INTERPRETING SOCIO-ECONOMIC RIGHTS - TRANSFORMING SOUTH AFRICAN SOCIETY?

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1 INTRODUCTION

Honourable Justices, Ladies and Gentlemen, before I embark on my paper I would like to quote the following words of Archbishop Desmond Tutu[1] who describes human rights as "God-given, there simply and solely because we are human beings". He further notes that:

> they were universal – everyone, just everyone whoever they might be, whether rich or poor, learned or ignorant, beautiful or ugly, black or white, man or woman, by the fact of being a human being had these rights. …. As a Christian I would add that each person was of infinite value because everyone had been created in the image of God. Each one was a God carrier and to treat any such person as if they were less than this was blasphemous, a spitting in the face of God.[2]

Human Rights and the continuous transformation thereof in a Bill of fundamental enforceable rights have changed the face of South African society forever. These rights guarantee each citizen equality, freedom and human dignity irrespective of race, colour, sex and the fact that they may be rich or poor. The Constitution contains a Bill of Rights that addresses both civil and political rights as well as socio-economic rights. Socio-economic rights in laymen's terms are rights placing an obligation on the state to act positively in favor of its citizens. These rights are also known as second generation -, welfare – or (and) red rights. They are specifically aimed at realizing the rights to access to housing, health-care, sufficient food and water, and social security of those in need.

1 Daniel Y et al Universal Declaration: of Human Rights Fifty Years and Beyond xiii.
2 Own emphasis.

It is necessary to make a few remarks as point of departure for this paper:

- This project of the Konrad-Adenauer-Stiftung[3] is aimed at an **analysing** the influence of political, socio-economic and cultural considerations on the Constitutional Court's interpretation and application of the Bill of Rights in order to develop **practical guidelines** for South African courts confronted with issues of a political, socio-economic and cultural nature.
- My paper today is only aimed at the first step of this two-folded process namely, analysing the influence of political, socio-economic and cultural considerations on the Constitutional Court's interpretation and application of the Bill of Rights.
- And particular the role of **political, socio-economic and cultural factors** in the decisions of the **constitutional court with regard to socio-economic rights**.
- Of particular importance in South African Constitutional socio-economic jurisprudence (if there is such concept) are the Soobramoney-, Grootboom- and TAC cases.

I have identified a number of important issues in these cases:

Firstly the importance of **interpretation strategies** and the **Interpretation clause**[4] in the Constitution.

Secondly the **movement from rationality to reasonableness**.

The **'core minimum entitlement'**-approach.

The **doctrine of separation of powers**.

The **internal limitations** contained in sections 26(2) and 27(2).

Finally the importance of the constitutional values and fundamental rights of **human dignity and equality** in the interpretation of socio-economic rights.

3 Titled: "Politics, Socio-Economic Issues and Culture in Constitutional Adjudication"

4 Section 39(1)(a) provides when interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.

2 BACKGROUND OF SOOBRAMONEY, GROOTBOOM AND TAC CASES

2.1 The Soobramoney case (Soobramoney v Minister of Health (KwaZulu-Natal) 1997 12 BCLR 1696 (CC))

Mr Soobramoney applied to the Durban High Court claiming that he had a right to receive renal dialysis treatment from the hospital in terms of section 27(3), which provides that no-one may be refused emergency medical treatment and section 11, the right to life of the 1996 Constitution. The application was dismissed. On appeal the Constitutional Court decided that this was not an emergency which called for immediate remedial treatment. The Court held that the right could not mean that the treatment of terminal illnesses had to be prioritised over other forms of medical care such as preventative health care. It also held that the right not to be refused emergency medical treatment was independent from the right to life and had to be interpreted in the context of the availability of health services generally. The Court went on to consider whether Mr Soobramoney ought to receive dialysis treatment at a state hospital in accordance with the provisions of the Constitution, which entitle everyone to have access to health care services provided by the state.[5]

2.2 The Grootboom case (The Government of the Republic of South Africa and Others v Grootboom and Others 2000 11 BCLR 1169 (CC))

Mrs Grootboom was one of a group of 510 children and 390 adults living in appalling circumstances in Wallacedene informal settlement. They then illegally occupied nearby land earmarked for low-cost housing but were forcibly evicted: their shacks were bulldozed and burnt and their possessions destroyed. Their places in Wallacedene had been filled and in desperation they settled on its sports field and in an adjacent community hall. This case raises the state's obligations under section 26 of the Constitution, which gives everyone the right of access to adequate housing, and section 28(1)(c), which affords children the right to shelter. It concerns questions about the enforceability of social and economic rights.

5 Section 27(1)(a) of the Constitution: "Everyone has a right to have access to health care services…"

2.3 The TAC case (Minister of Health and others v Treatment Action Campaign and others CCT8/02 (5 July 2002))

In the most recent cases dealing with socio-economic rights, Treatment Action Campaign v Minister of Health[6] in the High Court and Minister of Health v Treatment Action Campaign[7] in the Constitutional Court, the issue of government's duty to provide HIV positive pregnant women with anti-retroviral drugs to lower the risk of mother to child transmission[8] of the virus during childbirth was dealt with by the court.

3 SOME REMARK ON THESE CASES

3.1 Soobramoney –case

The court held that a court would 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. The majority judgement places great emphasis on the qualification of available resources:[9]

> What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this 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. This is the context within which section 27(3) must be construed.[10]

Even authoritative writers like De Waal, Currie en Erasmus[11] remark that:

> In the absence of available state resources, the failure of the state to address socio-economic rights is therefore not a violation of the rights. However, should resources become available, it will be difficult for the state to justify its failure to devote those resources to the fulfilment of the rights.

6 Case number: 21182/2001 Transvaal Provincial Division.
7 CCT8/02 (5 July 2002).
8 Henceforth referred to as MTCT.
9 1997 12 BCLR 1696 (CC) par 11. The Government of the Republic of South Africa and Others v Grootboom and Others 2000 11 BCLR 1169 (CC); also see Ngwena 2000 SAPL 14.
10. Soobramoney v Minister of Health (KwaZulu-Natal) 1997 12 BCLR 1696 (CC) par 11. Also quoted by the Constitutional court in the case The Government of the Republic of South Africa and Others v Grootboom and Others CCT 11/00 of 4 October 2000 par 46. Own emphasis.
11 The Bill of Rights Handbook 423.

It is clear when reading the case that the court considers political and socio-economic factors when deciding the Soobramoney case. The court is extremely careful not to interfere with the political decision making processes of government and especially with the health authorities.[12] Furthermore the court expressly states that the government does not have the socio-economic resources to provide tertiary level health care on request to all those in need thereof.

This limitation of resources has the result that the court sees it as a justifiable limitation on the almost absolute right to life, which is currently only seen as a negative right in South Africa. As opposed to European[13], Indian law[14], and even African law[15] where the right to life also has a positive dimension. It appears as if the court has the point of departure that if the right to life does have a positive dimension it will give rise to additional duties based on section 27. For this reason the court did not do so. Such a contextual approach can be criticised. Context should not be used to limit rights. Context should be used to interpret rights**.**

12 See Ngwena 2000 SAPL 15 who remarks that judges prefers exercise self-restraint on account of the doctrine of separation of powers and view the matter as one that should be essentially be resolved by elected by politicians.

However in his minority judgement justice Sachs remarks:

> **Courts are not the proper place to resolve the agonising personal and medical problems that underlie these choices**.[16] Important though our review functions are, there are areas where institutional incapacity and appropriate constitutional modesty require us to be especially cautious. Our country's legal system simply "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." **The provisions of the bill of rights should furthermore not be interpreted in a way which results in courts feeling themselves unduly pressurised by the fear of gambling with the lives of claimants into ordering hospitals to furnish the most expensive and improbable procedures, thereby diverting scarce medical resources and prejudicing the claims of others**.

13 Jansen van Rensburg "Die beregtiging van die fundamentele reg op toegang tot sosiale sekerheid" [The adjudication of the fundamental right to access to social security] LL D-Thesis (RAU Johannesburg 2000) 54-55. Article 2 of the European Convention on the Protection of Human Rights and Fundamental Freedoms which protects the right to life has been interpreted that the state has to protect a person's life. If the health care system does not comply with the minimum health care requirements the right to life has been violated. See Tavares v France 12 September 1991 (unpublished) as referred by Pellonpää Economic, Social and Cultural Rights 865. In the Tavares-case the applicant successfully proved that the respondent infringed on article 2 of the Convention after the applicant wife died in a French hospital due to complications she suffered after giving birth to their child. See also Scheinin Economic and Social Rights as Legal Rights 52.

14 Jansen van Rensburg "Die beregtiging van die fundamentele reg op toegang tot sosiale sekerheid" [The adjudication of the fundamental right to access to social security] LL D-Thesis (RAU Johannesburg 2000) 55. In Indian law the right to life is interpreted to include basic necessities to sustain a livelihood like food and clothing (Francis Coralie Mullin v The Administrator, Union Territory of Dehli 1981 2 SCR 516 op 529), the right to shelter (Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan & others 1977 AIR SC 152), the right to health care (Paschim Banga Khet Mazdoor Samity v State of West Bengal 1996 AIR SC 2426), and the right to education (Jain v State of Karmataka 1992 3 SCC 666; Krishnan v State of Andhra Pradesh & other 1993 4 LRC 234).

15 Jansen van Rensburg "Die beregtiging van die fundamentele reg op toegang tot sosiale sekerheid" [The adjudication of the fundamental right to access to social security] LL D-Thesis (RAU Johannesburg 2000) 55; Bennett Human Rights and the African Cultural Tradition 271.

16 Again confirming the argument that judges prefers exercise self-restraint on account of the doctrine of separation of powers. See Ngwena 2000 SAPL 15.

The court in Soobramoney uses the **purposive (contextual)** method of interpretation to interpret section 27(3). The court comes to the conclusion that the purpose of section 27(3) is to ensure that nobody is refused medical treatment and that this section must be interpreted **narrowly** in order to serve the **interests of the broader community**. The court further uses the literal method of interpretation and looks at the negative wording of section 27(3) to come to the conclusion that section 27(3) is not applicable in the particular case.

The minority judgement of justice Sachs refers to a number of important **socio-economic factors** which, according to him, are important in the **holistic protection** of the right to health care. He[17] remarks:

> Health care rights by their very nature have to be considered not only in a traditional legal context structured around the ideas of human autonomy but in a new analytical framework based on the notion of human interdependence. A healthy life depends upon social interdependence: the quality of air, water, and sanitation which the state maintains for the public good; the quality of one's caring relationships, which are highly correlated to health; as well as the quality of health care and support furnished officially by medical institutions and provided informally by family, friends, and the community. As Minow put it: "Interdependence is not a social ideal, but an inescapable fact; the scarcity of resources forces it on us. Who gets to use dialysis equipment? Who goes to the front of the line for the kidney transplant?"

He further proposes the following approach:

> Traditional rights analyses accordingly have to be adapted so as to take account of the special problems created by the need to provide a broad framework of constitutional principles governing the right of access to scarce resources and to adjudicate between competing rights bearers. When rights by their very nature are shared and inter-dependent, striking appropriate balances between the equally valid entitlements or expectations of a multitude of claimants should not be seen as imposing limits on those rights (which would then have to be justified in terms of section 36), but as defining the circumstances in which the rights may most fairly and effectively be enjoyed.

17 Par 54.

Sachs thus comes to the same conclusion as the majority judgement but **moves outside of the traditional legal context** and looks at the wider historical, current and future socio-economic factors which play a role in the right to health care and he balances these various factors and related needs to interpret the facts of the case in question. **Such a wider and more holistic interpretation method where various socio-economic considerations are taken into account can be welcomed.**

3.2 Grootboom –case

In the case of Soobramoney v Minister of Health (KwaZulu-Natal) the court made no mention of reasonableness. The court held that a court would 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. Before the judgement in the Grootboom case the conclusion can be reached that socio-economic rights can be enforced but that the court will be reluctant to interfere (except in extreme circumstances) with the functions of the legislative and executive branches of government. The state thus has the discretion about when and how these rights should be realised. However after the judgement in the Grootboom case it appears that the court will not investigate the rationality and bona fides of the executive and the legislature, but will rather ask whether the socio-economic programme and the implementation thereof was **reasonable**.

After the decision of the Constitutional court in the Grootboom-case it appears as if the court will no longer investigate the rationality and bona fides of the decisions of the legislative and executive authorities, but will rather investigate the **reasonableness** of the programme of the legislative and executive authority and the manner in which the programme is implemented.[18]

18 Jansen van Rensburg "Die beregtiging van die fundamentele reg op toegang tot sosiale sekerheid" [The adjudication of the fundamental right to access to social security] LL D-Thesis (RAU Johannesburg 2000) 114-116. See also Jansen van Rensburg L and Olivier MP "The Role and Influence of International Human Rights Instruments on South African Poverty Law" 2001 Law and Poverty IV - Moving towards International Poverty Law? Onati, Spain (to be published in Onati Proceedings by The Onati International Institute for the Sociology of Law.

In the words of Pierre de Vos[19]:

> This apparent divergence between these two judgements might reasonably bring one to conclude that the Constitutional Court has had a change of heart about the importance – and the nature and scope –of the social and economic rights protected in the Bill of Rights.

Of importance to this discussion is the manner in which the court interprets socio-economic rights and the **factors** which the court takes into account in the interpretation of such rights.

The large-scale consideration of international law by the court is to be welcomed.

The court notes that the facts of this case require a **twofold method of interpretation.** On the one hand a **textual interpretation** of these socio-economic rights and on the other hand a **contextual approach** so that these rights can be interpreted in their social and historical context is required.[20] In respect of the latter approach, the court immediately notes:

> A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on **human dignity**, freedom and **equality**. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. **Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right**. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. **If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test**.[21]

19 De Vos 2001 SAJHR 259 referring to Justice Chaskalson Third Bram Fischer memorial lecture in May 2000, just when the justices where sitting down writing the Grootboom decision. See Chaskalson A 2000 SAJHR 193.
20 Par 19.
21 Own emphasis.

It is clear that the court makes use of the **constitutional values** in the Constitution to give content to socio-economic rights. (So-called dignitarian approach) Denial of basic standards of living results in denial of a person's **human dignity.** It can further be argued that the value of **equality and the equality clause** as contained in the Bill of Rights strives to repair the historical inequalities and injustices of the past and this can be deduced from the court's abovementioned comment.[22] The court thus takes **historical, socio-economic and political factors** into account when giving content to socio-economic rights.

When investigating an infringement of a specific socio-economic right, such investigation must take place in **conjunction with all other socio-economic rights** in the Bill of Rights. The court emphasises that socio-economic rights must not be seen in isolation from one another. They must thus be read within the Constitution as a whole. The conclusion can be made that the state cannot realise all socio-economic rights immediately, and that the courts must keep this in mind and that the material needs of those persons who are **the most vulnerable ought to enjoy priority**. Once again socio-economic factors are considered in relation to one each other.[23]

It is not easy to determine infringement of a socio-economic right and each specific situation of alleged infringement must be evaluated on a **case to case** basis.[24]

22 Par 25: A programme which is aimed at the realisation of socio-economic rights which excludes a material section of the population will not be reasonable. Compare the article of De Vos 2001 SAJHR 258 – 276 where he argues that the rights in the Bill of Rights are interdependent and ……. See Jansen van Rensburg "Die beregtiging van die fundamentele reg op toegang tot sosiale sekerheid" [The adjudication of the fundamental right to access to social security] LL D-Thesis (RAU Johannesburg 2000) 55-66. Leckie makes the following observation with regard to the interdependence of civil and political rights on the one hand and socio-economic rights on the other hand: " Equality and non-discrimination form the basis of human rights law, and although generally associated with civil and political rights, these principles have always had pertinence to economic, social and cultural rights." Leckie 1998 Human Rights Quarterly 104-105.

23 Par 43 of the Grootboom-case.

24 Par 20 of the Grootboom-case. See suggestion in chapter 3 par 3.3.

It is clear that the Constitutional court gives socio-economic rights a wider interpretation in the Grootboom-case than in the Soobramoney-case. An attempt will be made to justify this difference in approach by the court. The Grootboom-case dealt with a group of homeless people in desperate need while the Soobramoney-case dealt with one specific individual whose life was dependant on specialised health care.

In the former case a vulnerable community in absolute need request the state to realise at least their **basic needs.** As opposed to this, in the Soobramoney-case **specialised** medical care which places exceptionally high financial claims on the state is required. It can be argued that the state is in possession of limited resources and that these resources must be utilised in the **best interest** of the **total population.** The courts will therefore more readily, where it appears that the state has not realised the basic needs of a vulnerable group, realise such basic needs of the group in question. Where a specific individual request high cost tertiary medical care while a large section of the population in South Africa does not even have access to primary medical care, the courts will not grant help readily, or at all.

3.3 TAC –case

Above mentioned case deals with provision of anti-retroviral drugs to pregnant mothers that do not have the means to afford these drugs themselves.

Section 27(1)(a) of the Bill of Rights determines that everyone has the right to access to medical care, including reproductive medical care. Section 27(1)(a), like most other socio-economic rights in the Bill of Rights is limited by the following provision contained in section 27(2):

> the state must take reasonable legislative and other measures
> within its available resources
> to progressively realise these rights.

It is argued on behalf of the TAC that section 27(1) creates an independent right that is not dependant on section 27(2) which requires that state to realise this right progressively. The court differs from this argument and interprets the relationship between sections 27(1) and 27(2) by looking at the **language** of the sections (**textual method of interpretation**). The court notes that the fact that section 27(2) refers to "these rights" gives a clear indication that it is connected to section 27(1). The same can be said of sections 26(1) en (2).[25] The court further refers to the Soobramoney and Grootboom –cases where this approach has already been followed.[26] The court notes that even where the court makes use of a **purposive method of interpretation** it will come to the same conclusion in respect of the above.

In line with the Grootboom decision, the court denies the existence of an international law principle of 'minimum core' or basic minimum realisation of every socio-economic right. The court interprets this as part of the question as to whether the state had a reasonable programme to realise a socio-economic right. The reason is described as follows by the court:

> It should be borne in mind that in dealing with such matters the court are not institutionally equipped to make the wideraging factual and political enquiries necessary for determining what the minimum core standards should be nor for deciding how public revenues should most effectively be spent.

The court further notes that a court is not in the position to make orders which can have social and economic consequences for the community. The court thus exercises judicial constraint and according to the court, they focus on the traditional function of the courts and forbid themselves from interfering with executive and legislative decisions. **In my opinion nothing prevents the court from giving instructions to executive and legislative authorities to start with a programme to identify the "minimum core" of each right**. Due to the fact that South Africa has signed and is in the process of ratifying the ICESCR.

25 Par 30: These two subsections are textually linked.
26 Par 29, 31 en 32.

4 CONCLUSION

Interpretation clause in Constitution plays large role

Political considerations

Social and economic consideration – statistical information, health care plans, housing programmes

Socio-economic circumstances in the country

Letterknegtelik because court is afraid of infringing on the principle of separation of powers

Contextuale – purposive even teologies

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