

Recession, recovery and service delivery

Political and judicial responses to the financial and economic crisis in South Africa

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I. Introduction

This chapter discusses the effects of the global financial crisis on South Africa. It considers the economic effects of the crisis and the government's response. It also assesses whether the crisis has had any impact on the judicial enforcement of economic and social rights. South Africa provides an interesting case study for two main reasons. First, because its transformative Constitution includes directly enforceable economic and social rights and, second, because the Constitutional Court has produced an influential body of case-law giving effect to these rights.¹ For these reasons, the South African experience might seem to hold valuable lessons for the role that economic and social rights can play as the financial crisis continues to unfold in other parts of the world.

However, there are factors that complicate our inquiry. For a start, South Africa had high levels of economic deprivation and inequality prior to the financial crisis. Thus, the crisis has served mainly to highlight and exacerbate these pre-existing problems. As well as this, the recession in South Africa has been relatively shallow compared to that experienced by some other countries. At the time of writing the South African economy had returned to modest growth and although the South African government was operating in conditions of fiscal constraint it had not

¹ The key provisions of the Bill of Rights are Section 26 (housing), Section 27 (health care, food, water and social security) and Section 29 (education). The Constitutional Court's decisions are discussed in the body of the chapter. For a general overview see S. Liebenberg, 'South Africa: Adjudicating Social Rights under a Transformative Constitution', in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008), pp. 75–101.

felt compelled to implement the type of austerity measures seen in many European countries.

The result is that it is difficult to discern a distinct turn in the Constitutional Court's case-law in 2009, the year in which the South African economy entered recession, or to establish a direct causal link between the global financial crisis and any developments in the Court's jurisprudence. Nevertheless, given that all of the South African cases have been decided in circumstances of deprivation and inequality – problems now gripping many other parts of the world to various degrees – we hope that our discussion can shed some light on the role that the judicial enforcement of economic and social rights can play in times of economic crisis.

II. A crisis prior to a crisis? South Africa 1990–2007

In order to properly understand the effects of the global financial crisis on South Africa, it is necessary to provide some background and historical context. It is well-known that South Africa emerged from apartheid in the early 1990s with extremely high levels of poverty, inequality and unemployment, following decades of discriminatory provision in health, education and infrastructure across population groups. The South African economy had grown at an average of only 0.8 per cent from 1985 to 1994,² and the African National Congress (ANC) inherited a substantial budget deficit and burgeoning debt.³ The new government was therefore faced with the daunting task of embarking on a project of social transformation in line with the new Constitution while also ensuring the sustainability of state finances.

In response to this challenge, the government adopted a broadly orthodox macroeconomic policy, focused on fiscal deficit reduction through expenditure restraint and tight monetary policy, coupled with trade liberalisation. This approach was embodied in the Growth, Employment and Redistribution Programme (GEAR), a five-year programme adopted in 1996.⁴ The objective of GEAR was to create the conditions for higher levels of economic growth, thereby addressing South Africa's unemployment crisis and generating the resources necessary to provide health care,

² S. Du Plessis and B. Smit, 'South Africa's Growth Revival After 1994', *Journal of African Economies*, 16 (2007), 668–704, 670.

³ T. Ajam and J. Aron, 'Fiscal Renaissance in a Democratic South Africa', *Journal of African Economies*, 16 (2007), 745–81, 746.

⁴ See 'Growth, Employment and Redistribution: A Macroeconomic Strategy', www.treasury.gov.za/publications/other/gear/chapters.pdf, last accessed 20 August 2013.

education and other services. According to John Weeks, it was predicted that GEAR would generate average growth of 4.2 per cent for 1996–2000.⁵ Weeks observes that this figure may seem modest but was in fact ambitious given the anaemic growth of the preceding years.⁶

GEAR largely set the agenda for the ANC's subsequent economic policy. As Stewart Ngandu *et al.* note, there has been considerable debate about the advantages and disadvantages of South Africa's macroeconomic policy.⁷ On the one hand, there is no doubt that the South African economy achieved increased rates of economic growth, averaging 3.1 per cent from 1995 to 2004 and reaching 5 per cent in 2004–6.⁸ The government made significant progress in reducing the budget deficit, even achieving a surplus in 2007–8.⁹ Progress was also made in reducing government debt, to just 27.1 per cent of GDP in 2006–7.¹⁰ Finally, the adoption of inflation targeting in 2000 meant that from 2003 to 2007 the inflation rate fell within the 3–6 per cent target range.¹¹

For defenders of the ANC's macroeconomic policy, these figures represent significant achievements that allowed for a sustainable expansion of social spending, especially through the system of social grants. As we shall see, defenders also argue that the government's 'countercyclical' economic policy – whereby surpluses are run in good years – meant that South Africa was in a stronger position than it would otherwise have been when the waves of the global financial crisis reached its shores. The net result was that South Africa did not need to seek external financial support from the International Monetary Fund. Nor has South Africa had to adopt austerity measures, although in its most recent budget the

⁵ J. Weeks, 'Stuck in Low GEAR? Macroeconomic Policy in South Africa, 1996–98', *Cambridge Journal of Economics*, 23 (1999), 795–811, 796.

⁶ *Ibid.*

⁷ S. Ngandu, M. Altman, C. Cross, P. Jacobs, T. Hart and I. Matshe, 'The Socio-Economic Impact of the Global Downturn on South Africa: Responses and Policy Implications' (2010), xvi, www.hsrc.ac.za/en/research-outputs/view/5390, last accessed 20 August 2013.

⁸ Du Plessis and Smit, 'South Africa's Growth Revival After 1994', 670.

⁹ Department of National Treasury, 'South African National Budget 2008: Overview of the 2008 Budget', 4, www.treasury.gov.za/documents/national%20budget/2008/review/chap1.pdf, last accessed 9 January 2014.

¹⁰ Department of National Treasury, 'South African National Budget 2007: Overview of the 2007 Budget', 16, www.treasury.gov.za/documents/national%20budget/2007/review/chap1.pdf, last accessed 9 January 2014.

¹¹ J. Aron and J. Muellbauer, 'Review of Monetary Policy in South Africa since 1994', *Journal of African Economies*, 16 (2007), 705–44.

government has indicated that fiscal constraints mean that growth in spending will be 'moderated' over the next three years.¹²

On the other hand, for many commentators South Africa is a prime example of the failure of neo-liberal economic policies. It is not difficult to find fault with the ANC's economic track record. For a start, even though the South African economy achieved a prolonged period of growth, many observers have noted that the figures are not especially impressive by global standards.¹³ As well as this, only modest progress was made in addressing South Africa's deep-rooted structural problems of poverty, inequality and unemployment. The 2011 census reveals that although the income of black households increased by 170 per cent over the preceding decade, their annual income is still only one-sixth that of white households.¹⁴ In respect of income inequality, South Africa remains one of the most unequal societies in the world.¹⁵ By some standards, the country has even moved backwards since 1994. For example, from 1995 to 2003 the unemployment rate rose from 17 per cent to 28 per cent on a narrow definition and from 29 per cent to a staggering 42 per cent on a broad definition.¹⁶ In late 2007, even before the effects of the financial crisis had reached South Africa, unemployment had reduced somewhat but still stood at 24 per cent on a narrow definition. Although the government has increased social expenditure since 1994, this has not always yielded better outcomes. Education accounts for one-sixth of government spending but in the World Economic Forum's Global Competitiveness Report

¹² Department of National Treasury, 'South African National Budget 2013: Fiscal Policy', 32, www.treasury.gov.za/documents/national%20budget/2013/review/chapter%203.pdf, last accessed 9 January 2014.

¹³ See, e.g., Du Plessis and Smit, 'South Africa's Growth Revival After 1994', 670. The authors note that East Asia, for example, achieved growth rates of 6.2 per cent during 1994–2004. See H. Marais, 'The Impact of the Global Recession on South Africa' (17 July 2009), www.realinstitutoelcano.org/wps/portal/rielcano_eng/Content?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/cooperation+developpment/ari115-2009, last accessed 9 January 2009.

¹⁴ 'South Africa's Census: Racial Divide Continuing', *BBC News* (30 October 2012), www.bbc.co.uk/news/world-africa-20138322, last accessed 20 August 2013.

¹⁵ 'Over the Rainbow', *The Economist* (20 October 2012), www.economist.com/news/briefing/21564829-it-has-made-progress-becoming-full-democracy-1994-failure-leadership-means, last accessed 20 August 2013.

¹⁶ The narrow definition of unemployment applies a job search test whereas the broad definition accepts as unemployed those who did not search for work in a four-week reference period but who report being available for work and say that they would accept the offer of a suitable job. See G. Kingdon and J. Knight, 'Unemployment in South Africa, 1995–2003: Causes, Problems and Policies', *Journal of African Economies*, 16 (2007), 813–48, 814.

South Africa ranks 132nd out of 144 countries for its standard of primary education and 143rd for the quality of its mathematics and science.¹⁷

It is therefore no exaggeration to say, as Isobelle Frye does, that ‘the crisis in South Africa existed long before its more recent international counterpart’¹⁸ and that the term ‘economic crisis’ might be said to ‘permanently characterise’ the lives of many South Africans.¹⁹ As we shall see, the effect of the global financial crisis has been to amplify and entrench these pre-existing problems.

III. The global financial crisis reaches South Africa: denial, response and muted recovery

There was initially a view that the South African economy would emerge from the global financial crisis largely unscathed. For instance, Finance Minister Trevor Manuel asserted confidently in 2008 that ‘we are not looking at a recession in South Africa’.²⁰ The reasons for this view are complex and, in retrospect, difficult to fathom. However, Hein Marais argues that a narrative of impressive growth and economic stability had taken hold in government and business circles, with much emphasis placed upon ‘sound economic fundamentals’ and South Africa’s well-regulated financial sector.²¹

Others were less sanguine. Early in 2009, *The Economist* ranked South Africa as the most vulnerable of the larger emerging economies, taking into account South Africa’s large current account deficit, short-term debt as a percentage of foreign exchange reserves and the ratio of banks’ loans to their deposits.²²

As it happens, the South African economy tipped into recession in the same year. But it is important to see that the triggers for recession were very different in South Africa to developed countries in North America

¹⁷ ‘Over the Rainbow’.

¹⁸ I. Frye, ‘Responses and Alternatives: South Africa’s Response to the Crisis’, in *Perspectives: Political Analysis and Commentary from South Africa* (2009), 8–12, 8, www.boell.org/downloads/Perspectives_3-09.pdf, last accessed 20 August 2013.

¹⁹ *Ibid.* 11.

²⁰ W. Roelf, ‘Manuel Sees No Recession but Inflation to Fall’, *Mail & Guardian* (18 November 2008), <http://mg.co.za/article/2008-11-18-manuel-sees-no-recession-but-inflation-to-fall>, last accessed 20 August 2013.

²¹ Marais, ‘The Impact of the Global Recession in South Africa’.

²² ‘Domino Theory: Where Could Emerging-Market Contagion Spread Next?’, *The Economist* (26 February 2009), www.economist.com/node/13184631, last accessed 20 August 2013.

and Europe. The South African banking sector had only limited exposure to international financial instruments and the United States subprime mortgage market. The economic downturn in South Africa was therefore not caused by a banking crisis. Nor was the downturn caused by unsustainable state finances. Instead, according to Ngandu *et al.*, the impact in South Africa mostly resulted from contagion effects from developments in international markets, which took the form of decreases in private capital inflows and commodity exports and a consequent reduction in trade revenues.²³ The mining and manufacturing sectors were the hardest hit by the changes in trade induced by the global downturn while there was a sharp outflow of foreign portfolio capital in late 2008 – an especially worrying development given that South Africa is highly reliant on private capital flows to finance its current account deficit.²⁴

The net result of these developments was that GDP fell by 0.7 per cent in the fourth quarter of 2008 and then by 7.4 per cent in the first quarter of 2009.²⁵ These two consecutive contractions in the growth rate of GDP meant that South Africa entered a recession for the first time in 17 years.²⁶ In total, from the fourth quarter of 2008 to the second quarter of 2010, the South African economy shed 1.1 million jobs as a result of the recession.²⁷ Given that South Africa had made only incremental progress in addressing unemployment since 1994 there is no doubt that job losses of this magnitude served only to deepen a pre-existing problem while also representing a ‘significant setback’ for the country.²⁸

Unsurprisingly, the effects of these developments on vulnerable sectors of society were especially severe. Frye notes that many of the jobs lost have been in the semi-skilled sectors of trade, transport and mining. Statistically, such workers tend to live in households that have fewer employed persons. It follows that the number of people dependent on the income of these workers tends to be higher than in households made up of skilled persons.²⁹ The financial crisis also reached South Africa following a period of high food and oil prices, resulting in a ‘compound crisis’.³⁰ From 2002 to 2007 there was a sustained decrease in food insecure households. However, by 2008 the intersection of high food prices and the

²³ Ngandu *et al.*, ‘The Socio-Economic Impact of the Global Downturn on South Africa’, 20.

²⁴ *Ibid.* 21. ²⁵ *Ibid.* 22. ²⁶ *Ibid.*

²⁷ *Ibid.* 32. ²⁸ *Ibid.* 32.

²⁹ Frye, ‘Responses and Alternatives’, 8.

³⁰ Ngandu *et al.*, ‘The Socio-Economic Impact of the Global Downturn on South Africa’, vii.

recession resulted in an increase in food insecure households, especially for lower-income households.³¹ Female-headed households in traditional huts and informal settlements were disproportionately affected, with roughly 20 per cent of female-headed households reporting that adults in the family had experienced hunger in the last year compared to 15 per cent of male-headed households.³²

After some initial denials, how did the South African government respond to these unfolding problems? At a fiscal level, the government's response was to initially increase spending, coupled to lower increases in spending in the years thereafter in an attempt to ensure sustainability. Some of these spending increases had been planned in advance. In 2007 the government had already committed to increasing the value and scope of the various social grants.³³ The 2010 budget therefore extended the eligibility criteria for the child support grant, resulting in an increased allocation of R9.4 billion over a three-year period.³⁴ Other spending increases were in keeping with the government's countercyclical economic policy and represented an attempt to stimulate the economy. For example, the 2010 budget allocated R52 billion for an expanded public works programme.³⁵ Overall, the 2010 budget resulted in government's share of GDP rising from 28.5 per cent in 2007–8 to 34.1 per cent in 2009–10. The budget as a whole increased by 8.6 per cent with social services receiving 54 per cent of government spending, an increase of 9.3 per cent relative to 2009–10.³⁶ For Finance Minister Pravin Gordhan, this was testament to the government's prudent macroeconomic policy: 'We entered the recent recession with a healthy fiscal position and a comparatively low level of debt. This allowed us to maintain government spending despite a sharp deterioration in revenue.'³⁷

However, questions can be raised about the sustainability of government spending in the years ahead. In the 2009 financial year, revenue decreased

³¹ *Ibid.* 66. ³² *Ibid.* 70. ³³ *Ibid.* 147.

³⁴ Department of National Treasury, 'National Budget Review' (2010), 104, www.treasury.gov.za/documents/national%20budget/2010/review/default.aspx, last accessed 20 August 2013.

³⁵ Minister of Finance, 'Budget Speech 2010' (17 February 2010), www.treasury.gov.za/documents/national%20budget/2010/speech/speech2010.pdf, last accessed 20 August 2013. Although by the Minister of Finance's own admission public works create only 'short-term job opportunities'.

³⁶ Ngandu *et al.*, 'The Socio-Economic Impact of the Global Downturn on South Africa', 129.

³⁷ Minister of Finance, 'Budget Speech 2011' (23 February 2011), www.treasury.gov.za/documents/national%20budget/2011/speech/speech2011.pdf, last accessed 20 August 2013.

by 9 per cent or R34 billion while expenditure increased by R127 billion.³⁸ The result was that the budget balance swung from a surplus of 1 per cent of GDP in 2007–8 to a deficit of 7.3 per cent in just two years.³⁹ The most recent 2013 budget estimated that the budget deficit had reduced to 5.2 per cent of GDP.⁴⁰ Nevertheless, it should be clear that the South African government is acting in a tight fiscal environment. Indeed, in the 2013 budget the government announced that growth in spending would be curbed by R10.4 billion over the next three years and its contingency reserves would be reduced by R23.5 billion over the medium term.⁴¹ Although no longer in recession, South Africa continues to be plagued by weak economic growth, with a recent report from the African Development Bank ranking the country 48th out of 52 countries in terms of economic outlook.⁴² Should there be a further downturn the ability of the South African government to stimulate a recovery would be severely limited.

As far as monetary policy is concerned, prior to the crisis the South African inflation rate had exceeded the target range of 3–6 per cent, reaching a high of 13.7 per cent in 2008.⁴³ The Reserve Bank therefore raised the repurchase (repo) rate to a high of 12 per cent in an attempt to contain inflation.⁴⁴ However, with the onset of the recession in 2008 the Reserve Bank adopted a more accommodating monetary policy and lowered the repo rate to 7 per cent in December 2008.⁴⁵ The repo rate currently stands at 5 per cent while the inflation rate is just within the target range of 3–6 per cent at 5.3 per cent.⁴⁶ Given the low exposure of South African banks to United States financial instruments, the Reserve Bank has not had to engage in policies such as ‘quantitative easing’ whereby central banks inject money into the economy.⁴⁷

³⁸ Ngandu *et al.*, ‘The Socio-Economic Impact of the Global Downturn on South Africa’, 127.

³⁹ Minister of Finance, ‘Budget Speech 2010’.

⁴⁰ Department of National Treasury, ‘South African National Budget 2013: Fiscal Policy’.

⁴¹ *Ibid.*

⁴² ‘South Africa’s Economy, Muddle through Will No Longer Do’, *The Economist* (1 June 2013), www.economist.com/news/middle-east-and-africa/21578692-slow-growth-and-sliding-currency-are-alarming-symptoms-deeper, last accessed 9 January 2014.

⁴³ South African Reserve Bank, ‘Targets and Results’, www.resbank.co.za/MonetaryPolicy/DecisionMaking/Pages/TargetsResult.aspx, last accessed 9 January 2014.

⁴⁴ South African Reserve Bank, ‘Rates’, www.resbank.co.za/Research/Rates/Pages/Rates-Home.aspx, last accessed 9 January 2014.

⁴⁵ *Ibid.*

⁴⁶ South African Reserve Bank, ‘Targets and Results’.

⁴⁷ Ngandu *et al.*, ‘The Socio-Economic Impact of the Global Downturn on South Africa’, 134.

A final aspect of the South African response to the global financial crisis that should be mentioned is that in early 2009 the government, organised labour, business and community organisations established the *Framework for South Africa's Response to the International Economic Crisis*.⁴⁸ The Framework prioritised 12 areas of work including a training layoff scheme for workers at risk of retrenchment, support for distressed sectors of the economy and an expanded public works programme.

The South African economy emerged from recession in 2010 and achieved modest growth rates of 2.3 per cent in 2012 and a projected 2.1 per cent in 2013.⁴⁹ In a sense, South Africa has therefore been fortunate. South Africa has not had to recapitalise its banks or cut spending on social programmes. However, the position remains precarious. Although the European Union is no longer South Africa's main trading partner – that position is now occupied by China – a further European crisis would have highly detrimental knock-on effects for the South African economy.⁵⁰

It is also important to emphasise the point made earlier in this chapter. Even before the financial crisis reached South Africa, the country suffered from exceptionally high rates of poverty, inequality and unemployment. South Africa might have been spared the worst of the global financial crisis but there is no doubt that these underlying structural problems have been deepened and entrenched, with fewer resources available to the South African government for such issues to be addressed and decreased prospects for economic growth. Indeed, the global financial crisis limits South Africa's possibilities at a time when the country has been described as being in a state of malaise, resulting from industrial strife, failure of government services and ineffective political leadership.⁵¹ The question is to what extent, if any, the negative repercussions of the global financial crisis have filtered through to the economic and social rights case-law produced by the courts. It is to this issue that we now turn.

⁴⁸ 'Framework for South Africa's Response to the International Economic Crisis' (19 February 2009), www.info.gov.za/view/DownloadFileAction?id=96381, last accessed 20 August 2013.

⁴⁹ H. Nyambura-Mwaura, 'South Africa Slashes 2013 GDP Growth Forecast to 2.1%', *Reuters* (21 October 2013) www.reuters.com/article/2013/10/23/safrica-budget-growth-idUSL5N0ID2FL20131023, last accessed 9 January 2014.

⁵⁰ N. Bauer, 'It Gets Worse: SA Economy Headed for Troubled Waters', *Mail & Guardian* (14 June 2012), <http://mg.co.za/article/2012-06-13-sa-economy-headed-for-troubled-waters>, last accessed 20 August 2013.

⁵¹ 'Over the Rainbow'.

IV. Adjudicating economic and social rights in a recession: case-law from 2009

The South African Constitutional Court has produced a well-known series of cases – *Soobramoney*,⁵² *Grootboom*,⁵³ *Treatment Action Campaign*⁵⁴ and *Khosa*⁵⁵ – dealing with the positive obligations imposed by economic and social rights. Early commentary focused on defining the Court's approach and suggesting more robust alternatives to that approach. Some scholars praised the jurisprudence as evidence that courts may play a useful role in implementing economic and social rights whilst, at the same time, respecting the expertise and democratic mandate of the other branches of government.⁵⁶ Others saw the Court's reasonableness-based approach as a weak device which stood little chance of fulfilling the transformative promise of the key economic and social rights provisions.⁵⁷ Even these commentators, however, expressed approval for aspects of the Court's reasoning.⁵⁸ Concerns about the practical effect of the judgments were rife but, for most commentators, and for civil society organisations thinking about strategies to implement the rights, these concerns highlighted the fact that courts are only one tool in the struggle to fulfil rights.

In some later cases, the Court indicated that it saw its role as a managerial one, that creative judicial remedies were possible and appropriate and that the goals of participatory democracy would inform judicial approaches to the rights.⁵⁹ In *Olivia Road*,⁶⁰ for instance, the Court had

⁵² *Soobramoney v. Minister of Health (KwaZulu-Natal)* 1997 (12) BCLR 1696 (CC).

⁵³ *Government of the Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC).

⁵⁴ *Minister of Health v. Treatment Action Campaign (No. 2)* 2002 (10) BCLR 1033 (CC).

⁵⁵ *Khosa and Others v. Minister of Social Development* 2004 (6) BCLR 569 (CC).

⁵⁶ See, e.g., C. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press, 2001), p. 221. See also C. Steinberg, 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence', *South African Law Journal*, 123 (2006), 264–84; M. Wesson, 'Grootboom and beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court', *South African Journal on Human Rights*, 20 (2004), 284–308.

⁵⁷ See, e.g., D. Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press, 2007) ch. 5; M. Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights', *South African Journal on Human Rights*, 20 (2004), 383–417, 407.

⁵⁸ See D. Bilchitz, 'South Africa: Right to Health and Access to HIV/AIDS Drug Treatment', *International Journal of Constitutional Law*, 1 (2003), 524–34, 530–1; Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights', 402–3.

⁵⁹ See *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) para 39.

⁶⁰ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg and Others* 2008 (3) SA 208 (CC).

issued an interim order that the City of Johannesburg should engage meaningfully with some 400 people that it wished to evict from unsafe and unhygienic buildings. The judgment affirmed the principle that where people face homelessness due to an eviction, public authorities should engage reasonably and in good faith with the occupiers with a view to finding solutions to their dilemma. Objectives of the engagement process should include, for instance, determining what the consequences of the eviction might be and whether the City could help in alleviating those consequences.⁶¹ In *Olivia Road* the engagement process was marked by good faith on both sides⁶² and resulted in a significant amount of agreement between the parties on the issues in the case. It is possible to see this as yet further evidence of an approach fixated with procedure rather than the substantive content of the rights. But commentators have seen the potential value of the meaningful engagement idea. Both scholars and activists were quick to suggest ways in which the remedy could be usefully developed – by combination with a supervision order, for example.⁶³

Two cases decided in 2009 – *Joe Slovo*⁶⁴ and *Mazibuko*⁶⁵ – attracted criticism of a more serious kind. The hope that the Court could develop its reasonableness model of economic and social rights adjudication to interrogate governmental action more closely and the early participatory promise of meaningful engagement orders were both severely undermined by these decisions. The principal concern for this chapter is to assess whether these cases represent a judicial response to the global economic and financial crisis. The timing is significant – *Joe Slovo* was decided shortly after the President had officially acknowledged that the South African economy had entered into a recession. *Mazibuko* was heard and decided some months after this.⁶⁶ We begin this section of the

⁶¹ *Ibid.* para 14 (per Van der Westhuizen J).

⁶² Stuart Wilson refers to the ‘almost comprehensive surrender on the City’s part’ when it came to framing the settlement, which was the product of the engagement process ordered by the court. See S. Wilson, ‘Litigating Housing Rights in Johannesburg’s Inner City: 2004–2008’, *South African Journal on Human Rights*, 27 (2011), 127–51, 150.

⁶³ See B. Ray, ‘Proceduralisation’s Triumph and Engagement’s Promise in Socio-Economic Rights Litigation’, *South African Journal on Human Rights*, 27 (2011), 107–26; A. Pillay, ‘Toward Effective Economic and Social Rights Adjudication: The Role of Meaningful Engagement’, *International Journal on Constitutional Law*, 10 (2012), 732–55.

⁶⁴ *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others* 2009 (9) BCLR 847 (CC).

⁶⁵ *Mazibuko and Others v. City of Johannesburg* 2010 (3) BCLR 239 (CC).

⁶⁶ *Nokotyana and others v. Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC) may be included in this group of cases but is not discussed here as it does not add anything to the analysis below. For a detailed examination of the case, see J. Dugard,

chapter with a brief analysis of the two cases. We then move on to discuss the Court's subsequent jurisprudence with a view to considering how, if at all, the crisis has impacted the Court's model of economic and social rights adjudication.

A. *Meaningful engagement diluted*

In *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes*, residents of the Joe Slovo settlement in the Western Cape resisted their eviction on several grounds. Government had targeted the settlement for reconstruction as part of its Breaking New Ground housing policy aimed at eliminating informal settlements country-wide.⁶⁷ The residents complained that government had breached an agreement that 70 per cent of the new houses in the development would be allocated to eligible Joe Slovo residents. Furthermore, rentals in the first phase of the development were considerably higher than the governmental estimates.⁶⁸ And residents objected to moving to Delft, the area designated for temporary relocation, because of reports of a high crime rate, poor transport services and few employment prospects in the area.⁶⁹ The applicants wanted the Court to hand down an order for further engagement between the parties, rather than eviction, at this stage.⁷⁰

The Court handed down a unanimous order, allowing for the eviction of the Joe Slovo residents. The eviction was made conditional on their relocation to temporary residential units which had to comply with certain specifications regarding size and quality. The parties were ordered to engage meaningfully with each other to try to reach agreement on the scheduling of the relocations and the respondents agreed to set aside 70 per cent of the houses yet to be built to eligible Joe Slovo residents.⁷¹

'Urban Basic Services: Rights, Reality and Resistance', in M. Langford, B. Cousins, J. Dugard and T. Madlingozi (eds.), *Symbols or Substance: The Role and Impact of Socio-Economic Rights Strategies in South Africa* (Cambridge University Press, 2013) p. 33. See also Ray's comments on *Abahlali Basemjondolo Movement SA and another v. Premier of KwaZulu-Natal and others* 2010 (2) BCLR 99 (CC) in 'Proceduralisation's Triumph and Engagement's Promise in Socio-economic Rights Litigation', 108.

⁶⁷ *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others*, para. 25 (per Yacoob J).

⁶⁸ *Ibid.* paras. 32–33 (per Yacoob J).

⁶⁹ *Ibid.* para. 31 (per Yacoob J), para. 222 (per Ngcobo J).

⁷⁰ *Ibid.* para. 316 (per O'Regan J), para. 401 (per Sachs J).

⁷¹ *Ibid.* para. 7.

All the judges acknowledged that there were serious deficiencies in the process of engagement.⁷² Justice O'Regan actually held that there had been no meaningful engagement.⁷³ But they found that these flaws were not so serious as to render the governmental action unreasonable.

One of the main reasons why the residents were arguing for a further process of engagement was that they wanted the upgrade to be conducted whilst they remained on site, allowing them to avoid the distress of relocation. *In situ* upgrading was stressed in government's Breaking New Ground housing plan and was consistent with international best practice⁷⁴ but the judges held that it was reasonable for government to opt for relocation in this case, noting that this was a matter over which the government exercised a wide discretion.⁷⁵ There is little explanation for the choice of relocation in the judgment – simply a contention by the respondents that *in situ* upgrading would not be feasible.⁷⁶

The Court's approach was problematic in a number of respects. For one thing, the delays, rising costs and miscalculations⁷⁷ associated with the N2 Gateway housing project were not primarily a consequence of a lack of cooperation by the residents. These problems arose directly from flaws in the project.⁷⁸ The judges allowed the State's nominal acceptance of the need for meaningful engagement and the overall worthiness of the project⁷⁹ to outweigh concerns about its impact on the residents. The argument that other, affected parties – particularly those who had already moved to Delft and were waiting to be allocated permanent housing – had also to be considered was, on the face of it, very convincing.⁸⁰ However, the idea that an order allowing for eviction of the residents would speed things up rested on the assumption that the primary cause of the delay was the residents' unwillingness to move. As discussed above, this was not the case.

On 24 August 2009, the Court decided to stay the execution of its eviction order in *Joe Slovo* until further notice.⁸¹ The decision was a response

⁷² *Ibid.* para. 167 (*per* Moseneke DCJ), paras. 113, 117 (*per* Yacoob J), para. 247 (*per* Ngcobo J), para. 301 (*per* O'Regan J), para. 378 (*per* Sachs J).

⁷³ *Ibid.* para. 301. (*per* O'Regan J). ⁷⁴ *Ibid.* paras. 364, 367 (*per* Sachs J).

⁷⁵ *Ibid.* para. 113 (*per* Yacoob J), para. 174 (*per* Moseneke DCJ), para. 253 (*per* Ngcobo J), para. 295 (*per* O'Regan J), para. 367 (*per* Sachs J).

⁷⁶ *Ibid.* para. 253. (*per* Ngcobo J). ⁷⁷ *Ibid.* paras. 371–2 (*per* Sachs J).

⁷⁸ *Ibid.* paras. 371–2 (*per* Sachs J), para. 295 (*per* O'Regan J).

⁷⁹ *Ibid.* para. 302 (*per* O'Regan J), para. 380 (*per* Sachs J).

⁸⁰ *Ibid.* para. 303 (*per* O'Regan J), para. 392 (*per* Sachs J).

⁸¹ P. de Vos, 'Sanity and Humanity Prevails – For Now', *Constitutionally Speaking* (8 September 2009), <http://constitutionallyspeaking.co.za/sanity-and-humanity-prevails-for-now/>, last

to the Western Cape government's acknowledgement that the relocation of Joe Slovo residents could end up costing more than the *in situ* upgrading of the settlement. Furthermore, the N2 Gateway Project would not offer enough houses to accommodate all the original Joe Slovo residents and there was no plan for those people left behind in the temporary relocation area.⁸²

It is possible to read the *Joe Slovo* decision as a narrative of success for the notion of meaningful engagement – after all, the government's ultimate capitulation resulted from the further engagement ordered by the Court. And the conditions imposed on the evictions by the Court highlighted the flaws in the project. From the perspective of the development of the Court's jurisprudence, however, it is difficult not to see this case as a retreat from an engagement remedy informed by the values of accountability, equality and participation.⁸³ The case made it clear that meaningful engagement was not a condition for governmental action. And the Court refused to attach the requirement of further engagement to a supervision order. Consequently, whether or not governmental bodies comply with the meaningful engagement requirement depends on factors like the extent to which the community involved is supported by a well-resourced, powerful civil society organisation with the wherewithal to place continued pressure on governmental bodies.⁸⁴

B. *Mazibuko: reasonableness redefined?*

The litigation in the *Mazibuko* case arose in the context of Johannesburg Water's Operation Gcin'amanzi (to save water) Plan.⁸⁵ Johannesburg Water decided to overhaul the system of water provision, starting with Phiri Township in Soweto. The plan was not directly prompted by the recession but its aims – 'to reduce unaccounted for water, to rehabilitate the water network, to reduce water demand and to improve the rate of

accessed 20 August 2013; A. Majavu, 'Evictions Suspended: Shack Dwellers Reprieved', *The Sowetan* (4 September 2009), www.sowetanlive.co.za/sowetan/archive/2009/09/04/evictions-suspended, last accessed 20 August 2013.

⁸² Majavu, 'Evictions Suspended.' See also Q. Mtyala, 'New Bricks for N2 Gateway', *IOL News* (2 March 2011), www.iol.co.za/news/south-africa/western-cape/new-bricks-for-n2-gateway-1.1034716, last accessed 20 August 2013.

⁸³ Pillay, 'Toward Effective Economic and Social Rights Adjudication'; S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008), p. 103.

⁸⁴ Pillay, 'Toward Effective Economic and Social Rights Adjudication'.

⁸⁵ *Mazibuko and Others v. City of Johannesburg*, para. 13 (per O'Regan J).

payment⁸⁶ – have clear resonance in the aftermath of the financial crisis, both in South Africa and elsewhere. The Phiri applicants alleged that the City's policy of allocating 6 kilolitres of free water per household per month (amounting to approximately 25 litres per person per day in areas such as Phiri where households are large) was unreasonable. The applicants wanted the Court to quantify the amount of water that would be considered 'sufficient' under Section 27(1)(b) as 50 litres per person per day, and determine whether the State had acted reasonably in seeking to achieve the progressive realisation of this right.⁸⁷

The Court stated that fixing a quantified content to the right of access to sufficient water could be a 'rigid and counter-productive' way of dealing with the right. An approach based on reasonableness, in contrast, allowed for the Court to take account of variations in context and time in adjudicating economic and social rights.⁸⁸ According to O'Regan J, for a unanimous court, the government's duty in respect to these rights was to take reasonable and progressive action to secure the 'basic necessities of life' to all citizens.⁸⁹ And rights-holders were entitled to hold government accountable for the manner in which it chose to do this.⁹⁰ The content of the right had to be determined in light of the content of the obligations set out in Section 27(2).⁹¹ The parameters of a reasonableness-based approach were defined most clearly in this case – and the definition was consciously very narrow.⁹²

One of the main considerations weighing against acceptance of the applicants' argument in the Court's decision was the finding that the expert evidence did not provide a single, clear answer to the question of what constituted 'sufficient water' in the context of this case. This was a debate the Court felt ill-equipped to settle.⁹³ But the disagreement was based on the fact that the amount of 50 litres per person per day included

⁸⁶ *Ibid.*

⁸⁷ For a summary of the arguments the applicants made against the Plan, see *ibid.* para. 44. The facts of the case are complex – for a more detailed discussion see M. Wesson, 'Reasonableness in Retreat? The Judgment of the South African Constitutional Court in *Mazibuko v City of Johannesburg*', *Human Rights Law Review*, 11 (2011), 390–405.

⁸⁸ *Mazibuko and Others v. City of Johannesburg*, para. 60.

⁸⁹ *Ibid.* para. 59. ⁹⁰ *Ibid.* para. 59. ⁹¹ *Ibid.* para. 68.

⁹² Sandra Liebenberg notes that the court's approach, as described in *Mazibuko*, is primarily a 'process-oriented approach to reasonableness review'. See S. Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Claremont: Juta, 2010), p. 471. See in particular *Mazibuko and Others v. City of Johannesburg*, paras. 67, 71.

⁹³ *Mazibuko and Others v. City of Johannesburg*, para. 62.

water-borne sanitation, which was relevant to the case. Furthermore the experts relied upon by the State indicated that the amount of 25 litres per person per day entailed a ‘“high” level of health concern’.⁹⁴

Justice O’Regan found that, based on average household sizes, the existing free basic water allocation was sufficient for 80 per cent of households in Johannesburg, even if ‘sufficient water’ were taken to mean 50 litres per person per day.⁹⁵ But, as she recognised in the judgment, the average household size in the townships of Johannesburg was higher than that in the rest of the city. Often, more than one household relied on the same water connection. Sometimes, this meant that 20 people, rather than the average of 3.2 people, were dependent on one source for their supply of water.⁹⁶

The applicants also challenged government’s decision to install pre-paid meters for the applicants and others in their position. There were three levels of service provision under Johannesburg Water’s Operation Gcin’amanzi (to save water) Plan: ‘The first level is the most basic and consists of a communal tap and communal ventilated pit latrines; the second level is a yard standpipe and a sewer connection or shallow communal sewer system with a pour-flush toilet; and the third level is a full metered water connection on each stand and a conventional water-borne sewerage system.’⁹⁷ Residents of Phiri Township were not given the option of a credit meter system.⁹⁸ There were disadvantages associated with the credit meter system: customers with credit meters paid higher tariffs for water supply than those with pre-paid meters; interest could be charged for arrear payments; defaulters’ names could be registered with the credit bureau;⁹⁹ and, of course, water supply could be cut off, as a consequence of non-payment. However, the discontinuation of the water supply could only be effected after officials had complied with a range of requirements ensuring a fair procedure.¹⁰⁰ With the pre-paid connections, water supply would stop once the free basic water supply had been exhausted, unless and until the consumer purchased credit for further water supply.¹⁰¹

The Court ruled that the municipality did not need to provide pre-paid customers with reasonable notice and an opportunity to be heard before

⁹⁴ See ‘Heads of Argument Submitted by the *Amicus Curiae*, the Centre for Housing Rights and Evictions’, para 83, www.wits.ac.za/files/res922904ce301243159e1c40e81148b21c.pdf, last accessed 20 August 2013.

⁹⁵ *Mazibuko and Others v. City of Johannesburg*, para. 89.

⁹⁶ *Ibid.* para. 87. ⁹⁷ *Ibid.* para. 107.

⁹⁸ *Ibid.* para. 155. ⁹⁹ *Ibid.* paras. 141, 152–3.

¹⁰⁰ *Ibid.* para. 116. ¹⁰¹ *Ibid.* para. 117.

their water supply was stopped. Affected customers would be aware of the fact that the water would be cut off once the supply was exhausted and '[t]o require the City to provide notice and an opportunity to be heard each time a pre-paid allowance is about to expire ... would be administratively unsustainable and in most cases serve no useful purpose'.¹⁰²

The Court relied on the municipality's indigent persons policy as a kind of safety net.¹⁰³ In terms of this policy, an additional 4 kilolitres per month would be provided free of charge to those households registered as indigent.¹⁰⁴ In response to arguments that the extra amount should simply be extended to all, the Court held that such an approach would benefit people who did not require the excess water, which would be costly and wasteful.¹⁰⁵ But the fact that only one-fifth of the households eligible to be registered as 'indigent' were actually on the register¹⁰⁶ is an indication that the introduction of the indigent persons policy was ineffective. The burden of knowing about, and following, a complex application procedure to be included on the register should not be placed on vulnerable people with few resources.

However one analyses it, Johannesburg Water's plan to overhaul the system of water provision in Phiri Township resulted in people with pre-paid meters being limited to the free basic water allowance for potentially months at a time while they tried to somehow find the money to pay for additional water. As was pointed out by the *amicus curiae* in the case, this policy applied regardless of how dire the need for water was.¹⁰⁷ It is submitted that the Court's treatment of the equality dimension of the case is also unconvincing, given that the City's plan was to introduce pre-paid meters solely in poorer, predominantly black, areas, and not in more affluent, predominantly white areas.¹⁰⁸

But perhaps the most concerning aspect of *Mazibuko* is the exceptionally deferential standard of review applied by the Court. We have noted already that the objectives underlying Operation Gcin'amanzi – for example, to reduce water demand and improve the rate of payment – have clear relevance in the aftermath of the financial crisis, not only in South Africa but in other jurisdictions where governments are attempting to deliver services in

¹⁰² *Ibid.* para. 123. Compare the court's reasoning on the notice requirement related to default judgments in the National Credit Act in the later *Sebola and another v. Standard Bank of South Africa Ltd and another* 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC).

¹⁰³ *Mazibuko and Others v. City of Johannesburg*, paras. 92–3.

¹⁰⁴ *Ibid.* para. 93. ¹⁰⁵ *Ibid.* paras. 99–102. ¹⁰⁶ *Ibid.* para. 98.

¹⁰⁷ See 'Heads of Argument Submitted by the Centre on Housing Rights and Evictions'.

¹⁰⁸ For further discussion, see Wesson, 'Reasonableness in Retreat'.

circumstances of fiscal constraint. On the facts of the case, the City's objectives appeared to be legitimate given that the decrepit state of the existing water infrastructure meant that much water pumped into Soweto was unaccounted for, and given the culture of non-payment for services originating in the apartheid era that exists in many parts of Soweto.¹⁰⁹

However, there is little consideration in *Mazibuko* of whether these objectives might have been pursued through less restrictive means. For example, the Court did not consider whether the City's objectives might have been achieved through installation of conventional credit meters, coupled with rehabilitation of the water network and more serious attempts at debt recovery. Nor did the Court consider whether a universalist approach to providing the extra 4 kilolitres a month would be more cost-effective than keeping an indigent persons register, given that the City's representative had indicated that the universalist system would be cheaper to administer.¹¹⁰

Governments must generally of course realise social rights within the scope of their available resources. In this regard, it is difficult for courts to determine the quantum of available resources, given that this may implicate issues such as levels of taxation and borrowing where judicial legitimacy and expertise are limited.¹¹¹ It is also difficult for courts to second-guess policies adopted in response to resource constraints. However, courts can be vigilant to ensure that such policies do not impact disproportionately on vulnerable sectors of society, especially where less restrictive alternatives exist. In *Mazibuko*, the vulnerability of the group in question, and the fact that Operation Gcin'amanzi implicated not only the right of access to sufficient water but also the right to equality, means that the reasonableness standard should have hardened so as to include an element of proportionality.¹¹²

However, as with *Joe Slovo*, the outcome of the litigation does not provide a complete picture regarding the vindication of the right to water in the *Mazibuko* case. In fact, following the case, the City of Johannesburg decided to raise the amount of water provided free to the poorest

¹⁰⁹ *Mazibuko and Others v. City of Johannesburg*, paras. 10–12, 166.

¹¹⁰ *Ibid.* para. 99.

¹¹¹ See M Pieterse 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights', *South African Journal on Human Rights*, 20 (2004), 383–417, 394–5; K McLean *Constitutional Deference, Courts and Socio-economic Rights in South Africa* (Pretoria University Law Press, 2009), pp. 195–6; M Tushnet, 'Social Welfare Rights and the Forms of Judicial Review', *Texas Law Review*, 82 (2004), 1895–919, 1896–7.

¹¹² This argument is made at greater length in M. Wesson, 'Disagreement and the Constitutionalisation of Social Rights', *Human Rights Law Review*, 12 (2012), 221–53.

households in the city to 50 litres per person per day and took other steps to soften the impact of the installation of pre-payment meters on relevant households.¹¹³ The litigation played a role in achieving this result because of the publicity it generated. But the litigation was only one feature in what Jackie Dugard refers to as the ‘politicisation of the ongoing process of engagement and contestation between civil society and government’.¹¹⁴ Other aspects of the ‘legal mobilisation process’ included ‘meetings, marches, media exposure and bypass, a form of civil disobedience that entails removing the offending technology ... and connecting to the main water supply, thereby restoring the unlimited water supply’.¹¹⁵ Residents were supported in this process by the Anti-Privatisation Forum and the new, affiliated Coalition Against Water Privatisation.

Dugard and others point out that, whilst the ANC is still able to depend on convincing victories in national elections, the ANC government is not insulated from public protest.¹¹⁶ In fact, some studies indicate that the country has ‘one of the highest *per capita* rates of protest action in the world’.¹¹⁷ Protests over failures in service delivery and communication, particularly at the level of local government, have become an important feature of the political landscape since 2004 and mushroomed in 2009.¹¹⁸ And sustained protest action has, in combination with litigation or threatened litigation, influenced governmental policies and decisions.

Returning to the assessment of *Mazibuko*, then, a wider lens provides evidence of the value of litigation where that litigation is used as one of the tools in the struggle for rights implementation. Where local communities can draw on organised assistance and advice to place various forms of pressure on government, judicial decisions are more likely to have an important and sustained impact. But the principles articulated in the *Mazibuko* judgment suggest a court distancing itself from the possibility of a more substantive, robust approach to reasonableness review in the context of economic and social rights.

C. *Assessing the cases: recession jurisprudence?*

As noted earlier, the Constitutional Court’s 2009 decisions in the area of economic and social rights have attracted concerns about a possible

¹¹³ Dugard, ‘Urban Basic Services’, 31. ¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.* 28. ¹¹⁶ *Ibid.* 12–18.

¹¹⁷ Marais, ‘The Impact of the Global Recession on South Africa’.

¹¹⁸ Dugard, ‘Urban Basic Service’, 12.

retreat to an approach that is much more deferential than that suggested in earlier cases and one that is not warranted by the judicial obligation to balance protection of the rights with respect for governmental decision-making. For our purposes, these concerns raise two questions. First, did the 2009 cases mark a departure from the Court's earlier jurisprudence and second, if so, is this shift connected to the financial and economic crisis?

For many commentators, the cases were not a departure from the Court's established approach but what Brian Ray refers to as the 'culmination of a strong trend towards the proceduralisation of socio-economic rights'.¹¹⁹ Scholars have consistently argued that a reasonableness-based approach is, by its nature, process-driven and overly deferential.¹²⁰ But some arguments have focused on the potential of a reasonableness-based approach to protect the values underlying economic and social rights and to interrogate governmental action in a robust way. Some analysis of the meaningful engagement idea suggests that even an ostensibly procedural remedy may give rise to substantive protection.¹²¹

Whilst the Constitutional Court did, in its earlier jurisprudence, sometimes adopt a stance more deferential than was warranted, its reasoning left open the possibility for more serious interrogation of governmental policy. In cases like *Treatment Action Campaign* and *Khosa*, the Court was responsive to arguments based on the disproportionate adverse impact on individuals when weighted against the governmental objective. The Court indicated that it would enquire into the weight of submissions regarding limited resources, not simply take them at face value.¹²² The dicta in *Mazibuko* closed down the space available to make such arguments. *Mazibuko* was not just a highly deferential decision on the facts of the case. It amounted to a statement of principle, a redefining of the Court's general approach to economic and social rights adjudication as light touch review.

The next question for us is whether what we have argued to be a departure from the Court's earlier approach may be attributed to the economic

¹¹⁹ Ray, 'Proceduralisation's Triumph and Engagement's Promise in Socio-Economic Rights Litigation', 107.

¹²⁰ See Bilchitz, *Poverty and Fundamental Rights*; Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights'.

¹²¹ See Pillay, 'Toward Effective Economic and Social Rights Adjudication'; Ray, 'Proceduralisation's Triumph and Engagement's Promise in Socio-Economic Rights Litigation'.

¹²² *Minister of Health v. Treatment Action Campaign (No. 2)*, paras. 65–6; *Khosa and Others v Minister of Social Development*, paras. 60–2.

and financial crisis. There are several reasons why this is a difficult assessment to make. First, there are no overt indications in the cases that the judgments were informed by concerns about the country being in a recession. Second, resource scarcity is usually relevant in South African economic and social rights cases anyway. The two pivotal sections of the Constitution – Sections 26 and 27 – require the State to act ‘within its available resources’ and the State has made submissions based on resource scarcity in nearly all the cases decided in terms of those provisions thus far. In the later cases, those submissions have not been linked to the specific economic climate of a recession. Third, as the jurisprudence has developed, and government responds to its obligations, as defined in the Constitution and by the Court, a greater level of complexity and more serious resource implications are to be expected whether the State is operating in an economic recession or not. Thus, for instance, *Olivia Road* involved housing plans for a relatively small group of people whereas *Joe Slovo* concerned a massive housing project with a corresponding huge potential impact. Finally, as noted earlier in this chapter, the extreme levels of poverty in South Africa pre-dated the financial and economic crisis. The number of people living in poverty has increased and this is due, partly, to the economic crisis. The dire living conditions of the most vulnerable have been exacerbated by the economic downturn. But the crisis has served mainly to highlight pre-existing problems with governmental responses to poverty.

In terms of what this means for the Constitutional Court’s model of economic and social rights adjudication, the Court has always had to balance its obligation to give effect to the economic and social rights with respect for the more democratic nature of governmental decision-making and the greater expertise of certain governmental officials and bodies. Neither the recession nor a global climate of economic insecurity and resource scarcity changes this fact. It does raise the question of whether the Court is getting the balance right. For the reasons described above, our argument is that the Court got it wrong in the 2009 cases. We turn now to examine post-2009 cases and consider the implications of this case-law for the Court’s general approach to economic and social rights. Our focus in the discussion below is on how the Court has treated arguments about resources and how it has developed the meaningful engagement remedy. The post-2009 jurisprudence reinforces the point that the financial crisis has had no real impact on how the South African Constitutional Court approaches social rights cases. However, the Court’s treatment of arguments about limited resources contains valuable lessons for how courts adjudicate social rights in a general context of resource scarcity.

V. Post-2009 developments in the case-law

The *Blue Moonlight*¹²³ decision was handed down on 1 December 2011. The case considers *inter alia* the impact of resource constraints on housing policy. Like *Mazibuko*, *Blue Moonlight* is therefore clearly relevant to the post-recession issue of how the State should deliver services in circumstances where resources are limited, and the role that judicial review can play in this regard. However, the case holds more constructive lessons than *Mazibuko* on both counts.

Blue Moonlight was a private company which, in 2004, had purchased several buildings in a state of considerable disrepair with the intention of redeveloping them.¹²⁴ The buildings were occupied by some 86 people who had been living on the property for more than six months, some of them for a considerably longer period. Between 1999 and 2004, they had also paid rent to a caretaker claiming to act for the owner, and to two different letting agencies. By 2005 the buildings were in a shocking condition and the City of Johannesburg issued notices warning Blue Moonlight to deal with the safety and health issues. The company then posted notices in the buildings giving residents approximately a month to vacate. The notices also claimed to end any lease agreement that may have existed. Blue Moonlight began eviction proceedings in the High Court in 2006. At this stage, the occupiers of the buildings asked that the City be joined to the proceedings because of their obligations with respect to housing – the City did not object and became a party in the case. When the case eventually came before the Constitutional Court, one of the main legal issues was whether the City's policy of excluding people evicted from private property from consideration for temporary housing was constitutional.¹²⁵ The fact that the occupiers would be homeless if evicted from the buildings was undisputed in the case.¹²⁶

The City sought to argue that its obligations with respect to emergency accommodation were limited to applying to the provincial government for assistance as and when the need arose. Their application for such assistance had been unsuccessful and they therefore had no further duties with respect to the occupiers.¹²⁷ In response, the Court held that there was nothing in the *Grootboom* decision or in Chapter 12 of the Housing Code to indicate that local government's capacity to provide emergency

¹²³ *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) BCLR 150 (CC).

¹²⁴ *Ibid.* paras. 1, 8. ¹²⁵ *Ibid.* para. 14.

¹²⁶ *Ibid.* para. 47. ¹²⁷ *Ibid.* paras. 48–9.

accommodation was conditional on provincial funding. Indeed, when the Housing Code was read in light of the broader constitutional and statutory framework, it was clear that the City was both entitled and obliged to allocate resources in the sphere of emergency housing.¹²⁸ In essence, this aspect of *Blue Moonlight* makes clear that the central finding of *Grootboom* – that those in immediate and desperate need of housing should not be neglected – applies to all levels of government.

From the perspective of this chapter, an especially important argument advanced by the City was that it simply lacked the resources to provide emergency accommodation for the occupiers if they were evicted.¹²⁹ The City submitted that it could not budget for emergency accommodation due to the element of unpredictability, and that it was ‘not obliged to go beyond its available budgeted resources to secure housing for homeless people ... [r]esources not budgeted for are not available’.¹³⁰ The City argued further that although a budget surplus had been projected it was now in a budget deficit.¹³¹

The Court acknowledged that it would be wholly inappropriate for a court to order an organ of state to do something that was impossible and that the City’s assertion about a lack of resources therefore deserved serious consideration.¹³² However, the Court rejected the submission that unpredictability precluded budgeting for emergency housing. This is because ‘the budgetary demands for a number and measure of emergency occurrences are at least to some extent foreseeable ...’¹³³ Furthermore, it was not good enough for the City simply to assert that it had not budgeted for something, where it was legally obliged to do so.¹³⁴ The City had also not provided any documentary evidence to support its claims of a deficit.¹³⁵ The evidence provided related to the City’s housing budget, rather than its overall financial position.¹³⁶ The Court was not prepared, in the light of this limited information, to overturn the Supreme Court of Appeal’s finding that the City had not demonstrated that it could not afford to provide the relevant emergency housing.¹³⁷

The Court went on to assess the constitutionality of the City’s policy of distinguishing between those relocated by the City and those evicted by private landlords, and providing for only the former in its temporary accommodation programme. In its analysis, the Court noted that state resources are limited in any country and that this was especially

¹²⁸ *Ibid.* para. 53

¹²⁹ *Ibid.* para. 71.

¹³⁰ *Ibid.* para. 72.

¹³¹ *Ibid.* para. 73.

¹³² *Ibid.* para. 69.

¹³³ *Ibid.* para. 63.

¹³⁴ *Ibid.* para. 74.

¹³⁵ *Ibid.* para. 73.

¹³⁶ *Ibid.* para. 74.

¹³⁷ *Ibid.* paras. 74–5.

so for South Africa. Section 26(2) recognises that resource constraints are relevant for an enquiry into the validity of housing policies and programmes.¹³⁸ The question was whether the differentiation between those evicted by private landlords and those evicted by the City could stand.¹³⁹ The Court held that the distinction was unreasonable inasmuch as it obscured the individual situations of the persons at risk and therefore did not meaningfully take their needs into account;¹⁴⁰ the City's duty arises not on the basis of who carries out the eviction but rather the fact that the eviction may result in homelessness.¹⁴¹

The Court thus dismissed the City's appeal. It ruled that the occupiers could be evicted but that the City had to provide them with temporary accommodation 'on a date linked to the date of eviction'. The Court ordered that the temporary housing be as close as possible to their current location and that it be provided 14 days before the eviction to allow the occupiers enough time to make the necessary moving arrangements and give them the security that the housing was, in fact, available to them.¹⁴² Although the occupiers had asked for a structural interdict in their written submissions,¹⁴³ the Court did not grant this, noting simply that the written arguments were not persuasive and had not been seriously pursued during the oral argument.¹⁴⁴

Nevertheless, the importance of *Blue Moonlight* lies in the Constitutional Court's consideration of the relationship between constitutional obligations and resource constraints. The Court emphasised that resource constraints must be taken seriously. However, the Court will not simply accept assertions that, for instance, a public authority has a deficit. The State is required to provide evidence supporting its assertions regarding resource limitations. Furthermore, even where resources are constrained, the State must budget so as to fulfil its constitutional duties. The State cannot evade its obligations to those who are most vulnerable simply by failing to allocate resources. The Court will not prescribe exactly how much should be budgeted for a specific purpose. But the Court will ensure that

¹³⁸ *Ibid.* para. 86. ¹³⁹ *Ibid.* para. 86. ¹⁴⁰ *Ibid.* para. 92. ¹⁴¹ *Ibid.* para. 92.

¹⁴² *Ibid.* paras. 99–101. For the court order, see *ibid.* para 104.

¹⁴³ A structural interdict is a type of supervisory jurisdiction, 'an injunctive remedy that requires the party to whom it is directed, to report back to the court, within a specified period, the measures that have been taken to comply with the court's orders'. See D. Davis, 'Socio-economic Rights in South Africa: The Record of the Constitutional Court after Ten Years', *Economic and Social Rights Review*, 5(5) (2004), 3–7, 4.

¹⁴⁴ *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties*, para.101.

those constitutionally entitled to the State's assistance are not neglected or excluded from the State's social programmes.

In two cases immediately following *Blue Moonlight – Pheko*¹⁴⁵ and *Schubart Park*¹⁴⁶ – the State did not raise any arguments regarding budgeting decisions and resource constraints. In contrast to *Blue Moonlight*, the Court's remedy in each of these cases included court supervision of the order.¹⁴⁷ In *Pheko*, the local authority involved, Ekurhuleni Metropolitan Municipality, sought to use the provisions of the Disaster Management Act 57 of 2002 to evict over 700 residents of the Bapsfontein Informal Settlement.¹⁴⁸ The key question was whether they could do this without first getting a court order.¹⁴⁹

The Court held that Section 55(2) of the Act did not allow for eviction or demolition of homes without a court order – only evacuation, which is limited to cases where temporary action is necessary for the preservation of life.¹⁵⁰ Here, there was no need for urgent evacuation. The circumstances which gave rise to the declaration of a disaster area – the presence of sink-holes – were first evident in 2004. Several reports were commissioned in 2005 but no action was taken until 2009 when another report was commissioned. It was only in 2010 that the municipality started to relocate residents. The eviction of the residents and demolition of their homes therefore constituted a violation of Section 26(3) of the Constitution.¹⁵¹

The Court made a declaratory order that the removal was unlawful. It also held that the municipality had a duty to provide the residents with temporary accommodation on suitable land.¹⁵² The municipality was under an obligation to engage with the applicants meaningfully regarding the identification of this land. The municipality had to report to the Court about its progress in approximately one year.¹⁵³ In ordering supervision, the Court noted that 'it was uncertain how long it will take for the Municipality to identify land for purposes of affording the applicants access to adequate housing. Supervisory relief is thus necessary in this

¹⁴⁵ *Pheko and Others v. Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC).

¹⁴⁶ *Schubart Park Residents Association and Others v. City of Tshwane and Others* 2012 ZACC 26.

¹⁴⁷ *Pheko and Others v. Ekurhuleni Metropolitan Municipality*, para. 50; *Schubart Park Residents Association and others v. City of Tshwane and Others*, para. 51.

¹⁴⁸ *Ibid.* paras. 1, 4.

¹⁴⁹ *Ibid.* para. 3. For the factual background, see *ibid.* paras. 5–11.

¹⁵⁰ *Ibid.* paras. 38–40. ¹⁵¹ *Ibid.* paras. 41, 45.

¹⁵² *Ibid.* para. 53 (on what 'suitable' temporary accommodation would amount to).

¹⁵³ *Ibid.* para. 50.

case to enable the Municipality to report to this Court about, amongst other things, whether land has been identified and designated to develop housing for the applicants'.¹⁵⁴ The Court's reason for ordering supervision in *Schubart Park* was similar. In this case, residents of three buildings who had been removed from their homes sought an order for re-occupation. The buildings in question were state-owned and, by 2011, they were occupied by many people not known to the City authorities. Conditions in the buildings had deteriorated significantly. In response to the City cutting off the water and electricity supply, some residents engaged in protest action – including the lighting of fires. When two fires broke out in one of the blocks, the police removed the residents from that block and did not allow them to return once the fire had been extinguished. Some weeks later, residents of the other two blocks were also removed. Ultimately, about 3000–5000 people were either living on the streets or in temporary shelters by the end of September 2009.¹⁵⁵

The High Court handed down what the Constitutional Court referred to as a 'tender implementation order'. This provided that the City had a duty to assist the affected residents by, amongst other things, providing temporary accommodation, beginning a process of refurbishment of the buildings and subsequent relocation of the residents to the buildings and, if technical advice showed this was not possible, providing habitable alternative buildings which had to allow for 'shelter, privacy and the amenities of life'.¹⁵⁶

The only defence presented by the City was that re-occupation was impossible because of the life-threatening conditions the High Court had found to exist, as a matter of fact, in the buildings. The City conceded before the Constitutional Court that this defence only applied for as long as it was actually impossible to return the residents – in other words, 'immediate removal on grounds of safety and temporary impossibility' could not 'result in the permanent lawful deprivation of the occupation of their homes'.¹⁵⁷ The Court pointed out that any other understanding would be inconsistent with previous case-law.¹⁵⁸ The Court agreed with High Court's findings that the removal was not a lawful eviction but action made temporarily necessary to preserve life, and that the residents were entitled to re-occupation once it was safe for them to return. But the judges objected to the lower court's finding that if the buildings could not

¹⁵⁴ *Ibid.* ¹⁵⁵ *Ibid.* paras. 1–8. ¹⁵⁶ *Ibid.* para. 12.

¹⁵⁷ *Ibid.* para. 20. ¹⁵⁸ *Ibid.* paras. 19–20.

be made safe, those who had accepted the City's tender must be provided with alternative accommodation. At that stage, the action would amount to eviction, rather than temporary removal and eviction could not be effected without a court order.¹⁵⁹

The Court also held that the High Court should have explicitly recognised the residents' right to eventual restoration of their occupation, provided the buildings could be rehabilitated.¹⁶⁰ The Court noted that a meaningful engagement order was appropriate, not just as a means of securing acceptable temporary accommodation for people facing eviction but also in circumstances where possible restoration of occupation was at issue.¹⁶¹ Perhaps most importantly, the Court held that the City's tender or offer of temporary accommodation was an 'inadequate basis for a proper order of engagement' because '[i]t proceeds from a "top-down" premise, namely that the City will determine when, for how long and ultimately whether at all, the applicants may return to Schubart Park'.¹⁶² Thus, the Court ordered that the City and the applicants had to engage meaningfully broadly in order to achieve restoration of the applicants' occupation. The parties were given slightly under two months to report to the High Court on their plans and progress. The Court held that this supervision was needed because of the uncertainty regarding how long the process of re-occupation would take.¹⁶³

On the face of it then, the decision to order supervision in the latter two cases and not in *Blue Moonlight* rested on the quality of argument put forward regarding supervision and the level of uncertainty on when the Court's order could be implemented. At the same time, the supervisory element of the Court's orders in *Pheko* and *Schubart Park* highlights the capacity of the Court to hand down more robust remedies where resource constraints are less of a concern. Importantly, the cases suggest that, where there is evidence of serious resource scarcity – whether linked to a global financial crisis or not – the courts may still play a role in, at least, holding government to account for its decisions. Thus, resource scarcity may influence a court's choice of remedies, rather than act as a reason for non-justiciability of the rights.

¹⁵⁹ *Ibid.* para. 41. ¹⁶⁰ *Ibid.* para. 49.

¹⁶¹ *Ibid.* para. 42. ¹⁶² *Ibid.* para. 50.

¹⁶³ The courts specified certain issues with respect to the subject matter of engagement. See *Schubart Park Residents Association and Others v. City of Tshwane and Others*, paras. 51, 53.

VI. Conclusion

It is still too early to measure whether the experience of recession will result in any real changes to political and economic conditions in South Africa. The crisis highlighted the pre-existing structural problems which have resulted in extreme poverty and inequality. But, in its fundamentals, government's economic policy remains unchanged. And the ANC's electoral dominance suggests that a shift in that economic policy is extremely unlikely.

The increase in organised resistance to governmental policies and the manner in which those policies are implemented – particularly when it comes to basic services – is perhaps the most interesting development of the 2009–12 period in terms of the current and future prospects for ESR realisation in South Africa. As noted above, it is difficult to establish a direct link between the kind of protest action now common in the country and the financial crisis. The protests are an expression of dissatisfaction over continued lack of access to basic services, and frustration over government's failure to properly engage with communities about their needs. These issues pre-dated the recession but were exacerbated by it.

Organised resistance has resulted in identifiable gains with respect to the protection of economic and social rights.¹⁶⁴ And litigation has proved to be a valuable element in the struggle for access to goods such as housing and water. The capacity of courts to effect social change is limited. For one thing, the social and economic rights cases decided in the courts represent the tip of a very large iceberg. And, most importantly, judicial decisions in this context have proved to be truly useful only when reinforced by community pressure for enforcement and further engagement. But, taking these considerations into account, the development of judicial principle continues to be an important element of social and economic rights discourse in South Africa.

Notwithstanding the fact that South Africa entered a recession in 2009 as a result of the global financial crisis, it is difficult to discern a distinct impact on the Constitutional Court's economic and social rights jurisprudence. It is true that two of the cases decided in that year – *Mazibuko* and *Joe Slovo* – have been criticised for diluting the requirements of reasonableness and meaningful engagement. However, the seeds for these developments were present in the Court's earlier decisions. And, whilst

¹⁶⁴ See, further, Dugard, 'Urban Basic Services'; H. Marais, *South Africa Pushed to the Limit: The Political Economy of Change* (London and New York: Zed Books, 2011), pp. 455–7.

Mazibuko appeared to signal a more fundamental shift in the Court's approach, subsequent developments suggest a quiet retreat from the deferential assumptions of that decision. The finding in *Blue Moonlight* that government had not provided adequate support for the claim that what was being asked for was beyond its resource capacity is significant. It is possible to argue that the difference in the cases was really one of scale: *Mazibuko* and, for that matter, *Joe Slovo*, dealt with far greater numbers of people and the resource implications were therefore more serious. But the Court's finding in *Blue Moonlight* that the City could not exclude people who had been evicted by private property-owners from its temporary housing programme has quite wide-ranging implications.

The Court has also adopted a more robust approach to the meaningful engagement remedy. Evacuation or eviction had already occurred in the later cases dealing with engagement so the question of whether removal should be made conditional on engagement did not really arise. However, in the *Schubart Park* case, the Court's declaratory order that the residents were entitled to re-occupy their homes in the buildings concerned, combined with the engagement order about the details of temporary accommodation, etc. meant that a future eviction (if the buildings could not be restored) could not take place in the absence of meaningful engagement. Furthermore, the addition of supervision orders to the engagement remedies in *Pheko* and *Schubart Park* was a step toward more careful scrutiny of governmental action that the Court had previously refused to take.

Taken as a whole, the jurisprudence of the Constitutional Court since 2009 – both the more restrained and interventionist elements – cannot be seen to be a direct response to the economic downturn. Nevertheless, we should not conclude that the South African experience holds no lessons for the role that economic and social rights can play in times of economic crisis. As we have emphasised throughout this chapter, all of the Constitutional Court's economic and social rights decisions have been reached in a context of deprivation and inequality. In a sense, all of the Court's judgments are a response to the ongoing economic crisis that characterises the lives of many South Africans. Decisions such as *Grootboom* and *Blue Moonlight* demonstrate that, at its best, the reasonableness approach is capable of holding even resource-constrained governments to account for the steps that they have taken to realise economic and social rights, while also respecting the expertise and democratic credentials of executive and legislative decision-makers. The difficulty is that the reasonableness standard is capable of lapsing into overly deferential review, as illustrated by the *Mazibuko* decision. However, there is now

a considerable body of literature about how the reasonableness standard can be strengthened so as to avoid this eventuality.¹⁶⁵

The case-law on meaningful engagement likewise emphasises the central importance of the values of accountability, equality and participation in circumstances where people face eviction, and possibly more broadly where the State threatens to deprive people of enjoyment of economic and social rights. Of course, there are limitations to the Court's meaningful engagement jurisprudence, some of which have been canvassed above. Perhaps the most damning critique is that some government officials may use, and have used, the remedy in a cynical way. Wilson has written about the City of Johannesburg's use of "engagement" to narrow the scope and content of its obligations toward the poor significantly'.¹⁶⁶ To some extent the problem has been recognised by the Constitutional Court in their orders in cases such as *Blue Moonlight*, where details were included about the conditions appropriate for temporary accommodation. The cases decided in 2011 and 2012 are also of some assistance because of the newly introduced court supervision of engagement orders. Supervision will go some way towards ensuring that engagement does not descend into a top-down exercise in information provision by governmental officials. The principles elaborated in the cases following the 2009 Constitutional Court term have yet to be tested in the context of large-scale projects in the nature of the government's Breaking New Ground housing policy or Operation Gcin'amanzi (to save water) Plan. They are, however, a promising development of the Court's economic and social rights jurisprudence. These cases add strength to the argument that adjudication is an important tool for organisations and individuals seeking to vindicate economic and social rights.

Moreover, given the fact that the South African experience of economic and social rights adjudication is located with a context of continuing economic insecurity, the jurisprudence speaks to the kind of demands that may be placed on governmental bodies in situations of very serious resource scarcity such as a global financial crisis. Even when not attached to court supervision, a detailed meaningful engagement order may contribute to the protection of interests in housing, water provision and so on. And court supervision is a useful way of ensuring the integrity of meaningful engagement. This is not to advocate a process-driven

¹⁶⁵ For general discussion, see the articles cited in notes 57–8. For a recent contribution, see Wesson, 'Disagreement and the Constitutionalisation of Social Rights'.

¹⁶⁶ Wilson, 'Litigating Housing Rights in Johannesburg's Inner City', 150.

approach to the implementation of economic and social rights, in general. Importantly, the jurisprudence also does not suggest that resource scarcity, however extreme, allows government free rein in deciding on best practice when it comes to social rights. Rather, the cases discussed here show that the political and economic complexity, whether due to the nature of a particular project, or the global financial climate, may demand that courts apply a level of creativity in deciding on appropriate remedial action.

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