutional interpretation that is out of synchrony with the Courts own professed approach or human rights jurisprudence in general.[7] Fear that a holistic line of interpretation might lead to consumers of health care services making additional demand on the state should not have dissuaded the Court from interpreting section 27(3) as a positive right that is in part animated by section 11 – the right to life. Socio-economic rights draw sustenance from the imposition of positive obligations. It means precious little say that no one may be refused emergency medical treatment and yet decline to impose on health care providers a positive duty to make such treatment available. Scott and Alston have described the Courts approach as constituting "negative textual inferentialism".[8]

4 Soobramoney (note 1) para 15.
5 Ibid para 20.
6 The appellant was suffering from end-stage renal failure. He was also suffering from coronary artery disease, ischaemic heart disease and diabetes and hypertension. He had a history of a stroke. On account of this medical history, he was not a candidate for a kidney transplant for the reason that he had a very poor prognosis.

The proper way to limit the appellants demand for renal dialysis should not have been an attempt to resurrect a literal approach but an application of section 27(2) which renders the provision of health care resources subject to available resources.

The shortcomings of Soobramoney are not confined to the legalistic interpretation of section 27(3) but stretch a little beyond that. It is true as Professor van Rensburg observes that the Court in Soobramoney identified resources as the most important element in the determination of socio-economic rights. It is self-evident that resources are finite and that the imposition of a ceiling on the quantity and quality of health care services that the state can provide is inevitable. It is also clear that the type of treatment that the appellant was seeking was beyond the reach of the state to the extent that he was seeking lifelong renal dialysis. However, at a doctrinal level, another shortcoming with Soobramoney is that it did not illuminate the nature and scope of the inquiry that a court has to undertake to determine the extent of resources available to the state. Soobramoney seems to suggest that the point of departure is what resources are asserted to be available by the state and if the assertion is bona fide and the resources thus claimed to be available support the states' contention, that is the end of the judicial the inquiry. While this approach has the virtue of recognising generously the doctrine of separation of powers, it sits uneasily with a Bill of Rights that has unequivocally made socio-economic rights justiciable.

Soobramoney failed to make it clear that when determining available resources, the judicial inquiry must not only seek to determine what resources the state has made available, but also the resources the state ought to have made available in the light of resources at its disposal.[9]

7 *S v Makwanyane and Another* 1995 4 BCLR 665 (CC) para 9; De Waal et al The Bill of Rights handbook (2001) 130-135.

8 Scott and Alston 'Adjudicating constitutional priorities in a transnational context: a comment on Soobramoney's legacy and Grootboom's promise (2000) 16 206-268 at 237.

9 Moellendorf 'Reasoning about resources: Soobramoney and the future of socio-economic rights claims' (1998) 327-333.

Notwithstanding that courts are not particularly suited to involving themselves in matters of budgetary appropriations, there must, nonetheless, be an inclination on part of the court to impugn executive and medical decisions about the allocation of resources. As the Court itself reiterated in Treatment Action Campaign, as long as executive policy impacts on the respect, promotion, protection and fulfilment of fundamental rights, the doctrine of separation of powers cannot be delineated by rigid boundaries.[10] The task of the judiciary is no longer to conduct review the traditional sense and inquire only into the form of executive policy decision. The substance has become as important as the form. Rationality and good faith are no longer sufficient conditions. The reasonableness of the decision must now be guided by constitutional benchmarks and, foremost, by the obligations placed on the state by the Constitution.

Health intertwines with many others sectors. It is dependent upon many factors and not just health care services. It belongs to both the private and the public domain. In this regard, Sachs J's observation that the courts are not the proper place to resolve agonising personal and medical problems that underlie allocations of resources and that the courts cannot replace the more intimate struggle that must be borne by the patient, those caring for the patient and those who care about the patient, may seem to be an appropriate reflection of a practical reality.[11] At the same time, however, the remark by the learned judge can be (mis)construed as relegating the provision of health care to the private rather than the public domain and insufficiently vindicating access to health as a human right. Madala J in his supporting judgment went as far as describing rights as the "ideal" and "something to be strived for" to the extent of perhaps diminishing the status of socio-economic rights from enforceable rights to mere aspirations.[12] The acknowledgement in the Bill of Rights of health care as a fundamental right conspicuously represents a broadening of government responsibility. Whilst the responsibilities of individuals, families, private charities and religious organisations are not being effaced, nonetheless, health has become a major governmental responsibility unlike in the past. With all its inherent problems, health has become part of the more inclusive understanding of human rights and constitutional adjudication of socio-economic rights must faithfully reflect this shift, even at semantic level.[13]

10 Treatment Action Campaign (note 3) para 98.
11 Soobramoney (note 1) 58.
12 Ibid para 42.

3 GROOTBOOM

Grootboom, of course, represents a coming of age for the Constitutional Court in that the Court was able bring into the adjudication of socio-economic rights the appropriate legal armamentarium. The Court was able to take advantage of the jurisprudence that has been developed by the Committee on Economic, Social and Cultural Rights under the International Covenant of Economic, Social and Cultural Rights. I do not differ with, but put a different emphasis to, Professor van Rensburg's submission that after Grootboom it appears that the Court will no longer investigate rationality and bona fides, but will instead investigate reasonableness. I see the approach of the Court in Grootboom not so much as an abandonment of the rationality and bona fides inquiry, but a shift towards reasonableness. I would argue that rationality and bona fides are still prerequisites, or better still, they have become part of and not the only criteria for determining the reasonableness of state policies and programmes. Rationality and good faith are now part of what can be described as an integrated substantive reasonableness test that the state has to meet if its policies and programmes for the discharge of socio-economic obligations are to pass constitutional muster. In Grootboom the state did pass rationality and good faith tests. In this connection, Jacoob J said:

> What has been done in execution of the programme is a major achievement. Large sums of money have been spent and a significant number of houses have been built. Considerable thought, energy, resources, and expertise have been and continue to be devoted towards the process of effective house delivery. It is a programme that is aimed at achieving the progressive realisation of the right to adequate housing.[14]

13 Chapman 'Core obligations related to the right to health and their relevance for South Africa' in Brand and Russell (eds) Exploring the core content of socio-economic rights: (2002) 38.

14 Grootboom (note 2) para 53.

One can surmise that had the programme not been thought out rationally and executed in good faith, by for example not involving all spheres of government or targeting beneficiaries on account of race, then it would not have passed the hurdle of rationality and good faith and it would have been unnecessary to inquire into substantive reasonableness.[15]

If in Soobramoney, the Court was guilty of seeing provisions of the Bill of Rights as disembodied elements isolated from one another, then in Grootboom it repaired this shortcoming. Grootboom represents a holistic approach to the interpretation of socio-economic rights. In this regard, I would be more generous that Professor van Rensburg and say that the Courts displayed a fulsome rather than "hesitant context sensitive" approach. From the beginning to the end of the judgement, the Court drew sustenance from the foundational values of the Constitution. Reasonableness in Grootboom transcended rationality and good faith and took an egalitarian and remedial orientation. Achieving substantive equality and protecting human dignity became overriding goals in the aftermath a legacy of state spawned gross inequality in access to housing. Protecting the vulnerable and weakest in our society as part of the transformation of post apartheid and post colonial South Africa fitted in well into the foundational values of the Constitution. Recourse to the jurisprudence of the Committee on Economic, Social and Cultural Rights was crucial in dispelling the myth of socio-economic rights as intangible rights that are unascertainable and unrealisable. The respondent's housing programme, though commendable in many respects, failed because it did not accommodate the immediate needs of the poorest and perforce most vulnerable in our society.

15 At para 47 Jacoob said "All spheres of government are intimately involved in housing delivery and the budget allocated by national government appears substantial. There is a single housing policy and a subsidy system that targets low income earners regardless of race".

The one area perhaps in which Grootboom spoke with hesitancy rather than forthrightness relates to core minimum entitlements and core minimum obligations. The Court was right in suggesting that the idea of core minimum should be seen as an integral part of rather than independent from the reasonableness inquiry. There is indeed no suggestion in General Comment 3 of the Committee on Economic, Social and Cultural Rights that the concept of minimum core obligations should be used to found a free standing rights. What the concept does, however, is to provide an indication for establishing prima facie evidence of non-compliance with socio-economic obligations. Once the prima facie evidence has been established, the onus then shifts to the state to offer a rebuttal by demonstrating that despite taking all reasonable measures at its disposal, it has nevertheless failed to meet even rudimentary needs. This is apparent from the following observations that the Committee made in paragraph 10 of General Comment 3:

> Thus, for example, a State in which any significant number of individuals is deprived of essential foodstuffs, of essential primary healthcare, of basic shelter and housing, or of the most basic forms of education, is prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not tot establish such a minimum core obligation, it would largely be deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a state has discharged its minimum core obligation must also take account of resource constraints applying within the country. …In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[16]

The concept of minimum core obligations is no more that a tool for impressing upon states that to protect human dignity they should at least endeavour to do the little they can even in the face of economic and other constraints. The problem in Grootboom, however, is that the Court did not have at its disposal the content of minimum core obligations in respect of the housing. Core minimum obligations should not differ from jurisdiction to jurisdiction or place to place, as the Court in Grootboom appears to have understood.[17] Instead, they should apply uniformly everywhere to underscore their universality as international human rights.

16 Emphasis original.
17 Grootboom (note 2) para 32.

4 TREATMENT ACTION CAMPAIGN

Treatment Action Campaign benefited from the jurisprudence that the Court developed in Grootboom. The Court demonstrated a willingness to impugn executive policy decisions that impact on the respect, protection, promotion and fulfilment of rights in the Bill of Rights. I agree with Professor van Rensburg observations that while the Court was conscious of its limited capacity to deal with policy issues that have budgetary implications, and the preeminence of the executive in such matters, the Court, nonetheless, did not interpret the doctrine of separation as meaning judicial abdication from policy matters. Indeed the effect of the Court's decision was not only to censure government policy on HIV/AIDS, but also to rewrite it in unambiguous terms. As with Grootboom, the Court went beyond rationality and good faith to inquire into the substantive reasonableness of the decisions against the backdrop of discrete socio-economic rights – section 27 – but also the foundational values of the Constitution, including egalitarian values.

Treatment Action Campaign, however, perpetuates a misunderstanding of the import of the concept of minimum core rights and obligations. The Court was reluctant to embrace the concept of minimum core obligations because it believed that this would mean that for every socio-economic rights, they would be a free standing minimum right.[18] As submitted earlier this is a misconstruction of paragraph 10 of General Comment 3. Professor van Rensburg endorsement of the Court's approach in this regard, also seems to repeat the misconception.

5 Concluding remarks

Professor van Rensburg paper had the difficult challenge of attempting to analyse a jurisprudence that is very much in the making. Some of the contours of that jurisprudence have yet to be clear. The cases upon which to analyse the approach and contribution of the Court are still sparse.

18 Treatment Action Campaign (note 3) paras 26-29.

Notwithstanding this limitation, Professor van Rensburg is justified in treating Soobramoney as having contributed little to the understanding and interpretation of socio-economic rights, and Grootboom has marking the beginning of an earnest attempt by the Court to invoke the appropriate interpretive principles for adjudicating socioeconomic rights. It is in Grootboom that the Court not only adopted a holistic purposive and contextual approach to interpretation of socio-economic rights, but also had recourse to the jurisprudence of the Committee on Economic, Social and Cultural Rights. Treatment Action Campaign was evidently a beneficiary of the precedent laid by Grootboom. Grootboom and most certainly Treatment Action Campaign represent a drawing back of the traditional frontiers of the doctrine of separation of powers. If they are interpretive errors in Grootboom and Treatment Action Campaign, they pale into significance when juxtaposed with the virtues. The one area however, where the Court could have assisted the state in complying with socio-economic right would have been in embracing rather than doubting the efficacy of concept of minimum core obligations and rights. Core minimum obligations and rights are an instrument for putting the onus upon the state to justify noncompliance with socio-economic obligations. They provide the state with practical benchmarks for formulating policies and programmes that are aimed at discharging socio-economic obligations. They provide the Court with a tangible yardstick for measuring the performance of the state.