1 Introduction

The Constitutional Court (“the Court”) has yet to develop a substantive account of the positive obligations socio-economic rights place on the state. It has suggested that it is precluded from doing so by the particular formulation of the separation of powers doctrine it has adopted in its later socio-economic rights jurisprudence. Accordingly, in Mazibuko v City of Johannesburg, the Court held that

“ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.”

Consistent with the constraints identified above, the Court has adopted a framework which mediates the interpretation of the state’s positive obligations through the prism of administrative law. This interpretive move has resulted in a test which requires policies giving effect to socio-economic rights to be “reasonable” and to be implemented in a procedurally fair manner.

In this article, we argue that this approach has not resulted in a jurisprudence which responds adequately to the interests of the poor. It is true that the Court regularly speaks, in general terms, of the need to adopt a transformative adjudicative paradigm. Yet, in the area of socio-economic rights, the Court has chosen not to consider the full transformative potential of the role it might

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1 Mazibuko v City of Johannesburg, 2010 4 SA 1 (CC).
2 Para 60.
3 The Court has repeatedly recognised the transformative nature of the Constitution. See, for example, Road Accident Fund v Mdeyide 2011 2 SA 26 (CC) para 125; Hassam v Jacobs NO 2009 5 SA 572 (CC) para 28; BioWatch v Registrar, Genetic Resources 2009 6 SA 232 (CC) para 17; Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 4 SA 490 (CC) paras 73-74.
have in eliminating structural inequality and disadvantage. This is indicated by the fact that it has instead 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. Where lived experiences of poverty and structural disadvantage are considered, they are afforded insufficient weight.

These 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 attempt to eliminate. They have contributed to the depoliticisation and domestication of poverty within fundamentally unjust pre-existing patterns of resource distribution, social control and disempowerment. The interests poor people seek to vindicate through litigation have not been meaningfully addressed in the Court’s socio-economic rights jurisprudence. It seems that these interests are, for the moment, to be defined and enforced through “democratic popular choice” and not through adjudication. Yet it is precisely in the supposedly “democratic” arena that poor peoples’ claims for better access to social and economic goods are marginalised and diminished. This is achieved in no small measure by bureaucratic processes which systemically exclude them and a dominant economic paradigm which tolerates high levels of structural unemployment.

We do not suggest that the Court can itself alter the balance of economic forces that sustains structural disadvantage. We do, however, suggest that the Court has underestimated the institutional role it can play in enabling poor people to articulate and assert their entitlements to the basic social goods. In order for the Court’s role in addressing poverty to move from the ameliorative to the transformative, the Court must take much greater account, within its interpretive and adjudicative paradigm, of the lived experience of poverty. We agree with Sandra Liebenberg, when she says that there is nothing in the Constitution of the Republic of South Africa, 1996 (“the Constitution”) or the doctrine of the separation of powers that precludes the Court from taking account of the needs, purposes and values which must be served by socio-economic rights. The Court can and must, we argue, develop a theory of these needs and purposes, by listening more closely to what poor litigants say in their papers about how the social context of poverty affects their access to socio-economic goods. Legal practitioners, too, must be prepared to put time

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and effort into understanding these needs and experiences and to give voice to them in pleadings, affidavits and written argument.

We suggest that relatively small changes in the Court’s interpretive paradigm can lead to big changes in outcomes. This may appear naïve to some. However, we choose to assume that the interpretive paradigm the Court has constructed for itself must shape how it responds to the claims poor people place before it. To assume otherwise would lead to the cynical conclusion that all the Court does when it decides socio-economic rights cases is pick an outcome acceptable to all or most of its members and reason back from it. We do not accept this. Instead, we propose changes to the paradigm which, in our view, would lead, over time, to a fairly substantial enhancement in the Court’s role in addressing poverty and inequality. Yet, in what follows, we do not propose that the Court announces any fundamental departure from the doctrine of the separation of powers, or that it abandons completely the administrative law concepts it has deployed until now. The changes we advocate for pre-suppose that the Court has over-constrained itself with these doctrines and concepts, which do not in fact limit opportunities for transformative adjudication in the way that the Court appears to assume that they do. In short, we seek to point out what we consider to be a blind spot in the Court’s reasoning in socio-economic rights – one which is not apparent in other areas of its jurisprudence. Once this blind spot is addressed, we suggest that the Court’s socio-economic rights jurisprudence will not only be better reasoned, but will also be more responsive to the needs of the most vulnerable of the claimants who turn to it for redress.

In the first part of this article, we sketch out the limitations of the Court’s approach to the positive obligations imposed by socio-economic rights, including the justifications it offers for refusing to go further. We point out that, after rejecting the “minimum core” approach to the interpretation of socio-economic rights in *Government of the Republic of South Africa v Grootboom*, the Court’s later jurisprudence failed to engage with any contextual standards against which state action may be assessed. This is despite the Court having foregrounded such an approach in *Grootboom* itself.

We then move on to consider how things could be different. We begin from the assumption that rights, at minimum, assign legal recognition to specific human interests. We set out a model of adjudication which pays appropriate regard to those interests, but still allows them to be weighed in the balance against the arguments based on general welfare, capacity and resource constraints which are generally advanced in order to justify the state’s unwillingness to respond to them. We argue that the balancing exercise the Court performs in assessing the reasonableness of state policies is necessarily skewed against poor litigants unless weight is attached to the specific needs and interests they approach the Court to vindicate.

We go on to emphasise the role to be played, at every step of this analysis, by a contextual analysis of poverty and disadvantage in developing an account

9 2000 1 SA 46 (CC).
10 Paras 41, 43-45, 56.
of the interests to be protected and advanced by socio-economic rights. We do so with reference to three cases in which the Court, in our view, paid no or insufficient regard to the claimants’ interests. In Mazibuko, we argue that uncontested contextual evidence of the urgent and intense distress caused by the claimants’ lack of access to sufficient water was virtually ignored in preference to a generalised superficial examination of state policy. In Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes, the Court assigned insufficient weight to the hardship which would be caused by a forced eviction and long range relocation from Langa Township to Delft in Cape Town. In Nokotyana v Ekhurhuleni Municipality, the Court refused to consider whether a municipal policy of requiring ten families to share one toilet in an informal settlement was a reasonable measure to secure the dignity of those families. In each of these cases, we consider how a more contextual analysis of poverty and structural disadvantage could have led to an outcome that both granted appropriate relief to the claimants and at the same time allowed the Court to refrain from the kind of judicial policy making, which would be inconsistent with its conception of the separation of powers.

2 The Court’s general approach to positive socio-economic rights claims

Aspects of the Court’s socio-economic rights jurisprudence have led some commentators to suggest that the Court has adopted an “administrative law model” for the enforcement of socio-economic rights. In its attempt to balance the need to hold the state accountable to the Constitution with deferring to its socio-economic policy choices, the Court has borrowed from administrative law to construct a framework within which to evaluate compliance with the state’s positive obligations. It would be a mistake to suggest that the Court’s socio-economic rights jurisprudence as a whole can be reduced to an application of an adapted conception of administrative law. In protecting against negative infringements of socio-economic rights, the Court has given the right to housing substantive content. It has held that any measure that brings existing security of tenure to an end is prima facie a violation of the right of access to adequate housing.  

11 2010 3 SA 454 (CC).
12 2010 4 BCLR 312 (CC).
14 Jaftha v Schoeman; Van Rooyen v Stoltz 2005 2 SA 140 (CC) paras 25-34.
Grootboom itself must also be understood as more than an exercise in administrative law reasoning, since it generated a substantive principle of broad application: that state policy must provide relief in the form of temporary shelter to desperately poor people facing housing crises.\textsuperscript{15}

However, it is true that there are aspects of the Court’s jurisprudence which indicate that it generally prefers to deploy the administrative law concepts of rationality, reasonableness and procedural fairness in testing state policy. Soobramoney v Minister of Health,\textsuperscript{16} Minister of Health v Treatment Action Campaign (“TAC”),\textsuperscript{17} Port Elizabeth Municipality v Various Occupiers,\textsuperscript{18} Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg\textsuperscript{19} and Khosa v Minister of Social Development\textsuperscript{20} are examples of this in that they all focus on the rationality of conscious decisions to exclude classes of persons from socio-economic programmes or on the procedural fairness of the implementation of those programmes. In TAC, the Court was asked to consider the reasonableness of government policy in facilitating access to antiretroviral treatment to prevent mother to child transmission of HIV. It found that the decision to limit access to antiretroviral treatment to a few test sites was irrational because there was no compelling reason to not provide treatment where it was medically indicated outside a limited number of research and testing sites. Likewise, Khosa characterised the exclusion of South African permanent residents from state social assistance programmes as irrational.\textsuperscript{21} The Court in that case was guided by the impact of the exclusion on the applicants’ right to equality. The right to social security, the Court held, vests in “everyone”. To exclude permanent residents from its social security programme affected the applicant’s rights to dignity and equality in material respects. Without sufficient reason being established to justify such an impairment of the applicants’ equality rights, the exclusion was irrational and unconstitutional. Soobramoney was about the rationality of a healthcare rationing decision. Port Elizabeth Municipality and Olivia Road were chiefly concerned with the lack of adequate consultation with unlawful occupiers before an eviction order was made against them. Although it is true that both decisions hint at substantive entitlements for potential evictees, these merely echoed the entitlement to temporary shelter the Court had already developed in Grootboom.

The deployment of administrative law concepts in this way has provided a device with which the Court can evaluate state policy without creating novel entitlements or designing new tests to which socio-economic policy may be subjected. It has also created an apparent overlap between the constitutional and administrative law concepts of reasonableness. Both the constitutional and administrative law concepts of reasonableness require more than a simple
connection between means and ends, but admit of a range of possibly reasonable decisions or policies within which a court will defer to the executive. 22 The question a court will ask in both cases is: on the facts placed before it, has the state adopted measures or taken a decision which can reasonably achieve the relevant legislative or constitutional purpose? 23

Yet there is a crucial difference. In the case of the exercise of administrative power, the legislation in terms of which the decision is taken will normally define the purpose of the exercise of the power, and the interests to be taken into account, with some precision. This is almost never the case when considering the reasonableness of measures to give effect to socio-economic rights, because the purpose of the rights in question, or the interests they exist to satisfy, are not defined in the Constitution. The Court must identify them through interpretation.

In TAC, Soobramoney, Khosa, Port Elizabeth Municipality and Olivia Road the Court was able to come to a conclusion by weighing up the facts before it and making a value judgment as to whether or not the measures under scrutiny were rational, reasonable or procedurally fair. It did so without importing any particular conception of the interests to be served by the rights in question.

Grootboom alone is different, at least in the positive obligations jurisprudence. This is because that case saw the Court appeal to a second order principle which gave some definition and purpose to the positive aspect of the right of access to adequate housing. This principle was that desperately poor people in situations of crisis should be provided with temporary shelter, pending the provision of permanent housing which will fully realise their rights of access to adequate housing. The Grootboom decision was a response to the urgent interests the claimants had in some form of shelter – as a temporary expedient – short of fully developed permanent housing.

What the Court has been reluctant to do since Grootboom is to exercise the power the Constitution assigns it explicitly to determine the interests socio-economic rights themselves exist to protect and advance. Reasonableness and procedural fairness are not sufficient to define these interests. They simply act as a prism through which the enforceability of these interests can be considered on the facts of a particular case. At best, they simply embroider the entitlements already guaranteed in section 33 of the Constitution. 24 What is required, as Danie Brand evocatively puts it, is an account of what socio-economic rights are for. 25 In relation to what needs and interests must the state’s measures be reasonable?

The considerations that the Court has said count against such a substantive account are unconvincing. The first consideration, relied on in Grootboom and

22 Compare, for example, Government of the Republic of South Africa v Grootboom 2000 1 SA 46 (CC) para 41 with Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 4 SA 490 (CC) para 49.
24 S 33(1) states that “[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair”. S 33(2) states that “[e]veryone whose rights have been adversely affected by administrative action has the right to be given written reasons”.
TAC, albeit in the context of a minimum core argument, was that the Court lacks the institutional capacity necessary to embark upon a wide-ranging enquiry into what the realisation of socio-economic rights requires. If this means that the Court cannot procure the information necessary to formulate a general policy, or calculate the resources necessary to fund it, or train the personnel necessary to implement it and so on, then that is undoubtedly correct. But, properly understood, that is not what the Court is required to do when it adjudicates socio-economic rights. The Court’s role is to identify the purposes underlying the specific rights in the form of the interests they seek to protect and advance. As we shall argue below, that is exactly what litigants come to courts for – in the hope that the court will assign their interests a measure of legal recognition.

The second consideration is that it is not “institutionally appropriate” for the Court to tell the executive and the legislature what the achievement of a particular right entails. The needs and interests to be responded to in the enforcement of a socio-economic right should be defined by the executive and legislature. This is more appropriate, so the argument goes, because the executive and the legislature are “more democratic” institutions than the courts, and more able to facilitate the participatory processes that are necessary to give popular content to socio-economic rights.

Accordingly, in Mazibuko, the Court defined its role in the definition and enforcement of socio-economic rights as a secondary one. It held:

“The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy.

When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open.”

This approach loses sight of the fact that litigants approach courts after the democratic process has failed. They do so on the basis that their interests are worthy of legal protection notwithstanding the fact that they are unpopular or have been overlooked in the democratic process. Having regard to the burgeoning number of community-based protests concerning the failure of

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26 Minister of Health v Treatment Action Campaign 2002 5 SA 721 (CC) para 37.
27 Mazibuko v City of Johannesburg 2010 4 SA 1 (CC) para 60.
28 Paras 160-161.
the state to “deliver” socio-economic rights, it may fairly be asked whether the executive and the legislature are routinely ensuring a truly democratic form of socio-economic development. Nonetheless, even if the process of policy formulation and implementation to give effect to socio-economic rights has not been perfectly democratic, the Court’s job must be more than to foster further participation, or even to consider whether the policy is, overall “reasonable”. It must surely also be to decide whether vital interests and needs have been overlooked in the “democratic” process.

The Court should not, of course, prescribe in detail each of the administrative or legislative steps which must be taken to give effect to a particular socio-economic right. That is surely not what an interpretive exercise requires. Rather, all that is ultimately required of the Court is to identify the particular interests which fall within the boundaries of the right in question. The Court has had little difficulty with this in the adjudication of civil and political rights. The Court has prescribed in detail, for example, the ambit of interests protected by the positive obligations imposed by right to vote, in the face of great administrative complexity. In interpreting clauses of the Constitution beyond the Bill of Rights, the Court has assigned much interpretive meaning to the positive duties of Parliament and the provincial legislatures to facilitate public participation in the legislative process. This has been done without prescribing the precise steps to be taken in doing so. We do not see how the interpretation of socio-economic rights is any different. It should not raise any greater separation of powers concerns than the Court faced in August v Electoral Commission or Doctors for Life International v Speaker of the National Assembly in giving content to the right to vote and the concept of public participation. Yet the Court has refused to provide socio-economic rights with similar interpretive depth.

This suggests that much of the problem lies not in the doctrine of the separation of powers, but in the paucity of normative resources on which the Court can draw in the interpretation of socio-economic rights or a clear purposive understanding of a transformative role for the Court in relation to socio-economic inequality. Civil and political rights are buttressed by several centuries of history and a rich array of jurisprudence across a host of jurisdictions by reference to which they have been interpreted. Having rejected the notion that socio-economic rights entail a minimum core of goods and services which must be provided by the state, the Court can only make limited use of the international law on the content of socio-economic rights.


30 This was also the Court’s approach in Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg 2008 3 SA 208 (CC), given effect to through an unprecedented “engagement order”.

31 August v Electoral Commission 1999 3 SA 1 (CC).

32 Doctors for Life International v Speaker of the National Assembly 2006 6 SA 416 (CC).

33 Paras 73-147.

34 Minister of Health v Treatment Action Campaign 2002 5 SA 721 (CC) paras 26-39.
Foreign law is also of limited use, as few other common law jurisdictions have socio-economic guarantees in a supreme law Bill of Rights. Those that do, appear to adopt a variation of the administrative law model set out above, are mostly advanced welfare states with relatively low levels of poverty, and do not contain the full range of socio-economic guarantees contained in South Africa’s Constitution. Other than the content of the South African government’s own statutes and policies (which are usually at issue before it), the Court can draw on little other than its own interpretive resources in giving meaning to socio-economic rights.

This makes developing a substantive jurisprudence of socio-economic rights a daunting task. But if “reasonableness” is to add up to anything more than “the values, assumptions, and sensitivities” that the judges themselves bring “to the exercise of decision making, whether consciously or not” then the Court’s approach needs to change. Such a change, we suggest, will require the Court to revisit some of its prior jurisprudence and re-assess the manner in which it has conceptualised socio-economic rights litigation in its recent decisions.

In particular, two innovations are necessary. The first is to abandon the idea that socio-economic rights litigation is primarily a form of public participation in policy making. The second is to develop an account of the particular interests socio-economic rights exist to protect and promote. This entails what Sandra Liebenberg has called “a context-sensitive assessment” of the impact the denial of a particular socio-economic good has on the claimants in question, including the “implications of the lack of access to the resource or service in question for intersecting rights and values such as the rights to life, freedom and security of the person, equality and dignity.” The raw material for such an examination is the situation of a particular claimant. More often than not, the claimant in question will be a person living in poverty, or at least a person who is very poor. It is accordingly with a claimant’s lived experience of poverty and deprivation that a new theory of socio-economic rights must begin.

3 Towards a new theory

Claimants approach courts to vindicate their interests. When they receive a decision in their favour, it is because the law recognises that their interests are worthy of protection. We consider that this vindicatory purpose of litigation and the socio-economic interests litigants seek to advance are worthy of respect and attention. The first step in adjudicating positive socio-economic rights claims must be to identify the interest a litigant has come to court to advance or protect and to establish, as a matter of evidence, whether a particular socio-

36 Germany and Canada are good examples.
37 Williams (2010) CCR 142.
38 Liebenberg Socio-Economic Rights 185.
economic interest is affected in the context of a given case. That is, after all, why claimants litigate – not primarily because they feel that the state’s overall approach in an area of socio-economic policy is flawed, or unreasonable, but because they wish to make a difference in their own lives.

The second step is to consider whether that interest is one of the interests deserving of protection and fulfilment under the socio-economic right in question. The third step is to evaluate, with reference to the urgency and intensity of the interest in question, whether state policy and the manner of its implementation constitute an appropriate response to a person in the situation of the claimant, taking into account the range of other competing concerns the state must inevitably consider and prioritise. If the state’s response, in the context of the particular case, is appropriate, then its policy is reasonable. If the state’s response is inappropriate, then it is unreasonable and accordingly, on the Court’s adopted test, a violation of the constitutional right at play. This broad conceptual schema grounds the right in question in a contextual account of the interests it must protect, while at the same time allowing the Court the necessary flexibility to assess whether or not the state has acted reasonably in response to those interests.

We now illustrate this argument by reference to the Mazibuko, Joe Slovo and Nokotyana decisions. In each case, we seek to expose the manner in which the Court’s interpretive approach has prevented it from taking account of the real basis of the complaints before it. This has undercut the Court’s ability to engage head on with the claimants’ needs and lived experiences of poverty. Instead, the Court tends to prefer a facial examination of state policy, implicitly accepting the conceptions of reasonableness and possibility upon which those policies are drafted and implemented. This tends to reproduce the exclusion from policy formulation and implementation processes which have brought the claimants to court in the first place. Accordingly, we suggest that the Court’s current approach falls at the first hurdle set up by the paradigm we propose: the interests driving the complaint – and the experiences of poverty and deprivation upon which they are based – are almost never properly defined and taken seriously.

3.1 An interest in sufficient water?

In Mazibuko, the Court had to consider whether the City of Johannesburg’s Free Basic Water (“FBW”) policy was reasonable in terms of section 27(1) and (2) of the Constitution, which guarantees everyone’s right of access to sufficient water. The thrust of the applicants’ complaint was that the policy limited FBW provision to six kilolitres of water per household per month regardless of household size or need. The Court also had to consider whether both the

39 The main respondents in the case were the City of Johannesburg and Johannesburg Water (Pty) Ltd, a wholly publicly-owned municipal entity. For the sake of convenience, we make reference to “the City” to encompass the arguments of both parties, which were represented by the same legal counsel. There was a further respondent, the Department of Water Affairs and Forestry (now called Water and Environmental Affairs), but their arguments are not dealt with as they were largely irrelevant to the issues discussed here.
installation and operation of prepayment water meters, which automatically disconnected the water supply if additional water credit was not purchased following the exhaustion of the FBW allocation, were lawful.

It was common cause that the twin effects of the installation of prepayment water meters and limited FBW was that the applicants’ water supply ran out around halfway through each month. This was in circumstances where they could not afford to pay for additional water to meet their basic washing, cooking, drinking, health and sanitation needs.

The applicants were five households from Phiri, Soweto. They were desperately poor, with household incomes of around R1 000 per month. Of the five applicants, four represented female-headed households and all the households were surviving mainly off government grants. It was not disputed that many Phiri households were fairly equally disadvantaged. It was common cause that Phiri is one of the most densely-populated suburbs of Soweto, with numerous “backyard” shacks and many people on one stand. For example, Lindiwe Mazibuko, the first applicant, lived on a small stand with twenty people all sharing the same water supply:40

"Of the 20 people who are part of our household, one is a pensioner, 3 are small babies and six go to school. I suffer from arthritis and high blood pressure. My mother suffers from diabetes, high blood pressure and has a history of cardiac arrest. My sister, who recently moved into our house, suffers from a stroke. She moved in with us with her four children for us to take care of them. My mother is retired and receives a pension grant of R820 per month. The rest of us are unemployed. Other than her pension, my mother used to rely on R150.00 monthly rental she received from the three outside shacks. All of our boarders moved out in August 2005 however, following the change in our water situation. Between August and December 2005 we had to survive without this supplementary income. It was only in December 2005 that we finally found two new boarders… We charge them R70.00 and R50.00 each. I receive a child support grant of R180.00 per month in respect of two children in our household, namely Khosi and Zodwa Mazibuko. Our total monthly household income is accordingly R1 300. I am unsure of the exact figures of all my mother’s expenses. However, she spends money on her own monthly doctor consultation fees in the amount of R140. She also spends another R140 for my doctor consultation fees. She then has to cater for all the transportation, food and clothing needs of the 14 Mazibukos, as well as schooling for the minor Mazibuko children, Themb, Siphiwe, Zodwa, Nkothula, Ntombikayise, Gift, Khosi, Zanele, Mabuntle and Mbal. Above that, she has to pay for the electricity and water expenses for the entire 20-person household… The people of Phiri are very poor. They are all black. There are many people who live in households with even more people than I do. Many of them are women who take care of children, elderly members of their family, or other members of the community who are ill. Many of the people in my community are HIV positive or have AIDS."41

Mazibuko’s founding affidavit goes on to describe how the prepayment water meter system has compounded her adverse living conditions since it was installed on 11 October 2004:

“In October 2004, the first month that the meter was installed in our household, the 6 kilolitres ran out between 11 and 29 October 2004 [Mazibuko’s prepayment meter was installed on 11 October and the free basic water supply was exhausted by 29 October]. The free 6 kilolitres of water per month has never lasted the entire month since it was installed on 11 October 2004. It usually finishes anytime between the 12th and 15th of each month. We can often not afford to buy further water. This means that our household is without any water for more than half of every month. When the free 6 kilolitres of water is finished, the water supply is discontinued without notice. There is no person to whom I can explain the reason why

32 Lindiwe Mazibuko passed away just days after the High Court judgment was delivered, in May 2008. She was 36 years old and had suffered for many years from diabetes and high blood pressure.

40 Founding Affidavit of Lindiwe Mazibuko (03-06-2006) Mazibuko Record 1 32-34 paras 69-77.
I cannot pay, or why I need the water to remain connected. The prepayment water meter automatically cuts off the water… The amount of 6 kilolitres free water we are supplied with is simply not enough for our entire household’s basic needs. This is despite the fact that we use water only for our basic needs. We cannot use less water in our household than what we are using at the moment. Our household uses water each day for drinking, cooking, sanitation, bathing, cleaning the house and laundry…”

Mazibuko went on to point out that the effect of the City’s FBW policy was that “each person in our household of 20 would only be able to flush the toilet less than once every two days; each person could only have a ‘body wash’ every four days; 2 kettles of water, 1 sink full of dishes and half a clothes’ wash per day would have to be used by 20 people. After all the free basic water budgeted for that day was used, no water would be left for anything else, such as drinking, cooking, cleaning the house and watering my food garden. We use very little water to bath with. We are now forced to do our laundry at my sister’s house in Protea South, approximately 4 kilometres from our house. Sometimes, I do not drink sufficient water. This weakens my health… We often do not flush our toilets. If we do, we use water that was used for bathing or washing dishes to flush our toilets. I used to have a small food garden but abandoned it when my water was cut off in March 2004. Now I have to buy the vegetables that I used to plant in my garden. The other applicants have suffered even more from prepayment water meters and the meagre rations of free basic water.”

In challenging the City’s water supply measures, the applicants made several arguments. We focus here one of these arguments, which relied on an assessment of the context in which the policy was implemented. This was that the FBW policy was unreasonable because it was incapable of giving effect to the applicants’ constitutional right of access to sufficient water.

The Court rejected this claim. It found that the City’s FBW policy fell “within the bounds of reasonableness”. Yet its judgment attached no significance to the facts that the applicants were desperately poor, had inadequate access to water, and suffered greatly as a result. These undisputed facts relating to the applicants’ circumstances received no real attention in the judgment. The Court did not ask whether the City had a reasonable programme that was “capable of facilitating the realisation of the right” in the context of its implementation. Nor did it examine the evidence put up by the applicants that the City had the resources to provide additional FBW. It focused instead on a plethora of bureaucratic data concerning the difficulties the City said it faced in supplying water to Soweto.

In our view, the Mazibuko judgment fails to situate its analysis within a recognition of poverty and disadvantage. If it had done so, it would have been required to take a more critical, less deferential, approach to the City’s claims. Without assigning any weight to the applicants’ interests in having enough

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42 Founding Affidavit of Lindiwe Mazibuko Mazibuko Record 1 40-44 paras 100-118.
43 We do not deal with all the arguments here. In the main, the other – more legally technical – arguments related to: the decision to install prepayment water meters in Phiri amounted to administrative action and, because it was taken without consultation, violated s 4(1) of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”); and that the automatic disconnection of prepayment water meters violated s 4(3) of the Water Services Act 108 of 1997, which requires reasonable notice and an opportunity to make representations prior to the limitation or discontinuation of water services. It could be argued that a more contextual appraisal of the right to water in this case might have rendered less deferential decisions on both the PAJA and Water Services Act rulings. This might result in a welcome move towards bringing a proportionality test into the Court’s approach to deference, not dissimilar to the contextual test for reasonableness that we propose here.
44 Mazibuko v City of Johannesburg 2010 4 SA 1 (CC) para 9.
45 Government of the Republic of South Africa v Groothoom 2000 1 SA 46 (CC) para 41.
water to get through the month, and without reading that interest in the context of deep poverty, vulnerability and overpopulated residential stands, the Court deprived itself of the opportunity to subject the City’s policies to much meaningful evaluation. The City’s policies were, instead, evaluated in the abstract – meaning that the City’s justifications for them had to be taken at face value. The sufficiency argument was accordingly disposed of by the Court in the following way:

“The fourth argument is that the 6 kilolitres per month per household is not sufficient in that it does not provide 50 litres per person per day across the board. There is a welter of evidence on the record indicating that household sizes in Johannesburg vary markedly. According to the 2001 Census there are one million households in the City. Of those households, 51% have a household income lower than R1 600 per month. What is clear is that in general the number of people per household is dropping, and the number of households is increasing sharply. The 2001 Census showed a decline in household density from 3.8 people per household in 1996 to 3.2 in 2001. The same period saw a 38.3% increase in the number of households. In addition, in 2001 only 20% of households had more than four people in them and only 2.5% of households more than nine.

The picture is further complicated, however, by the fact that there is often more than one household relying on one water connection. This is especially so in townships where there is still an acute housing shortage, a legacy of apartheid urbanisation policy. Stand-holders permit tenants to erect homes in their backyards, normally against payment of rental. So, for example, the 2001 Census data showed there to be 2,1 houses per stand in Phiri with an average 8,8 people per stand. In some cases, there are far more people per stand. As we have seen, Mrs Mazibuko’s household at the time of the launch of the proceedings, for example, comprised three separate households with a total of 20 residents. Two of those households paid Mrs Mazibuko low monthly rentals. On the other hand, there were only three residents on the stand of Mrs Malekutu, the fourth applicant. What emerges from the record, thus, is that although the average household size is quite low, the variation in the number of occupants per water connection is significant. There are many water connections where there is only one resident, but there are some with as many as 20.

Where the household size is average, that is 3.2 people, the free basic water allowance will provide approximately 60 litres per person per day, considerably in excess of the amount the applicants urge us to establish as the sufficient amount of water as contemplated by section 27 of the Constitution. The difficulty is that many households are larger than the average, particularly where there is more than one family or house on a stand as is the case in Phiri and many other poor areas. Yet, to raise the free basic water allowance for all so that it would be sufficient to cover those stands with many residents would be expensive and inequitable, for it would disproportionately benefit stands with fewer residents.

Establishing a fixed amount per stand will inevitably result in unevenness because those stands with more inhabitants will have less water per person than those stands with fewer people. This is an unavoidable result of establishing a universal allocation. Yet it seems clear on the City’s evidence that to establish a universal per person allowance would administratively be extremely burdensome and costly, if possible at all. The free basic water allowance established is generous in relation to the average household size in Johannesburg. Indeed, in relation to 80% of households (with four occupants or fewer), the allowance is adequate even on the applicants’ case. In the light of this evidence, coupled with the fact that the amount provided by the City was based on the prescribed national standard for basic water supply, it cannot be said that the amount established by the City was unreasonable.”

The difficulty with this line of reasoning is that it deals with the applicants as a deviation from a convenient average and divorces the question of the sufficiency of the free basic supply from the hardship caused by the disconnection of water once the free component has been exhausted. Because the City’s policy is assessed separately from the particularities of the applicants’ needs (and the automatic

46 Mazibuko v City of Johannesburg 2010 4 SA 1 (CC) paras 79-82.
disconnection is ignored altogether)\(^{47}\) the policy appears reasonable because its contextual impact is ignored. The lived reality of having a water supply cut off in circumstances where one cannot afford to pay more is airbrushed out of the picture by a compartmentalised, abstracted approach to the impact of the City’s policy in the context of manifold deprivation. The needs of the twenty percent of residents whom the court acknowledges will have insufficient water in the applicants’ case, form no part of the analysis.

On our approach, the *Mazibuko* case would have been relatively easy. There was no dispute that *prima facie* many Phiri households had insufficient water to meet their basic needs. A person’s interest in the provision of a sufficient amount of the good itself must be at the very heart of what the right of access to sufficient water is supposed to protect. Given this, the City would then have had to show that the frustration of the claimant’s basic needs was justified by some other competing interest or concern. The Court should, therefore, have turned to examine the City’s justifications for not providing more FBW. In the main, these related the fact that the City said it had more pressing policy priorities. Chief among which was the provision of basic water supplies to informal settlements.

The approach taken by the Court did not require it to question whether it was reasonable to prioritise the needs of informal settlers over the needs of the applicants. It is, however, necessary for us to address it because the question would have arisen had the Court followed the approach we urge. Although it may appear reasonable to prioritise the needs of informal settlers over the residents of Phiri on the surface, once the appropriate contextual factors have been taken into account, the picture is not so clear. The only significant difference between the two groups was that the Phiri residents had access to formal housing and waterborne sanitation, whereas informal settlers tend to rely on pit latrines or chemical toilets. This meant that the Phiri residents would ordinarily need more water than residents of informal settlements. This was obviously not their fault. There was no difference in income or socio-economic status between the Phiri residents and people living in informal settlements. It would accordingly be absurd to suggest that water needs of the residents of Phiri ought not to be met because, by historical accident, they live in formal housing and accordingly require more water to meet their waterborne sanitation needs. The City did not seriously contend that it did not have sufficient resources to meet the needs of both.\(^{48}\) On this basis, the Court could and should have ruled that the City was able and required to do so.

Lucy Williams suggests that by comparing the South African Constitutional Court’s approach in *Mazibuko* with the German Constitutional Court’s approach in *Hartz IV*, it is possible and entirely appropriate for even relatively

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\(^{47}\) The lawfulness of prepayment meters is considered later in the judgment, but without reference to sufficiency.

\(^{48}\) In the High Court leg of the case, *Mazibuko v City of Johannesburg* 2008 4 All SA 471 (W) para 51, Tskoa J noted that Mogale City, a poorer municipality than the City of Johannesburg, provided ten kilolitres of FBW per household per month, in comparison to the City’s provision of six kilolitres. Indeed, the applicants placed on record an econometric analysis of water tariffs and FBW allocations in South Africa’s main metropolitan areas that revealed that other metropolitan municipalities provided more FBW and had more pro-poor water tariffs than Johannesburg.
deferential courts to interrogate governmental reasons for not satisfying the interests at stake in any case. However, we consider that those interests must be defined and taken seriously for the interrogation of the state’s justificatory framework to have any real force. The Court’s failure to define and evaluate the interests at stake in Mazibuko undercut its ability to hold the City to any meaningful standard of reasonableness. Because it had little to no regard for the needs and interests articulated by the applicants, it was able to conclude that it was “reasonable” to deprive them of sufficient water.

3.2 An interest in location: “convenience” or survival?

In Joe Slovo, 20,000 people (the residents) from Joe Slovo informal settlement in Cape Town appealed to the Court to set aside an order for their eviction granted by the Cape High Court. The High Court ordered the eviction of the residents and their forced relocation to temporary housing to a new development near Delft, some fifteen kilometres away.

The residents claimed that the proposed relocation would cause considerable hardship and fundamentally compromise their access to hospitals, schools, employment and social, cultural and family life. They presented (substantially undisputed) evidence about the likely adverse impact of the move. This included the facts that residents were not being offered security of tenure or guaranteed access to formal housing, and that the new location did not have public amenities such as a clinic, a school or any community hall. Moreover, the new location was far away from residents’ existing jobs and livelihoods and in most cases the cost of commuting between existing jobs and the new settlement would have doubled (amounting to upwards of half or more of their monthly incomes). In addition, being further away from Cape Town’s city centre and linked settlements, Delft did not provide the opportunities for piece jobs that kept many of the residents financially afloat.

In short, the relocation would have been an economic and social disaster, despite the fact that better constructed housing (as opposed to shacks) was being offered on the relocation site. The residents, together with two amici curiae, argued that the advantages their current location afforded them, in the context of their poverty, economic vulnerability and social disadvantage, ought to be protected by the right of access to adequate housing. Housing is, after all, more than mere bricks and mortar.

Although Moseneke DCJ’s judgment did acknowledge the need for “special concern where settled communities face the threat of being uprooted to other neighbourhoods distant from employment, schooling or other social

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50 There were two other main legal grounds not dealt with here: namely, that the occupiers were not unlawful occupiers and could not therefore be lawfully evicted; and that the Province’s promises had given rise to a legitimate expectation that 70% of the formal houses in the upgraded Joe Slovo settlement would be allocated to them.
51 As the Court itself held in Government of the Republic of South Africa v Grootboom 2000 1 SA 46 (CC) para 35.
amenities”, the Court trivialised the clearly devastating impact the relocation would have had. The residents’ interest in their location was reduced 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”.

The Court did not apply the reasonableness test to weigh up the interests of the residents and the harm to be suffered against the justifications of the government for the relocation. The hardships were largely written off as unfortunate consequences of policy choices over which the Court was unable to exercise any scrutiny:

“In essence these are largely operational matters in relation to which the state should ordinarily have a large discretion. Courts would not normally intervene to decide how well or badly programmes are being managed.”

In upholding the eviction but placing conditions on the relocation, the Court seemed to conceive of its role as requiring the government to implement the best possible version of the policy it had presented. It did not attempt to delve into the question of whether the policy was appropriate to the community’s objectively established needs.

Had it done so, we think the Court would have found the policy wanting. When weighed against the residents’ clear interests and the dire consequences of the relocation, the City’s eviction policy was plainly unreasonable. On our approach, state action resulting in the destruction of a whole community’s economic and social base: its access to jobs, livelihoods, education and healthcare would require compelling justification. It cannot seriously be suggested that the mere provision of admittedly better constructed housing – with no guaranteed tenure security – can itself provide that justification.

By downgrading the residents’ interests to matters of mere “convenience”, the Court was not able properly to weigh them against state’s eviction policy. Given that the Province has since reversed its opposition to an in situ upgrade and, as a consequence, the eviction order has been discharged, a harder look at the justifications for the relocation as against the residents’ urgent interests in their current location as a means for survival may have produced a different result at the time.

3 3  An interest in going to the toilet in dignity?

In Nokotyana, the applicants were desperately poor residents of the Harry Gwala informal settlement in Ekurhuleni, who had been living for many years without formal access to water, sanitation or electricity while the

52 Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes 2010 3 SA 454 (CC) judgment of Mosebenze DCJ para 165.
54 Judgment of Sachs J para 399.
56 Judgment of Sachs J para 381.
57 See Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes 2011 7 BCLR 723 (CC).
municipality failed to take a decision on whether to upgrade the settlement *in situ*. The applicants sued the municipality for access to water, the provision of high mast street lighting and access to basic sanitation. The High Court had, by agreement between the parties, ordered the municipality to expand the number of communal water taps to the applicants, but had dismissed the residents’ claims for the installation of toilets and street lighting. Before the matter reached the Court, and undoubtedly spurred by the ongoing litigation, the municipality adopted a new policy in terms of which every informal settlement in its jurisdiction, including Harry Gwala, would be provided with one chemical toilet per ten households.

The applicants criticised this policy as unreasonable on two main grounds. First, they claimed that expecting ten households to share one communal toilet compromised their dignity. Second, they argued that they should receive Ventilated Improved Pit latrines (“VIPs”) rather than chemical toilets, for which residents usually have to purchase costly chemicals to maintain.

The Court declined to take into account any of the contextual information the applicants adduced regarding sanitation (which included details comparing various forms of sanitation), electricity, healthcare, dignity and privacy. In connection with sanitation the Court held that evidence related to the new sanitation policy was inadmissible because it fundamentally changed the issues between the parties, making the Court one of first and last instance to a new policy adopted after the hearing in the High Court. The Court also refused to order the municipality to implement the policy it had produced.

The Court’s failure to grapple with the contextual evidence placed before it by the applicants in the run-up to the Court hearing put paid to any chances of the reasonableness test delivering a ruling that would vindicate the applicants’ articulated interests. In order to see how the Court might have developed the reasonableness test through a contextualised examination of the interests at stake, it is instructive to look at another recent judgment concerning sanitation – that of Judge Erasmus of the Cape High Court in *Beja v Premier of the Western Cape*.

In this case, which concerned the provision by the state of toilets in Silvertown near Khayelitsha in Cape Town, the Western Cape High Court had to determine whether the provision of unenclosed toilets, in the ratio of one toilet per five families, violated the residents’ rights. The decision addressed the applicants’ sanitation-related needs and interests head-on. Residents were left with toilets without doors, that were “in a bad state”, “generally filthy and underserviced” with no street lighting, and which did not satisfy their claims to dignity or privacy. The conduct of the Mayor and City of Cape Town in providing unenclosed toilets was found to be in violation of the residents’ constitutional rights – particularly sections 10 (dignity), 12 (freedom and security of the person), 14 (privacy), 24 (environment), 26 (housing), and

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58 *Nokotyana v Ekhuruleni Municipality* 2010 4 BCLR 312 (CC) para 19.

59 2011 3 All SA 401 (WCC).

60 Paras 29-30.
27 (healthcare) of the Constitution. The Mayor and City of Cape Town were ordered to enclose all the toilets.61

Implicit in the approach of the High Court in Beja is an interpretive paradigm in which the court steps into the shoes of an ordinary informal settler faced with the choice of going to the toilet in the bush or using an unenclosed latrine. The court then asks whether the state’s failure or refusal to address this state of affairs was reasonable in all the circumstances. In the absence of compelling justification for putting an informal settler to such an unconscionable election, the state’s policy is found wanting.

It is virtually impossible to consider whether a ratio of ten toilets to one family is a reasonable measure capable of giving effect to constitutional rights to dignity in informal settlements, without an approach which delves in to the lived experience of informal settlers themselves, and develops an account of their interests from those experiences. Taking into account the privations of informal settlement living (all of which were before the Court in Nokotyana), and assuming that more is possible (a question which was never explored), such a measure appears undignified and objectionable. This is so even if it is accepted that the residents had nothing before – a fact upon which the Court in Nokotyana appeared to place implicit reliance in refusing to categorise the residents’ needs as emergent. In any event, absence of services in the past cannot justify the provision of inadequate services in future. Whatever the case, the Court’s failure to reach into the social context in which the services were provided in order to assess their adequacy rendered its approach in Nokotyana unsatisfactory.

4 Conclusion

In this article, we have urged a more substantive, interest-based approach to socio-economic rights adjudication. We have suggested that the current modes of adjudication adopted by the Court pay insufficient regard to the vindicatory purpose of litigation as well as the reasons why, and conditions under which, claimants turn to it for redress. It is neither appropriate nor coherent, we have suggested, to leave a substantive account of socio-economic rights to supposedly “democratic” processes beyond the Court’s purview. The Constitution itself requires the Court to assign meaning to socio-economic rights through purposive interpretation which takes account of the specific needs and interests for which socio-economic rights exist to promote.

The Court has an important institutional role to play in addressing poverty and inequality in South Africa. It has the means and the opportunity to develop a socio-economic rights jurisprudence which adequately accounts for the lived experience of poverty, and which requires state policy to face up to the realities of that experience. The analysis of the cases in part three of this paper demonstrates that the Court has deprived itself of the conceptual tools necessary to forge a sufficiently rich account of the interests protected by socio-economic rights. It is only through a bold engagement with those

61 Paras 1-3.
interests, and the lived reality of the claimants who articulate them, that the Court can fulfil its institutional potential. If it does so, the Court will not only contribute more effectively to social transformation, but will also enhance the legitimacy of the constitutional project in the eyes of the poor. If the popular protests which have recently engulfed townships and informal settlements across South Africa tell us anything, it is that the basic needs of people participating in them have not been well-served by the “democratic” process upon which the Court says they must rely.

**SUMMARY**

The Constitutional Court’s socio-economic rights jurisprudence fails to meaningfully address the needs and interests that poor people approach the Court to vindicate. This has resulted in a body of jurisprudence which cannot realistically contribute to the elimination of poverty and inequality and the transformation of social relations. This need not be so. This article argues that the Court’s existing approach to socio-economic rights claims can be adapted to contribute substantively to the progressive elimination of poverty and disadvantage. The starting point is to identify the specific needs and interests claimants come to Court to vindicate and weigh them against the state’s justifications for its refusal to respond to them. The seeds of such an approach were sown in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC). However, since *Grootboom*, the Court has turned away from an evaluation of the intensity of the interests litigants approach it to vindicate, preferring instead to embark upon an abstracted and empty facial evaluation of state policy. This article sketches out an alternative, interests-based approach which, we argue, may be adopted within the confines of the version of separation of powers doctrine the Court appears to have adopted. The article then applies the approach to three practical examples and seeks to demonstrate that it is better suited to responding to the needs and interests of the poor.