

THE DESPERATE LEFT IN DESPERATION:
A COURT IN RETREAT - *NOKOTYANA V
EKURHULENI METROPOLITAN
MUNICIPALITY* REVISITED

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1 Introduction

Recently I was engaged in an intense discussion with one of my friends – a luminary legal mind – on some recent constitutional law developments in South Africa and elsewhere. In the course of that discussion, I mentioned my strong misgivings about the decision of the Constitutional Court of South Africa (the Constitutional Court) in *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* (the *Nokotyana* case).¹

I mentioned the fact that I would be presenting a commentary on the *Nokotyana* case at the Constitutional Court Review 3 Workshop. I said to him that my view was that the *Nokotyana* case represents yet another setback in the Constitutional Court's jurisprudence on socio-economic rights, following hot on the heels of another disappointing decision in *Mazibuko & Others v City of Johannesburg & Others* (the *Mazibuko* case).² I said that at best, the decision amounted to a perilous retreat from the court's fairly progressive jurisprudence on socio-economic rights, generally ossifying the overly deferent and minimalist position adopted by the court in the *Mazibuko* case;³ and that at worst, it amounted to an abdication of the court's role as the final arbiter in interpreting and applying the provisions of the Constitution, a process that necessarily suggests clarifying the meaning and content of all rights guaranteed under the Constitution.

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¹ 2010 4 BCLR 312 (CC).

² 2010 4 SA 1 (CC).

³ 2010 4 SA 1 (CC).

My interlocutor smiled wryly, responding that my project did not sound all that exciting because, in his view, enough has already been written on the Constitutional Court's now easily predictable approach to the implementation and enforcement of socio-economic rights and that whatever I might wish to say about the *Nokotyana* decision will introduce nothing new to the debate. 'Change tack and consider writing something on criminal law!' he quipped, sardonically probably, as he knows that criminal law is not normally within the immediate horizon of my research interests.

In response, I recited a story from the Bible with which my interlocutor is all too familiar. It is called the *Parable of the Widow and the Unjust Judge*.⁴ In this story, there was once a judge in a certain town who neither feared God nor cared about people's troubles or concerns. A widow in the town once came to him saying that she wanted justice against her adversary. The judge was not interested. She came again and again and the judge still did not care. The woman kept coming and nagging him to hand down a just decision. One day, the judge said to himself: 'This woman will not give up, let me listen to her story and decide the matter justly as she seeks; otherwise, she will wear me out'. The moral of the story is of course persistence in seeking right. My interlocutor immediately realised where I was taking him with this parable (he is really a sage) and he just laughed it off, insisting that he had made his point, and we parted.

Whilst the story in the parable is distinguishable from my present project, in that, unlike the hypothetical unjust judge, the Constitutional Court actually does care about people's troubles and concerns, the principle behind the story as explained is what prompted me to provide the illustration to my luminary friend: persistence in seeking right. We as socio-economic rights commentators in the legal academe are part of a wider web of lobbyists for practical reform in the extant judicial reasoning on socio-economic rights aimed at fostering radical social change so as to better the lot of the mass of South Africans and all those that live in it.⁵ Hence we shall keep on writing on socio-economic rights decisions as they come. This quest for radical change underscores the reason why we must keep writing in critique of the approach the Constitutional Court has seemingly definitively adopted with respect to this cluster of rights.

⁴ Luke 18:1-8.

⁵ P O'Connell 'The death of socio-economic rights' (2011) 74 *The Modern Law Review* (forthcoming). Available at <http://oconnellpadd13.wordpress.com/2010/07/09/ssrn-the-death-of-socio-economic-rights-by-paul-oconnell> (accessed 3 December 2010).

In an interesting flow of events, soon after my engagement with my interlocutor, I got hold of an article titled 'The death of socio-economic rights'.⁶ In this article, Paul O'Connell makes a strong case that despite progress in their formal recognition and entrenchment, socio-economic rights are being undermined and rendered nugatory by what he calls 'a pincer movement involving both the discursive and material negation of such rights'.⁷ His thesis is that in an era of globalisation, apex courts in a number of jurisdictions have embarked on a *de facto* harmonisation of domestic constitutional law in order to entrench principles of neo-liberalism and that in so doing, they have been fundamentally undermining socio-economic rights. Focusing on South Africa, he argues that the cases of *Mazibuko* and *Nokotyana* reflect an embrace of judicial minimalism that has involved a jettisoning of the transformative vision of the Constitution and a recasting of socio-economic guarantees as some form of a hyper-procedural requirement, rather than a guarantee of substantive material change.⁸ As Dugard has argued, the post-apartheid judiciary has collectively failed to act as an institutional voice for the poor in that courts in South Africa have not adequately realised their potential to promote socio-economic transformation in the interests of materially-disadvantaged South Africans.⁹

With such a strong charge against the Constitutional Court's approach towards socio-economic rights, I have what I consider to be another potent reason to critique the *Nokotyana* case and assess whether these charges are justified. In my submission, socio-economic rights are clearly not dead, but they are perhaps 'shipwrecked'. In any event, if it is urged that socio-economic rights might as well be pronounced dead, as O'Connell seems to suggest, there is need for deeper scholarly engagement that seeks to ensure either their rebirth or resurrection, whichever is easier. If they are simply shipwrecked, as I suggest, such engagement is similarly called to ensure a rescue from imminent demise. Thus either way, I submit, my interlocutor is wrong in suggesting that all that needs to be said in South African socio-economic rights discourse has been said, and that this obviates the need for further discourse on the subject. Hence, in this paper, I proceed to look at some of the aspects that worry me about the *Nokotyana* decision.

Firstly, I worry about the court's undue emphasis on matters of procedural technicalities at the expense of substantive issues.

⁶ As above.

⁷ As above.

⁸ As above.

⁹ See J Dugard 'Courts and the poor in South Africa: a critique of systemic judicial failures to advance transformative justice' (2008) 24 *South African Journal on Human Rights* 214 215.

Secondly, I worry about the court's manner of application of the concept of constitutional avoidance in the case. Thirdly, I worry about the court's confusion about the test to be applied in deciding claims relating to socio-economic (subsistence) rights, as it seems to depart, perhaps without deliberately setting out to do so, from the reasonableness test it laid down earlier in *Government of South Africa and Others v Grootboom and Others* (the Grootboom case).¹⁰ Finally, I worry about the court's approach to the question of remedies in the case.

2 Facts

In August 2006, the Ekurhuleni Metropolitan Municipality (the Municipality) submitted a proposal, pursuant to Chapter 13 of the National Housing Code to the Member of the Executive Council for Local Government and Housing of the Province of Gauteng (MEC) to upgrade the status of the Harry Gwala Informal Settlement (the Settlement), located in the area of jurisdiction of the Municipality, to a formal township. According to the municipality, a decision by the provincial Government to upgrade the settlement was a pre-requisite for the provision of basic services by the municipality to its residents.¹¹ Three years later, the Provincial Government had not yet made the required decision.¹²

Mr Nokotyana and others approached the South Gauteng High Court (the High Court) on behalf of residents of the Settlement, seeking an order against the Municipality pending the decision to upgrade the Settlement, to provide the Settlement with: (1) communal water taps, (2) temporary sanitation facilities, (3) refuse removal and (4) high-mast lighting in key areas. The claim was essentially based on sections 26 and 27 of the Constitution and Chapters 12 and 13 of the National Housing Code.¹³ The municipality quickly conceded the applicants' claims in respect of the provision of water taps and refuse removal services and an order to this effect was made by the High Court.¹⁴ After full hearing, the High Court found against the applicants in respect of the remainder of the claims, holding that there was no emergency to trigger the application of Chapter 12 of the National Housing Code and that they could not rely on the provision of basic services based on Chapter 13 of the said Code because the application of Chapter 13 could only be triggered once a

¹⁰ 2000 11 BCLR 1169 (CC).

¹¹ *Nokotyana* (n 1 above) para 8.

¹² As above.

¹³ *Nokotyana* (n 1 above) para 10.

¹⁴ *Nokotyana* (n 1 above) para 11.

decision had been made by the Provincial Government to upgrade the settlement to a formal township.¹⁵

The applicants appealed directly to the Constitutional Court. On appeal, it is quite clear that the applicants changed their claim, in part. Whilst they had claimed the provision of temporary sanitation facilities in the High Court, in the Constitutional Court they instead claimed the provision of one ventilated improved pit latrine (somehow in short hand called a 'VIP' latrine) per household with immediate effect, or alternatively one VIP latrine per two households; and they maintained their claim for high mast lighting to enhance security and easy access by emergency vehicles.¹⁶

On its part, the Municipality, among other things, brought a fresh issue on the appeal, informing the Court that it had since adopted a new policy in April 2009 in respect of which an offer was being made to the applicants for the provision of one chemical toilet per ten families.¹⁷

Also significant is the fact that the Court ordered that the MEC, the National Minister for Human Settlements (Minister), and the Director General of the National Department of Human Settlements (DG) should be joined in the case as respondents.¹⁸ Having been joined as parties, the MEC, the Minister and the DG offered to supplement funds to the Municipality such that the Municipality could, instead of making provision of one chemical toilet per ten households, make provision of one such toilet per four households. They stated that the offer was to apply only to the Harry Gwala Settlement on the basis that the inordinate delay to finalise the application for upgrade constituted an exceptional circumstance.¹⁹

The Constitutional Court identified five issues for determination:

- (a) Whether the municipality was under an obligation to provide the services claimed under Chapter 12 of the National Housing Code;
- (b) whether they were obliged to do so under Chapter 13 of the said Code;
- (c) if the municipality was not obliged under these Chapters, whether the applicants could rely directly on section 26 of the Constitution;
- (d) the relevance of the municipality's new policy that was introduced for the first time in the Constitutional Court; and

¹⁵ *Nokotyana & Others v Ekurhuleni Metropolitan Municipality* (08/17815) [2009] ZAGPJHC 14 (24 March 2009) (unreported) (*Nokotyana* High Court), summarised and referred to in *Nokotyana* (n 1 above) paras 12 & 13.

¹⁶ *Nokotyana* (n 1 above) para 21.

¹⁷ *Nokotyana* (n 1 above) paras 32 & 33.

¹⁸ *Nokotyana* (n 1 above) para 6.

¹⁹ *Nokotyana* (n 1 above) para 36.

(e) whether it was appropriate for the Court to address the delay by the Gauteng Province in deciding whether the Harry Gwala Informal Settlement should be upgraded into a township.

The Court held against the applicants and dismissed the claims. In the parts that follow, the decision of the Court in dismissing the applicants' claims, is explored and critiqued.

3 Formalities v substance

It is quite apparent that there were some weaknesses in the manner in which the case was argued by the parties. The most evident example on the part of the applicants is the fact that they changed their claim from seeking temporary sanitation in the court of first instance, to a more specific claim for VIP latrines in the Constitutional Court, apparently without proper explanation or justification for this significant change. The Court, in this regard, took issue with some of the procedural flaws. The Court stated that bringing fresh evidence on appeal in bulk, as the parties in the instant case did, is, in general, not ideal in appellate proceedings.²⁰ It observed that the documentation in this case included policy instruments²¹ and some 307 pages of articles²² and other documents filed together with the applicants' written arguments. The Court further noted that the Municipality also tendered evidence of a new policy on the provision of temporary sanitation services which was adopted on 16 April 2009, after the delivery of the High Court judgment.²³ It noted that the applicants also sought to challenge this new policy on the basis that it was irrational and could not be regarded as a reasonable measure to

²⁰ The Court observed that '[t]here are two problems with the submission of new evidence on appeal. First, it tends to change the issues that were before the court below, or even introduce new issues, thus rendering this Court a court of first and final instance. Second, the submission of new evidence – and especially large volumes – in an appeal is generally highly undesirable and cumbersome.' (*Nokotyana* (n 1 above) para 19).

²¹ The policy instruments that the court referred to were: Department of Water Affairs and Forestry: National Sanitation Task Team 'Free basic sanitation implementation strategy' (October 2008); Department of Water Affairs and Forestry: National Sanitation Programme Unit 'National Sanitation Strategy' (August 2005); Department of Water Affairs and Forestry: National Sanitation Task Team 'Sanitation for a healthy nation: Sanitation technology options' (February 2002). The list was non-exhaustive.

²² The articles referred to by the court were: L van Vuuren 'African ministers unite in fight against backlogs' (2008) *The Water Wheel* 16; L van Vuuren 'Sanitation research laying the foundation for sustainable service delivery' (2008) *Sanitation Supplement to The Water Wheel* 8; and G Setswe & L Zungu 'Can SA lay a claim to a 'sanitary revolution?'' (2008) *The Water Wheel* 34. Again the list here was non-exhaustive.

²³ Resolution of the Ekurhuleni Metropolitan Municipality's 4th Housing Portfolio Committee Meeting, 16 April 2009.

achieve the right of access to adequate housing in terms of section 26(1) and (2) of the Constitution.²⁴

The Court held that it was not appropriate on appeal to consider a case so fundamentally changed. In the circumstances, it held that it was not necessary to consider the new evidence lodged by either the applicants or the Municipality and the rationality and reasonableness, or lack thereof, of the policy embodied in the evidence.

Pausing there, I must observe that I do not wish to argue that technical procedures have little relevance in the pursuit of justice through the courts. Procedural law no doubt plays a vital role in ensuring that disputes are settled and rights are enforced in an orderly and peaceful manner that is fair and just to all parties involved. It is for instance essential that matters must be brought before the appropriate (competent) forum; that they must be brought in the correct form and in good time; that procedural steps relating to the form, filing and serving of court documents must be scrupulously complied with; that court decorum must be observed; and that remedies have to be enforced in appropriate ways provided for by the law. Thus in order to have an effective and efficient system of justice, a healthy symbiosis between procedural law and substantive law needs to be sustained and the two cannot exist independent of each other. In the absence of procedure law, judicial proceedings would be disorderly and in the end, substantive justice would be compromised.

However, at the same time, it is recognised that even though procedural justice serves important purposes as discussed above, an undue emphasis on technical procedures might end up materially prejudicing substantive justice in a very undesirable way. Delva rightly argues that:

both extremes must be avoided: on the one hand, utopian substantive law which cannot be realised' and on the other 'procedural law which is too technical and leads its practitioners towards a kind of procedural narcissism. Let us remember the saying: "*inter utrumque*": strike a happy medium.²⁵

Striking a happy medium in the course of justice is a virtue. It is in this regard that in many common law jurisdictions, there is a fundamental principle of the law of procedure that cautions courts that, procedural prescriptions notwithstanding, substantial justice should be done without undue regard to technicality. For instance,

²⁴ *Nokotyana* (n 1 above) paras 20-21.

²⁵ W Delva 'Official opening speech' in M Storme & H Casman (eds) *Towards justice with a human face: The First International Congress on the Law of Civil Procedure* (1978) 5 7.

section 3(2) of the Judicature Act in Kenya²⁶ provides that courts will decide cases ‘according to substantial justice without undue regard to technicalities of procedure and without undue delay’. A similar provision finds expression in section 3 of the Criminal Procedure and Evidence Code in Malawi.²⁷

The Nigerian case of *Amaechi v INEC*²⁸ is particularly instructive in this regard. The Federal Supreme Court of Nigeria held that in the interest of justice and fair play the court should not shy away from doing substantial justice without any undue regard to technicalities. The Court held that it would not allow technicalities to prevent it from doing substantial justice. The Court stressed that it has a standing and rigid invitation to do substantial justice to all matters brought before it, and that the justice it dispenses must not be allowed to be inhibited by any paraphernalia of technicalities. It emphasised that all courts have a duty to ensure that citizens, high and low get the justice which their case deserves. The court pointed out that the judiciary like all citizens of the country cannot be a passive on-looker, and that it should not hesitate to use the powers available to it to do justice in the cases before it.²⁹

In South Africa courts have adopted a similar approach in the context of civil procedure law. In *Alphedie Investments (Pty) Ltd v Greentops (Pty) Ltd*³⁰ The Court stated that it was ‘inclined to look benevolently at pleadings ... so that substantial justice need not yield to technicalities.’³¹ The same approach was adopted more recently by the High Court in *Inzinger v Hofmeyr & Others*³² where Reyneke AJ held that the view that substantial justice must be done without undue regard to technicalities has been expressed by courts in previous decisions, such as *Odendaal v Van Oudtshoorn*.³³

A number of scholars have also grappled with the question of the interface between procedural and substantive law. Aranella has argued that procedure law, at the end of the day, serves and should serve the purpose of vindicating substantive rules of law and, most significantly, that it performs a legitimation function by resolving state-citizen disputes in a manner that commands the community’s respect for the fairness of its processes as well as the reliability of its

²⁶ Cap 8 of the Laws of Kenya

²⁷ Cap 8:01 of the Laws of Malawi.

²⁸ (2008) 5 NWLR 227 451 (per Aderemi, JSC)

²⁹ *Amaechi* (n 28 above) pp 324, 344, & 449 (per Oguntade, Musdapher and Aderemi JJSC).

³⁰ 1975 1 SA 161 (T).

³¹ *Alphedie* (n 30 above) 161H-162A.

³² (7575/2010) [2010] ZAGPJHC 104.

³³ 1968 3 SA 433 (T) 436D.

outcomes.³⁴ Krings urges that procedural rules have to be flexible and proceedings before the court must not degenerate into rigid and purely formal procedural discourse that ignores the purposes of substantive law.³⁵ Similarly, Delva submits that procedural law must not be allowed to become alienated from the aspiration to make justice prevail to a greater extent by means of sound rules of substantive law; therefore, rules may not impede the enforceability of material norms.³⁶ To summarise the point, Oputa has eloquently stated that:

The judge should appreciate that in the final analysis *the end of law is justice*. He should therefore endeavour to see that the law and the justice of the individual case he is trying go hand in hand ... To this end he should be advised that the spirit of justice does not reside in formalities, not in words, nor is the triumph of the administration of justice to be found in successfully picking a way between pitfalls of technicalities. He should know that all said and done, the law is, or ought to be, but a handmaid of justice, and inflexibility which is the most becoming robe of law often serves to render justice grotesque. In any “fight” between law and justice the judge should ensure that justice prevails ... The judge should always ask himself if his decision, though legally impeccable in the end achieved a fair result. “That may be law but definitely not justice” is a sad commentary on any decision.³⁷

Thus, I submit that we need to examine the approach of the Constitutional Court in view of this exposition of the interplay between procedural and substantive law. In the present circumstances, it is to be recalled that the substantive law actually comprises the fundamental rights guaranteed under the Constitution.

The question that arises is: notwithstanding the flaws of the parties in prosecuting their respective cases, considering all the circumstances of the case, should the court have refused to consider issues and evidence brought on appeal that were clearly directly related and relevant to the determination of the case? Here it is apposite, by way of analogy, to go back and examine how the Court dealt with the issue of direct appeal from the High Court. The Court said:

It is generally preferable for a litigant to exhaust all appeal remedies

³⁴ P Aranella ‘Rethinking the functions of criminal procedure: the Warren and Burger Courts’ competing ideologies’ (1983) 72 *The Georgetown Law Journal* 185 188.

³⁵ See E Krings ‘Official opening speech’ in Storme & Casman (eds) (n 25 above) 4.
³⁶ Delva (n 25 above) 7.

³⁷ As quoted in E. Azinge ‘Living oracles of the law and the fallacy of human divination’ (2007) 6th *Justice Idigbe Memorial Lecture*, Faculty of Law, University of Benin, 8.

and especially not to by-pass the Supreme Court of Appeal.³⁸ However, a decision by the Supreme Court of Appeal would most likely not finally dispose of this matter, as a further appeal to this Court is highly probable. As the residents of the Settlement have already been subjected to long delays, it is in the interests of justice for this Court to hear the matter directly.³⁹

Thus the Court cited two key grounds that tilted the interests of justice in favour of abridging the appellate process and allowing a direct appeal: (1) the inevitability of the fact that the matter would still end up in the Constitutional Court; and (2) that the appellants had already endured long delays in relation to the issues before the Court. It is, in light of this reasoning, difficult to appreciate why the court did not similarly consider that these two major justifications for allowing a direct appeal were equally applicable to the question of whether, in all the circumstances of the matter, it would have been in the interests of justice for the court to consider the new policy that had been adopted by the 1st Respondent since it directly related to the issues raised by both the parties.

It is submitted that based on the same justification, the court should have accepted the invitation to consider constitutional issues raised which the court acknowledged were very important; instead of, as we shall discuss later in this paper, quickly dismissing them based on the fact that the appellants did not launch a direct attack on the constitutionality of Chapters 12 and 13 of the National Housing Code. In my view, notwithstanding the fact that the issues raised by the parties were new and ordinarily the court, in terms of the rules of procedure, would have been justified in deciding not to consider them; in light of the foregoing discussion, there were sufficient grounds for condoning the flaws and addressing the issues. The Court might have felt that it was imperative to follow procedural law to the letter, but in the end, this became a classic instance of the court paying undue regard to technicalities at the expense of substantial justice. As Oputa has eloquently put it, “[t]hat may be law but definitely not justice” is a sad commentary on any decision.⁴⁰

The principle that substantial justice should be done without undue regard to technicalities, it is submitted, is even more compelling for application in socio-economic rights cases as the applicants involved are all too frequently poor and vulnerable whilst the issues are frequently complex and highly demanding on

³⁸ See for example *Dudley v City of Cape Town & Another* 2005 5 SA 429 (CC); 2004 8 BCLR 805 (CC) para 12; *Mkangeli & Others v Joubert & Others* 2001 2 SA 1191 (CC); 2001 4 BCLR 316 (CC) para. 7.

³⁹ *Nokotyana* (n 1 above) para 17.

⁴⁰ Oputa (n 37 above)

expertise;⁴¹ and unfortunately such applicants do not have the means of engaging in protracted and cyclical litigation that strict and inflexible adherence to procedural rules might require. In the instant case, it is significant that the Court pointed out on numerous occasions that the applicants were living in desperate circumstances. In the Court's words, '[t]he facts [of this case] illustrate that the plight of the poor is desperate and that their patience is often tested to the limit by unfortunate and unjustified delays.'⁴²

These are circumstances that should have informed the court's ultimate approach, flaws in procedural requirements notwithstanding. The court should have remained keenly mindful of the desperate circumstances of the applicants; the fact that, as the court acknowledged, the applicants' patience had been tested by the structures of the state to the limit; the fact that the applicants' claims in relation to sanitation clearly implicated human dignity which is both a founding value of the South African Constitution as well as a specific justiciable right under the Bill of Rights;⁴³ and the need to resolve state-citizen disputes in a manner that commands the community's respect for the fairness of its processes as well as the reliability of its outcomes.⁴⁴ The totality of the circumstances surrounding this matter are such that the majority of the appellants would find it difficult to appreciate and maintain trust in the reliability of the outcomes of socio-economic issues brought to the court by the poor and most desperate for determination.

It is submitted that this is a case where, considering all the circumstances, when weighed on the scales of justice; it was imperative for the court to pronounce on the substantive constitutional issues raised, as well as specifically to address the issue of the new positive policy developments that had ensued during the currency of the proceedings. Such type of measured flexibility which mediates a number of interests and strikes a happy medium between the importance of adhering to procedural rules on the one hand; and

⁴¹ See J Dugard & T Roux 'The record of the South African Constitutional Court in providing an institutional voice for the poor: 1995-2004' in R Gargarella *et al* (eds) *Courts and social transformation in new democracies* (2006) 109-111, where the authors argue that reasonableness standard of review has 'the potential to diminish the capacity of the Court to function as an institutional voice for the poor since it requires expert understanding of complex policy and budgetary issues, making it all but impossible for poor people to bring [socioeconomic] rights cases without extensive technical and financial support'.

⁴² *Nokotyana* (n 1 above) para 4.

⁴³ See ss (1) and (10) of the Constitution respectively. It is worth noting in this regard that the Constitution does not expressly guarantee the right of access to basic sanitation although basic sanitation is clearly a basic and fundamental human need (see D Bilchitz, 'Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*' (2010) 127 *South African Law Journal* 591 591).

⁴⁴ Aranella (n 34 above) 188.

the imperative of giving meaningful effect to guaranteed substantive rights on the other; is essential in ensuring that the socio-economic rights guaranteed under the constitution are accorded meaning through effective enforcement.

4 Constitutional avoidance

The Court in *Nokotyana* was very reluctant to address the issues brought before it premised on the Constitution. The Court summarised its reasons for such refusal in the following terms:

The applicants have not sought to challenge either chapter of the National Housing Code. This Court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation or alternatively challenge the legislation as inconsistent with the Constitution.⁴⁵ The applicants recognised this by relying primarily on Chapters 12 and 13 [of the National Housing Code]. They also tried to rely directly on the Constitution though. They cannot be permitted to do so. It would not be appropriate for this Court in these proceedings to consider whether the Municipality's new policy complies with the Constitution, for this reason, as well as in view of the above-mentioned inadmissibility of the new documentary evidence in which the policy is embodied.⁴⁶

The concept of constitutional avoidance has a well-established place in South African constitutional law jurisprudence. It was first expressed by Kentridge AJ in *S v Mhlungu* where he expressed the view that it was a general principle that wherever it is possible to decide a case, be it civil or criminal, without reaching a constitutional issue, that is the approach that should be adopted.⁴⁷

It should however be recalled that the court in *Nokotyana*, in its own analysis, began with an acknowledgment of the importance of the constitutional issues that were before it. It stated that the applicants had raised 'constitutional matters' which were 'important to communities all over the country and to all spheres of government'.⁴⁸ Again as stated earlier, the court felt that it had to deal with issues raised in the matter by way of direct appeal because in any event, the issues were bound to end up before it.

⁴⁵ This principle was emphasised in *Mazibuko* above, where reference was made to earlier cases: *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 4 SA 490 (CC); 2004 7 BCLR 687 (CC) paras 22-26; *MEC for Education, Kwa-Zulu Natal & Others v Pillay* 2008 1 SA 474 (CC); 2008 2 BCLR 99 (CC) para 40; and *South African National Defence Union v Minister of Defence & Others* 2007 5 SA 400 (CC); 2007 8 BCLR 863 (CC) para 52.

⁴⁶ *Nokotyana* (n 1 above) paras 48-49.

⁴⁷ 1995 3 SA 867 (CC) para 59.

⁴⁸ *Nokotyana* (n 1 above) para 16.

Whilst the concept of constitutional avoidance is well established; it is also equally established that the rule of constitutional avoidance is not inflexible. Currie & De Waal state that ‘the principle that constitutional issues should be avoided is not an absolute rule. It does not require that litigants may only directly invoke the Constitution as a last resort.’⁴⁹ They urge that in circumstances where the violation of the Constitution is clear and there is no meaningful alternative way of getting relief, there is no need to waste time seeking non-constitutional means of arriving at a remedy. This will for instance be the case, they urge, ‘when the constitutionality of a statutory provision is placed in dispute because, apart from reading down, there are no other remedies available to the litigant affected by the provision.’⁵⁰

The present matter is one such case where a clear violation of the socio-economic rights of the applicants had been established, and there was no other remedy apart from a reading down of Chapters 12 and 13 of the National Housing Code, a process of reading down that, it is submitted, the Court did not engage in with a good measure of sophistication.⁵¹ That there was a clear violation is evident from the court’s decision itself, when the decision is gauged against the test it earlier laid down in the *Grootboom* case. In *Grootboom*, the Court stated that:

The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. *Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity.* In short, I emphasise that human beings are required to be treated as human beings.⁵²

In the instant case, the Constitutional Court, addressing its mind to the issue of the inordinate delay taken by the provincial Government in arriving at a decision, held that:

a delay of this length is unjustified and unacceptable. It complies neither with section 237 of the Constitution,⁵³ nor with the requirement of reasonableness imposed on the government by section 26(2) of the Constitution with regard to access to adequate housing.⁵⁴

⁴⁹ See I Currie & J De Waal, *The Bill of Rights Handbook*, (2005) 78.

⁵⁰ As above.

⁵¹ Indeed, it is submitted that one needs to keep in mind the fact that the National Housing Code is, in any event, a policy instrument of the Government and not a piece of legislation as the Court seemed to suggest in *Nokotyana*.

⁵² *Grootboom* case, (n. 10 above) Para. 83. My emphasis.

⁵³ Section 237 of the Constitution provides: ‘All constitutional obligations must be performed diligently and without delay.’

⁵⁴ *Nokotyana* (n 1 above) para 55.

In other words, the right of the appellants in section 26 of the Constitution which, according to the Court in *Grootboom* entails a right to ‘reasonable action by the state in all circumstances and with particular regard to human dignity’⁵⁵ had clearly been violated.

In such circumstances, it would not be apposite for the court to engage in an enterprise of picking a way between pitfalls of technicalities in order to avoid a direct engagement with the constitutional issues that the appellants sought to raise.

It would also appear that the Court suggests that Chapter 13 of the National Housing Code, even if it had been directly attacked by the applicants on the basis of unconstitutionality, would in any event have passed the reasonableness test. The Court said:

The principle on which Chapter 13 is thus based is that capital-intensive services will not be provided until a decision has been made on whether to upgrade a settlement. The Municipality reinforced this by referring to the provisions of the Municipal Finance Management Act, which prohibits “fruitless and wasteful expenditure”.⁵⁶ Only once the layout of a township has been established, can the infrastructure for the installation of engineering services be provided. *As pointed out by the Municipality, if this is done earlier, the cost incurred in providing interim services would be wasted.*⁵⁷

It appears here that the court suggests that the approach taken by the Code is justified. One would therefore ask: what was the point of preventing the applicants from arguing on the unconstitutionality of the Code when the Court was at the same time prepared to make a generous comment justifying the philosophy behind the Code? It is submitted that the court should not have avoided dealing with the constitutional issues based on the principle of constitutional avoidance.

5 What test? Confusion confounded

It is now axiomatic that the Constitutional Court has firmly established the reasonableness test as a measure against which Government compliance with its socio-economic rights obligations is to be gauged. The test, as is now well-known, was defined by the Court in the *Grootboom* case and has been consistently applied in a series of socio-economic rights cases that followed.

⁵⁵ *Grootboom* (n 10 above) para 83.

⁵⁶ The Local Government: Municipal Finance Management Act 56 of 2003 defines ‘fruitless and wasteful expenditure’ as ‘expenditure that was made in vain and would have been avoided had reasonable care been exercised’.

⁵⁷ *Nokotyana* (n 1 above) para 42 (my emphasis).

Whilst the Court in *Nokotyana* quickly affirms this position, on closer analysis, it is rather difficult for one to appreciate what standard was actually applied by the court in arriving at its decision. As noted above, the Court on several occasions in its judgment acknowledges the fact that the applicants were in a desperate situation. Thus the court notes for instance, that:

[t]he offer from the MEC, the Minister and the DG to assist the Municipality with the necessary finances to provide one chemical toilet per four families requires attention, for it *may alleviate the desperate situation* of those living in the Settlement, even if only to a limited degree.⁵⁸

The Court goes further to acknowledge that the existing policy does not address the immediate needs of the desperate.⁵⁹

According to the *Grootboom* test, in the context of the right of access to adequate housing, in order for the housing programme to pass the reasonableness test, it must be 'sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short term requirements.'⁶⁰ Thus the Court concluded in *Grootboom* that:

[t]he nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the state must provide for relief for those in desperate need. They are not to be ignored in the interests of an overall programme focused on medium and long-term objectives.

Yet, the *Nokotyana* court, despite clearly observing that the community of the Harry Gwala Settlement was living in desperate circumstances, that their conditions would remain the same until the provincial Government makes a decision in accordance with Chapter 13 of the National Housing Code, and that their patience had been tested to the limit, still refused to make a finding that the policy in this regard was unreasonable for failing to cater for the immediate and short-term interests of those in desperate circumstances. Having found that the residents of the Harry Gwala Settlement were living in desperate circumstances, one would think that such a finding should have followed as a matter of course. Instead, the Court made a finding that:

To the extent that [the applicants] rely on Regulation 2 to bolster the claim made in their notice of motion that the Municipality must furnish them with temporary sanitation facilities, pending the decision whether

⁵⁸ *Nokotyana* (n 1 above) para 53 (my emphasis).

⁵⁹ *Nokotyana* (n 1 above) para 57.

⁶⁰ *Nokotyana* (n 1 above) para 56 (my emphasis).

to upgrade the Settlement, the Municipality's response is that Chapter 13 precludes capital intensive service provision until the decision to upgrade has been taken. This principle seeks to ensure that public funds are expended effectively. It cannot be said, in the absence of a challenge to Chapter 13, that the approach of the Municipality to the claim for temporary sanitation services is unreasonable. The applicants' submissions in this regard cannot be upheld.⁶¹

Viewed closely, the court suggests that a policy sanctioning expenditure that is targeted at addressing the immediate or short term needs of those living in desperate circumstances at the Harry Gwala Settlement, would be unwise and that such expenditure would be fruitless, wasteful and ineffective.⁶² As shown above however, failure to take care of those immediate needs amounts to a failure to meet the reasonableness test. In the premises, it does not appear that the court was applying the same test as the one adopted in *Grootboom*. The court's analysis confuses the test.

Perhaps a few reasons for the court's rather ambivalent approach in analysing the conceptual issues in this case might be surmised here. It could be that the court was thoroughly unhappy with the way the case was generally argued and was thus generally inclined to find against the applicants. It could also perhaps be a sign of weariness on the part of the court in having to stress to socio-economic rights litigants that they really should not be approaching the court seeking a definition of the content of socio-economic rights and the provision of basic services as that is, in the view of the court, a matter to be dealt with by the political branches of Government. Whatever the reasons, it is clear that the analysis of the issues in *Nokotyana* leaves a lot to be desired.

6 The question of remedies

One of the major weaknesses of the Constitutional Court's jurisprudence in socio-economic rights cases has been in the area of remedies. Mbazira observes that one of the reasons why the adjudication of socio-economic rights has not made a very big impact on the lives of the poor is because of the Constitutional Court's reluctance to use the mechanism of the structural interdict to supervise the enforcement of its decisions.⁶³ He also significantly observes that the approach of the Constitutional Court differs between civil and political rights litigation on the one hand, and

⁶¹ *Nokotyana* (n 1 above) para 45.

⁶² *Nokotyana* (n 1 above) para 42.

⁶³ See CM Mbazira 'From ambivalence to certainty: Norms and principles for the structural interdict in socio-economic rights litigation in South Africa' (2008) 24 *South African Journal on Human Rights* 1 1-2.

socio-economic rights litigation on the other. He argues that whilst the Constitutional Court has readily issued the structural interdict in litigation touching on the civil and political rights in the Constitution,⁶⁴ the Court, despite acknowledging the availability of this form of relief as an appropriate, just and equitable remedy in socio-economic rights litigation, has declined to use the relief on the basis that the executive has always respected its orders; and that this is so even in those cases where there is evidence to the contrary.⁶⁵ Mbazira's view is echoed by Dugard who argues that the kinds of conventional and somewhat limited relief pursued by the Constitutional Court in socio-economic rights cases have acted as a further deterrent to poor people opting for litigation as a means of enforcing their socio-economic rights (as opposed to direct protest, political action etc). She urges that despite Section 172(1) of the Constitution providing that '[w]hen deciding a constitutional matter within its power, a court – (b) may make any order that is just and equitable' – the Constitutional Court has always taken the approach of providing programmatic/policy relief rather than direct relief to the affected individuals, and that it has failed to utilise structural interdicts or otherwise maintain oversight over the enforcement of its socio-economic rights judgments. This she argues, has meant that the few litigants who have brought socio-economic rights claims to the Constitutional Court have not secured any direct benefits from the litigation, a further disincentive to future litigants.

The decision of the Constitutional Court in *Nokotyana* is a classic exemplification of these concerns. The court clearly found that the claims against the Municipality, the 1st Respondent, were ill-conceived and dismissed them.⁶⁶ Thus in so far as the 1st Respondent (who happens to have been the original Respondent) was concerned the issue of remedies did not arise.

However, the Court still addressed its mind to the new policy adopted by the 1st Respondent in April 2009 (which it earlier on refused to admit on technical grounds as discussed above). It noted that the new policy was presented as an offer by the Municipality to provide one chemical toilet per every ten families and its express

⁶⁴ He cites *August & Another v Electoral Commission* 1999 4 BCLR 363 (CC); and *Sibiya & Others v DPP, Johannesburg High Courts & Others* 2006 2 BCLR 293 (CC) as instances.

⁶⁵ See *Minister of Health & Others v Treatment Action Campaign* 2002 5 SA 721 (CC) (TAC).

⁶⁶ The Court found that the applicants could not rely on Chapter 12 of the national Housing Code because no emergency had been declared by the MEC. It proceeded to accept the 1st Respondent's argument wholesale, that in any event Chapter 12 provided that assistance would be limited to absolute essentials and that queue jumping would not be permitted (*Nokotyana* (n 1 above) para 19). The relevance of this point, it would appear, was an implicit suggestion that the applicants' claims did not constitute 'absolute essentials'.

intention to do this in the near future. It also noted that the applicants' argued that the new policy was unreasonable.⁶⁷ The Court held that all that it had to do with regard to the Municipality's new policy was to note it and record the Municipality's intention and undertaking to act speedily. Otherwise it was 'neither necessary nor proper to pronounce on the reasonableness or rationality of the policy, or to include the policy in the order of this Court.'⁶⁸ Thus the Court had regrettably decided to reduce itself to a passive onlooker in this regard.

The issues raised above of the court paying undue regard to technicality at the expense of substantive justice resurface here. It is submitted that even if it had found that the processes under Chapter 13 were reasonable and that the Municipality could not be faulted, having found that the community in the Harry Gwala settlement was living in desperate circumstances, a rights-based pro-poor approach should have enjoined the court to do more than just 'note' the policy. It should have included this offer into the Order one way or the other as half a loaf is better than none.

Further to the offer made by the municipality in the new policy, was an offer from the MEC, the Minister and the DG that would ensure that the municipality was in a position to provide at least one chemical latrine per four families instead of ten families. As stated in the facts above, they stated that the offer was to apply only to the Harry Gwala Settlement on the basis that the inordinate delay to finalise the application for upgrade in relation to the settlement constituted an exceptional circumstance. The Municipality resisted the offer on the ground that accepting the same would lead to discrimination as there were other similarly situated communities. In its remedial analysis, the Court observed that this offer had to be considered because it might 'alleviate the desperate situation of those living in the Settlement, even if only to a limited degree'.⁶⁹ It stated that in the circumstances it was tempting to order the Municipality to accept the assistance offered. However, the Court stated that the circumstances of the (desperate) Harry Gwala community were neither exceptional nor unique, on the grounds that there were other similarly situated communities both within the 1st Respondent's jurisdiction as well as throughout the country. The Court held that it 'would not be just and equitable'⁷⁰ to make an order that would benefit only those who approached a court and caused

⁶⁷ *Nokotyana* (n 1 above) para 51.

⁶⁸ *Nokotyana* (n 1 above) para 52.

⁶⁹ *Nokotyana* (n 1 above) para 53.

⁷⁰ Section 172(1)(b) of the Constitution provides in relevant part: 'When deciding a constitutional matter within its power, a court ... may make any order that is just and equitable'.

sufficient embarrassment to provincial and national authorities to motivate them to make a once-off offer of this kind.’⁷¹

It is rather surprising that the Constitutional Court took this approach, effectively barring the applicants from benefiting from the offer. Firstly one observes that the MEC, the Minister and the DG had already made an assessment that the situation in which the applicants found themselves was an exceptional circumstance in comparison with other communities. The Court differed with the assessment, relying on information from the municipality that there were other similarly situated communities. It is unfortunate that we live in a society in which the highest Court should be compelled to hold that it is neither an exceptional or unique circumstance to live in desperately poor conditions. This is a troubling fact in a country with a per capita income of USD 9 812 (about R66 000.00).⁷² However, it is submitted that this was an appropriate case where, in so far as the offer made by the MEC, the Minister and the DG was concerned, the Court should have made an order for meaningful engagement. It does not appear inconsistent with the tenets of the Bill of Rights to make differential provision for different communities in respect of the realisation of socio-economic rights, since it is clear from sections 26(2) and 27(2) of the Constitution that the enjoyment of these rights is subject to progressive realisation. Progressive realisation will entail that, in some circumstances, different categories of people, or communities, would move towards the full realisation of the rights at different rates.⁷³ This, it is submitted, is not necessarily unconstitutional, as long as the test used to arrive at the differential provision is not arbitrary, and a reasonable plan is in place that makes provision for the progressive steps to be taken towards realisation on an equal footing.

It is also rather unfortunate, it is submitted, that the court refers to the desperately poor litigants in this case as a group of people that

⁷¹ *Nokotyana* (n 1 above) para 54.

⁷² United Nations Development Programme (UNDP) *Human development report - human development index and its components* (2010) 143 145.

⁷³ Thus Bilchitz has persuasively argued in this regard, that ‘[i]mportantly, equality cannot mean, in relation to socio-economic rights, that everyone at every stage must be provided with the same level of resources. This understanding of equality would lead to an absurd constitutional bar on developmental processes being undertaken. It is not within the realm of human possibility that where large-scale poverty exists, the immediate provision of sufficient resources and services for all can be provided. It is crucial to understand that the Constitution sets a long-term goal of ‘equality of sufficiency’: it mandates that this be achieved through a process of progressive realisation which requires some level of inequality in the short-term.’ See Bilchitz (n 43 above) 604. He has further argued, correctly, that ‘[i]n *Nokotyana*, the court illustrated the perils of a mistaken understanding of equality in the socio-economic rights context ... The court’s finding however implies that everyone should be reduced to the same level of desperation, thus minimising overall well-being in the context of scarce resources.’ Bilchitz (n 43 above) 605.

approached the court to cause sufficient embarrassment. The Court in *Grootboom* was faced with a similar situation and expressed itself in a more sensitive way. The Court said:

We must also remember that the respondents are not alone in their desperation; hundreds of thousands (possibly millions) of South Africans live in appalling conditions throughout our country. Although the conditions in which the respondents lived in Wallacedene were admittedly intolerable and although it is difficult to level any criticism against them ... it is a painful reality that their circumstances were no worse than those of thousands of other people, including young children, who remained at Wallacedene. It cannot be said, on the evidence before us, that the respondents moved out of the Wallacedene settlement and occupied the land earmarked for low-cost housing development as a deliberate strategy to gain preference in the allocation of housing resources over thousands of other people who remained in intolerable conditions and who were also in urgent need of housing relief. It must be borne in mind however, that the effect of any order that constitutes a special dispensation for the respondents on account of their extraordinary circumstances is to accord that preference.

The applicants in this case should clearly not have been singled out by the court for having come to court to cause sufficient embarrassment to authorities. It was not a problem that they came to court, and they most probably did not come to court as a deliberate strategy to gain preference over other similarly situated communities in the municipality or elsewhere in the country by causing the court sufficient embarrassment. They were only seeking to vindicate their constitutional rights.

Finally, though not least, the question of remedies does squarely arise in respect of the 2nd Respondent whom the Court found to have been in violation of its obligations under section 26(2) of the Constitution. The court deplored the fact that there had been a delay of more than three years on the part of the 2nd Respondent in reaching a decision on the Municipality's application to upgrade the Settlement to a township. It observed that the rights of residents under Chapter 13 were dependent on a decision being taken, and that the delay was 'the most immediate reason for the dilemma and desperate plight of the residents'.⁷⁴ The Court emphasised that:

The provincial government should take decisions for which it is constitutionally responsible, without delay. A delay of this length is unjustified and unacceptable. It complies neither with section 237 of the Constitution,⁷⁵ nor with the requirement of reasonableness imposed on

⁷⁴ *Nokotyana* (n 1 above) para 57.

⁷⁵ Section 237 of the Constitution provides: 'All constitutional obligations must be performed diligently and without delay.'

the government by section 26(2) of the Constitution with regard to access to adequate housing.

Even that being so, the Court simply ordered that ‘it is just and equitable to order the MEC to reach a decision within 14 months.’ Firstly, the period of 14 months in any event seems too long mindful of the fact that the MEC had already delayed by over three years at the time of the decision. Secondly, and more importantly, given the delays that have characterised this matter, it is submitted that this was also a proper case in which the Court should have issued a structural interdict in order to ensure that the MEC remained accountable to the Court throughout the process.

7 Conclusion

The decision in *Nokotyana* is a major setback in socio-economic rights jurisprudence. It ossifies the already overly deferent approach that the Constitutional Court adopted in *Mazibuko*, and at best, does not demonstrate the sensitivity desired of the Court in addressing matters of the desperately poor and vulnerable members of our society. Thus Davis is right when he argues that:

Too much deference to the executive, whether in the scope given to a socio-economic right or in the limited use of supervising relief, may result in the dissipation of huge energy by the disempowered in the ensuing litigation for no gain.⁷⁶

Another concern is that in *Nokotyana*, the Court adopted an overly legalistic approach in placing undue weight on procedural technicalities, instead of putting the substantive concerns of the poor applicants at the core. Further, the analysis of the test used to assess Government’s compliance with its constitutional obligations is unclear, as the court seems to have refrained from applying the reasonableness test set in *Grootboom*; and it seems the decision may not add much content to the progressive development of socio-economic rights jurisprudence in South Africa. Further, the rather mundane manner in which the claims in this case were dismissed does resonate with the sentiments of those who have started a conversation on ‘the death of socio-economic rights’. The decision represents a further retreat by the court from its duty to define and develop the content of the socio-economic rights guaranteed under the Constitution. In *Nokotyana*, the socio-economic rights claims of

⁷⁶ D Davis ‘Adjudicating the socio-economic rights in the South African constitution: Towards “deference lite”?’ (2006) 22 *South African Journal on Human Rights* 301 326.

desperately poor litigants for the provision of the basic necessities of life seem to have been shipwrecked.

I also demonstrate the weaknesses of the remedial approach adopted by the Court, observing that the Court seems not to have considered a range of remedial avenues open to it, such as a rigorous structural interdict or an order for meaningful engagement.

This case also demonstrates the need for litigants to adopt more concerted and/or collaborative litigation strategies. Again as Davis argues, ‘when law is seen as part of a broader political strategy, the result may well be more progressive outcomes.’⁷⁷ In this regard, he urges that, as an illustration:

The distinction in the outcome in the Grootboom and TAC cases can, in part, be attributed to the ability of the Treatment Action Campaign to organise politically and utilise legal strategy as but one tool in their kit, as opposed to squatters who have no political power. This suggests that those who have no emancipatory strategies available to them, other than the law, find that the law provides less protective covering than a fig leaf for the lack of any ability to protest outside of the court room.⁷⁸

Finally, considering that the Constitutional Court seems to have ossified in its position of deference towards the executive in socio-economic rights matters, whilst there remains hope that the Court might still be persuaded, through continued scholarly engagement and litigation to gradually revisit its principled positions in this regard, it is perhaps time that litigants in South Africa also considered supra-national avenues for pursuing socio-economic rights claims. In this regard, it might be worth the while to consider bringing a test case, by way of *actios popularis*, before the African Commission on Human and Peoples’ Rights in order to test the conformity of the Constitutional Court’s approach with South Africa’s socio-economic rights obligations under the African Charter on Human and Peoples’ Rights.⁷⁹

⁷⁷ Davis (n 76 above) 326.

⁷⁸ As above.

⁷⁹ Whilst the UN Committee on Economic, Social and Cultural Rights might be the ideal body to expertly deal with such claims at the supra-national level, South Africa has regrettably not yet ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol of 2008 that establishes an individual complaints procedure. Thus, yet another challenge that remains for lobbyists and activists in this area is to continue to motivate the South African Government to ratify these instruments. Such ratification is not only important in signifying South Africa’s commitment to ensure that the rights of its people, gauged by international standards, are fully guaranteed, but it will also significantly stamp the country’s position as a leader on the African continent and thus provide an impetus for a wider progressive movement towards the ratification of these instruments by other African countries, which development would in turn contribute towards building a culture of accountability on the continent.