Courts and structural poverty in South Africa: To what extent has the Constitutional Court expanded access and remedies to the poor?

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INTRODUCTION

The South African Constitution is explicitly framed in transformative language. It seeks to “heal the divisions of the past”, “establish a society based on democratic values, social justice and fundamental human rights” and “improve the quality of life for all citizens and free the potential of each person”. Yet, 18 years after the advent of democracy, South Africa is an increasingly unequal society with extremes of prosperity and poverty. So, to what extent has the Constitutional Court (Court), as one of the primary interpreters of the Constitution, fulfilled its constitutional promise? Specifically, has the Court acted optimally as a constitutional voice for the poor? This chapter seeks to contribute towards answering such questions by examining the Constitutional Court’s record of grappling with (or not) key fault lines for advancing transformative adjudication, access and remedies for the poor.

The Constitutional Court was established in 1994 as a key institution of the post-apartheid constitutional order in recognition of how tainted the existing judiciary had been under apartheid and specifically to create a democratically representative judicial institution to oversee the new democratic dispensation. A hybrid of decentralised and centralised systems, the Court has characteristics of a final court of appeal, as well as characteristics of a court of constitutional review. According to the 1996 (final) Constitution, the Constitutional Court is the court of final instance for all constitutional matters, including appeals on constitutional matters from the Supreme Court of Appeal, and it decides on which issues are constitutional matters. In turn, the Supreme Court of Appeal is the final court of appeal in all

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6 See RICHARD SPITZ & MATTHEW CHASKALSON, THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA’S NEGOTIATED SETTLEMENT 191 (2001), who argue that one of the fundamental reasons for South Africa deciding on a centralised model of constitutional review with a separate Constitutional Court was an implicit recognition to ‘bypass’ the existing judicial hierarchy and especially the Appellate Division (later re-named the Supreme Court of Appeal), which lacked the political legitimacy and demographic representivity to assume the role of court of final appeal on constitutional matters in the new democratic dispensation.

7 In jurisdictions with decentralised judicial review, for example the United States, Japan, India and Australia, constitutional review is incorporated into the existing judicial hierarchy with a single Supreme Court at the apex. In jurisdictions with centralised judicial review, such as France, Germany, Indonesia, Colombia and South Africa, constitutional review is undertaken by a separate, specialised, constitutional court.

8 Under the 1993 Interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993), the position between the then Appellate Division of the Supreme Court and the Constitutional Court was even more ambiguous, with the two courts appearing to enjoy parallel jurisdiction.
matters other than constitutional matters. In addition to its concurrent appeals function shared with the Supreme Court of Appeal, the Constitutional Court has non-appellate jurisdiction in three areas. First, it is required to confirm any order of invalidity of an Act of Parliament a provincial Act or conduct of the President “made by the supreme Court of Appeal, a High Court, or a court of similar status”. Second, the Constitutional Court has exclusive jurisdiction over: the constitutionality of amendments to the Constitution; the constitutionality of parliamentary or provincial Bills; and disputes between national and provincial spheres of government concerning their powers and functions. Third, and most critically for this chapter, section 167(6)(a) of the Constitution empowers the Constitutional Court to function as the court of first instance by allowing direct access “when it is in the interests of justice and with leave of the Constitutional Court”. As detailed below, it is in respect of this direct access function that the Court’s practice has been most disappointing.

Whatever jurisdicitional and functional confusions might have been expected to arise from establishing a new superior court alongside an existing system were compounded by an early decision of the Constitutional Court in which the Court ruled that all matters are constitutional matters, thereby further blurring the jurisdictional lines between the Supreme Court of Appeal and the Constitutional Court:

There is only one system of law. It is shaped by the Constitution, which is the supreme law, and all law, including the common law, derives its force from the constitution and is subject to constitutional law.

Having established that all law is constitutional law, the Court has subsequently not conclusively defined what is not a constitutional matter i.e. when does the Constitutional Court not have jurisdiction? Or, to put it differently, why is there a need for both a Constitutional Court and a Supreme Court of Appeal? Indeed, overlapping and to some extent usurping the jurisdiction of the Supreme Court of Appeal, and despite being the most powerful court in South Africa, the Constitutional Court has yet to carve a distinct and comprehensive character for itself. And, while it has been robust in defending civil and political rights, it appears to have struggled to define its role in respect of healing the class divisions of the past and advancing socio-economic transformation. This has been most evident in its failure to take the gaps provided in the constitutional schema for pro-poor adjudication in respect of advancing direct access and remedying poverty.

Thus, despite being racially representative and having expressly committed itself to overseeing socio-economic justice in the interests of South Africa’s overwhelmingly poor black majority, the

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9 Section 167(3) of the Constitution.
10 Section 167(5) of the Constitution.
11 Section 167(4) of the Constitution.
12 Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC), paras 44-45.
13 See for example, Frank Michelman, who argues that the Court’s subsequent attempts to narrow down its appellate jurisdiction to a “subset of all possible appeals” have not been entirely successful (FRANK MICHELMAN, The Rule of Law, Legality and the Supremacy of the Constitution, in CONSTITUTIONAL LAW OF SOUTH AFRICA PAGES (Stuart Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein and Matthew Chaskalson eds., 2005) 2nd ed.
14 Although in 1994, seven of the eleven judges were white and four were black, the ratio of white to black judges steadily decreased, and, in 2012 only three of the eleven judges are white. All of the black judges grew up in socio-economic disadvantage under the apartheid system. Thus, following Theunis Roux’s analysis of the Land Claims Court, the Court can be regarded to be a “pro-poor” court at least in form (see Theunis Roux, Pro-poor Court, Anti-poor Outcomes: Explaining the performance of the South African Land Claims Court, SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 20, 511-43 (2004)).
Constitutional Court has balked at allowing poor people who might otherwise be denied justice to gain direct access and has failed to operationalise a meaningful recognition of poverty in its socio-economic judgments. As a consequence, and in stark contrast to the popularity of Constitutional Courts in many developing countries such as Colombia,\(^\text{16}\) in South Africa the Constitutional Court is a remote institution that is increasingly sandwiched between growing animosity from the polity over its political judgments\(^\text{17}\) on the one hand and, on the other hand, disinterest and distrust by the majority poor citizenry.\(^\text{18}\)

In analysing the Court’s jurisprudence using a pro-poor lens, I first outline the dimensions and consequences of structural poverty in South Africa. I then examine the two main problems poor litigants encounter in accessing justice. First, simply getting to the Court and, second, the jurisprudential obstacles faced by such litigants if they manage to reach the Constitutional Court. I conclude that the Constitutional Court needs to develop a more robust approach to poor litigants bringing socio-economic rights claims if it is going to move from a purely ameliorative role to a transformative one.

**DIMENSIONS AND CONSEQUENCES OF STRUCTURAL POVERTY**

\(^{16}\) See for example the chapter in this book on access to justice in Colombia by Manuel Iturralde, as well as the chapter by Libardo José Ariza on the economic and social rights of prisoners in Colombia.

\(^{17}\) Since the controversial run-up to, and assumption of, Jacob Zuma’s presidency of South Africa (on 6 April 2009, on the eve of national and provincial elections, the National Prosecuting Authority dropped various fraud and corruption charges against Zuma, citing political interference and, in doing so, cleared the way for Zuma to become President, which he did following the elections of 22 April 2009), there has been considerable hostility between the polity and the judiciary. The judiciary (along with the mainstream print media) has been publicly accused by senior ANC officials of being “untransformed” and acting in the interests of conservative elements of society. For example, in July 2008, African National Congress (ANC) secretary-general Gwede Mantashe was quoted as saying that Constitutional Court judges were “counter-revolutionaries” “preparing to pounce on Zuma” (http://www.businessday.co.za/Articles/Content.aspx?id=50316).

\(^{18}\) And, judgments such as *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) - in which the Constitutional Court (narrowly; with five judges concurring in the majority judgment and four dissenting) ruled that the legislation that disbanded a specialist anti-corruption unit (the Directorate of Special Operations, which had been very actively pursuing corruption) was constitutionally invalid – are thought to have been behind recent statements by senior ANC officials calling into question the judiciary’s standing. For example, in September 2011, Ngoako Ramathodi (ANC National Executive Committee member, chairperson of the ANC’s Elections Committee and Deputy Minister of Correctional Services) issued a statement in which he accused the judiciary of frustrating “the transformation agenda”, pandering to “white-dominated law societies” and being dominated by “forces against change” (published in: http://www.timeslive.co.za/opinion/commentary/2011/09/01/the-big-read-anc-s-fatal-concessions).

The tensions between the ANC and the judiciary are complex, with ANC leaders pointing to legitimate concerns over the slow pace of racial transformation in the judiciary (generally). However, it is clear that the ANC is instrumentally using this issue to undermine the judiciary more generally and specifically because of judgments such as the *Glenister* judgments, which are viewed as pushing a (white) liberal rule of law/ anti-corruption agenda that the ANC is nervous about. Part of the resultant (disingenuous) complexity is that - notwithstanding critiques (such as in this chapter) of the Constitutional Court not being sufficiently pro-poor or transformative - in fact, in ruling against the government in most of the socio-economic rights cases to have come before the Constitutional Court, the Court has certainly not done so in the service of white/liberal anti-transformation interests. On this point, see for example the Op-Ed by Jackie Dugard and Kate Tissington, “In defence of the ConCourt”, *The Star*, 14/12/2011: http://www.iol.co.za/the-star/in-defence-of-the-concourt-1.1198152

\(^{18}\) A 2008 survey on attitudes to public institutions conducted by the Human Sciences Research Council found a gradual erosion of public trust in the courts since 2004, with only 49 percent of respondents having trust in the courts in 2007 compared with 58 percent in 2004 (R Roberts “Between Trust and Scepticism: Public Confidence in Institutions” *Human Sciences resource Council Social Attitudes Survey* Vol 6 no 1 (2008) p 10: http://www.hsrc.ac.za/index.php?module=pagesetter&type=file&func=get&tid=25&fid=pdf&pid=23 (accessed on 9 February 2012). Among the likely reasons for the popular erosion of trust is that the majority (poor and black) members of society do not view the courts as doing enough to tackle inequality and advance socio-economic justice, while they do see courts as regularly defending rule of law matters.
While poverty per se has slightly decreased in South Africa between 1993 and 2012 (mainly through social grants and the extension of basic services to poor households), there are two worrying socio-economic indicators for the same period: inequality has increased, and the racialised nature of poverty has hardly shifted since 1994. Indeed, in sharp contrast to the Constitutional objective of achieving equality, South Africa is becoming an ever more unequal society. While some blacks have become rich, the gap between the poorest and richest South Africans has widened. And race remains a predominant factor in poverty and inequality. For example, while unemployment is chronic, and formally estimated at around 25 percent of the economically active population, it is overwhelmingly racialised: in 2009 approximately 27.9 percent of Africans were unemployed while only 4.6 percent of whites were unemployed. And, in terms of wage differentials, the average black worker earns USD 1 524 per annum while the average white worker earns approximately USD 8 270. A recent study by Murray Leibbrandt and Ingrid Woolard indicates that by all measures - including the gini coefficient (the gini coefficient measures inequality on a ration of 0 to 1, with 0 representing an equal society; the gini coefficient was 0.66 in 1993 and 0.70 in 2008) - inequality has grown between races and within races, and South Africa has the highest inequality between race groups in the world.

And, despite significant extension of infrastructure, access to housing and basic services is still heavily conditioned on apartheid spatial geography, which located black workers in dormitory townships and peri-rural areas on the outskirts of white towns and cities, meaning that the richer suburbs with houses and advanced access to services tend to be white and the poorer townships, informal settlements and rural areas with inferior houses and services are overwhelmingly black. To the extent that there has been provision, there are problems with access and quality. For example, state supplied or subsidised houses are usually provided on the urban periphery where there are limited employment opportunities and transport is too expensive to allow for urban integration. And basic services have been criticised for being too expensive, despite minimal free basic water and electricity provisions, resulting in widespread disconnections. Moreover, notwithstanding a doubling of fiscal expenditure on healthcare since 1994, health outcomes have deteriorated, evidenced by a fall in life expectancy (mainly due to HIV/AIDS). Similarly, notwithstanding relatively high expenditure on education, the quality of education in most of rural (black) South Africa remains poor and most school-leavers are unable to find work. As such, poverty in South Africa is structural and strongly linked to the subsisting legacy of apartheid’s racialised system of oppression and disadvantage. According to UN Habitat’s (2008) State of the World’s Cities Report 2008-2009:

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20 Section 1(a) of the Constitution.
21 The unemployment figure is about 15 percent higher, at around 40 percent if the informal economy is excluded from employment statistics.
25 In 2007, public expenditure on education accounted for approximately 5.4 percent of GDP, amounting to 17.4 percent of total government expenditure. This is a higher proportion than, for example Germany (SAIRR, note 22 above p 379).
Inequalities were not only increasing in South Africa’s urban centres but were also becoming more entrenched which suggests that failures in wealth distribution are largely the result of structural or systemic flaws ... South Africa stands out as a country that has yet to break out of an economic and political model that concentrates resources”.

This reality raises serious questions for South Africa’s quest to consolidate democracy. Structural poverty, especially when it encompasses such extreme (racially delineated) inequality, has a fundamentally undermining effect on social cohesion and stability. As set out in The Spirit Level, inequality is bad for society as a whole, rich and poor. Certainly, in South Africa, the effects of structural poverty with the extreme inequality dimension include serious violence and particularly gender-based violence. And - together with the narrowing of formal democratic spaces, which are dominated by an increasingly defensive, remote and autocratic African National Congress (ANC) – this has led to an explosion of local protests in township and informal settlement areas across the country since 2004.

In this truncated political and economic context, rising discontent over structural poverty has had two main outlets: protest and litigation. To date, and partially linked to the problems of access to justice outlined below, protest has been the main site of socio-economic contestation. The phenomenon of ‘service delivery’ or local protests in post-apartheid South Africa is a relatively recent one, beginning in 2004 and escalating in 2009, when there was an estimated average of 19.18 protests per month. A recent study by the Community Law Centre (CLC) of local protests between 2007 and 2010 found that there was a common mix of issues in the articulated concerns of protesters across the country, all either directly or indirectly related to socio-economic rights, with access to housing the single most cited concern (36.33 percent). After housing, the highest expressed concerns of protesters were access to water (18.36 percent), access to electricity (18.16 percent), poor service delivery generally (15.62 percent), public participation, such as ward committees, have also become captured by local politics. See for example Peter Alexander, Rebellion of the Poor: South Africa’s service delivery protests – a preliminary analysis, 37(2) REVIEW OF AFRICAN POLITICAL ECONOMY, 25-40 (2010); and Laurence Piper & Lubna Nadvi, Too Dependent to Participate: Ward Committees and Local Democratisation in South Africa, 35(4) LOCAL GOVERNMENT STUDIES 415-433, (2009).

While there are grounds to trace current protests back to the apartheid era, most commentators on local protests date the contemporary protest phenomenon as beginning in 2004 (see for example Booyzen (2007)). It is possible that the onset of the current wave of protests in 2004 relates to the consolidation of the powers of local government and the first round of local government elections in December 2000, and civil society’s growing dissatisfaction over the subsequent months and years with the failures of the local government realm.

There is evidence that protests have escalated since the election of President Jacob Zuma in April 2009. According to Municipal IQ, a private research company, there were more ‘service delivery’ protests in the first seven months of the Zuma administration than in the last three years of the Mbeki administration (Municipal IQ (1 December 2010) Explanations for the rise in incidents of protest under President Zuma relate to the raised, and then dashed, expectations of his more administration than in the last three years of the Mbeki administration (Municipal IQ (1 December 2010) Explanations for the rise in incidents of protest under President Zuma relate to the raised, and then dashed, expectations of his more administration than in the last three years of the Mbeki administration (Municipal IQ (1 December 2010) Explanations for the rise in incidents of protest under President Zuma relate to the raised, and then dashed, expectations of his more administration than in the last three years of the Mbeki administration (Municipal IQ (1 December 2010) Explanations for the rise in incidents of 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percent), sanitation (13 percent) and corruption generally (11.47 percent).\(^{33}\) Thus, broadly speaking, protests are about both poor service delivery and unresponsive/remote government. As argued by Richard Pithouse, the protests are best understood as being about “the material benefits of full social inclusion ... as well as the right to be taken seriously when thinking and speaking through community organisations.”\(^{34}\) In the words of Abahlali baseMjondolo:

But we have not only been sentenced to permanent physical exclusion from society and its cities, schools, electricity, refuse removal and sewerage systems. Our life sentence has also removed us from the discussions that take place in society.\(^{35}\)

As discussed below, these are the same issues that poor people bring (or try to bring) litigation claims over. While it is as yet unclear what impact the rising rebellion of the poor will have on the political economy, there are some indications that it might have adverse consequences particularly from a human rights paradigm. For example, a recent report by the Centre for the Study of Violence and Reconciliation (CSVR) and Society, Work and Development Institute (SWOP), reveals that in many communities protests (and particularly violent protests) have an undermining effect on community cohesion and result inter alia in women withdrawing from the public sphere.\(^{36}\) In addition, protest carries with it the very real risks of arrest, imprisonment and even death. The latter risk was poignantly demonstrated on 13 April 2011, when Andries Tatane, a community activist from Maqheleng township (Ficksburg in the Free State) was shot dead by police officers who lost control during a protest by the community over their right to water. Such realities suggest that it is critical for constitutional litigation to be a serious avenue for contesting the lived realities of poverty. This is all the more important given current populist perceptions by some ANC leaders and many poor black South Africans that the Constitution is an elite document and the Constitutional Court serves mainly elite interests.\(^{37}\) Naturally, I do not suggest that the Court can on its own alter the balance of economic forces that sustains structural poverty. I do, however, suggest that the Court has underestimated or misinterpreted the role it can play in promoting access to justice by advancing access to, and meaning within, the judicial system. I also suggest that if the Court were to embrace a more substantively pro-poor role, this could contribute not only to material change and socio-economic justice, but also to the consolidation of democracy in South Africa.

**ACCESS TO JUSTICE**

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\(^{34}\) Richard Pithouse (2007) “‘Our struggle is thought, on the ground, running’: The University of Abahlali baseMjondolo”: http://www.abahlali.org/node/2814 (accessed on 9 February 2012).


The first hurdle a poor person must overcome in any justice system is accessing that system. But access to justice means more than mere physical access to courts – it incorporates the ability to be effectively heard and responded to. In South Africa, the normal difficulties of accessing justice are exacerbated by structural poverty as outlined above, which means that they are not in a position to pay for private legal representation and often feel disempowered when it comes to making complex legal claims. In light of the injustices of the past, some of which related to a conservative legal order that propped up the apartheid regime and the related inability for the majority of South Africans to access justice, it follows that it should be a fundamental preoccupation of the post-apartheid judiciary to secure legal representation for poor litigants. Yet, as an institution, the judiciary has not done enough to address the problem of the unrepresented poor from a systemic perspective.

Getting to the Court

While, for the most part, poor people facing serious criminal charges do receive legal representation at state expense (mainly through Legal Aid South Africa), this is not the case for civil and political litigation, including socio-economic rights-related challenges. While the judiciary as a whole - and the Constitutional Court as the highest court in all constitutional matters, specifically - cannot assume the full burden of the weight of ensuring physical access to the court, there are at least two critical ways in which the Constitutional Court could have overcome barriers to poor people getting their cases heard. First, the Constitutional Court could have prioritised delineating a comprehensive right to legal representation at state expense for all matters (whether criminal or civil). Second, the Court could have developed an expansive practice regarding direct access. As argued below, the Court can be criticised for not going far enough on both fronts.

Failure to delineate a comprehensive right to legal representation at state expense in civil matters

In recognition of the facts that legal representation lies at the core of access to justice and that poor people are unlikely to be able to afford lawyers’ fees, section 35(3)(g) of the South African Constitution gives accused persons the right to a legal practitioner at state expense, “if substantial injustice would otherwise result”. Yet, with the exception of children, there is no explicit right to legal representation at state expense in civil cases, including non-criminal constitutional matters. Yet, as I discuss below, there are compelling arguments to interpret section 34’s right to a “fair public hearing” as implying a right to legal representation at state expense using the same caveat as section 35(3)(g)’s “if substantial injustice would otherwise result”.

In the context of criminal cases, the Constitutional Court has gone some way towards clarifying the parameters of the term “if substantial injustice would otherwise result”. The fourth judgment handed down by the Court, S v Vermaas; S v Du Plessis, took the form of a consolidated referral of two criminal cases from the Transvaal Provincial Division of the High Court in which the accused both ran out of money in the course of the proceedings and sought to rely on the right to legal representation at state expense for all matters (whether criminal or civil). Second, the Court could have developed an expansive practice regarding direct access. As argued below, the Court can be criticised for not going far enough on both fronts.

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38 See for example John Dugard (1978) HUMAN RIGHTS AND THE APARTHEID LEGAL ORDER (Princeton: Princeton University Press) for an account of how the judiciary under apartheid legitimised the apartheid state and in general failed to take any gaps to advance human rights.

39 I do not include in my criticism of the judiciary’s failure to systemically advance access to justice, individual judge’s ad hoc attempts to remedy specific unrepresented clients through referrals to the Legal Aid Board or to Law Societies etc.

40 Section 28(1)(h) of the Constitution.

41 S v Vermaas; S v Du Plessis 1995 (3) SA 292 (CC) (Vermaas).
expense in section 25(3)(e) of the interim Constitution. The two trial judges independently decided that the accused were not entitled to rely on section 25(3)(e) because the trials had commenced prior to the interim Constitution taking effect. Nevertheless, both judges suspended the trials and referred the possible application of the right to legal representation at state expense to the Court in case it might take a different view.

As it turned out, the Court did not take a different view, holding that the interpretation of section 25(3)(e)’s qualification — “where substantial injustice would otherwise result” — was within the concurrent jurisdiction of the Appellate Division (later named the Supreme Court of Appeal) and, as such, had been incorrectly referred to the Court. The Court furthermore declined to answer the substantive question put to it, remitting the two cases back to their respective trial courts. However, despite such avoidance, in the Vermaas judgment the Court did venture to establish some guidelines for trial courts considering whether to order the state to pay for an accused person’s defence. These are the need to assess “the accused person’s aptitude or ineptitude to fend for himself or herself”, as well as to reference being made to the “ramifications [of the decision to grant legal representation] and their complexity or simplicity … how grave the consequences of a conviction may look, and any other factor that needs to be evaluated in the determination of the likelihood or unlikelihood that, if the trial were to proceed without a lawyer for the defence, the result would be ‘substantial injustice.’” Simply put, in Vermaas the Court established that, to assess if “substantial injustice” would result from the failure to provide legal representation at state expense in a criminal case, a court should take into account the complexity of the case, the accused person’s ability to fend for her/ himself and the gravity of the possible consequences of a conviction. The Court further expressed its concern about the steps that the state had thus far taken to put in place “mechanisms that are adequate for the enforcement of the right [to legal representation]”.

Turning to civil cases, Geoff Budlender has persuasively argued that the alteration of the wording of the relevant section on civil trials as between the interim Constitution (section 22) and the Constitution (section 34), has had the effect of constitutionalising a right to legal representation in civil cases. To explain this train of logic, it is necessary to summarise Bernstein v Bester,in which section 22 of the interim Constitution, which guaranteed “the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum”, came before the Court. In Bernstein, the CC contrasted this section 22 provision with the guarantee of a “fair and public hearing” in article 6(1) of the European Convention on Human Rights (ECHR). It held that, while article 6(1) of the ECHR constitutionalises the right to a fair civil trial (in European member states), the use of clearly different

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42 The interim Constitution of the Republic of South Africa Act 200 of 1993 was a transitional arrangement, which was replaced by the Constitution in 1996. Like the qualification in section 35(3)(g) of the Constitution, the right to legal representation in the interim Constitution, too, was qualified by the phrase, “where substantial injustice would otherwise result” (section 25(3)(e) of the interim Constitution).
43 Vermaas (note 41 above) para 12. Under the interim Constitution the Court was inserted into the existing judicial structure at the same level as the Appellate Division, both as divisions of the Supreme Court with concurrent jurisdiction, neither being able to hear appeals from the other.
44 The intermediate question whether the rights in the interim Constitution applied to pending cases was settled in S v Mhlungu 1995 (3) SA 867 (CC), a decision handed down in between the referral of the two High Court cases to the Court and its decision in Vermaas (note 41 above).
45 Vermaas (note 41 above) para 15.
47 Vermaas (note 41 above) para 16.
48 Bernstein v Bester 1996 (2) SA 751 (CC) (Bernstein).
w wording in section 22 indicated that the framers of South Africa’s interim Constitution “deliberately elected not to constitutionalise the right to a fair civil trial”, meaning that, in contrast to the ECHR, South Africa’s interim Constitution did not guarantee a right to a fair civil trial. Yet, for the Constitution, the framers reverted to the ECHR wording, including in section 34’s formulation the right to have a “fair public hearing”. The fact that section 34 of the Constitution follows the formulation in the ECHR prompts Budlender to argue: “it is difficult to avoid the conclusion that this constitutionalises the right to a fair civil trial” in South Africa.

Critical to an interpretation of the right to a fair civil trial, the European Court of Human Rights clarified in Airey v Ireland that the right of access to a fair civil trial includes the right to be able to place one’s case effectively before a court, which in many circumstances will require the assistance of a lawyer. In the context of assessing whether Mrs Airey’s right of access to court (implicit in the guaranteed right to “a fair and public hearing”) had been breached by virtue of her not being able to afford legal representation to obtain a degree of judicial separation from her husband (divorce not being permissible in Ireland), the court reasoned:

The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective ... This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial ... It must therefore be ascertained whether Mrs Airey’s appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and effectively.

In coming to its conclusion that Mrs Airey’s inability to afford legal representation in the absence of legal aid in Ireland had violated her right of access to court, the court assessed a number of factors not dissimilar to the guidelines suggested by the South African Court in Vermaas, including the complexity of the case. The South African Land Claims Court (LCC) in Nkuzi Development Association v Government of the Republic of South Africa seems to support this interpretation, of the right to a fair hearing involving an assessment of the right to legal representation at state expense, in certain circumstances. Considering the question of whether “persons who have a right to security of tenure in terms of the Extension of Security of Tenure Act (ESTA) and the Land Reform (Labour Tenants) Act and whose tenure is threatened or has been infringed, have a right to legal representation or legal aid at State expense under certain conditions”, the LCC found:

There is no logical basis for distinguishing between criminal and civil matters. The issues in civil matters are equally complex and the laws and procedures difficult to understand. Failure by a judicial officer to inform these litigants of their rights, how to exercise them and where to obtain assistance may result in a miscarriage of justice.

50 Bernstein (note 48 above) para 106.
51 Budlender (note 46 above) 342.
52 Airey v Ireland 32 Eur Ct HR Ser A (1979).
53 Ibid. para 24. [Airey]
54 Ibid. [Airey]
55 The Land Claims Court (LCC) is a specialist court with the same status as the High Courts, which was established in 1996 to have jurisdiction over the Restitution of Land Rights Act 22 of 1994, the Land Reform (Labour Rights) Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997.
56 Nkuzi Development Association v Government of the Republic of South Africa 2002 (2) SA 733 (Land Claims Court (LCC)) (Nkuzi).
58 Land Reform (Labour Tenants) Act 3 of 1996.
59 Nkuzi (note 56 above) para 1.
60 Ibid. para 11. [Nkuzi]
It concluded that the people concerned “have a right to legal representation or legal aid at state expense ...” and it declared that the state was under a duty to “provide such legal representation or legal aid through mechanisms selected by it”. The LCC further ordered the Minister of Justice and the Minister of Land Affairs to “take all reasonable measures to give effect to this order, so that people in all parts of the country who have rights as set out in this order, are able to exercise those rights effectively”.

It is noteworthy that, in deriving a right to legal representation in certain circumstances, presumably from section 34’s “guarantee of a ‘fair public hearing’”, the LCC used section 35(3)(g)’s caveat of “if substantial injustice would otherwise result”, which does not seem to be an unreasonable extension of the criminal case logic. Indeed, in his Heads of Argument in the LCC case The Richtersveld Community and The Government of the Republic of South Africa and Others, Geoff Budlender argues that “the fact that an element expressly required for a fair criminal trial has not been expressly required for a fair civil trial, does not mean that it is by implication excluded in civil trials ... Just as, in a criminal trial, the right to a fair trial is broader than the list of specific rights set out in the Constitution”.

Taking this further, in assessing if substantial injustice would otherwise result in the context of civil trials, Budlender suggests supplementing the list of factors to be considered as established by the CC in Vermaas, with the issue of “equality of arms”. By this he means that one of the factors that should be considered when assessing if “substantial injustice” would result if legal representation is not provided at state expense, is the extent to which the opponent is represented and if this will place any party at a substantial disadvantage.

Ultimately, whenever any issue of legal representation for a civil matter comes to being tested, as is the case for criminal matters, it should occur on a case by case basis, grounded in reality. As defined by the Court in Airey, in the context of Europe, so, in South Africa, rights are not legal fictions, and they are meaningless if they are not rendered practicable and effective. As argued by Budlender:

Access to court therefore means more than the legal right to bring a case before a court. It includes the ability to achieve this. In order to be able to bring his or her case before a court, a prospective litigant must have knowledge of the applicable law; must be able to identify that she or he may be able to obtain a remedy from a court; must have some knowledge about what to do in order to achieve access; and must have the necessary skills to be able to initiate the case and present it to the court. In South Africa the prevailing levels of poverty and illiteracy have the result that many people are simply unable to place their problems effectively before the courts.

**Failure to advance direct access to the Constitutional Court in the public interest**

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61 Ibid. para 1.1. [Nkuzi]
62 Ibid. para 12, Order para 1.2. [Nkuzi]
63 Ibid. para 12, Order para 2. [Nkuzi]
65 Nkuzi (note 56 above), at para 12, Order at para 1.1. The paragraph reads: “the persons … have a right to legal representation or legal aid at State expense if substantial injustice would otherwise result, and if they cannot reasonably afford the cost thereof from their own resources”.
66 Applicant’s Heads of Argument, The Richtersveld Community v The Government of the Republic of South Africa and Others (unreported Land Claims Court case no 63/05). The government settled the matter after the case had been argued and before judgment in order not to set a jurisprudential precedent regarding the right to legal assistance at state expense (email to author from Geoff Budlender, 3 July 2006).
67 Nkuzi (note 56 above) para 53, including footnote 26.
68 Budlender (note 46 above) 344.
69 Ibid. 341. [Budlender]
In a 2006 article about the Constitutional Court’s ‘pro-poor’ record,70 I argued that the Court had not always functioned as an institutional voice for the poor – evident in the relatively low number of cases brought by poor people as a percentage of the total number of cases in which decisions are handed down by the Court.71 I suggested that one way in which the Court could live up to its transformative promise of functioning as an institutional voice for the poor was to utilise the direct access mechanism to allow constitutional matters to be brought directly to it by poor people who have been unable to secure legal representation.72 I pointed out that in its first decade (1995-2006), the Court had interpreted its rules overwhelmingly restrictively,73 to only grant direct access in eight instances,74 and never to allow an ‘off the street’ complaint by a poor person to be heard.75 Indeed, as I had observed - while spending two weeks in the Registry conducting archival research during February 2005 - poor people who came to the Court Registry window to seek justice were sent away with a copy of the Court rules, regardless of whether their complaint raised substantive constitutional issues. Such severe gatekeeping occurred in the context of a low caseload,76 which suggested to me that the Court could hear a number of direct access cases each year, if these were appropriately screened for raising constitutional issues in the public interest. I concluded that the Court’s practice of restricting its roll rather than actively facilitating direct access by the poor meant that - in contrast with for example the Constitutional Court of Costa Rica (“Sola Constitucional” of the Supreme Court, located in San Jose), which accepts any kind of direct claim (called amparo) written in any form, and considers around 17 000 amparo cases each year,77 or the Constitutional Court of Colombia, which up until 2011 considered approximately 800

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71 Out of the 24 cases in which judgments were handed down in the course of 2005, the applicant/appellant was poor (by any objective South African standard) in only three cases (ibid. 275). [Dugard SAJHR 2006]
72 Section 167(6)(a) of the Constitution provides that “National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court – (a) to bring a matter directly to the Constitutional Court‟.
73 The applicable Court rule (rule 17(1) of the 1995 Rules, succeeded by rule 18 of the 2003 Rules: <http://www.constitutionalcourt.org.za/site/thecourt/rulesofthecourt.htm>) allowing direct access has been restrictively interpreted to refuse applicants for direct access on the grounds of finding non-compliance with the following criteria: “exceptional circumstances”, “urgency” and “public importance”; as well as under the evolving principle that “this Court should ordinarily not deal with matters as both a Court of first and as one of last resort”.
74 I excluded the leave to appeal applications that were disguised as direct access applications. The eight instances are: Brink v Kitshoff NO 1996 (4) SA 197 (CC), S v Dlamini (heard with S v Dladla; S v Joubert; S v Schietekat) 1999 (4 SA 623 (CC), Moseneko v The Master 2001 (2) SA 18 (CC), Satchwell v President of the Republic of South Africa 2003 (4) SA 266 (CC), Minister of Home Affairs v National Institute for Crime prevention and the Re-integration of Offenders (NICRO) 2005 (3) SA 280 (CC), Bhe and Others v Magistrate Khayelitsha and Others (heard together with Shibi v Sithole and Others; South African Human Rights Commission and Another v President Republic of South Africa and Another) 2005 (1) SA 580 (CC), Mkontwana v Nelson Mandela Metropolitan Municipality and Another (heard together with Biset and Others v Minister of Provincial Affairs and Constitutional Development; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others) 2005 (1) SA 530 (CC), and Minister of Home Affairs v Fourie and Another; Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs and Others 2006 (1) SA 524 (CC).
75 The granting of direct access in these eight cases appears to have been motivated by the need to remedy some procedural defect in the circumstances around which the case came before the Court or to attach what served as an essentially amicus-type intervention by a relevant interest group to an existing matter.
76 Between February 1995 and January 2006 the Court delivered 254 written judgments, averaging 23 per year (with a low of 14 in 1995 and a high of 34 in 2002). This same practice has persisted until 2012, with an average of 23 cases heard per year between January 2006 and January 2012. This is a very low roll compared with other constitutional or apex courts. What this means is that the South African Constitutional Court is a cautious court that elects to maintain a low roll. While there are no definitive authoritative explanations of this practice, it is often said that, in controlling its roll generally and denying direct access specifically, the Court has been responding to the perceived “floodgates” problem experienced by the Supreme Court of India, which has too many cases to deal with and ends up with many judgments not upheld by the government.
77 Email communication with Professor Bruce Wilson, University of Central Florida, Orlando, Florida, 1 October 2008.
tutela cases each year, and for 2011 considered 449 direct access cases - the Court risked becoming an elite institution, increasingly inaccessible to the poor.

Over the past six years, the Court has not significantly changed its practice of avoiding direct access. I still maintain that direct access is a potentially powerful mechanism for facilitating constitutional matters to be heard that otherwise would not make it through the normal judicial hierarchy. And I still believe that, in order to become relevant to the majority of South Africans, the Court needs to reverse its stance on direct access, energetically promoting it rather than discouraging it. However, I have subsequently refined my argument. Taking into account a possible criticism that granting direct access to the Court to unrepresented poor litigants might not be the optimal way for constitutional matters to be effectively dealt with, especially in a common law system where precedent is strictly pursued, I suggest a pivotal role for public interest organisations in facilitating such direct access. I envisage that this could work in two ways, to the benefit both of affording greater access to justice to the poor and to the development of South Africa’s socio-economic rights jurisprudence.

First, an appropriately-staffed Court Registry office (perhaps using volunteers or interns who have undergone a relevant training course) should scan complaints from poor people approaching the Registry window for substantive constitutional matters. Where such matters are identified, the staff member (in consultation with senior Court Registry staff) should proceed with a formal process of referring the matter to a relevant public interest organisation, requesting the organisation to represent the applicant in a direct access application to the Court. Second, the Court should actively encourage public interest organisations wishing to take up their own constitutional matters (or such matters on behalf of poor people or in the public interest) by allowing them to utilise the direct access route. If public interest organisations with relevant cases could bypass the normal judicial hierarchy, this would greatly reduce the costs and time involved in litigating for them, and it is likely to encourage more organisations to take up public interest litigation. Regardless of whether such public interest legal assistance avenues are pursued, it might anyway be necessary for the Court to rethink its style of adjudication in the interest of significantly increasing its case load. In this regard, the Court might consider the practice of the Costa Rican Constitutional Court, which - in order to consider 17 000 amparo cases per year - makes extensive use of leterados (trained legal clerks) to screen direct access applications for merit, and typically hands down very concise rulings.

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78 Email communication with Professor César Rodríguez-Garavito, University of the Andes, Bogota, 8 February 2012. Rodríguez-Garavito explains that the decrease in tutela cases in 2011 is in line with the Constitutional Court’s new practice since 2011 of streamlining and drawing together similar cases together to avoid repetitive rulings.

79 On my count, between January 2006 and January 2011, the Court heard only seven direct access cases. Of these, it only granted direct access in one instance, and this was not to assist a poor litigant to gain access to justice. In Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetha v President of the Republic of South Africa and Another 2008 (5) SA 31 (CC), the Court granted direct access in order to compel the disclosure of discreet portions of a record of proceedings related to national intelligence underway in the Constitutional Court. Here, the Court found that it was in the public interest to grant direct access, not least as “none of the parties is opposed to us adjudicating the matter” (para 20). The practice of denying direct access continues to impact negatively on the profile of cases the Court hears, meaning that the Court hears very few cases brought proactively by poor litigants (as opposed to criminal cases).

80 The Court could, perhaps, facilitate fund raising to assist public interest organisations to take up such litigation. If the litigation can proceed on a direct access basis, the costs of litigating will be substantially reduced compared to proceeding through the normal judicial hierarchy.

81 In the normal course, a constitutional matter is first heard in the High Court, then it is usually appealed to the Supreme Court of Appeal, before reaching the Court (it is possible to apply for leave to appeal directly from the High Court to the Court, however, such applications are often dismissed). The process can take years and the cost can be exorbitant.

82 Email communication with Professor Bruce Wilson, University of Central Florida, Orlando, Florida, 1 October 2008.
On a number of occasions I have heard Court judges bemoan the absence of socio-economic rights cases coming before them. Yet, the Court has done little to address systemic access-related obstacles in the interest of poor people. Specifically, the Court has not delineated a comprehensive right of access to justice at state expense for civil/constitutional matters and it has failed to utilise its own direct access mechanism in the public interest. As a consequence, the Court remains a relatively non-accessible institution and it loses countless opportunities to develop constitutional law in the interests of the poor. As detailed below, for the few poor litigants who make it to the Constitutional Court, the Court’s weak socio-economic rights record has further undermined the promise of transformative justice.

**Being heard**

Moving beyond the Court’s international reputation for having formally declared socio-economic rights justiciable, much has been written about the Court’s substantively weak approach to socio-economic rights adjudication and the dampening effect this has had on the number of related cases coming before the Court, as well as how this has been detrimental to the development of socio-economic rights jurisprudence generally. As of October 2011, only 12 substantive socio-economic rights cases had come before the Court since its establishment in 1995, six of these decisions which were handed down between 2008 and 2009 - two on healthcare rights, six on housing rights, one on social assistance rights, one on water rights, one on electricity rights and one on sanitation rights. Some socio-economic rights have never been adjudicated at Constitutional Court level, including the right of access to sufficient food (section 27(1)(b) of the Constitution).

To a large extent, the paucity of socio-economic rights cases having come before the Court relates to the obstacles of access set out above. The barriers to poor people accessing courts independently (such as

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83 I have heard two Court judges speak specifically about their wish to see a case come before them about “school children still being taught under trees”.

84 For example, in certifying the 1996 Constitution, the Court stated: “In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights ...” Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution 1996 1996 (4) SA 744 (CC) para 76.


86 I classify a “substantive socio-economic rights case” by whether the ratio of the decision was linked to a cause of action founded on any of the socio-economic rights in the Constitution.

87 Soobramoney v Minister of Health, Province of KwaZulu-Natal 1998 (1) SA 765 (CC), and Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC).

88 Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) (Grootboom), Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC), Jaftha v Schoeman; Van Rooyen v Scholtz 2005 (2) SA 140 (CC), Occupiers of 51 Olivia Road, Berea Township and Another v City of Johannesburg and Others 2008 (3) SA 208 (CC) (Olivia Road), Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and others 2010 (3) SA 454 (CC) (Thubelisha Homes) and Abahlali baseMjondolo v Premier of KwaZulu Natal Province and others (2010) BCLR 99 (CC).

89 Khosa and Others v Minister of Social Development and Others 2004 (6) SA 505 (CC).

90 Mazibuko and others v City of Johannesburg and others 2010 (4) SA 1 (CC) (Mazibuko).

91 Joseph v City of Johannesburg 2010 (4) SA 55 (CC).

92 Nokotyana and others v Ekurhuleni Municipality 2010 (4) BCLR 312 (CC).

93 Just after writing this chapter, the Court handed down a string of four socio-economic rights judgments in December 2011, all dealing with the right to housing. None of these judgments reflects a fundamental change in the Court’s adjudicative style.
no comprehensive right to legal representation at state expense in civil matters) mean that very few socio-economic rights-related cases are taken up at all, and fewer still make it all the way to the Court. Another reason for the low number of socio-economic rights cases relates to how the Court has approached the few socio-economic rights cases that it has heard. With Theunis Roux, I have previously written about two of these specific disincentives. First, we argued that the Court’s decision to adopt a reasonableness standard of review, instead of a more robust rights-based/ violations-related standard (including a minimum core content approach), has “the potential to diminish the capacity of the Court to function as an institutional voice for the poor since it requires expert understanding of complex policy and budgetary issues, making it all but impossible for poor people to bring [socio-economic] rights cases without extensive technical and financial support”. This has been exacerbated by the Court not providing much clarification in terms of the content of socio-economic rights. Second, we argued that the kinds of “conventional and somewhat limited relief97 pursued by the Court in socio-economic rights cases acted as a further deterrent to poor people opting for litigation as a means of enforcing their socio-economic rights (as opposed to direct protest, political action etc). We noted that - despite section 172(1) of the Constitution providing that “[w]hen deciding a constitutional matter within its power, a court – (b) may make any order that is just and equitable” - the Court has always opted to provide programmatic/policy relief rather than providing direct relief to the affected individuals, and it has failed to utilise structural interdicts or to set itself up as an institution with oversight over the enforcement of its socio-economic rights judgments. This has meant that the few litigants who have brought socio-economic rights claims to the Court have not secured any direct benefits from the litigation, a further disincentive to future litigants.

A further disappointing characteristic of the Court’s socio-economic rights record is the Court’s practice of not grasping opportunities to pronounce on potentially transformative issues unless it has to. The Court has all along adopted a cautious adjudication style, which Ian Currie (following Cass Sunstein) has referred to as one of “judicious avoidance”. This style of adjudication is characterised by a “reluctance on the part of the Court to pronounce on any issue that does not have to be decided for the purposes of settling the case”. This practice resulted in the Court passing over the opportunity presented in Vermaas to delineate a comprehensive right to legal representation at state expense (an opportunity that has not again arisen in the Court’s subsequent cases and one that could have greatly contributed to

94 J Dugard & T Roux (note 15 above).
95 J Dugard & T Roux (note 15 above) 116. There is another troubling consequence of the CC having adopted the weak and overly-deferential reasonableness test – it has entrenched a perception among the executive that judges may not review socio-economic rights-related policy. This attitude was recently revealed in the unscripted comments of Amos Masondo, Executive Mayor of the City of Johannesburg, at a press conference on 15 May 2008 at which he announced the City’s intention to appeal the Mazibuko judgment. Attacking Tsoka J directly, Masondo warned: “Judges must limit their role to what they are supposed to do. If they want to run the country they must join political parties and contest elections. In that way they can assume responsibilities above their powers” (reported in: Kingdom Mabuza (15 May 2008) “Jozi to contest ruling on water”: http://www.sowetanlive.co.za/sowetan/archive/2008/05/15/jozi-to-contest-ruling-on-water (accessed on 9 February 2012).
98 In Grootboom (note 88 above), the CC did remark in passing that the South African Human Rights Commission (which appeared as amicus curiae in the case) should “monitor and report” on the state’s progress in complying with the judgment (note 106 above, para 97). However, the CC did not incorporate this oversight function in its order and, as a consequence, when the Commission attempted to report back to the CC on the ongoing intolerable conditions still prevailing in the claimant community, the CC refused to engage with it.
99 J Dugard (note 2 above) [SAJHR systemic article]
101 J Dugard & T Roux (note 15 above) 110.
advancing transformative justice). Judicious avoidance has also had a deadening effect on socio-economic rights jurisprudence. It has, for example, resulted in the Court’s most recent socio-economic rights judgment adding very little to the jurisprudence. In *Olivia Road*, the Court sat on an appeal from the Supreme Court of Appeal on the nature of the state’s obligations towards 67 000 desperately poor people facing eviction from buildings in the inner city of Johannesburg in terms of the City’s urban regeneration strategy. By the time the dispute reached the Court, an obligation to provide at least temporary alternative shelter had been conceded. The remaining issues over which the parties sought clarification from the Court included:

- Whether the right of access to adequate housing, as guaranteed by section 26 of the Constitution, requires a consideration of location in the provision of alternative accommodation (i.e., what weight should be attached to the benefits poor people facing eviction derive from their present location);
- Whether or not, in failing to make any provision for the poor in its inner city housing plans, the City of Johannesburg’s housing policy was unconstitutional;
- Whether a 1977 law (the National Building Standards and Building Regulations Act 103 of 1977) – which gave a local authority the right to evict occupiers of buildings it considered to be unsafe without considering the availability of alternative accommodation) was inconsistent with the Constitution.

Choosing to avoid these issues, the Court focused instead on establishing the requirement for a local authority to meaningfully engage with occupiers facing eviction. Finding that the City of Johannesburg had failed to make an effort to engage with the occupiers at any time before proceedings for their eviction were brought, the Court ruled that the subsequent eviction was unlawful. However, while a welcome innovation, the concept of meaningful engagement does not provide poor people with any concrete protections against eviction, nor does it help to delineate the right to housing. In refusing to decide on the issues outlined above, which were squarely placed before the Court, the Court missed an important opportunity to develop the right to housing jurisprudence beyond its decision in *Grootboom*. By so doing, the Court failed to tackle the policies and practices at the core of the vulnerability of poor people living in locations earmarked for commercial development and it failed to establish critical rights-based safeguards for extremely vulnerable groupings, despite having all the material before it to do so.

As Stuart Wilson and I have argued, in assessing the adjudication of socio-economic rights over the past 18 years, it is apparent that the Court has failed to take seriously and to operationalise within its judgments the issue of structural poverty. Indeed, the Court has consistently “turned away from what claimants say about their lived experiences of poverty in favour of an abstract evaluation of the state’s justifications for its refusal to respond to them”, and the judges’ interpretive moves construct poverty not as a *prima facie* transgression of legal norms, but as a banal feature of the social order, which Judges are enjoined to “manage” rather than to attempt to eliminate. They have contributed to the depoliticisation and domestication of poverty within fundamentally unjust pre-existing patters of resource distribution, social control and disempowerment.

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By way of examples, we point to the Court’s failure to engage with the substantive evidence regarding the water needs of the residents of Phiri, Soweto in the Mazibuko case, which dealt with, inter alia, section 27(1)(b) of the Constitution, the right to sufficient water. In this case, which is also dealt with in the chapter in this book by David Bilchitz, the Court overlooked the underlying material problem and considerable contextual evidence provided by the applicants – this included direct testimony from very poor, female-headed, multi-dwelling, jobless families that ran out of the government’s free basic water supply halfway through each month and could not afford additional water once this supply was automatically disconnected by a prepayment water meter - in favour of taking refuge in a highly deferential approach to the policy choices of the government that effectively “divorces the question of the sufficiency of the free basic supply from the hardship caused by the disconnection water once the free component had been exhausted”. As we explain, because the government’s policy is assessed separately from the particularities of the applicant’s needs and their context (including waterborne sanitation), and the automatic disconnection of their water supply is ignored altogether, the policy appears reasonable.

We provide another example of the Court not front-loading a contextual analysis of structural poverty and, as such, not “taking poverty seriously” in its ruling in Thubelisha Homes, a case concerning the proposed eviction and relocation by the City of Cape Town of approximately 20,000 poverty-stricken residents of Joe Slovo informal settlement to a barren location some fifteen kilometers away. Here, the residents and expert NGOs presented substantially undisputed evidence of the likely catastrophic impacts of the move, including that the proposed relocation would cause considerable hardship and fundamentally compromise their access to hospitals, schools, employment and social, cultural and family life. Yet, in upholding the eviction, the Court trivialised the clearly devastating impact of the move. It effectively reduced the residents’ interest in their location to one of mere “convenience” – the Court stated that while being relocated would be “an inevitably stressful process”, “there are circumstances in which there is no choice but to undergo traumatic experiences so that we can be better off later”.

Together with the other weaknesses in the Court’s approach to access and the adjudication of socio-economic rights outlined above, this trivialisation of poverty serves to further reduce the relevance of the courts as a forum for democratic participation by poor people and thereby to reinforce perceptions

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104 Mazibuko (note 90 above).
107 Ibid. [Wilson & Dugard pp. 676-677]
108 Thubelisha Homes (note 88 above).
109 The ruling did place conditions on the eviction and, as it subsequently transpired, the City failed to meet these conditions, resulting in the Court discharging the eviction order. See Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes 2001 7 BCLR 723 (CC), and also see the analysis of the Thubelisha case in S Wilson & J Dugard (note 102 above) pp. 678-679.
110 Thubelisha Homes (note 88 above), main judgment of O’Regan J para 321.
111 Ibid, concurring judgment of Sachs J para 399. [Thubelisha Homes]
112 Ibid, concurring judgment of Yacoob J para 107. [Thubelisha Homes]
of a remote and elite-serving judiciary, as well as restricting options for civic action and pushing people towards protest and other ‘extra-system’ activities. This remoteness from the lives of the majority of South Africa’s residents, in turn, renders the Court weaker in the face of increasing hostility from the polity. As things stand, if the Constitutional Court came under concerted political pressure, it is likely that only elite groups would come to its defence, a reality that would probably seal the Court’s fate. It is therefore more critical than ever that the Court moves beyond rhetorical lip-service to develop a meaningfully pro-poor approach, even if this means revisiting some of its previous judgments and practices.

CONCLUSION

In attempting to understand the South African Constitutional Court’s failure to advance direct access and robustly adjudicate socio-economic rights (in the absence of much elucidation by the judges themselves) one set of related explanations about the role of legal culture seems persuasive. A good starting point is an article by Theunis Roux about another post-apartheid judicial institution, the Land Claims Court, entitled: “Pro-poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court”. In this article, which raises some of the same problems with the Land Claims Court’s interpretive styles that I have raised here in relation to the Constitutional Court, Roux answers his own question: “why did the specialist court ... interpret social rights so narrowly that they were rendered virtually meaningless?” by first eliminating two usual variables of judicial performance: social composition and underlying legal framework. As Roux points out, the Land Claims Court – like the Constitutional Court – was established as a post-apartheid institution and the appointments have been broadly representative, with many of the judges having grown up under apartheid-imposed disadvantage, and the underlying legislation (as with the Constitution) remains explicitly pro-poor.

Having discounted social composition and underlying legal framework, Roux considers the most compelling explanation for the Land Claims Court’s disappointing (“anti-poor”) outcomes at the time of writing to relate to the influence of formal legal culture, with all the judges having gone through university legal education at a time when university legal education in South Africa was overwhelmingly formalistic and executive-minded, and not oriented towards seizing gaps and crafting creative remedies in the interests of justice.

This reflection is equally valid in respect of the Constitutional Court and its judges, all of whom have been through the same legal education system as the Land Claims Court judges. Indeed, as Roux points out, after the first year of the Court’s operation, Alfred Cockrell published a frequently-cited article in which he argued that the Constitutional Court’s failure to develop a coherent “substantive vision of law” as required by the new Constitution, was largely a consequence of the lag effect of the judges training in a rule-bound, “formal vision of law”. Two years later, Karl Klare wrote an equally celebrated article in which he remarked that a “visiting U.S. lawyer cannot help but be struck by the conservatism of South

113 The Constitutional Court is still too young for much self-reflection, and those judges who have retired have not yet been very forthcoming about why particular interpretive or adjudicative styles were selected over others.

114 Ibid p. 513. [Roux pro-poor court]

115 Roux stresses that he does not suggest that the judges are anti-poor – indeed, he alludes to their social background as being pro-poor. Rather, he uses the term “anti-poor” as the binary of “pro-poor” to relate to the interpretive approach of the court (as opposed to its judgments per se, which he does not analyse for their correctness): specifically, he uses this term in the context where “plausible, pro-poor” options were open to the Court that they rejected or ignored (ibid p. 515). [Roux]

116 Ibid p. 532. [Roux]

117 Ibid pp. 533-534. [Roux]

African legal culture”, explaining that he was not referring to ‘conservatism’ in the form of political ideology, but “cautious traditions of analysis common to South African lawyers of all political outlooks”. Subsequently, Cora Hoexter defined South African legal formalism as “a judicial tendency to attach undue importance to the pigeonholing of a legal problem and to its superficial or outward characteristics; and a concomitant judicial tendency to rely on technicality rather than substantive principle or policy, and on conceptualism instead of common sense”. As Roux notes, although this approach to legal interpretation is not necessarily conservative (even under apartheid, formalism could sometimes be ‘flipped’ by progressive lawyers to achieve progressive outcomes), where judges are required to engage in substantive reasoning, “a culture of legal formalism may work against the achievement of the objectives” of social transformation.

Building on this explanation, I believe that the Court’s cautious approach to direct access and socio-economic rights can best be understood as reflecting a jurisprudential conservatism that arises from a legal culture and training in which access to justice for the poor and socio-economic rights do not feature strongly. Without clear pointers, South African judges are ill-equipped to deal with many of the current challenges regarding structural poverty and, consequently, they appear uncomfortable with playing an activist, pro-poor role.

However, as I have argued in this chapter, it has never been more critical for the Court to embrace a role as a dedicated institutional voice for the poor. For its own survival, as well as the survival of democracy in South Africa, the Court needs to become more responsive and accessible to poor people. Constitutional Court judges are in fact well-placed to pursue a more redistributive vision of adjudication, with the Court having a conducive social composition and underlying legal framework. Indeed, unlike judges of other courts such as the Indian Supreme Court, which has had to overcome much more to open access to justice, the judges of the South African Constitutional Court only have to overcome one hurdle: a conservative legal culture. It is essential that they do so. In the words of Enoch Dumbutshena, a former Chief Justice of Zimbabwe:

> Judges must use their judicial power in order to give social justice to the poor and economically and socially disadvantaged. South Africa is best equipped to do this. Its bill of rights contains social and economic rights. In interpreting those provisions which protect social and economic rights, judges should remember that they cannot remain aloof from the social and economic needs of the disadvantaged. Through their activism, judges can nudge their governments so that they can move forward and improve the social and economic needs of the disadvantaged. Through their activism, judges can nudge their governments so that they can move forward and improve the social and economic conditions of the poor. In South Africa, the bill of rights is, without interpretation, activist in its own right. However, it requires activist judges to make its provisions living realities.

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123 Ibid. [Roux p. 534]
124 This is not to underestimate the power of legal culture. Nor is it to deny that there are other factors at play, and mounting political pressure might result in more politically expedient rulings in the future (until now, it is fair to say that the Court has been robust in defending its right to rule against the executive, and has been robust in doing so especially regarding civil and political rights).
125 Enoch Dumbutshena (1998) “Judicial Activism in the Quest for Justice and Equality”, in B. Ajibola and D. Van Zyl (eds) *The Judiciary in Africa* p. 188.