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**Book title:** *Socioeconomic Rights in South Africa: Symbols or Substance?*

**Editors:** Malcom Langford, Ben Cousins, Jackie Dugard and Tshepo Madingozi

**Publisher:** Cambridge University Press 2014

**Reviewer:** Ebenezer Durojaye, Community Law Centre, University of the Western Cape

The publication of this book comes two decades after South Africa became a democratic state. It could not have come at a better time as it provides the authors with a good opportunity to assess the benefits or otherwise of the inclusion of socioeconomic rights in the Constitution. The chapters of this book are written by academics, experts and civil society organizations. In the introductory chapter of the book Malcom Langford observes that South Africa presents an interesting paradox with regard to the realisation of socioeconomic rights. While on one hand, the country has explicitly guaranteed socioeconomic rights in the Constitution, enacted pieces of legislation to give bite to these rights, and courts have developed a rich jurisprudence to clarify the content of these rights, on the other hand, these developments have not in any way transformed into better living conditions for the people. Indeed, Langford laments that “the failure of South Africa to match the narrative with social transformation in practice has generated a counter-narrative” (page 1). He explains that the main purpose of the book is to “assess one part of the puzzling of the contrasting on South Africa: what has been the role and impact of socioeconomic rights strategies by civil society actors?” (page 1) He observes that one of the critiques of the South African experience is that the landmark cases on socioeconomic rights have not been properly implemented or that the “rights-culture” has impacted negatively on the alternative route for social change. Focusing on the period 2000-2010, the book seeks to unravel how a diverse group of actors, particularly from marginalised and disadvantaged communities and social groups has used the linguistic and strategic resource of socioeconomic rights? Equally the book seeks to assess the direct and indirect impact of rights-based strategies on realising socioeconomic rights in the country.

Langford observes that the recent deteriorating socioeconomic situation and the narrowing of opportunities for democratic participation have led to the emergence of what he term “oppositional” civic action. He notes that shortly after South Africa became a democratic state in 1994, a significant number of the civil society groups existing at that time such as COSATU, the United Democratic Front and other organizations, were mostly concerned with the implementation of the ANC led government’s manifestos and were largely uncritical of the government. However, due

to diminishing activism on the part of these organizations, a vacuum was created which was easily filled by new sets of civil society organizations such as the National Coalition of Gay and Lesbians, Treatment Action Campaign, the AIDS Law Project, the Legal Resources Centre, the Centre for Applied Legal Studies and the Community Law Centre at the University of the Western Cape. Most of these organizations engaged with the government on issues relating to the socioeconomic rights and needs of the people.

The book is divided into two parts of 15 chapters, each dealing with a very interesting topic on socioeconomic rights.

In chapter 2 of the book titled “Constitutional jurisprudence: The first and second waves”, Stuart Wilson and Jackie Dugard examine the development of socioeconomic rights jurisprudence in the country. The authors assess the role played by the Constitutional Court in clarifying the content of the socioeconomic rights provisions of the Constitution. According to the authors, the aim of the chapter is to characterise the scope and limitations of the Constitutional Court’s interpretation of the socioeconomic rights provisions of the Constitution. The authors critically evaluate the extent to which litigation strategies have influenced the interpretation of the socioeconomic rights provisions of the Constitution. The assessment of the Constitutional Court’s role was done under two categories—the first wave and the second wave. Under the first wave, the authors focus on the earlier decisions of the Court and its approach to interpreting the socioeconomic rights provisions. They note that in the mid-1990s socioeconomic rights were still in their infancy and required further clarification. Moreover, there were hardly any precedents from other common law countries that could provide guidance in interpreting the socioeconomic rights provisions in the Constitution. Perhaps the only authoritative guidance for the understanding of socioeconomic rights at the time was the conceptual framework provided by the Committee on Economic, Social and Cultural Rights (CESCR). However, since South Africa was yet to ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR) at that time, the conceptual framework developed could not have direct application within the country. It needs to be stated here that non-ratification of the ICESCR did not in any way prevent the Constitutional Court from relying on the interpretative guidance provided by the CESCR in some of its General Comments.

In their analysis of the application of the reasonable test in some of the socioeconomic rights cases, the authors note that while the Court’s conclusion in the *Soobramoney*<sup>1</sup> case would seem easily justifiable, absent any challenge to the excuse of a lack of resources raised by the government, the approach of the Court indicates its reluctance to inquire into the substantive account of what entitlements fall within the scope of the right of access to health-care services. The authors then examine the logic behind the Court’s rejection of the minimum core content of socioeconomic rights and its adoption of the reasonableness approach in the *Grootboom*<sup>2</sup> and *TAC cases*.<sup>3</sup> In the

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<sup>1</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

<sup>2</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC).

authors' view, since the reasonableness approach in *Grootboom case* focuses on protecting the most marginalised and vulnerable members of society, it can be said to have the most far-reaching impacts of all the socioeconomic rights cases. In essence, the *Grootboom* case can be regarded as the *locus classicus* when it comes to understanding the meaning of not only the right to housing, but also other socioeconomic rights guaranteed in the Constitution. The authors observe that one of the shortcomings of the reasonableness approach, as evidenced in the *Thubelisha Homes case*<sup>4</sup>, is its failure to "adequately incorporate the admittedly drastic consequences" of an eviction for the occupiers. They further point out the possibility of the reasonableness approach to undermine some of the substantively established administrative processes, as shown in the *Mazibuko case*<sup>5</sup>.

It is pointed out that the second wave also witnessed the development of the concept of meaningful engagement by the Constitutional Court in response to eviction cases. In conclusion, the authors observe that from the look of things, the Constitutional Court will continue to apply the reasonableness approach instead of developing a more nuanced normative standard to ascertain whether a state is progressively realising socioeconomic rights. The authors express optimism with regard to the impact of future socioeconomic rights litigation in the country. According to them, the major challenge in the future, relates to compelling the state to respond to the objective needs of the poor when formulating and implementing socioeconomic rights policies.

In chapter 3 of the book titled "Socioeconomic rights beyond the public-private divide", Sandra Liebenberg examines the disparity that exists between the public-private divide regarding accountability for human rights violations in general, and socioeconomic rights violation in particular. The chapter seeks to examine the extent to which socioeconomic rights have influenced the development of common law and customary law in three areas-personal and family law, property law and contract. According to her, while scholarship, litigation and advocacy on socioeconomic rights in South Africa have focused on developing norms and standards for holding organs of state accountable, little effort has been made in developing the same for holding private actors accountable. Her observation resonates with arguments by other commentators that the real enjoyment of human rights, particularly socioeconomic rights, will be undermined if appropriate mechanisms are not developed to hold private actors equally accountable as states.<sup>6</sup> Liebenberg argues that in providing for horizontal application in

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<sup>3</sup> *Minister of Health and others v Treatment Action Campaign and others* [2002] ZACC 15; 2002 (5) SA 721 (CC).

<sup>4</sup> *Thubelisha Homes and Others v Various Occupants and Others (13189/07)* [2008] ZAWCHC 14

<sup>5</sup> *Lindiwe Mazibuko and others v City of Johannesburg and others* [2009] ZACC 28 (CC)

<sup>6</sup> See for instance, Chirwa D "The horizontal application of constitutional rights in a comparative perspectives"(2006) 10 *Law, Democracy & Development* 21; Katuoka S & Dailidait M "Responsibility of transnational corporations for human rights violations: Deficiencies of international legal background and solutions offered by national and regional legal tools" (2012) 19 *Jurisprudence* 1301; See also Frey B "The legal and ethical responsibilities of transnational corporations in the protection of international human rights" (1997) 6 *Minnesota Journal of Global Trade* 152.

the Bill of Rights, the South African Constitution of 1996 departs from other liberal Constitutions, such as that of the United States. She, however, observes that the provision for horizontal application of human rights was not without controversy as an attempt was made during the certification process to challenge its constitutionality in court. The bases for such a challenge include that it will undermine the separation of powers, it will require the Court to engage in a balancing of rights and may require individuals to become bearers of rights and not of obligations. In response to the challenge, the Constitutional Court had held that it is a misconception to think that the horizontal application of rights will undermine the separation of powers doctrine rather than a strict vertical application of these rights, and that constitutional rights affect private law in so many other areas without necessarily implying that individual rights will be eroded.

While Liebenberg notes that there are various provisions of the Constitution relating to the horizontal application of the Bill of Rights, her main focus is on section 8 of the Constitution. Section 8 (2) provides that the Bill of Rights binds a natural and juristic person. In addition, section 8 (3) (a) provides that the court must apply and where necessary develop the common law to the extent that legislation does not give effect to that right. The author then discusses some of the cases where the Constitutional Court has attempted to develop the common law and customary law. She notes that in the *Grootboom* and *TAC* cases the Constitutional Court held that the negative obligation not to interfere with the enjoyment of the rights to housing and healthcare services is imposed on both the state and non-state actors. According to her, it was in the *Jaftha* case<sup>7</sup> that the Constitutional Court was really able to expound on the scope and nature of the negative duties the Constitution imposes on a private actor. In that case, the Court was asked to review the constitutionality of the provision of the Magistrates' Court's Act 32 of 1944, which permits the sale in execution of peoples' homes in order to satisfy judgment debts without a court's supervision. It was held by the Court that the provision of the law was not justifiable since it will deprive a person of his/her home where a creditor could have pursued other means of executing the judgment debt. By way of a remedy, the Court further read in provisions requiring a court's supervision of such transactions.

Liebenberg notes that while it is much clearer to impose negative obligations on private actors to realise socioeconomic rights, same cannot be said of positive obligations imposed by the Constitution. This is so because according to the language adopted by the Constitution, it is the state that must take reasonable legislative and other measures within its available resources to progressively realise socioeconomic rights. However, one may still argue that private actors are not completely excluded from bearing positive obligations to realise socioeconomic rights. This argument is buoyed by the Constitutional Court's observation in the *Grootboom* case where it was held that the socioeconomic rights of children guaranteed in section 28 of the

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<sup>7</sup> *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC).

Constitution are binding first on parents and families, and then on state only when such care is lacking (at page 71).

In chapter 4 on “Post-apartheid social movements and legal mobilisation”, Tshepo Madlingozi examines the emergence of civil society activism in South Africa after 1994. He explains that legal mobilisation does not occur outside of social movement activity, but rather takes place within its context. According to him, there are certain conditions that serve as catalysts for legal mobilisation in a society. These include political opportunities and threats, action repertoire, resources and a collective action frame. He observes that a significant number of social movements in South Africa are rights-based in the sense that most of their grievances are framed in human rights language. He gives examples of national and local legal movements that have made important contribution to shaping of laws and policies. These include the National Coalition for Gay and Lesbian Equality (NCCLE, now known as the Gay and Lesbian Equality Project), the Treatment Action Campaign and the Abahlali baseMjondolo movement. The NCCLE was formed in 1994 and has played a major role in addressing discrimination based on sexual orientation and has advocated for legal reforms on this issue. By 2007 about 18 pieces of legislation had been amended to address discrimination based on same-sex relationships on the country. The Treatment Action Campaign was formed in response to the Mbeki government’s reluctance to ensure the provision of life-saving medication for people living with HIV. With more than 10,000 members, it is one of the largest civil movements in the country. Its membership cuts across different strands of society including professionals, activists, academics, labour unionists and individuals. It is renowned for its dogged advocacy and shrewd mobilisation skills which eventually led to a celebrated legal victory in 2002 in which the Constitutional Court found the government’s policy to limit the provision of antiretroviral therapy to prevent mother-to-child transmission of HIV to a few testing centres to be unreasonable and in breach of its constitutional obligation in section 27. This case later paved way for a more articulate response from the government to address the HIV pandemic in the country.

The Abahlali baseMjondolo is a shark-dwellers’ movement formed in 2005 to advocate for land, housing and participatory democracy for all, especially vulnerable and marginalised groups. Despite efforts by the government to stifle its activities, the movement has recorded a number of notable victories. One of this was the Constitutional Court challenge to a piece of legislation in KwaZulu-Natal which purported to eradicate slums in the province. The Constitutional Court declared parts of the law as unconstitutional. Madlingozi then examines the positive and negative impacts of legal mobilisation. He notes that social movements have used litigation to point government’s attention to injustices experienced by vulnerable and marginalised groups in society, and to hold politicians and public officers accountable. The negative aspects of such movements relate to the tendency for some other groups with different agendas to hijack the genuine and valid demands of the people and sometimes the tendency for some of these movements to adopt an elitist approach which may not necessarily reflect the needs of the majority of their members.

Chapter 5 of the book deals with “Political power: Social pacts, human rights and the development agenda”. Adam Habib examines a very important issue relating to the link between democracy and development. The chapter is concerned with addressing the question whether social pacts can lead to the realisation of rights. He observes that human rights activists in South Africa have often held the view that bad leadership and poor policies on socioeconomic rights. In other words, the failure to realise the socioeconomic rights of the people as guaranteed in the Constitution can be attributed to the failure of individual leaders. However, Habib argues that this conclusion must be scrutinized carefully, in the sense that some of the leaders are constrained by the power relations existing in the country. He identifies the ingredients for configuring the power relations in the country to include electoral reform, a viable opposition party and a vibrant civil society. In tracing the rise of social pacts in South Africa, Habib notes that the democratic transition in the country was characterised by two distinct processes—political democratisation and economic liberalism. While the former aims at representative government, the latter is concerned with integrating South Africa’s economy with the global economy. He describes social pacts as being “essentially about managing the expectation of citizens, workers and even the business community” (page 149). Based on this definition, he evaluates the performance of the Zuma-led government and the leadership of the ANC and comes to the conclusion that they have failed the people. He attributes this failure to the lack of imaginative responses to the needs of the people. In conclusion he argues that social pacts will only lead to the realisation of rights where there exists a structural configuration of power, which must recognise relative equity in the leveraging of business and labour, political courage, imagination and will, in order to contain the aspirations of the elite with a view to enabling popular expectations to be managed.

The second part of the book deals with specific issues relating to socioeconomic rights. Due to lack of space, this review only focuses on chapters 7, 8, 10, 13 and 14. In chapter 7, titled “Housing rights litigation: *Grootboom* and beyond”, Malcom Langford examines the impact of litigation in realising the right to housing guaranteed in section 26 of the Constitution in the *post-Grootboom* era. The assessment was carried out based on interviews, statistics, policy documents and jurisprudence. In the first part of the chapter, Langford traces the historical development of laws and policies on housing in the country, beginning with the apartheid era (1907) to date. This review includes laws and policies, such as the Slums Act of 1934, the Group Areas Act of 1954, the National Housing Subsidy Scheme, the Reconstruction and Development Programme (RDP), the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 1998 (PIE), the Extension of Security of Tenure Act (1997) and the Rental Housing Act (1999).

In the second part of the chapter Langford discusses the facts and relevance of the *Grootboom* case. He notes that assessing the impact of *Grootboom* is by no means an easy task. This is so because while the community achieved victory in Court this has not translated into a better standard of living for the people. To buttress this point, he quotes one of the community leaders who said: “We won the championship, but where is the trophy?” Langford examines the development that has taken place in Wallacedene since the *Grootboom* decision. He discusses efforts made at implementing the

*Grootboom* decision and the challenges this has posed. He notes that by 2008 the plan to implement part of *Grootboom* judgment was achieved for those that chose the People's Housing Process, while those who chose contractor-built housing, including Mrs. Grootboom, were still waiting due to some logistical delay. Although about 3000 of these types of houses had been constructed in Wallacedene, construction of the remaining number has not been completed due to bureaucratic set-backs and corruption. He identifies some of the impacts of the *Grootboom* case to include policy reforms such as the adoption of a housing emergency policy, socio-political impacts and symbolic impacts.

In chapter 8, titled "Health rights: Politics, places and the need for 'sites of rights'", Peris Jones and Nyasha Chigore examine the meaning of a rights-based approach to health and its impact on the lives of the people, especially vulnerable and marginalised groups in society. The authors note that post-apartheid South Africa has witnessed improvement in health spending, facilities and infrastructure, however, this has not in any way led to better health outcomes, as HIV/AIDS, remains a challenge and maternal mortality has worsened due to the prevalence of HIV. Also, tuberculosis, together with the associated challenge of drug resistance has become a worrisome issue. More recently, the country is facing other health concerns including diabetes, obesity and mental illness. The authors note that while a plethora of laws and policies relating to the right to health exists in South Africa, the major concern has been poor implementation. Jones and Chigore are of the view that litigation and other human rights strategies are crucial in advancing the right to health in the country, they however, caution about placing too much hope in a rights-based approach as this may sometimes be problematic. This is a concern shared by other commentators who have noted that a rights-based approach to an issue may sometimes become counter-productive and pedantic. In their analysis of the *TAC* case, the authors note that beyond the social force and mobilisation garnered by the case, the peculiar nature of the issues, namely; failure to provide nevirapine for pregnant women to prevent mother-to-child transmission of HIV- also drew the sympathy of the Constitutional Court to the case of the applicants/respondents. Moreover, the fact that the case deals with the singular issue of access to life-saving medications and requires the enforcement of negative obligations of the state, made it relatively comfortable for the Court to decide against the government.

Commenting on the positive impacts of the *TAC* case, the authors observe that "despite some national level changes in the wake of high profile cases and campaigns...rights-based approach often founder on the rock of local implementation.." (page 233). In explaining the notion of sites for rights, the authors use the Themba Hammanskraal and Thswelopele Project as a case study. They note that this project focuses on how a rights-based approach can be applied to address some of the challenges posed by HIV/AIDS at the community level. Some of the essential features of this project include an emphasis on training and advocacy. The project was able to provide training for some paralegals so as to assist in providing legal support or referral services to members of the community. According to the authors, one of the most significant outcomes of this project is that fact that it helps in facilitating access to

justice for people living with HIV. The authors conclude by noting that one of the challenges with a rights-based approach is how to maintain a focus on specific aspects of the right to healthcare given the deep inequality and poverty that exist in the country.

In chapter 10, Jackie Dugard examines “Urban basic services: Rights, realities and resistance”. She argues that while a rights-friendly legal environment seems to exist to realise the right to water and sanitation in the country, the situation on the ground is far from palatable as many people in local communities still lack access to water and basic sanitation. Dugard notes that recently attempts have been made to litigate on issues relating to the right to water and sanitation. In her view it is too early to critically evaluate the social value and impacts of these cases. She explores the legal framework for provision of basic services in South Africa by examining the constitutional provisions and other legislation, such as, the Water Services Act of 1997, the Electricity Act of 1987 and the Local Government Municipal Scheme Act of 2000. According to her, economic and political constraints, particularly the malfunctioning of local government institutions, which has led to lack of accountability, have undermined the enjoyment of basic services at the community level. She notes that the failure of the government to deliver basic services to the people has sparked service delivery protests across the country. A study by the Community Law Centre shows that lack of access to housing tops the list of the reasons for service delivery protests; this is closely followed by lack of access to water, electricity and basic services generally.<sup>8</sup> Dugard then discusses three of the Constitutional Court decisions on access to basic services, namely: the *Joseph*<sup>9</sup>, *Mazibuko* and *Notayana*<sup>10</sup> cases. She notes that these cases She notes that the outcomes of these cases have been more diverse than anticipated. In particular, she observes that despite the legal loss in *Mazibuko*, legal mobilisation has almost delivered as much improvement in access to water as expected from the case itself.

Chapter 12 of the book by Kristina Betley and Richard Gallard , deals with the importance of the right to information to the realisation of socioeconomic rights in the country. The authors argue that in order for the people to enforce their socioeconomic rights, it is crucial that they have access to basic information about these rights and other government activities. It is noted that despite the concept of meaningful engagement developed by the Constitutional Court in recent cases, most communities still lack the capability to engage with policy makers due to poverty and lack of information. After discussing the legal framework on access to information, including section 32 of the Constitution and the provisions of the Promotion of Access to Information Act (PAIA) 2000, the authors then provide some case studies of how civil society groups have empowered community people to demand their socioeconomic rights. This is done with reference to some cases that may have implications for access

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<sup>8</sup> Community Law Centre Service Delivery Barometre Report available at <http://mlgi.org.za/barometers/service-delivery-protest-barometer> (accessed 23 January 2015).

<sup>9</sup> *Joseph and Others v City of Johannesburg and Others* (CCT 43/09) [2009] ZACC 30; 2010 (3) BCLR 212 (CC).

<sup>10</sup> *Johnson Matotoba Nokotyana and others v Ekurhuleni Metropolitan Municipality* [2009] ZACC 33

to information. For instance, the authors discuss the *Occupiers of 51 Olivia Road*<sup>11</sup> case and note decisions on similar issue. According to the authors, to the extent that the *Occupiers of 51 Olivia Road* case laid down the need for government to engage with people facing evictions with a view to agreeing on the modalities for the eviction, it is in a way promoting access to information on policy and programmes on the socioeconomic rights of the people. More interestingly, this access to information is granted without the need for the people to have recourse to the PAIA.

Chapter 13, on “Gender and socioeconomic rights: The case of gender based violence and health”, by Liesl Gemtholtz and Jennifer MacLeod examine the link between gender inequality and deprivations of socioeconomic rights with focus on gender-based violence and the right to health. The authors argue that poor socioeconomic situations may aggravate gender based violence. On the other hand, gender based violence may hinder access to education for women and girls. The chapter analyses the *TAC* case to highlight the link between gender-based violence and HIV infections. The authors observe that the success of the *TAC* case was based on the combination of social mobilisation of various interest groups and stakeholders and litigation. It is pointed out that throughout its judgment the Constitutional Court failed to consider the gender implication of the case nor made any reference to the right to reproductive health care guaranteed in section 27 (1) (a) of the Constitution. However, the Court merely focuses on the right to health of children. This criticism has been echoed by other commentators who noted that the Constitutional Court missed a great opportunity to highlight the gender dimension of lack of access to life saving medications for women.<sup>12</sup> The authors conclude by noting that given the link between pervasive socioeconomic rights deprivation and gender inequality in the country, much more needs to be done regarding the adoption of strategies to accommodate this linkage.

Chapter 15 by Malcom Langford, Jackie Dugard, Tshepo Madlingozi and Ben Cousins serves as the concluding perspective of the book. The authors attempt to synthesize the thoughts of the various contributors to the book and to summarise the main themes of the book. The authors consider the impact of socioeconomic rights strategies-both litigation and non-litigation- employed by civil society groups. For litigation strategy, the impact identified include material and political, while for non-litigation strategy the impact identified include policy and legal reforms, rights-based service provision and protest.

This book has made a major contribution to the discussion on the realisation of socioeconomic rights in South Africa. It contains useful information about social movement groups and the realisation of socioeconomic rights in South Africa in post-apartheid South Africa. The contributors are diverse experts both academics and from civil society groups. One observation on the content of this book is the unavoidable

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<sup>11</sup> *Occupiers of 51 Olivia Road Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and others* [2008] ZACC (CC).

<sup>12</sup> See for instance, Cook RJ ‘Exploring fairness in health care reform’ (2004) 29 *Journal of Juridical Science* 1-29; see also Durojaye E ‘Advancing gender equity in access to HIV treatment through the Protocol on the Rights of Women in Africa’ (2006) 6 *African Human Rights Law Journal* 188

repetition of cases and law; virtually all the chapters have reason to make reference to most of the celebrated cases on socioeconomic rights.