An Analysis of the Separation of Powers Doctrine in Housing Rights Remedies Jurisprudence

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ABSTRACT

The remedy issued by the Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom and Others 2000* 11 BCLR 1169 (CC), has been criticized for being overly deferential. In spite of the courts' wide remedial powers, it made an order lacking specificity about the measures required to remedy the housing rights infringement in that case, overly deferring its remedial role to the executive and legislative branches of government. The basis of the court's overly deferential approach was the separation of powers doctrine. Therefore, the question that this study aims to address is how the separation of powers doctrine impacts on the courts' provision of remedies in South African housing rights remedies jurisprudence. To answer this question, this study contains an analysis of the separation of powers doctrine in the abstract and as understood in the South African context, as well as an analysis of the remedies issued by the courts in housing rights cases, with a specific focus on the remedies issued by the Constitutional Court (hereafter "the Court").

This study attempts to illustrate that the foundation for the Court's strict understanding of the separation of powers doctrine was laid during the debate about the inclusion of socio-economic rights in the 1996 Constitution. During this debate, separation of powers concerns, judicial capacity, and judicial legitimacy, were raised by those against the inclusion of socio-economic rights in the 1996 Constitution. In this study it was found that the same separation of powers concerns raised during this debate are ritually invoked by the Court in housing rights cases during the remedy stage of adjudication. It is against this backdrop that the Court has traditionally adopted a deferential approach in relation to the provision of remedies in housing rights cases. However, despite the implications of the Court's traditionally deferential approach, the Court post-*Grootboom* has shifted away from this approach. While the Court's post-*Grootboom* approach was necessary considering the failed interaction between a deferential Court and an incompetent government, and its implication for the victims of housing rights violations, it potentially raises separation of powers concerns. Despite these separation of powers concerns, it is argued in this thesis that the Court's post-*Grootboom* approach is justified on the basis of a more contemporary understanding of the separation of powers doctrine.

While the Court's post-*Grootboom* approach was a step in the right direction, the transformative — coupled with the supreme — nature of the 1996 Constitution requires

something more, a reconceptualization of the separation of powers doctrine. The reconceptualised doctrine that I have in mind encapsulates a separation of powers that is understood and applied by the Court with the achievement of the transformative aims of the 1996 Constitution in mind.

OPSOMMING

Die remedie uitgereik die Konstitusionele Hof in *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC), is al gekritiseer omdat dit oordrywend eerbiedig is. Ten spyte van die howe se wye remediërende magte reik die hof ‘n orde uit wat ‘n te kort aan spesifisiteit gehad het oor die nodige stappe om die behuisingsregtelike krenking in daardie saak te remedieer, met die gevolg dat die remediërende rol van die hof oorgegee is aan die uitvoerende en wetgewende takke van die regering. Die basis van die hof se oormatige eerbiedige benadering was die leerstuk van die skeiding van magte. Dus word daar in hierdie studie gevra hoe die leerstuk van die skeiding van magte die howe se uitreiking van remedies in die Suid-Afrikaanse behuising-remedies regsleer beïnvloed. Om die vraag te beantwoord bevat hierdie studie ‘n analise van die leerstuk van die skeiding van magte in die abstrak en in die Suid-Afrikaanse konteks, asook ‘n analise van die remedies uitgereik deur die howe se behuisingsreg sake, met ‘n besondere fokus op die remedies uitgereik deur die Konstitusionele Hof (hierna “die Hof”).

Hierdie studie beoog om te illustreer dat die grondslag van die Hof se strikte begrip van die skeiding-van-magte leerstuk gelê is en tye van die debat rondom die insluiting van sosioëkonomiese regte in die 1996 Grondwet. Gedurende hierdie debat is bekommernisse oor die skeiding van magte, geregtelike kapasiteit, en geregtelike legitimiteit geopper deur diegene wat teen die insluiting van sosioëkonomiese regte in die 1996 Grondwet was. In hierdie studie is bevind dat die selfde bekommernisse oor die skeiding van magte gedurende hierdie debat ritueel opgeroep word deur die Hof in behuisingsregsake gedurende die remedie-fase van beregting. Dit is teen hierdie agtergrond dat die Hof tradisioneel ‘n eerbiedige benadering ten opsigte van die uitreiking van remedies in behuisingsregsake aanneem. Maar, ten spyte van die Hof se tradisionele eerbiedige benadering, het die hof post-*Grootboom* wegbeweeg van hierdie benadering. Terwyl die Hof se post-*Grootboom* benadering nodig was omdat die wisselwerking tussen die eerbiedige hof en ‘n onbevoegde regering misluk het vir die slagoffers van behuisingsregkrenkings, bring dit bekommernisse oor die skeiding van magte te vore. Ten spyte van die skeiding van magte bekommernisse word daar in hierdie verhandeling geargumenteer dat die Hof se post-*Grootboom* benadering geregverdig kan word op die basis van ‘n meer kontemporêre begrip van die skeiding van magte leerstuk.

Terwyl die Hof se post-*Grootboom* benadering ‘n stap in die regte rigting was, verlang die transformatiewe en oppergesagtelike aard van die 1996 Grondwet iets meer – ‘n herkonseptualisering van die skeiding van magte leerstuk. Die herkonseptualisering van die leerstuk wat ek in gedagte het behels ‘n skeiding van magte wat verstaan en toegepas word deur die hof met die nastrewing van die transformatiewe oogmerke van die 1996 Grondwet in gedagte hou.

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ABBREVIATIONS

AHRLJ	African Human Rights Law Journal
CCR	Constitutional Court Review
CLJ	Cambridge Law Journal
CLoSA	Constitutional Law of South Africa
Harvard LR	Harvard Law Review
HRQ	Human Rights Quarterly
Int J Consititut Law	International Journal of Constitutional Law
IRPA	International Review of Public Administration
Nordic J Hum Rts	Nordic Journal of Human Rights
North Carolina Journal of Int'l Law	North Carolina Journal of International Law
NYLSR	New York Law School Review
NYULR	New York University Law Review
Penn State Int. Law Rev	Penn State International Law Review
PER/PELJ	Potchefstroom Law Journal
PULP	Pretoria University Law Press
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
SA Publiekreg/Public Law	SAPL/PL
SJSJ	Seattle Journal for Social Justice
Stell LR	Stellenbosch Law Review
Univ Pennsylvania LR	University of Pennsylvania Law Review

TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION

1 1 Background to the Research Problem

In *Government of the Republic of South Africa and Others v Grootboom and Others ("Grootboom")*,[1] Mrs Irene Grootboom, along with a group of almost 900 people comprising children and adults, illegally occupied land earmarked for low-cost housing near the Wallacdene informal settlement because of their intolerable living conditions.[2] Unfortunately, they were forcibly evicted, their shacks were bulldozed and their possessions destroyed.[3] After finding that their original places in Wallacdene were occupied, in desperation, they settled on the Wallacdene sports field.[4] The residents' lack of durable material to construct temporary structures on the Wallacdene sports field prompted their attorney to draft a letter to the Oostenberg Municipality ("municipality") describing their intolerable living conditions. In the letter, the residents' attorney demanded that the municipality fulfil its constitutional obligation to provide temporary accommodation to the residents.[5] When this letter to the municipality proved futile, the residents launched an urgent application at the Cape of Good Hope High Court ("the High Court") on 31 May 1999 for an order requesting that the government provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief.[6] This matter proceeded to the Constitutional Court ("the Court"). When it came to the remedy stage of adjudication, the Court ordered that the state devise and implement a programme that includes reasonable measures to progressively realise section 26 of the 1996 Constitution,[7] the right of access to adequate housing.[8] The Court's declaratory order that the state's housing programme include "reasonable measures" has been criticized

[1] 2000 11 BCLR 1169 (CC).
[2] *Government of the Republic of South Africa and Others v Grootboom ("Grootboom") and Others* 2000 11 BCLR 1169 (CC) para 2.
[3] Para 10.
[4] Para 11.
[5] Para 11.
[6] Para 11.
[7] S 26 of the 1996 Constitution states that
"(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."
[8] Part 2(a) and (b) of the Order.

for being overly deferential,[9] because, in spite of the Court's wide remedial powers, it made an order lacking specificity about the measures required to remedy the housing right infringement, overly deferring its remedial role to the executive and legislative branches of government.[10]

This study thus aims to illustrate that the basis of the Court's overly deferential approach in relation to its provision of relief in *Grootboom* was the separation of powers doctrine.[11] As Pieterse has observed, separation of powers concerns arise most acutely at the remedy stage of adjudication.[12] Furthermore, Currie and De Waal observe that the separation of powers and the deference a court owes to the legislature is relevant to remedial provision.[13] Therefore, the focus of this thesis will be how the separation of powers doctrine has impacted the Court's exercise of its remedial role. The separation of powers concerns worthy of discussion in this study are judicial capacity and judicial legitimacy.[14]

The socio-economic right of particular importance in this study is the right of access to adequate housing in section 26 of the 1996 Constitution. Section 26 is an important constitutional right because of South Africa's apartheid history of forced removals and the current reality of eviction and homelessness. During apartheid, the state forcibly removed people of colour from their homes to establish areas for white people.[15] The aim, loosely put, was to reserve the nice homes and areas for white people by forcing people of colour into the more remote, infrastructurally underdeveloped areas. These forced removals have had far-reaching implications for people of colour in South Africa in that many are far from economic hubs affecting their ability to travel to and retain work. In addition, many lost homes that were in their families for generations. A lot of areas in South Africa are still racially divided because the spatial injustices of apartheid have been left largely unaddressed by the

[9] K Pillay "Implementation of Grootboom: Implications for the enforcement of socio-economic rights" (2002) 6 *Law, Democracy and Development* 255 276.
[10] 262. See also D Bilchitz "Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance" (2002) 119 *SALJ* 484 485; D Bilchitz "Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence" (2003) 19 *SAJHR* 1 5-11.
[11] S Wilson & J Dugard "Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights" (2011) 22 *Stell LR* 664 666.
[12] FI Michelman "The Constitution, Social Rights and Liberal Political Justification" (2003) 1 *International Journal of Constitutional Law* 15 13-34.
[13] Currie and De Waal *Bill of Rights Handbook* 181-182.
[14] See 6 2 1 below.
[15] See the Group Areas Act 41 of 1950.

government. Moreover, the government still seems prone to initiating and implementing apartheid-style evictions, perpetuating spatial injustice, up till today.[16] It is thus important to attempt to unpack the responsibilities of the various branches of government in protecting the right of access to adequate housing.

1 2 Research Question and Hypotheses

As stated above, the declaratory order issued in *Grootboom* has been criticised for being overly deferential. This study aims to illustrate that the basis of the Constitutional Court's overly deferential approach in relation to its provision of relief in *Grootboom* was the separation of powers doctrine. This study will be limited to the role and responsibility of the Constitutional Court (hereafter "the Court"), and the manner in which the Court's understanding of its role and responsibility, on the basis of the separation of powers doctrine, could inhibit its remedial reach in housing rights cases.[17] Therefore, the question that this study aims to address is how the separation of powers doctrine impacts on the Court's provision of remedies in South African housing rights remedies jurisprudence. To address this question, there are several hypotheses of importance for purposes of this study outlined as follows. Firstly, the separation of powers doctrine is necessary to prevent an over-concentration of power in one governmental branch. Secondly, a strict understanding of the separation of powers doctrine encapsulates rigid separation between the three branches of government whilst a more contemporary understanding of the separation of powers doctrine includes a system of checks and balances. Thirdly, the separation of powers doctrine is a fundamental principle of South Africa's constitutional democracy, though it is not explicitly referred to in the 1996 Constitution. Fourthly, the separation of powers doctrine which forms part of South Africa's post-apartheid constitutional design contemplates a more contemporary understanding of the separation of powers doctrine which favours checks and balances. Fifthly, it is assumed that each governmental branch, the executive, legislature, and judiciary have its own role within the separation of powers doctrine. Sixthly, a strict understanding of the separation of

[16] S Shoba "'They took us by surprise': Sea Point homeless left out in the cold after City of Cape Town confiscates tents" (25-08-2021) *Daily Maverick* < https://www.dailymaverick.co.za/article/2021-08-25-they-took-us-by-surprise-sea-point-homeless-left-out-in-the-cold-after-city-of-cape-town-confiscates-tents/> (accessed 25-08-2021).
[17] M Pieterse "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR* 384.

powers doctrine, in the context of socio-economic rights litigation, gives rise to separation of powers concerns. The separation of powers concerns brought to the fore during socio-economic rights litigation, including housing rights litigation, are identical to the separation of powers concerns raised against the inclusion of socio-economic rights in the 1996 Constitution. Finally, a reconceptualization of the separation of powers doctrine is necessary for socio-economic rights to be better protected, promoted, and enforced. With the abovementioned question in mind, in this study, I aim to do the following. I aim to analyse the separation of powers doctrine in the abstract, differentiating between a strict and contemporary understanding of the separation of powers doctrine. Thereafter, I aim to analyse the separation of powers doctrine as understood during apartheid and post-apartheid South Africa. I aim to analyse the impact of the separation of powers doctrine on the debate about the inclusion of socio-economic rights in the 1996 Constitution. I aim to analyse the judiciary's role in terms of the separation of powers doctrine as understood in the South African context, and thereafter, the impact of the separation of powers doctrine on the Court's exercise of its remedial role in the first housing rights case, *Grootboom*. I aim to analyse whether the Court's understanding of the separation of powers doctrine and its approach in relation to its provision of remedies has evolved with reference to subsequent housing rights cases. These subsequent housing rights cases are limited to *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd ("Modderklip")*,[18] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others ("Olivia Road")*,[19] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others ("Joe Slovo")*,[20] *Pheko and Others v Ekurhuleni Metropolitan Municipality ("Pheko")*,[21] *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another ("Schubart Park")*,[22] and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another ("Blue Moonlight")*.[23] Thereafter, I aim to analyse whether the Court's approach in relation to remedies provided in subsequent housing rights cases raised

[18] 2005 5 SA 3 (CC).
[19] 2008 5 BCLR 475 (CC).
[20] 2010 3 SA 454 (CC).
[21] 2012 4 BCLR 388 (CC).
[22] 2013 1 BCLR 68 (CC).
[23] 2012 2 SA 104 (CC).

separation of powers concerns. Should it be found that the Court's approach in relation to the provision of remedies in the housing rights cases post-*Grootboom* raised separation of powers concerns, I aim to analyse whether the Court's approach is nevertheless justifiable in light of the transformative goals of the 1996 Constitution. I therefore aim to consider how the transformative goals of the 1996 Constitution could inform the Court's exercise of its remedial role and its understanding of the separation of powers doctrine. Finally, I aim consider a reconceptualised separation of powers doctrine in light of transformative constitutionalism.

1 3 The Separation of Powers Doctrine

1 3 1 The Separation of Powers Doctrine in the Abstract

Trias politica or the separation of powers is the idea developed by Charles Baron de Montesquieu to divide governmental power between different institutional bodies to challenge "the unlimited might and arbitrariness of an absolute monarch".[24] From this definition flows two main purposes of the doctrine. The first is to prevent an overconcentration of governmental power in one institution to avoid abuse.[25] The second is to allow difficult tasks like law-making and law-enforcement to be performed by the institution best capable and equipped to perform these functions.[26] With the initial form of the separation of powers, government power was, notionally at least, strictly separated.[27] The initial form of the separation of powers doctrine emphasising strict separation between the branches of government encapsulates the strict understanding of the separation of powers doctrine. The separation of powers doctrine as applied in South Africa fulfils the same purpose as that of the separation of powers doctrine in the abstract, as will be discussed below.

[24] *South African Association of Personal Injury Lawyers v Heath and Others* 2001 1 BCLR 77 (CC) para 22; *De Lange v Smuts NO and Others* 1998 7 BCLR 779 (CC) paras 60-61. S Seedorf and S Sibanda "Separation of Powers" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 2018) 6. See also R Calland *Institutional Leadership: South Africa's Trias Politica and Independent Institutions* (2013) unpublished paper presented at South African Catholic Bishops' Conference in Cape Town: CPLO (on file with the author).
[25] S Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution* (2010) 67.
[26] 67.
[27] 11.

1 3 2 The Separation of Powers Doctrine in Context

In *South African Association of Personal Injury Lawyers v Heath,* the Court stated that "[c]hapters 4 to 8 [of the 1996 Constitution] provides for a clear separation of powers between the three spheres of government", namely the legislature, executive and judiciary.[28] The executive authority is vested in the President,[29] legislative authority is vested in Parliament,[30] and judicial authority is vested in the courts.[31] Though all three branches exercise governmental authority, former Chief Justice Langa notes that a separation of authority is necessary to "avoid an excessive concentration of power, which can lead to abuse, in one person or body".[32] While each governmental branch has at least some control over another to prevent "a diffused and uncoordinated exercise of power",[33] and the functions of the three branches may overlap, "the terrains are in the main separate, and should be kept separate".[34] Along with a separation of authority, the separation of powers doctrine in South Africa also involves a separation of functions.[35] The legislature's function is to enact legislation giving effect to rights.[36] The executive's function is to initiate legislation in line with policy and execute legislation by allocating sufficient resources.[37] The judiciary's function is to interpret rights,[38] measure state compliance with its constitutional obligations,[39] and make pronouncements on the validity of legislation.[40] If rights violations are found, a court

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[28] 2001 1 BCLR 77 (CC) para 22. See also *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 106-113. See also Seedorf and Sibanda "Separation of Powers" in *CLoSA* 3-5.
[29] S 85(1) of the 1996 Constitution.
[30] S 42(2) of the 1996 Constitution states that "[t]he National Assembly and the National Council of Provinces participate in the legislative process in the manner set out in the Constitution."
[31] S 165(1) of the 1996 Constitution.
[32] P Langa "Symposium: 'A Delicate Balance': The Place of the judiciary in a Constitutional Democracy: The Separation of Powers in the South African Constitution" (2006) 22 *SAJHR* 4 2-9.
[33] SS 1 and 2 of the 1996 Constitution. See also Seedorf and Sibanda "Separation of Powers" in *CLoSA* 11. See also K O'Regan "Checks and Balances Reflections on the Development of the Doctrine of the Separation of Powers under the South African Constitution" (2005) 8 *PER/PELJ* 120 125.
[34] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 183.
[35] Langa 2006 *SAJHR* 4.
[36] SS 85(2)(d) and 125(2)(f) of the 1996 Constitution.
[37] Seedorf and Sibanda "Separation of Powers" in *CLoSA* 2. See ss 85(2)(b) and 125(2)(d) of the 1996 Constitution.
[38] S 39(1) and (2) of the 1996 Constitution. See also Liebenberg *Socio-economic Rights* 37.
[39] S 167(4)(e) of the 1996 Constitution. See also Pieterse 2004 *SAJHR* 383.
[40] S 167(5) of the 1996 Constitution. See also Pieterse 2004 *SAJHR* 383. Seedorf and Sibanda "Separation of Powers" in *CLoSA* 34 states that "the inclusion of a justiciable Bill of Rights and express powers of judicial review has made it unnecessary to consider which branch has the power finally to decide the meaning of the Constitution. The Constitutional Court is quite clearly the final and authoritative interpreter of the Constitution, enjoying the last word on all constitutional matters". See also *Doctors for Life International v Speaker of the National Assembly and Others* 2006 6 SA 416 (CC)

can make declarations of invalidity and "grant appropriate relief".[41] The Court thus has far-reaching remedial powers conferred by the Constitution in section 38 and section 172(1).[42] In spite of these wide remedial powers, the Court approaches its remedial role, especially in socio-economic rights adjudication, with visible unease. This is attributable, as Pieterse observes, to the separation of powers doctrine.[43] I argue that the Court's approach to its remedial role with visible unease is attributed specifically to a strict understanding of the separation of powers doctrine. Of particular importance in this study is the remedial function of the Court because separation of powers concerns arise most acutely at the remedy stage.[44] These concerns will be analysed below, with the impact of these concerns on the remedies devised by the Court in housing rights cases to follow.

1 3 3 The Separation of Powers Concerns

It is important to state at the outset that this study does not suggest that the separation of the powers doctrine be abandoned, nor that the separation of powers doctrine is the main problem.[45] I argue that the Court has overly limited its role and opportunities for transformative adjudication in the manner that it understands and applies the separation of powers doctrine, especially in the context of socio-economic rights litigation.[46] The separation of powers "problem" can be separated into two concerns: Judicial capacity and judicial legitimacy.[47] Judicial capacity relates to the capacity of the courts to deal with "polycentric" matters brought before it.[48] Housing rights cases are classified as polycentric in nature because "the degree of polycentricity in socio-economic rights litigation is often high".[49] Polycentrism "gives rise to many diverging issues, each of which is linked to the other in a complex web of interdependent

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para 200; *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 77.

[41] SS 172(1) and 38 of the 1996 Constitution. See also *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC) para 101. See also Currie and De Waal *Bill of Rights Handbook* 180.

[42] S 38 of the 1996 Constitution states that "the court may grant appropriate relief". S 172(1)(b) of the 1996 Constitution states that "a court (...) may make any order that is just and equitable".

[43] Pieterse 2004 *SAJHR* 384.

[44] Michelman 2003 *Int J of Constitut Law* 15.

[45] S Wilson & J Dugard "Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights" (2011) 22 *Stell LR* 664 666.

[46] Wilson & Dugard (2011) *Stell LR* 666.

[47] Pieterse 2004 *SAJHR* 389-390.

[48] 392. Liebenberg *Socio-economic Rights* 72.

[49] Currie and De Waal *Bill of Rights Handbook* 566.

relationships".[50] Since remedies provided by courts in housing rights cases may have policy and/or budgetary implications, and affect a wide range of rights and interests of parties who are not before court, judicial capacity is brought into question.[51] This is so because, as Currie and De Waal note, "[t]he executive and legislature, who have access to empirical evidence and are sensitive to numerous competing demands, are said to be better suited to make [polycentric] decisions".[52] Any judicial remedy that imposes a positive obligation on the state to provide material benefits (i.e. temporary accommodation) is thus polycentric in nature and considered to be within the executive and legislative domain.[53] If the Court was specific regarding the measures required to remedy any infringements of housing rights, and the remedy had policy and/or budgetary implications, it is contested as an encroachment into the legislative and executive domain.[54] In matters that are highly polycentric or require the imposition of positive duties on the state, the Court is prone to defer to the executive and legislature. This approach was affirmed in *Minister of Health and Others v Treatment Action Campaign and Others* where the Court held that the "Constitution contemplates a restrained and focused role for the courts".[55] The Court is thus hesitant to provide relief with such implications and defers such decisions to the executive or legislative branch of government on the basis of a strict understanding of the separation of powers doctrine,[56] as illustrated in *Grootboom*.[57]

Judicial legitimacy relates to the legitimacy of court decisions. The supremacy clause of the 1996 Constitution automatically renders law or conduct inconsistent with

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[50] L Fuller and K Winston "The forms and limits of adjudication" (1978) 92 *Harvard LR* 394 353–409 as cited in Liebenberg *Socio-economic Rights* 72.
[51] Liebenberg *Socio-economic Rights* 72.
[52] Currie and De Waal *Bill of Rights Handbook* 566.
[53] See chapter 2 § 2 4 4 below.
[54] Liebenberg *Socio-economic Rights* 54. See also *Mazibuko and Others v City of Johannesburg and Others* 2010 3 BCLR 239 (CC) para 61 which states that "[s]econdly, ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps the government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice."
[55] 2002 5 SA 721 (CC) para 38. See also K Mclean "Towards a Framework for Understanding Constitutional Deference" (2010) 25 *SAPL* 452 445-470.
[56] Pieterse 2004 *SAJHR* 399.
[57] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC).

the 1996 Constitution as invalid.[58] However, as section 172(1) of the Constitution states, the Court must declare any law or conduct inconsistent with the Constitution as invalid to the extent of its inconsistency.[59] Moreover, law or conduct that is found to be inconsistent with the 1996 Constitution cannot be disregarded until set aside by a court.[60] This brings the legitimacy of the Court's decisions to the fore because of the counter-majoritarian dilemma. The counter-majoritarian dilemma boils down to discomfort with unelected judges having the power to strike down or declare legislative provisions or policy conceived by a democratically elected government invalid.[61] The Court's power to issue such declarations challenges the clearly defined boundaries between the three branches of government in terms of a strict understanding of the separation of powers doctrine. This blurring of the boundary lines between the three branches of government is understood on the basis of a strict understanding of the separation of powers doctrine as judicial encroachment into the legislative or executive domains.[62] Currie and De Waal succinctly state that:

> "[t]he judiciary is an elite and undemocratically appointed branch of the state. Therefore, so the argument goes, it lacks the democratic legitimacy necessary to decide the essentially political question of how to apportion public resources among competing claims and between individuals, groups and communities in society".[63]

While the counter-majoritarian dilemma may seem undesirable because courts are not accountable to the citizenry,[64] courts are mandated to exercise their authority to issue these declarations of unconstitutionality. As section 172(1)(a) states, in constitutional matters, courts *must* declare law or conduct that is inconsistent with the Constitution invalid; it is not a discretionary power.[65] Once an inconsistency with the Constitution is found, resulting in a rights violation, appropriate relief may be granted.[66]

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[58] S 2 of the 1996 Constitution.
[59] S 172(1) of the 1996 Constitution.
[60] Currie and De Waal *Bill of Rights Handbook* 179.
[61] Du Plessis W, Barnard-Naudé J, Freedman W, Mahler-Coetzee J, Bronkhorst C, Bellengere A, Swanepoel N, Karels M, Keevy I, Letsoalo D *Introduction to Law and Legal Skills* (2012) 29. See also Pieterse 2004 *SAJHR* 390.
[62] S 172(1)(a) of the 1996 Constitution states that "[w]hen deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency."
[63] Currie and De Waal *Bill of Rights Handbook* 566.
[64] Pieterse 2004 *SAJHR* 390.
[65] S 172(1)(a) of the 1996 Constitution.
[66] Currie and De Waal *Bill of Rights Handbook* 180. See also Pillay 2002 *Law, Democracy and Development* 259 states that "[t]he principle of separation of powers is one of the cornerstones of South Africa's constitutional democracy because it regulates the exercise of public power. However, this

Moreover, any counter-majoritarian argument that is raised against the Court enforcing socio-economic rights conveniently ignores the fact that litigants approach the judiciary once the democratic branches have failed them.[67] The purpose of courts in this regard is not just to foster the participation of those who have been overlooked in the democratic process, but to decide whose socio-economic interests have been overlooked and how this can be cured.[68]

Though the manner in which the Court is limited by separation of powers concerns during the remedies stage of adjudication is not always elucidated, Currie and De Waal observe that deference involves "restraint by the Courts in not trespassing onto that part ... reserved by the Constitution … [for the executive and] the legislature".[69] In *Grootboom*, the Court's strict understanding of the separation of powers doctrine manifested as an overly deferential approach to housing rights to avoid the provision of a remedy that encroaches onto the executive and legislative branches of government.[70] While this is not problematic because the functions of the three branches should be kept separate in terms of a strict understanding of the separation of powers doctrine,[71] an overly deferential approach by the Court during the remedy stage of adjudication could deprive occupiers in housing rights cases of appropriate relief, especially in the absence of clear unconstitutionality.[72] Pillay has thus noted that the biggest "constraint on the discretion of the courts is their inability to step into the domain of the other branches of government because of the doctrine of the separation of powers".[73] Despite the far-reaching remedial powers that the 1996

principle does not detract from the duty on courts to grant effective remedies where rights are being enforced."

[67] S Wilson & J Dugard "Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights" (2011) 22 *Stell LR* 664 671.

[68] Wilson & Dugard (2011) *Stell LR* 671.

[69] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) para 66 as cited in Currie and De Waal *Bill of Rights Handbook* 182. See also Pieterse 2004 *SAJHR 399.*

[70] Pillay 2002 *Law, Democracy and Development* 276.

[71] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 183.

[72] S 172 of the 1996 Constitution states that "a court *must* declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its unconstitutionality; and *may* make any order that is just and equitable" (own emphasis). Based on the wording of the section, it seems that the court is obliged to declare any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency, but that the court exercises discretion when it comes to a just and equitable order.

[73] Pillay 2002 *Law, Democracy and Development* 258. See also *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) para 66 which states that "[t]he other consideration a court must keep in mind, is the principle of the separation of powers and,

Constitution bestows upon the Court, the Court understood its remedial role to be a limited one on the basis of a strict understanding of the separation of powers doctrine. There has since been considerable development regarding the provision of remedies in housing rights cases by the Court, and the Court's understanding of the separation of powers doctrine. In the housing rights cases post-*Grootboom*, the Court has indicated a shift away from its overly deferential approach in relation to the provision of remedies in housing rights cases. This development will be discussed later in the thesis with reference to *Modderklip*,[74] *Olivia Road*,[75] *Joe Slovo*,[76] *Pheko*,[77] *Schubart Park*,[78] and *Blue Moonlight*.[79]

1 3 4 The Way Forward

Based on the much-needed developments in housing rights jurisprudence after *Grootboom*,[80] it is important to ask where the Court should move to in future. The Court has shown a willingness since *Grootboom*, despite separation of powers concerns, to move away from an approach based on a strict separation of powers doctrine in favour of a contemporary understanding of the separation of powers doctrine.[81] The strict understanding of the separation of powers doctrine favours strict demarcations between the three government branches, as opposed to a functional, pragmatic understanding that facilitates cooperation and collaboration between the three branches.[82] Liebenberg notes that:

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flowing there from, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature."

[74] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).

[75] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC).

[76] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 3 SA 454 (CC).

[77] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC).

[78] *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 1 BCLR 68 (CC).

[79] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 2 SA 104 (CC).

[80] Chapter 3 § 3 2 5. See also chapter 3 § 3 3 1 - 3 3 7.

[81] Liebenberg *Socio-economic Rights* 67.

[82] 67 and 70. See also *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 6 SA 597 (CC) para 46.

> "[i]n its idealised, static form, the separation of powers doctrine may be ritually invoked by the courts as a way of avoiding their constitutional mandate to … enforce constitutionally guaranteed rights".[83]

A move away from courts bypassing the fulfilment of their remedial roles based on a strict understanding of the separation of powers doctrine was endorsed in *Mwelase* when it was asserted that though the separation of powers doctrine is a fundamental principle of South Africa's constitutional democracy, it provides no basis for the Court to avoid its obligation to provide just and equitable relief. [84] The Court should thus move from its overly deferential approach and embrace its inevitable encroachment into the legislative and executive branches of government when providing appropriate relief on the basis of a contemporary understanding of the separation of powers doctrine.[85]

1 3 5 Conclusion

It is generally known that the 1996 Constitution contains transformative goals.[86] This implies that courts, in fulfilling its constitutional mandate to enforce rights and protect against rights violations during adjudication, must do so with these transformative goals firmly in mind. As a result of the transformative nature of the 1996 Constitution, the Court should go even further than an approach based on a contemporary understanding of the separation of powers doctrine because a rather drastic reconceptualisation of the separation of powers doctrine, and of the judicial role within the doctrine is necessary.[87] In further chapters, the strict and contemporary understanding of the separation of powers doctrine will be distinguished. This study attempts to frame the reconceptualised separation of powers doctrine,[88] and illustrate

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[83] Liebenberg *Socio-economic Rights* 67. See also *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 183.
[84] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 6 SA 597 (CC) para 36.
[85] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 183.
[86] Liebenberg S & Goldbatt B "The Interrelationship between Equality Rights and Socioeconomic Rights under a Transformative Constitution" (2007) 23 *SAJHR* 360 335-361. See also Liebenberg *Socio-economic Rights* 43, 45.
[87] C Scott & P Macklem "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 *Univ Pennsylvania LR* 1, 37 and J McMillan "Judicial Restraint and Activism in Administrative Law" (2002) 30 *Federal LR* 335, 337 in Pieterse 2004 *SAJHR* 404.
[88] Chapter 4 § 4 3 4.

that though courts are limited by a strict understanding of the separation of powers, the Court is not only authorised but constitutionally *obliged* to "enforce the Constitution and the rights enshrined in it".[89] Even if this may result in an encroachment by the court into the executive or legislative branch of government, it "is an intrusion mandated by the Constitution itself".[90] The Court should thus "develop an appropriately transformative [remedial] role within a reconceptualised, uniquely South African separation of powers".[91] When the Court exercises its remedial powers and does not understand its role to be a limited one on the basis of a strict understanding of the separation of powers doctrine, it is best able to judicially enforce the right of access to adequate housing.

1 4 Research Method and Chapter Outline

The methodology and approach that will be used to answer the question of how the separation of powers doctrine impacts on the courts' provision of remedies in South African housing rights remedies jurisprudence is as follows. In order to analyse how the separation of powers doctrine impacts on the Court's provision of remedies in housing rights remedies jurisprudence, the separation of powers doctrine in the abstract will be discussed. Thereafter, a strict and contemporary understanding of the separation of powers doctrine will be differentiated. A discussion of how the separation of powers doctrine has been understood and applied in apartheid and post-apartheid South Africa will then follow. The debate about whether socio-economic rights should be included in the 1996 Constitution will also be discussed to illustrate how a strict understanding of the separation of powers doctrine formed the basis of the arguments raised against the inclusion of socio-economic rights. The strict understanding of the separation of powers doctrine gave rise to two separation of powers concerns. The two separation of powers concerns of importance for this study are judicial capacity and judicial legitimacy. After explaining the two separation of powers concerns raised during the debate about the inclusion of socio-economic rights in the 1996 Constitution, it will be illustrated that the same concerns led to the Court's adoption of a deferential approach in relation to the provision of remedies in housing rights cases.

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[89] Seedorf and Sibanda "Separation of Powers" in *CLoSA* 73 (own emphasis).
[90] Groundup "Separation of powers: Have the courts crossed the line?" (2015) url: https://www.groundup.org.za/article/separation-powers-have-courts-crossed-line_3152/. (accessed: 27th May 2020).
[91] Pieterse 2004 *SAJHR* 385.

The Court's adoption of a deferential approach and its implications will be illustrated with reference to *Grootboom*. The implications of the Court's deferential approach were the state's incompetence, intransigence, and unreasonable delay in the fulfilment and protection of the right of access to adequate housing. It will thereafter be illustrated that the implications of the Court's deferential approach necessitated a change in the Court's approach on the basis of a more contemporary understanding of the separation of powers doctrine. Development in the Court's approach post-*Grootboom* will be illustrated with reference to subsequent housing rights cases limited to *Modderklip,*[92] *Olivia Road,*[93] *Joe Slovo,*[94] *Pheko,*[95] *Schubart Park,*[96] *and Blue Moonlight.*[97] Though the subsequent development in the Court's approach was necessary, it will be illustrated that it raised separation of powers concerns identical to those raised during the debate about the inclusion of socio-economic rights in the 1996 Constitution. It will be argued that though the Court's post-*Grootboom* approach in relation to the provision of remedies in housing rights cases raised separation of powers concerns in terms of a strict understanding of the separation of powers doctrine, this approach is justifiable in light of the new judicial role and responsibility contemplated by transformative constitutionalism. Transformative constitutionalism as a notion will therefore be briefly explained. Lastly, it will be illustrated that the Court should develop and apply a reconceptualised separation of powers doctrine in accordance with a contemporary understanding of the separation of powers doctrine and the new judicial role and responsibility contemplated by transformative constitutionalism.

In the first chapter, the research problem and research question are outlined and the way the research question will be answered was explained. The methodology followed when addressing the research question and structure of the thesis is also explained. In chapter two, the separation of powers doctrine in its abstract form is

[92] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).
[93] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC).
[94] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 3 SA 454 (CC).
[95] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC).
[96] *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 1 BCLR 68 (CC).
[97] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 2 SA 104 (CC).

discussed and the strict and contemporary understanding of the separation of powers doctrine are differentiated. Moreover, the separation of powers doctrine as understood and applied in apartheid and post-apartheid South Africa is discussed. The debate about whether to include socio-economic rights within the 1996 Constitution is also considered in order to illustrate the impact of the strict understanding of the separation of powers doctrine on this debate. In chapter three, *Grootboom* is discussed to illustrate the impact of the strict understanding of the separation of powers doctrine on the judicial role. Thereafter, the Court's deferential approach and its justification in light of the strict understanding of the separation of powers doctrine is discussed. Thereafter, the necessity for the Court to adopt a more contemporary understanding of the separation of powers doctrine and a robust approach in relation to the provision of remedies is discussed. It is also illustrated that despite the necessity of a more robust approach, the remedies issued post-*Grootboom* raises separation of powers concerns in terms of a strict understanding of the separation of powers doctrine. These separation of powers concerns are thus briefly discussed, with a focus on which remedies issued in housing rights cases bring separation of powers concerns to the fore. In chapter four, it will be illustrated that though the remedies issued by the Court post-*Grootboom* raises separation of powers concerns in terms of a strict understanding of the separation of powers doctrine, the Court's approach is justified in light of transformative constitutionalism. Transformative constitutionalism as a notion is thus briefly discussed and it is illustrated that a new judicial role and responsibility and contemporary understanding of the separation of powers doctrine is contemplated by transformative constitutionalism. Thereafter, it is illustrated that the new judicial role and responsibility contemplated by transformative constitutionalism justifies the Court's adoption of a robust approach in relation to the provision of remedies in spite of potential separation of powers concerns. Finally, it is illustrated that the transformative — coupled with the supreme — nature of the 1996 Constitution requires that the separation of powers doctrine be reconceptualised to accommodate the Court's more robust approach in relation to the provision of remedies. In chapter five, the study is concluded with a summary of findings, as well as recommendations for the Court's conception of the separation of powers model.

CHAPTER 2: TRIAS POLITICA

2 1 Introduction

Since the topic of this thesis is how the separation of powers doctrine impacts the Constitutional Court's provision of remedies in South African housing rights jurisprudence, the focus of this chapter is the separation of powers doctrine. To analyse how the separation of powers doctrine impacts on the Court's provision of remedies in South African housing rights jurisprudence, it is imperative to identify the origins, key characteristics, and purpose of the separation of powers doctrine in the abstract. This chapter thus begins with a discussion of the doctrine in the abstract, and a strict versus contemporary understanding of the separation of powers doctrine. In order to contextualise the separation of powers doctrine, how the separation of powers doctrine was understood and applied in apartheid and post-apartheid South Africa will be discussed. Of particular importance for purposes of this chapter is how the introduction of the interim and 1996 Constitutions influenced the separation of powers doctrine as understood in South Africa. While the interim Constitution included socio-economic rights, the socio-economic rights included in the 1996 Constitution were more far-reaching. The second part of this chapter thus continues with the effect that justiciable socio-economic rights had on the understanding of the separation of powers doctrine in South Africa. The debate about whether socio-economic rights should have been included in the interim and 1996 Constitutions highlighted separation of powers concerns on the basis of a strict understanding of the separation of powers doctrine. Therefore, the third part of this chapter contains a discussion of these separation of powers concerns, specifically judicial capacity, and judicial legitimacy. Since separation of powers concerns are raised customarily during the remedies stage of adjudication,[1] a discussion of the remedial role of the courts will follow in the fourth part of this chapter. Finally, a discussion of judicial remedies which specifically raise separation of powers tensions will follow.

2 2 The Separation of Powers Doctrine in South Africa

2 2 1 The Separation of Powers Doctrine in the Abstract

To analyse how the separation of powers doctrine impacts on the Court's provision of remedies in South African housing rights jurisprudence, it is imperative to identify the origins, key characteristics, and purpose of the separation of powers doctrine in the abstract. *Trias*

[1] FI Michelman "The Constitution, Social Rights and Liberal Political Justification" (2003) 1 *Int J of Constitut Law* 15 13-34.

politica or the separation of powers is the theory of governance defined as "specific functions, duties and responsibilities [being] allocated to distinctive institutions with defined areas of competence and jurisdiction" to prevent an abuse of political power.[2] From this definition flows two main purposes of the separation of powers doctrine. The first purpose is to prevent an overconcentration of political power in one institution to avoid abuse.[3] The second is to allow complex tasks like law-making and law-enforcement to be performed by the institution best capable and equipped to perform these functions.[4] The introduction of a separation of powers theory of governance was necessitated by the political thinkers of seventeenth century Europe challenging the "the unlimited might and arbitrariness of an absolute monarch".[5] There was a need to check self-interested action and to limit powers of the rulers, giving rise to the idea to separate power between different institutions.[6] The separation of powers doctrine is thus thought to have originated in seventeenth-century Europe,[7] yet it was foundational to the Roman Republic from as early as the sixth century BC.[8]

Political thinkers that contributed to the development of the separation of powers doctrine throughout history included the Greek Philosopher Aristotle, who devised the idea of a threefold division of public power as one of the requirements of a good constitution.[9] While Aristotelian theory focused on the wellbeing of the community as a whole,[10] the Reformation and Renaissance period brought with it a call for public power to be "exercised in the interest of the governed".[11] During this time, the idea that public power be distributed and restrained with a view of holding the government accountable to the will of the people was born.[12] Political thinkers like John Locke, Charles Baron de Montesquieu, and James Madison introduced the notion "that democracy and the rule of law require both the division of powers and mutual checks and balances",[13] thus laying the basis for a more contemporary understanding of the separation of powers doctrine which is largely centred on the division between the executive, legislative, and judicial branches of government. A

[2] S Seedorf and S Sibanda "Separation of Powers" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 2018) 2.
[3] S Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution* (2010) 67.
[4] 67.
[5] Seedorf and Sibanda "Separation of Powers" in *CLoSA* 3.
[6] 3.
[7] 3.
[8] 4.
[9] 4.
[10] 4.
[11] 4.
[12] 5.
[13] 5.

strict understanding of the separation of powers doctrine thus emphasises strict separation between governmental branches, while a contemporary understanding favours separation and a system of checks and balances to maintain accountability between the three branches of government. Although the separation of powers doctrine developed throughout history, and there are different forms of the doctrine,[14] there remain key characteristics of the doctrine.

Key characteristics of the separation of powers doctrine, both in its classical and contemporary understanding, is the division of political power; and the division of political functions in different institutions.[15] The power to make laws, administer laws and execute these laws being divided between different institutions is based on Montesquieu's division of power model.[16] This division of power between different institutions with different functions speaks to a horizontal separation of powers doctrine between the executive, legislative, and judicial branches of government. In addition to dividing power horizontally between different institutions in the same sphere of influence,[17] power can also be divided vertically in a state "between the local, provincial, and national levels (or spheres) of government".[18] Since different countries have different histories and political contexts, the separation of powers doctrine is understood and applied differently by different countries. Of specific importance for this study is the manner in which the separation of powers doctrine was applied in the South African context.

2 2 2 The Separation of Powers Doctrine in Apartheid South Africa

When the Union of South Africa was founded in 1910,[19] the South African government was based on the Westminster system that promoted parliamentary sovereignty.[20] Parliamentary sovereignty is defined as Parliament having the authority to make or unmake any law and no person or body having the authority to override it or set it aside.[21] Since Parliament was sovereign during this time, most governmental power was centralised in Parliament being the legislature, with the executive forming part of the legislature. [22] The relationship between

[14] 13.
[15] 13.
[16] 13.
[17] 13.
[18] 13.
[19] JD van der Vyver "Parliamentary Sovereignty, Fundamental Freedoms and a Bill of Rights" (1982) 99 *SALJ* 557 570.
[20] P Langa "Symposium: 'A delicate balance': The place of the judiciary in a constitutional democracy: The separation of powers in the South African Constitution" (2006) 22 *SAJHR* 2 2-9.
[21] AV Dicey "The nature of parliamentary sovereignty" in AV Dicey (eds) *Introduction to the Study of the Law of the Constitution* (1979) 41 39-86.
[22] Langa (2006) *SAJHR* 2.

the executive and legislature was thus of an interdependent nature, with the judiciary being the only branch of government that operated independently.[23] Courts could exercise its independent position by declaring legislation enacted by Parliament in contravention of procedural requirements invalid.[24] This is illustrated in *Harris and Others v Minister of the Interior and Another*,[25] when the Appellate Division held that the Separate Representation of Voters Act was invalid due to its adoption according to an incorrect procedure.[26]

Notwithstanding its independent position, the independence of the judiciary was undermined by the legislature in various ways. Firstly, the judiciary's role was limited to the interpretation of legislation, rather than its substantive review, with the result that unless legislation was promulgated in contravention of procedural requirements, there was little to no room for the review of parliamentary decisions.[27] In addition, the executive was responsible for the appointment of judges.[28] The interdependent relationship between the executive and legislature meant that Parliament was indirectly responsible for the appointment of judges, resulting in Parliament exercising a great deal of control over the judiciary.[29] The consequence was that Parliament had exclusive, unchecked power to make and enforce decisions in the form of legislation in relation to the people of South Africa.[30] Parliamentary sovereignty thus enabled the establishment of a "pervasive system of racial segregation … through a barrage of legislative measures" in pre-1994 South Africa.[31] The lack of an effective separation of powers model during apartheid in South Africa permitted and perpetuated "the endemic invasion of fundamental rights and the political exclusion and economic impoverishment" of the black majority.[32]

The centralisation of governmental power in Parliament was contrary to the idea behind a strict understanding of the separation of powers doctrine to avoid an abuse of

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[23] 2.
[24] A Gordan and D Bruce (eds) "Transformation and the Independence of the Judiciary in South Africa" in (no names of editors) *CSVR* (OS 2009) 12. See also Langa 2006 *SAJHR* 3.
[25] 1952 2 SA 428 (A) 55-56.
[26] Gordan and Bruce "Transformation and the Independence of the Judiciary in South Africa" in *CSVR* 12.
[27] Gordan and Bruce "Transformation and the Independence of the Judiciary in South Africa" in *CSVR* 12. See also TH Madala "Rule under Apartheid and the Fledgling Democracy in Post-Apartheid South Africa: The Role of the Judiciary" (2001) 26 *North Carolina Journal of Int'l Law* 743 748.
[28] Langa (2006) *SAJHR* 2.
[29] D Philpott "Sovereignty" (22-06-2020) *Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/entries/sovereignty/> (accessed: 29-11-2020).
[30] D Philpott "Sovereignty" (22-06-2020) *Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/entries/sovereignty/> (accessed: 29-11-2020). See also Liebenberg *Socio-economic Rights* 4.
[31] Liebenberg *Socio-economic Rights* 4. See Liebenberg *Socio-economic Rights* 3 for a summary of the racially oppressive laws passed during apartheid in South Africa.
[32] Justice D Moseneke "Separation of Powers, Democratic Ethos and Judicial Function" (2008) unpublished paper presented at conference at the Oliver Schreiner Memorial Lecture hosted by the University of Witwatersrand, Johannesburg, 23-10-2008 (on file with the author).

governmental power by dividing it between different institutional bodies.[33] It has thus been acknowledged that a quasi-separation of powers model applied in apartheid South Africa because the Montesquieuan principle of a threefold separation of powers doctrine could not flourish under a system of government which actively promoted parliamentary supremacy and domination by the executive.[34] This quasi-separation of powers model and abuse of parliamentary power in apartheid South Africa illustrated the need to prevent an over-concentration of power in one institution again. Therefore, one of the compulsory features of the negotiated post-1994 Constitution was a separation of powers between the legislature, executive and judiciary with appropriate checks and balances.[35] This Constitution would also establish a framework that would facilitate a smooth transition from:

> "a deeply divided society characterised by strife, conflict, untold suffering, and injustice [to a society] founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".[36]

After a lengthy, eventful Multi-Party Negotiation Process ("MPNP"), an interim Constitution was agreed upon and ratified.[37]

2 3 The Separation of Powers Doctrine and Socio-economic Rights

2 3 1 Introduction

Once apartheid began to unravel, a successful MPNP culminated in the adoption of an interim Constitution.[38] Since the interim Constitution was only an interim measure,[39] the Constitutional Assembly was tasked with drafting and adopting a final constitutional text that would comply with the 34 constitutional principles contained in Schedule 4 of the interim Constitution.[40] The constitutional principle of importance for this study is that there be a

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[33] Seedorf and Sibanda "Separation of Powers" in *CLoSA* 2.
[34] *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 6. See also JD van der Vyver "The Separation of Powers" (1993) *SAPR/PL* 177 177-191.
[35] United Nations Peacemaker "Codesa declaration of intent 1991-12-20" (no date of electronic publication) *United Nations* <https://peacemaker.un.org/southafrica-codesa-intent1991> (accessed 28-11-2020).
[36] Constitution of the Republic of South Africa Act 200 of 1993.
[37] See Constitution Hill "The Story of the MPNP" *Constitution Hill: Our Struggle* <https://ourconstitution.constitutionhill.org.za/the-multi-party-negotiating-process/> (accessed 22-08-2021).
[38] See Constitution Hill "The Story of the MPNP" *Constitution Hill: Our Struggle* <https://ourconstitution.constitutionhill.org.za/the-multi-party-negotiating-process/> (accessed 22-08-2021).
[39] Constitutional Court of South Africa "The History of the Constitution" (2017) *Constitutional Court of South Africa*.
[40] Section 68(1) and (2) of the Constitution of the Republic of South Africa, Act 200 of 1993 states that
"(1) The National Assembly and the Senate, sitting jointly for the purposes of this Chapter, shall be the Constitutional Assembly.

separation of powers between the legislature, executive, and judiciary that includes appropriate checks and balances to ensure accountability, responsiveness, and openness.[41] A separation of powers doctrine that not only separates governmental power but also includes a system of checks and balances illustrates that the interim Constitution envisaged a contemporary understanding of the separation of powers doctrine.[42] To reaffirm this constitutional principle, there are various sections within the interim Constitution which divided governmental authority into three separate branches.[43] A division of governmental authority and roles which would have become obscure if socio-economic rights were included in the 1996 Constitution,[44] giving rise to a debate about whether socio-economic rights should be included in the 1996 Constitution.[45]

2 3 2 Arguments Against the Justiciability of Socio-Economic Rights

As aforementioned, a debate arose about whether socio-economic rights should be included in the 1996 Constitution.[46] Those arguing against the inclusion of socio-economic rights, who Mureinik termed the anti-constitutionalisers,[47] feared that the inclusion of socio-economic rights would bring the 1996 constitutional text into disrepute.[48] The anti-constitutionalisers argued that socio-economic rights are unenforceable,[49] and including unenforceable socio-economic rights into the most authoritative document in the legal system would discredit the Constitution.[50] The anti-constitutionalisers argued that socio-

(2) The Constitutional Assembly shall draft and adopt a new constitutional text in accordance with this Chapter". Section 71(1) of the Constitution of the Republic of South Africa Act 200 of 1993 states that "a new constitutional text shall comply with the Constitutional Principles contained in Schedule 4." See also W Du Plessis, J Barnard-Naudé, W Freedman, J Mahler-Coetzee, C Bronkhorst, A Bellengere, N Swanepoel, M Karels, I Keevy, D Letsoalo *Introduction to Law and Legal Skills* (2012) 221.

[41] Constitutional Principle VI, Schedule 4 of the Constitution of the Republic of South Africa, Act 200 of 1993.

[42] § 2 2 1 above.

[43] S 75 of the Constitution of the Republic of South Africa Act 200 of 1993 states that "[t]he executive authority of the Republic with regard to all matters falling within the legislative competence of Parliament shall vest in the President, who shall exercise and perform his or her powers and functions subject to and in accordance with this Constitution"; s 37 of the Constitution of the Republic of South Africa Act 200 of 1993 states that "[t]he legislative authority of the Republic shall, subject to this Constitution, vest in Parliament, which shall have the power to make laws for the Republic in accordance with this Constitution and s 96(1) of the Constitution of the Republic of South Africa Act 200 of 1993 states that "[t]he judicial authority of the Republic shall vest in the courts established by this Constitution and any other law." Chapter 3 of the 1996 Constitution also establishes a system of co-operative governance, further dividing governmental authority between national, provincial, and local spheres.

[44] Liebenberg *Socio-economic Rights* 67.

[45] For more on this debate, see E Mureinik "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 *SAJHR* 464-474; M Pieterse "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR* 383-417; R Daniels "The Counter-Majoritarian Difficulty and the South African Constitutional Court" (2006) 25 *Penn State Int Law Rev* 371-404.

[46] See § 2 2 above.

[47] 465.

[48] 465.

[49] 465.

[50] 465. See also N Haysom "Constitutionalism, Majoritarian Democracy and Socio-Economic Rights" (1992) 8 *SAJHR* 4 455 451.

economic rights are incapable of judicial enforcement because of the nature of socio-economic rights, and the implications of judicial decisions made during socio-economic rights litigation. Scott and Macklem observed the following regarding justiciability:

> "Debates over the justiciability of a particular subject matter occur in the long shadow of the basic democratic principle that the will of the majority ought to prevail in the fashioning of law and policy. This principle underpins a standard doctrine of separation of powers manifested in democratic governance: the legislature makes the law, the executive implements the law, and the judiciary applies and enforces the law".[51]

The arguments raised against the inclusion of justiciable socio-economic rights in the 1996 Constitution can be summarised into two separation of powers concerns: Judicial capacity and judicial legitimacy.[52] The judicial capacity argument can be further subdivided into the expense, indeterminacy, and positiveness argument which will be explained below.[53]

The first argument is the expense argument.[54] The crux of the expense argument is that socio-economic rights cannot be enforced by a court,[55] because their enforcement "cost a great deal of money" and "judges should not be doing the spending".[56] As the argument goes, judges do not have the capacity to evaluate how much public funds need to be spent, what public funds should be spent on,[57] nor what should be spent on first.[58] The evaluation of how public funds should be prioritised involves weighing various policy considerations and making policy decisions.[59] Socio-economic rights are inherently polycentric in nature,[60] And as the argument goes, the level of complexity involved in weighing various policy considerations and making policy decisions is such that judges are unqualified to resolve.[61]

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[51] C Scott and P Macklem "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 *University of Pennsylvania Law Review* 1 1 17 (footnotes omitted).
[52] 389. See also Scott and Macklem (1992) *Univ Pennsylvania LR* 20 which state that "arguments against the inclusion of social rights in a written bill of rights correspond to two dimensions of justiciability: the legitimacy dimension and the institutional competence dimension."
[53] See also Davis (1992) *SAJHR* 475-490.
[54] Mureinik (1992) *SAJHR* 465. See also Scott and Macklem (1992) *Univ Pennsylvania LR* 24.
[55] 465. See also C Heyns and D Brand "Introduction to Socio-economic Rights in the South African Constitution" (1998) 2 *Law Democracy and Development* 154 153-167 where it was observed that those against the inclusion of socio-economic rights in the new Constitution were of the view that "the Constitution would lose its credibility if it told people they had rights in respect of which the state cannot deliver, due to a lack of resources."
[56] Mureinik (1992) *SAJHR* 465.
[57] 466.
[58] 465.
[59] Haysom (1992) *SAJHR* 456.
[60] Chapter 1 § 6 2 1.
[61] Mureinik (1992) *SAJHR* 468.

To the anti-constitutionalisers, the branches of government that have the capacity to legitimately make these policy choices are the executive and legislature.[62]

The second argument is the indeterminacy argument.[63] The indeterminacy argument is that since the content of socio-economic rights are inherently vague and indeterminate, they do not lend themselves to judicial enforcement.[64] Take for example, the right that forms the topic of this thesis, the right of access to adequate housing,[65] and the first housing rights case that came before the Constitutional Court, *Grootboom*. Though *Grootboom* came after the inclusion of justiciable socio-economic rights in the 1996 Constitution, it is still relevant to the arguments raised against the inclusion of socio-economic rights. The Court in *Grootboom* concluded that it was not necessary for a court to determine the content of a right.[66] The Court also held that the measures to be adopted to enforce a given right were primarily a matter for the legislature and the executive.[67] The Court in *Grootboom* reached this conclusion on the basis that the content of the right of access to adequate housing could not be determined "without first identifying the needs and opportunities for the enjoyment of such a right",[68] which would vary according to income, unemployment, the availability of land, and poverty.[69] After identifying the variables at play in determining the content of the right of access to adequate housing, the Court stated that it lacked the requisite information to make this determination.[70] The Court in *Grootboom* was clearly of the view that, due to the complexity involved in determining the content of the right of access to adequate housing, the judiciary lacked the capacity to determine its content. I will argue later that the Court held this view on the basis of a strict understanding of the separation of powers doctrine.[71]

The third argument is the positiveness argument.[72] According to this argument, because socio-economic rights are positive in nature,[73] requiring state action rather than inaction, they are unsuitable for judicial enforcement.[74] As this argument goes, it is difficult

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[62] 465.
[63] 467. See also Davis (1992) *SAJHR* 484. See also Scott and Macklem (1992) *Univ Pennsylvania LR* 24-25.
[64] Mureinik (1992) *SAJHR* 467. See also § 2 4 4 below.
[65] S 26 of the 1996 Constitution.
[66] Para 33.
[67] Para 41.
[68] Para 32.
[69] Para 32.
[70] Para 32-33. See also I Currie and J De Waal *The Bill of Rights Handbook* (2013) 566; Mureinik (1992) *SAJHR* 465.
[71] Chapter 3.
[72] Mureinik (1992) *SAJHR* 467. See also Haysom (1992) *SAJHR* 455. See also Scott and Macklem (1992) *Univ Pennsylvania LR* 24.
[73] Davis (1992) *SAJHR* 475-490.
[74] Mureinik (1992) *SAJHR* 467. See also § 2 4 4 below.

for judges to fashion remedies enforcing positive socio-economic rights because they can be enforced in many ways.[75] To link this back to *Grootboom*, the Court in *Grootboom* noted that a wide range of possible measures could be adopted by the state to enforce the right of access to adequate housing.[76] Since the determination of which measure is best to enforce the right of access to adequate housing, and other socio-economic rights, involves weighing various policy considerations and making policy decisions,[77] this determination falls within the domain of the executive and legislature.[78] It therefore becomes difficult for judges to fashion a remedy involving socio-economic rights without choosing among the alternative measures.[79] Upon inspection, the expense, indeterminacy, and positiveness argument raised against the inclusion of justiciable socio-economic rights because of their unenforceability are inextricably linked to a strict understanding of the separation of powers doctrine.

2 3 2 1 Judicial Capacity

As stated above,[80] judicial capacity relates to the capacity of the courts to deal with the matters brought before it.[81] Given that matters involving socio-economic rights are polycentric in nature, [82] it was argued by the anti-constitutionalisers that the executive and legislature are better suited to address them, while courts lack the necessary expertise.[83] The judicial capacity argument raised against the inclusion of justiciable socio-economic rights can be subdivided into the expense, indeterminacy, and positiveness argument. The premise of the expense argument illustrated above is that the judiciary lacks the *capacity* to evaluate how much public funds need to be spent, what public funds should be spent on, and what public funds should be spent on first during the enforcement of socio-economic rights.[84] The premise of the indeterminacy argument illustrated above is that the judiciary lacks the *capacity* to determine the content of vague and indeterminate socio-economic

[75] 467.
[76] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 41.
[77] Haysom (1992) *SAJHR* 456.
[78] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 41. See also Mureinik (1992) *SAJHR* 468; Haysom (1992) *SAJHR* 456.
[79] Mureinik (1992) *SAJHR* 468.
[80] See § 2 3 2 above.
[81] Pieterse 2004 *SAJHR* 392; Liebenberg *Socio-economic Rights* 72.
[82] Currie and De Waal *Bill of Rights Handbook* 566. See also Scott and Macklem (1992) *Univ Pennsylvania LR* 24.
[83] Mureinik (1992) *SAJHR* 465; *Du Plessis and Others v De Klerk and Another* 1996 3 SA 850 (CC) at para 931-932; D Davis "Transformation: The Constitutional Promise and Reality" (2010) 26 *SAJHR* 95 85-101. See also Scott and Macklem (1992) *Univ Pennsylvania LR* 21.
[84] See § 2 3 1 above.

rights.[85] Finally, the premise of the positiveness argument illustrated above is that determining how best to enforce a given socio-economic right that is positive in nature involves weighing various policy considerations and making policy decisions which the judiciary lacks the *capacity* to do. The judiciary, during the enforcement of socio-economic rights, is placed in a position to determine its content, and thus make a policy choice about how public funds should be spent.[86] Therefore, the judiciary enforcing socio-economic rights has policy and budgetary implications for the executive and legislative branches of government.[87] For example, when the judiciary enforces the right of access to adequate housing by determining that the content of the right of access to adequate housing involves the state providing temporary accommodation to residents rendered homeless by an eviction, it has policy implications for the other branches of government. One of the policy implications could be that the state will be required to adopt a new housing policy or amend its existing housing policy due to the judiciary's determination of the content of the right in question. Moreover, the state will need to re-formulate its budget according to the housing policy to make provision for temporary accommodation considering the judiciary's determination of the content of the right of access to adequate housing. Since decisions with such policy and budgetary implications fall outside the area of expertise of the judiciary,[88] to the anti-constitutionalisers, the court's capacity to judicially enforce socio-economic rights were brought to the fore. In addition, the anti-constitutionalisers were of the view that the judiciary making decisions that have policy and/or budgetary implications for the other branches of government brought the legitimacy of such decisions to the fore.

2 3 2 2 Judicial Legitimacy

The second separation of powers concern is the legitimacy of court decisions.[89] Since judges are not democratically elected, they were deemed not to be politically accountable,[90] bringing the legitimacy of their decisions made during socio-economic rights litigation into question.[91] If socio-economic rights were included in the 1996 Constitution, during their enforcement, unelected judges would be free to review and nullify the law or conduct of the democratically elected branches of government.[92] To the anti-constitutionalisers, the fact

[85] See § 2 3 1 above.
[86] See § 2 4 4 below.
[87] Liebenberg *Socio-economic Rights* 72. See also Mureinik (1992) *SAJHR* 465-467.
[88] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 41. See also Mureinik (1992) *SAJHR* 467. See also Haysom (1992) *SAJHR* 456.
[89] Currie and De Waal *Bill of Rights Handbook* 566.
[90] Haysom (1992) *SAJHR* 455-456.
[91] Mureinik (1992) *SAJHR* 465. See also Liebenberg *Socio-economic Rights* 13. See also Davis (1992) *SAJHR* 489.
[92] Pieterse (2004) *SAJHR* 387.

that law or conduct of the democratically elected branches of government would be subject to the judiciary that is not democratically elected and lacks political accountability would undermine the principle of representative and participatory democracy in South Africa.[93] The inclusion of justiciable socio-economic rights was seen to have the potential to undermine representative and participatory democracy because the determination of how these rights would be enforced would be diverted from majority rule and placed within the exclusive domain of the judiciary.[94] Undermining the principles of representative and participatory democracy was to be avoided especially after a time of political exclusion and non-representation on the basis of race during apartheid.[95] The anti-constitutionalisers sought to avoid the substitution of parliamentary sovereignty with a "dikastocracy", or rule by judges.[96]

2 3 3 Arguments for the Justiciability of Socio-Economic Rights

Those who argued in favour of the inclusion of justiciable socio-economic rights in the 1996 Constitution, those Mureinik termed the constitutionalisers, raised equally convincing arguments.[97] The constitutionalisers, taking South Africa's oppressive apartheid past into account, argued that for the Constitution to have a meaningful place in the hearts and minds of ordinary South Africans, it must be capable of addressing their basic needs.[98] As captured by Haysom, the 1996 Constitution could not institutionalise and guarantee civil and political rights and ignore the rights needed to survive – "it must promise both bread and freedom".[99] In the absence of addressing the survival needs of people, to Haysom, it wound find no lasting resonance with South African citizens.[100] The 1996 Constitution also needed to include justiciable socio-economic rights to reflect the values and aspirations of those who fought for it.[101] By including socio-economic rights in the 1996 Constitution, there would be a value-based framework within which to address the gross legacy of apartheid and its

[93] S 57(1)(b) of the 1996 Constitution states that "[t]he National Assembly may make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement". S 70 (1)(b) of the 1996 Constitution states that "[t]he National Council of Provinces may make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement". S 116(1)(b) of the 1996 Constitution states that "[a] provincial legislature may make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement." See also S Wilson & J Dugard "Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights" (2011) 22 *Stell LR* 664 670.
[94] Liebenberg *Socio-economic Rights* 18.
[95] 13.
[96] *Du Plessis and Others v De Klerk & Another* 1996 3 SA 850 (CC) para 181. See also K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 147 146-188.
[97] Mureinik (1992) *SAJHR* 465.
[98] Haysom (1992) *SAJHR* 454.
[99] 454. See also Scott and Macklem (1992) *Univ Pennsylvania LR* 27.
[100] Haysom (1992) *SAJHR* 454.
[101] 454.

policies.[102] Stated differently, including a right of access to adequate housing reflects an aspiration and necessity to address South Africa's history (and arguably present) of forced removals and spatial injustice. Without the inclusion of socio-economic rights, disadvantaged groups would have been denied the opportunity to make constitutional claims against the state on the basis of these rights, with the implication that their most basic needs would have been deemed irrelevant and left unaddressed.[103]

In light of the judicial capacity argument presented by the anti-constitutionalisers, the Court conceded that the inclusion of socio-economic rights may result in courts making orders with direct implications for policy or budgetary matters.[104] However, the Court acknowledged that the enforcement of civil and political rights — like the right to equality, freedom of speech and the right to a fair trial — also have such implications.[105] The enforcement of civil and political rights have similar implications because civil and political rights could be enforced in much the same way as socio-economic rights.[106] This can best be illustrated by way of an example. Take the right of access to a fair trial. On the face of it, this right could be enforced negatively by the state not interfering with its enjoyment. However, this right imposes a positive duty on the state to allocate funds for establishing and maintaining courts, prosecuting services, interpreters, legal aid, police, and prison facilities.[107] It has therefore been recognised that civil, political, and socio-economic rights all involve positive state action and the allocation of public resources to be meaningfully enforced.[108] As stated in *First Certification*, the inclusion of socio-economic rights in the 1996 Constitution does not confer a task on the courts' so different from that conferred by the inclusion of civil and political rights that it results in a breach of the separation of powers.[109] Moreover, though the enforcement of socio-economic rights might sometimes have budgetary implications, they are not in themselves directed at rearranging budgets.[110]

Regarding the judiciary's supposed lack of capacity, and the legislature's assumed expertise to enforce socio-economic rights, I agree with Barber that legislatures basically comprise of a large group of popularly elected laymen "who often lack the technical expertise

[102] Scott and Macklem (1992) *Univ Pennsylvania LR* 28.
[103] 28.
[104] *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 77.
[105] Para 77.
[106] Haysom (1992) *SAJHR* 457.
[107] 457. See also Scott and Macklem (1992) *Univ Pennsylvania LR* 47.
[108] Haysom (1992) *SAJHR* 457; Mureinik (1992) *SAJHR* 464; Davis (1992) *SAJHR* 478.
[109] *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 77.
[110] *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC) para 38.

necessary for effective socio-economic policy making".[111] Therefore, though the executive and/or legislature have specific policy roles does not imply that they are necessarily experts in those roles. Nor does it imply that the judiciary completely lacks the necessary expertise to make policy choices. As observed by Haysom, civil and political rights are rights with expanding content because their content evolves as the material, cultural and historical context evolves.[112] The content and thus the way civil and political rights are enforced varies with time depending on a given society's available resources. The more resources are readily available, the more the content of a given right will be expanded. The decision of whether and how the content of a given right should be expanded or contracted involves a policy choice on the part of the court enforcing it, whether civil, political, or socio-economic in nature. It is for this reason that civil and political rights, like socio-economic rights are couched in general terms. Therefore, if courts possess the necessary expertise to enforce civil and political rights, they could enforce socio-economic rights as well. As Haysom accurately pointed out, every criticism that could be levelled against socio-economic rights in support of excluding them from the 1996 Constitution, could be levelled to a greater or lesser degree against civil and political rights as well.[113] Socio-economic rights should thus not be excluded from the 1996 Constitution on the basis that the judiciary lacks the technical expertise to enforce them. Furthermore, when a socio-economic right becomes the subject of litigation and the court hearing the matter lacks the necessary expertise to address it, the court has the authority to order that the necessary information be brought before it by the applicable parties and expert witnesses to enable the court to make an informed decision.[114]

Considering the judicial legitimacy argument presented by the anti-constitutionalisers, Haysom noted that socio-economic rights in the 1996 Constitution was a necessary condition for a more inclusive and democratic post-apartheid South Africa.[115] Through the judicial enforcement of socio-economic rights, the excluded majority was guaranteed the social resources necessary to enjoy their civil and political rights by participating in democratic political processes.[116] By including socio-economic rights in the 1996 Constitution, structural inequalities could be addressed through a commitment to substantive equality. Through a commitment to substantive equality, patterns of domination, subordination and exclusion could be broken, creating the conditions for an inclusive

[111] NW Barber "Prelude to the Separation of Powers" (2001) 60 *CLJ* 81, 82 59-88.
[112] Haysom (1992) *SAJHR* 457.
[113] 457.
[114] Daniels (2006) *Penn State Int Law Rev* 377; *Twine and Another v Naidoo and Another* 2018 1 All SA 297 (GJ). See also Wilson & Dugard (2011) *Stell LR* 670.
[115] Haysom (1992) *SAJHR* 459.
[116] Klare (1998) *SAJHR* 153.

democracy and thus the effective exercise of civil and political rights.[117] South African citizens require more than access to a ballot box to be empowered, equal citizens.[118] Socio-economic rights had to be included in the 1996 Constitution to facilitate real participation in social, political and economic life for the excluded majority.[119] While the legitimacy of judicial decisions might be questionable due to the unelected nature of the judiciary, for the constitutional text to be regarded as legitimate amongst South Africans, it had to address their most basic needs in the form of justiciable socio-economic rights. Moreover, the counter-majoritarian dilemma is mitigated in the following way. Though the judiciary is not directly accountable to the public by virtue of being elected, judges of the Constitutional Court and all other courts are appointed by the President who is democratically elected and directly accountable to the public.[120] The fact that a democratically elected President, being the head of the national executive,[121] appoints judges remains faithful to both the principle of representative democracy and participatory democracy.[122] In addition, it is noteworthy that there are mechanisms for holding the judiciary accountable.[123] The public nature of court hearings, the need to give reasons in judgments, and the doctrine of *stare decisis* serve as mechanisms to hold the judiciary accountable.[124] Therefore, the inclusion of justiciable socio-economic rights does not undermine representative or participatory democracy, nor does it give the judiciary too much power as an unelected branch of government. The fact that courts have the power to enforce socio-economic rights does not derogate from the separation of powers doctrine as understood. It instead legitimates court decisions to enforce socio-economic rights by holding the executive and legislative branches of government accountable for the realisation of these and other rights in the Constitution in accordance with a contemporary understanding of the separation of powers doctrine.

I thus argue that the anti-constitutionalisers wanted a strict separation of governmental power as opposed to the inclusion of socio-economic rights that they believed would blur the lines between the different branches of government. However, as mentioned above, the contemporary understanding of the separation of powers does not merely emphasise strict

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[117] Haysom (1992) *SAJHR* 461.
[118] 460. Haysom continues: “Can an illiterate, hungry person participate in the political process let alone social life? Does a marginalised, rural woman — untrained and unemployed — have anything remotely akin to civic equality to her urban, middle-class male compatriot? The question barely needs an answer.”
[119] 461.
[120] S 174(4) of the 1996 Constitution states that “[t]he other judges of the Constitutional Court are appointed by the President, as head of the national executive...”.
[121] S 174(4) of the 1996 Constitution.
[122] Haysom (1992) *SAJHR* 463.
[123] Pieterse (2004) *SAJHR* 391.
[124] 391. See also Yusuf S “The Rise of Judicially Enforced Economic, Social, and Cultural Rights-Refocusing Perspectives” (2012) 10 *SJSJ* 761 753-791.

separation but also aims to bring about a system of checks and balances between the different branches of government that ensures governmental accountability. Therefore, the constitutionalisers' arguments in favour of the inclusion of socio-economic rights were not in breach of the separation of powers doctrine. In fact, their arguments encapsulate a more contemporary understanding of the separation of powers doctrine that ensures appropriate checks and balances between the different branches of government. Below I will show that this understanding of the separation of powers doctrine was also accepted by the drafters of the post-apartheid constitutions.

2 3 4 The Separation of Powers Doctrine in the 1996 Constitution

After a long drafting process, certification hearing and amendments, rights which best reflected "the fundamental needs, aspirations, and historical experiences for the majority of South Africans" were constitutionally entrenched.[125] A Constitution containing justiciable socio-economic rights was certified on 4 December 1996, in spite of the separation of powers concerns raised against their inclusion.[126] The 1996 Constitution was introduced as a standard that law and conduct is measured against, and law or conduct that is not in conformity with it is invalid.[127] Since the certification and adoption of a supreme Constitution, Parliament no longer had unbridled authority to make or unmake any laws that could not be set aside,[128] as now, any law, action or conduct inconsistent with the 1996 Constitution is invalid.[129] The notion of constitutional supremacy thus took the place of parliamentary sovereignty, in compliance with the interim Constitution.[130] This supreme Constitution not only influenced all law or conduct, but the separation of powers doctrine as applied in South Africa as well.[131] The influence of the supreme Constitution on the separation of powers doctrine can be gleaned from *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa.*[132] In this case, the Court held that while the separation of powers doctrine recognises the functional independence of

[125] Scott and Macklem (1992) *Univ Pennsylvania LR* 4.
[126] See ss 25-27 of the 1996 Constitution.
[127] S 2 of the 1996 Constitution states that "[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."
[128] Dicey "The nature of parliamentary sovereignty" in *Introduction to the Study of the Law of the Constitution* 41.
[129] S 2 of the 1996 Constitution. The CODESA Declaration of Intent was signed on 21 December 1991 with the aim of initiating the process of drawing up and adopting a constitution. CODESA was thus formed as a standing body to facilitate a negotiation process. See also Du Plessis et al *Law and Legal Skills* 26.
[130] Constitutional Principle IV of the Interim Constitution states that "[t]he Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government."
[131] K Klare "Self-Realisation, Human Rights, and Separation of Powers: A Democracy Seeking Approach" (2015) 26 *Stell LR* 446 445-470.
[132] 1996 4 SA 744 (CC).

the branches of government, the principle of checks and balances contained in the 1996 Constitution emphasises a prevention of one branch of government usurping power from another.[133] The purpose of the system of checks and balances was to "ensure accountability, responsiveness and openness" between the three branches of government.[134] It is this very system of checks and balances that results in an intrusion by one branch into another. As Pieterse has noted, "the boundaries of the separation of powers doctrine in post-1996 South Africa has shifted dramatically".[135] The separation of powers doctrine thus envisaged in the 1996 Constitution "anticipates the necessary or unavoidable intrusion of one branch on the terrain of another".[136] The constitutionally entrenched principle of co-operative governance is confirmation that "the Constitution knows no functional borders or exclusive institutional domains".[137] The 1996 Constitution thus favoured a contemporary understanding of the separation of powers doctrine that separates governmental power but also maintain governmental accountability by including a system of checks and balances.

In South Africa, though the separation of powers doctrine is not expressly mentioned in the 1996 Constitution, it is clearly envisaged in the structure and manner in which governmental power is distributed.[138] In *South African Association of Personal Injury Lawyers v Heath,* the Court stated that "[c]hapters 4 to 8 [of the 1996 Constitution] provides for a clear separation of powers between the three spheres of government", namely the legislature, executive and judiciary.[139] The executive authority is vested in the President,[140] legislative authority is vested in Parliament,[141] and judicial authority is vested in the courts.[142] In terms of the 1996 Constitution, each branch has been allocated various roles. The

[133] *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 109.
[134] S 1(d) and the Preamble of the 1996 Constitution.
[135] Pieterse (2004) *SAJHR* 405. See also *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 108.
[136] *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 109.
[137] Klare (2015) *Stell LR* 447. See also s 1(d) of the 1996 Constitution. See also O'Regan K "Checks and Balances Reflections on the Development of the Doctrine of the Separation of Powers under the South African Constitution" (2005) 8 *PER/PELJ* 120-150.
[138] *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 4 SA 222 (CC) para 181. See also *Glenister v President of the Republic of South Africa and Others* 2009 2 BCLR 136 (CC) para 29.
[139] 2001 1 BCLR 77 (CC) para 22. See also *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 106-113. See also Seedorf and Sibanda "Separation of Powers" in *CLoSA* 3-5.
[140] S 85(1) of the 1996 Constitution.
[141] S 42(2) of the 1996 Constitution states that "[t]he National Assembly and the National Council of Provinces participate in the legislative process in the manner set out in the Constitution."
[142] S 165(1) of the 1996 Constitution.

executive's function is to initiate legislation in line with policy and execute legislation by allocating sufficient resources.[143] The legislature's function is to enact legislation giving effect to rights.[144] The judiciary's function is to interpret rights,[145] measure state compliance with its constitutional obligations,[146] and make pronouncements on the validity of legislation.[147] If rights violations are found, a court can make declarations of invalidity and grant appropriate relief.[148] In terms of the separation of powers doctrine envisaged in the 1996 Constitution, the judiciary is granted wide remedial powers. However, there have been instances where courts have approached its remedial role, especially during socio-economic rights adjudication, with visible unease. This is attributable, paradoxically, to a strict understanding of the separation of powers doctrine.[149]

2 4 The 1996 Constitution and the Court's Remedies

2 4 1 Section 38 of the 1996 Constitution

Before delving into the impact of a strict understanding of the separation of powers doctrine on remedies issued in socio-economic rights cases, it is necessary to explore the remedies that a court is authorised to provide. Courts have wide powers encapsulated in the 1996 Constitution. In terms of section 38 a court may grant appropriate relief when "a right in the Bill of Rights has been infringed or threatened".[150] In cases involving socio-economic rights specifically, these rights are infringed or threatened when the state's measures to progressively realise a particular socio-economic right is not reasonable.[151] Put differently,

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[143] Seedorf and Sibanda "Separation of Powers" in *CLoSA* 2. See ss 85(2)(b) and 125(2)(d) of the 1996 Constitution.
[144] S 85(2)(d) and s 125(2)(f) of the 1996 Constitution.
[145] S 39(1) and (2) of the 1996 Constitution. See also Liebenberg *Socio-economic Rights* 37.
[146] S 167(4)(e) of the 1996 Constitution. See also Pieterse (2004) *SAJHR* 383.
[147] S 167(5) of the 1996 Constitution. See also Pieterse (2004) *SAJHR* 383. Seedorf and Sibanda "Separation of Powers" in *CLoSA* 34 states that "the inclusion of a justiciable Bill of Rights and express powers of judicial review has made it unnecessary to consider which branch has the power finally to decide the meaning of the Constitution. The Constitutional Court is quite clearly the final and authoritative interpreter of the Constitution, enjoying the last word on all constitutional matters". See also *Doctors for Life International v Speaker of the National Assembly and Others* 2006 6 SA 416 (CC) para 200; *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 77.
[148] S 172(1) and s 38 of the 1996 Constitution. See also *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC) para 101. See also Currie and De Waal *Bill of Rights Handbook* 180.
[149] Pieterse (2004) *SAJHR* 384. See also Michelman (2003) *Int J Constitut Law* 15.
[150] S 38 of the 1996 Constitution.
[151] S 25(5) of the 1996 Constitution states that ""[t]he state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis"; s 26(2) of the 1996 Constitution states that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right"; s 27(2) of the 1996 Constitution states that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right"; s 29 (1)(b) of the 1996 Constitution states that "[e]veryone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible."

a court can grant appropriate relief in socio-economic rights cases when the law or conduct of the state does not provide effective protection against infringement or threat of infringement to these rights, falling short of the "reasonableness" standard required in terms of the Constitution.[152] As will be illustrated in further chapters with reference to *Grootboom,* the state's conduct warranted the provision of appropriate relief by the Court because the state's housing policy was unreasonable and unconstitutional.[153]

Appropriate relief can take various forms. In *Grootboom*, it took the form of a declaratory order.[154] A declaratory order assists in clarifying a party's legal and constitutional obligations in order to promote the protection and enforcement of rights in terms of the Constitution and its values.[155] The court's power to grant appropriate relief allows courts sufficient leeway to issue declaratory orders in circumstances even where it has not found conduct to be in conflict with the Constitution.[156] As the Court held in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*, in terms of section 38 of the 1996 Constitution, the Court may grant a declaration of rights where it would constitute appropriate relief.[157] In *Grootboom*, the declaratory order described that the section 26 right of access to adequate housing was breached, while leaving it to the executive and legislature to decide on the means and policy to be adopted in order to remedy the breach.[158] The positive action required by the state in terms of section 7(2) to remedy rights infringements was thus left within the exclusive discretion of the executive and/or legislature.[159] A court granting exclusively declaratory relief is done in the hopes that the governmental branches against which the order applies will take the measures necessary to comply with the order.[160] The declaratory order constituting appropriate relief in terms of section 38 is thus dependent on the executive and/or legislative branches of government complying with the order. If there

[152] S 25(5), 26(2), 27(2) and 29(1)(b) of the 1996 Constitution.
[153] Paras 54, 63-64, 82-83, 99 part 2(b) of the Order. See chapter 3 § 3 2.
[154] S 38 of the 1996 Constitution states that "[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights." See also *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 99 part 2.
[155] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) para 107. See also Liebenberg *Socio-economic Rights* 398.
[156] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) para 106. See also Liebenberg *Socio-economic Rights* 397.
[157] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) para 106. See also Liebenberg *Socio-economic Rights* 397.
[158] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 66.
[159] *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 61.
[160] See K Pillay "Implementation of Grootboom: Implications for the enforcement of socio-economic rights" (2002) 6 *Law, Democracy and Development* 255-277 for criticism of the declaratory order in GB. See also Liebenberg *Socio-economic Rights* 398. See also *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) para 109 and 111.

is non-compliance with a declaratory order, and thus no effective relief for a particular constitutional breach or deterrence from future violations, the declaratory order cannot constitute appropriate relief in terms of section 38.[161]

In terms of section 38, a person may approach a court for relief once their rights have been infringed, but also when there is a threat that their rights may be infringed in future.[162] Since rights can be infringed when an action is committed against them, a person may approach the court for a prohibitory interdict to prevent certain conduct.[163] Since rights can also be infringed when someone who is supposed to act, omits to act, the person whose rights were infringed by the omission may approach the court for a mandatory interdict to compel certain conduct.[164] A court can thus order a prohibitory interdict to prevent certain conduct, and a mandatory interdict to compel certain conduct when it constitutes appropriate relief.[165] Mandatory orders can be further divided into orders for the provision of benefits and services,[166] orders of meaningful engagement and for mediation.[167]

2 4 2 Section 172 of the 1996 Constitution

Courts' also have authority to declare any law of conduct that is inconsistent with the 1996 Constitution invalid to the extent of its inconsistency and make any order that is just and equitable.[168] When a court finds that law or conduct is not consistent with the 1996 Constitution, the court must declare it invalid. After this declaration of invalidity, the court has the power to make any order that is just and equitable.[169] There are several remedies courts can provide in terms of section 172 once law or conduct is found to be inconsistent with the 1996 Constitution. Severance is a remedy introduced to cure law found to be inconsistent with the 1996 Constitution.[170] Severance entails removing unconstitutional words or sections from legislation, as opposed to invalidating the whole legislative instrument.[171] Reading-in is another remedy which can be employed when a law can be deemed to be constitutional after certain words or phrases are added to the legislative

[161] Liebenberg *Socio-economic Rights* 399.
[162] 409.
[163] 409.
[164] 409. See *Setlogelo v Setlogelo* 1914 AD 221 at 227 for the common-law requirements of a permanent interdict.
[165] Liebenberg *Socio-economic Rights* 409.
[166] 409.
[167] 418.
[168] S 172 of the 1996 Constitution.
[169] S 172 of the 1996 Constitution.
[170] *Coetzee v Government of the Republic of South Africa* 1995 4 SA 631 (CC); *Matiso v Commanding Officer, Port Elizabeth Prison* 1995 10 BCLR 1382 (CC).
[171] Liebenberg *Socio-economic Rights* 383.

instrument.[172] This remedy is useful when a statute is unduly exclusive of certain groups in its protection.[173] Another remedy courts can offer is limiting the retrospective effect of a declaration of invalidity.[174] Law or conduct that is declared invalid because of its unconstitutionality is deemed to be unconstitutional "from the date of the conduct, or the coming into effect of the relevant legislation".[175] However, courts' are able to limit the retrospective effect of the declaration of invalidity if it is just and equitable.[176] In addition to limiting the retrospective effect of declarations of invalidity, courts' can also suspend declarations of invalidity.[177] The purpose of suspending a declaration of invalidity is "to allow the competent authority to correct the defect".[178] If the competent authority does not correct the defect before a prescribed period, the declaration of invalidity will take effect.[179]

2 4 3 Section 39(1)(b) of the 1996 Constitution

The court, during the interpretation of the Bill of Rights, is obliged to consider international law.[180] International law ought to be briefly discussed on this basis. Yacoob J, in *Grootboom*, had the following to say about international law:

> "The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable".[181]

The international law that is relevant for the interpretation of section 26 of the 1996 Constitution is the International Covenant on Economic, Social and Cultural Rights (1966) ("ICESCR"),[182] being a pivotal international convention that protects economic, social, and cultural rights.[183] It is important to note that at the time that *Grootboom* was brought before Court, it had not yet ratified the ICESCR. The implication being that the Court in *Grootboom* could comfortably and confidently rely on the difference in wording between section 26 of

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[172] 383.
[173] 383 and 384 for guidelines to determine when reading-in is appropriate.
[174] S 172(1)(b)(i) of the 1996 Constitution states that "[w]hen deciding a constitutional matter within its power, a court may make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity..."
[175] Liebenberg *Socio-economic Rights* 388.
[176] 388. See also s 172 of the 1996 Constitution.
[177] S 172 of the 1996 Constitution.
[178] Liebenberg *Socio-economic Rights* 388. See *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC).
[179] Liebenberg *Socio-economic Rights* 389.
[180] S 39(1)(b) of the 1996 Constitution states that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum must consider international law."
[181] Para 26 (footnotes omitted).
[182] The United Nations Human Rights Office of the High Commissioner, UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, 993 UNTS 3.
[183] Liebenberg *Socio-economic Rights* 106.

the 1996 Constitution and the ICESCR to circumvent the inclusion of a "minimum core obligation" endorsed by the UN Committee on Economic, Social and Cultural Rights.[184] However, South Africa became the 163rd state party to the ICESCR by ratifying it on 12 January 2015.[185] The impact being that should litigants rely on South Africa being a state party to the ICESCR, the Court might not be able to wiggle itself out of the inclusion of a minimum core obligation anymore. This begs the question of where the Court could move to in future regarding the enforcement of housing rights, in light of the ratification of the ICESCR. Since ratifying the ICESCR, South Africa has presented its initial report to the ICESCR indicating its progress on deepening its enforcement of socio-economic rights in the country.[186] Predictably, the UN Committee on Economic, Social and Cultural Rights is not pleased with South Africa's progress on the implementation of the ICESCR so far.[187]

2 4 4 Judicial Remedies and Separation of Powers Tensions

As illustrated above, courts have wide remedial powers in terms of sections 38 and 172 of the Constitution. These wide remedial powers potentially give rise to separation of powers concerns in terms of a strict understanding of the separation of powers doctrine. These separation of powers concerns mirror those raised by the anti-constitutionalisers against the inclusion of socio-economic rights in the 1996 Constitutional. For example, the section 38 power to issue mandatory interdicts for the provision of benefits and services is in direct contrast to the functional boundaries between the three branches of government in terms of a strict understanding of the separation of powers doctrine. The argument would

[184] 108. *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 31 states that "[t]he concept of minimum core obligation was developed by the committee to describe the minimum expected of a state in order to comply with its obligation under the Covenant. It is the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation. Each right has a "minimum essential level" that must be satisfied by the state parties. The committee developed this concept based on "extensive experience gained by [it] … over a period of more than a decade of examining States parties' reports." The general comment is based on reports furnished by the reporting states and the general comment is therefore largely descriptive of how the states have complied with their obligations under the Covenant. The committee has also used the general comment "as a means of developing a common understanding of the norms by establishing a prescriptive definition." Minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligation must be understood in international law (footnotes omitted)."

[185] Right to Education "South Africa Ratifies the International Covenant on Economic, Social and Cultural Rights" (19-01-2015) The Right to Education <https://www.right-to-education.org/news/south-africa-ratifies-international-covenant-economic-social-and-cultural-rights> (accessed 10 November 2021).

[186] The United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, Initial Reports of States Parties Due in 2017, South Africa, E/C.12/ZAF/1, 7 June 2017.

[187] The United Nations Economic and Social Council Committee on Economic, Social and Cultural Rights, Concluding Observations on the Initial Report of South Africa, E/C.12/ZAF/CO/1, 29 November 2018.

go that, in terms of the separation of powers doctrine, each governmental branch has its own roles and areas of expertise. Budgets and resource allocations fall within the executive domain, with the effect that courts exercising their section 38 power to issue mandatory interdicts for the provision of benefits and services in socio-economic rights cases are an encroachment into the executive domain.[188] In addition to being an encroachment into the executive domain, the argument would be that the court lacks capacity (one of the separation of powers concerns) to issue such mandatory orders in socio-economic rights cases since budgets and resource allocations fall within the legislature's area of expertise.

The legitimacy of mandatory orders issued by courts in socio-economic rights cases are also questioned because the judicial function:

> "does [not] permit the kinds of pluralistic public interventions, press scrutiny, periods for reflection and the possibility of later amendments which are part and parcel of Parliamentary procedure. How best to achieve the realisation of the values articulated by the Constitution is something far better left in the hands of those elected by and accountable to the general public than placed in the lap of the Courts".[189]

As the argument goes, the fact that the formulation of court remedies does not lend itself to public participation,[190] public comment and the possibility of being amended means that realising constitutional values and rights should be left to the elected branches of government.[191] To some, the courts' section 172 power to issue declarations of invalidity also brings the legitimacy of the court's decisions to the fore because the legislature is the governmental branch responsible for enacting legislation giving effect to rights.[192] The fact that unelected courts have the authority to declare legislation adopted and action implemented by a democratically elected legislature and executive invalid causes separation of powers tensions in terms of a strict understanding of the separation of powers doctrine.[193] This separation of powers tension was captured in *National Coalition for Gay*

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[188] 54.
[189] *Du Plessis and Others v De Klerk and Another* 1996 5 BCLR 658 (CC) para 180.
[190] There is a framework for public participation in government processes in terms of the Public Service Commission "Report on the Assessment of Public Participation Practices in the Public Service" (2008) *Public Service Commission* <http://www.psc.gov.za/documents/2009/Report_Assess.pdf> (accessed 28-02-2021). See also M Sebola "Public Participation in South Africa's Policy Decision-Making Process: The Mass and the Elite Choices" (2016) 14 *IRPA* 55-73.
[191] Draft bills drafted by the legislature are available for public comment on South Africa Government "Documents for public comment" (2021) *South African Government* <https://www.gov.za/documents/public-comment#> (accessed 28-02-2021).
[192] S 85(2)(d) and s 125(2)(f) of the 1996 Constitution.
[193] Daniels and Brickhill (2006) *Penn State Int Law Rev* 371-404.

and Lesbian Equality and Others v Minister of Home Affairs and Others where it was stated that:

"The other consideration a Court must keep in mind is the principle of the separation of powers and, flowing therefrom, the deference it owes to the Legislature in devising a remedy for a breach of the Constitution in any particular case … In essence … it involves restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the Legislature".[194]

These remedies thus warrant further discussion in later chapters.[195]

The fact that socio-economic rights are included in the 1996 Constitution and are thus partly justiciable,[196] means that socio-economic rights can be enforced in a court of law.[197] However, Liebenberg argues that enforcing socio-economic rights frequently requires courts to extend access to social and economic resources to those who lack it.[198] Since courts have wide remedial powers, including the authority to issue mandatory orders for the provision of benefits and services, enforcing socio-economic rights includes the extension of access to social and economic resources to those previously deprived of it. Extending access to social and economic resources will require positive action by the State.[199]

It is clear that the adoption of the 1996 Constitution and its inclusion of justiciable socio-economic rights has had various implications for the exercise of the court's remedial role, and thus its understanding of the separation of powers doctrine. In the next chapter, I will show that the same separation of powers concerns raised during the debate about the inclusion or not of justiciable socio-economic rights in the 1996 Constitution has subtly been raised during housing rights litigation.

2 5 Conclusion

In this chapter, the separation of powers doctrine in the abstract, including its origin, key characteristics, and purposes were explored. The strict and contemporary understanding of the separation of powers doctrine was distinguished and it was found that the strict

[194] 2000 2 SA 1 (CC) para 66.
[195] See chapter 3 § 3 4.
[196] *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 78.
[197] Liebenberg (2002) *Law, Democracy and Development* 160.
[198] Liebenberg *Socio-economic Rights* 75.
[199] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 24, the Court stated that "[t]he state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing."

understanding emphasises strict separation while the contemporary understanding favours separation coupled with a system of checks and balances to ensure governmental accountability. The separation of powers doctrine as understood in pre-1994 and post-1994 South Africa followed thereafter. The impact of the separation of powers doctrine on the inclusion of justiciable socio-economic rights in the 1996 Constitution was explained and it was illustrated that the arguments raised against the inclusion of justiciable socio-economic rights in the 1996 Constitution were inextricably linked to a strict understanding of the separation of powers doctrine. Two main separation of powers concerns were explored, being judicial capacity and judicial legitimacy. Despite the separation of powers concerns, justiciable socio-economic rights were included in the 1996 Constitution.[200] Since separation of powers concerns are raised customarily during the remedies stage of adjudication,[201] a discussion of the remedial role of the courts and remedies which specifically raises separation of powers concerns followed. International law and its potential impact on socio-economic rights was also briefly discussed to illustrate that it affords courts more leeway in the enforcement of socio-economic rights. In conclusion, it will be shown in the chapters that follow that the same separation of powers concerns that were raised against the inclusion of justiciable socio-economic rights in the 1996 Constitution are raised customarily during housing rights litigation. The impact of these separation of powers concerns being raised during housing rights litigation will be discussed in subsequent chapters.[202]

[200] *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 78.
[201] FI Michelman "The Constitution, Social Rights and Liberal Political Justification" (2003) 1 *Int J Constitut Law* 15 13-34.
[202] See chapter 3 § 3 2 and 3 3.

CHAPTER 3: THE COURT'S APPROACH TO HOUSING RIGHTS REMEDIES

3 1 Introduction

The inclusion of justiciable socio-economic rights in the 1996 Constitution implies that the judiciary has a significant role to play in the enforcement of socio-economic rights,[1] and in turn, the transformation of South Africa that the transformative Constitution envisions.[2] Courts initially (and implicitly) expressed hesitancy to fulfil this role. In this chapter, I will argue that the hesitancy appears to implicitly endorse a strict understanding of the separation of powers doctrine favoured by those who argued against the inclusion of socio-economic rights in the 1996 Constitution (the so-called "anti-constitutionalisers").[3] As explained in Chapter 2, the anti-constitutionalisers suggested that the separation of powers doctrine requires that the judiciary, during the exercise of its role, ought not to usurp the authority of the executive and legislative branches of government.[4] They therefore argued that the Court ought not issue remedies with budgetary and policy implications for the executive and legislative branches of government.

During the first socio-economic rights case before it, namely *Grootboom,*[5] the Court adopted a deferential approach, ultimately based on the anti-constitutionalists' concerns related to a strict understanding of the separation of powers doctrine. This chapter thus provides an illustration of the impact that a strict understanding of the separation of powers has had on the Court's provision of remedies in housing rights cases. In the first section of the chapter, it will be illustrated that arguments raised by the anti-constitutionalisers about the separation of powers doctrine dictated the Court's adoption of a deferential approach in *Grootboom*.[6] Thereafter, the reasons for the adoption of this deferential approach will be analysed, as well as whether its adoption was justified.[7] In the second section of the chapter, it will be illustrated that due to the state's incompetence, intransigence, and unreasonable

[1] S Liebenberg "South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?" (2002) 6 *Law, Democracy and Development* 159 160.
[2] See Chapter 4.
[3] See DM Davis "The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles" (1992) 8 *SAJHR* 4 475-490; N Haysom "Constitutionalism, Majoritarian Democracy and Socio-Economic Rights" (1992) 8 *SAJHR* 451-463; E Mureinik "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 *SAJHR* 464-474; M Pieterse "Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience" (2004) 26 *HRQ* 26 882-905.
[4] See chapter 2 § 2 3 1.
[5] 2000 11 BCLR 1169 (CC).
[6] See § 3 2 4 below.
[7] See § 3 2 4 below.

delay in the fulfilment and protection of the right of access to adequate housing, the Court has indicated a shift away from the deferential approach adopted in *Grootboom* on the basis of a more contemporary understanding of the separation of powers doctrine.[8] The post-*Grootboom* development in the Court's approach will be illustrated with reference to the following cases: *Modderklip,*[9] *Olivia Road*,[10] *Joe Slovo*,[11] *Pheko*,[12] *Schubart Park*,[13] and *Blue Moonlight*.[14] In the third section of the chapter, the implications of the Court's subsequent development for a strict understanding of the separation of powers doctrine will be analysed, and I will illustrate that the Court's post-*Grootboom* approach might raise separation of powers concerns.[15] However, in conclusion, I will argue that although the Court's approach post-*Grootboom* might raise separation of powers concerns, it is justified in accordance with a contemporary understanding of the separation of powers doctrine, and for its contribution to the enforcement of the right of access to adequate housing in conformity with transformative constitutionalism.[16]

3 2 The Court's Approach in *Grootboom*

3 2 1 The Facts

Mrs Irene Grootboom ("Mrs Grootboom") was part of a group ("residents") living in deplorable conditions in the Wallacdene Community ("Wallacdene").[17] All of the residents of Wallacdene lived in shacks, with half of them being children. A quarter of the households had no income at all, and more than two thirds of the residents earned less than R500 a month.[18] Moreover, the residents had no water, sewage or refuse removal services and only 5% of the shacks had electricity.[19] Though Mrs Grootboom and the other residents applied for subsidised low cost housing from the Oostenberg Municipality ("the municipality"), they remained on the waiting list for up to seven years without any indication of when housing would be provided.[20] These factors are what prompted her and around 900 other people to leave Wallacdene at the end of September 1998 to move to private land reserved for formal

[8] See § 3 3 below.
[9] 2005 5 SA 3 (CC).
[10] 2008 5 BCLR 475 (CC).
[11] 2010 3 SA 454 (CC).
[12] 2012 4 BCLR 388 (CC).
[13] 2013 1 BCLR 68 (CC).
[14] 2012 2 SA 104 (CC).
[15] See § 3 4 below.
[16] Chapter 4 § 4 3 4.
[17] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 7.
[18] Para 7.
[19] Para 7.
[20] Para 8.

low-cost housing, establishing the community of "New Rust".[21] The owner of the vacant land soon applied for an ejectment order, which was granted in the Magistrates' Court on 8 December 1998 in the absence of the residents and their legal representatives.[22] Since the ejectment order was granted in the absence of the residents, they refused to move.[23] On 8 April 1999, the residents originally opposed the eviction but, after obtaining legal advice, chose instead to obtain alternative accommodation as well as to conclude an agreement regarding a deferred date for the move from New Rust.[24] The eviction thus took place on 18 May 1999, but the manner in which it was carried out was lamentable. The Court has remarked that the eviction was done "prematurely and inhumanely: reminiscent of the apartheid-style evictions".[25] With nowhere to go, the residents settled on the Wallacdene sports field.[26] However, with their building materials being destroyed during the eviction, the material used to construct temporary structures on the sports field proved wholly inadequate.[27]

3 2 2 The High Court Order

Since the material used by the residents to construct temporary structures did not provide them with protection from the elements, the resident's attorney drafted a letter to the municipality describing the intolerable conditions of the residents and demanded that the municipality fulfil its constitutional obligation to provide temporary accommodation to the residents.[28] When this letter to the municipality proved futile, the residents launched an urgent application at the Cape of Good Hope High Court ("the High Court") on 31 May 1999 for an order requesting that the government provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief.[29] The residents argued that the government had a duty to provide them or their children with basic shelter on the basis of sections 26(2) and 28 of the Constitution.[30]

The residents were not successful in their reliance on section 26 of the Constitution for the relief they sought before the High Court for the reasons that follow. The municipality

[21] Para 4.
[22] *Grootboom and others v Oostenberg Municipality and others* 2000 JOL 5991 (C) 4.
[23] 4.
[24] 4.
[25] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 10.
[26] Para 11.
[27] *Grootboom and others v Oostenberg Municipality and others* 2000 JOL 5991 (C) 5.
[28] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 11.
[29] Para 11.
[30] *Grootboom and others v Oostenberg Municipality and others* 2000 JOL 5991 (C) 6.

successfully demonstrated that it was under severe budgetary constraints, that it was faced with a massive shortage in available housing and that it had formulated an Accelerated Managed Land Settlement Programme that would assist local councils to manage the settlement of those facing housing crises that was in the process of being implemented with reference to clear evidence.[31] The residents, however, could not prove that the state was under an obligation to provide some form of shelter while a rational housing programme was in the process of being progressively implemented.[32] Section 26(2) of the Constitution states that the state must take reasonable legislative and other measures, within its available resources to achieve the *progressive realisation* of the right of access to adequate housing.[33] According to the wording of the Constitution, the right of access to adequate housing ought to be realised progressively, and not immediately upon demand.[34] On the basis of the Constitution's wording, and the fact that a rational housing programme was in the process of being progressively implemented, the residents had to prove that the state was under an obligation to do more than implement a reasonable housing programme but could not. [35] Proving that the state was under an obligation to do more than implement a reasonable housing programme was especially arduous in light of the severe resource constraints that the municipality was under.[36]

The residents were, however, successful in their reliance on section 28 of the Constitution. The residents relied upon section 28 to argue that children have an unqualified right to shelter and there is thus a duty imposed upon the municipality to provide such shelter to the children when their parents are unable to.[37] The residents also argued that since it is in the best interests of a child to remain with his or her parents, the right to such shelter should be extended to their parents in order for the children to remain within the family unit.[38] The High Court seemed to agree with this argument and held that while the primary obligation to provide shelter for a child rests upon his or her parents, this obligation falls upon the state if the parents are unable to provide shelter for their children.[39] Furthermore, the High Court held that section 28(1)(b) and section 28(1)(c) does not create a derivative

[31] 10.
[32] 10. See Liebenberg (2002) *Law, Democracy and Development* 167.
[33] S 26(2) of the 1996 Constitution (own emphasis).
[34] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 71.
[35] *Grootboom and others v Oostenberg Municipality and others* 2000 JOL 5991 (C) 14.
[36] 14.
[37] 14.
[38] 14.
[39] 16-17, 19.

right for residents who are parents because the bearer of the right is the family unit.[40] The High Court therefore held that section 28(1)(c) was drafted as an unqualified constitutional right because it was not made subject to a qualification of the availability of the state's financial resources.[41]

The High Court accordingly declared that:

> "(a) the applicant children are entitled to be provided with shelter by the appropriate organ or department of state;
>
> (b) the applicant parents are entitled to be accommodated with their children in the aforegoing shelter; and
>
> (c) the appropriate organ or department of state is obliged to provide the applicant children, and their accompanying parents, with such shelter until such time as the parents are able to shelter their own children".[42]

At the hearing of the matter in the High Court, an offer was made by the municipality to the residents to improve the immediate crisis situation in which they were living and the residents accepted the offer.[43] The acceptance of this offer allayed the urgent nature of the matter.[44] However, since the municipality had failed to comply with the terms of their offer, the residents instituted an urgent application to the Constitutional Court ("the Court"), that was set down for 21 September 2000.[45] Before progressing onto the order granted in the Constitutional Court, it is relevant for purposes of this study to illustrate what the problematic aspects about the order granted in the High Court were.

One of the problematic aspects of the High Court order was the declaration that section 28 of the Constitution constitutes a right to claim housing on demand for residents that have children, that those that might be more deserving due to age, disability or other grounds do not have.[46] This was vaguely suggested in the High Court judgment in the following terms:

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[40] 18.
[41] 20 and 22.
[42] 26.
[43] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 5. In the High Court, the first appellant was the Government of the Republic of South Africa (the national government); the second was the Premier of the Province of the Western Cape representing the Western Cape Provincial Government (the Western Cape government); the third appellant, was the Cape Metropolitan Council (the Cape Metro); and the fourth appellant was the Oostenberg Municipality (the municipality). All the appellants are organs of government. The respondents were the residents of the Grootboom community.
[44] Para 5.
[45] Para 5.
[46] See *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 71.

> "Respondents have a legitimate concern about the potential consequences of this interpretation of s.28(1)(c). They may fear a flood of applications or demands by other squatters that shelter be provided for their children, and also for them as parents of those children. In this way, the respondents may be forced to provide inadequate housing under the guize of shelter, thereby disrupting the housing programme and delicate decisions already made about allocation of scarce resources".[47]

Based on the above, this order was problematic because residents with children would have expected housing on demand with the implication that the municipality would have been forced to meet this demand and the already financially constrained housing program would lack the necessary resources for proper implementation, leaving other residents homeless and remediless.[48]

A second problematic aspect of the High Court order was the organ(s) of state who were obliged to provide the applicant children and their accompanying parents with shelter was not stated.[49] This in practice could easily have resulted in blame shifting between the organs and levels of state regarding who is ultimately responsible for the provision of shelter. Non-compliance with the judgment could therefore have resulted in further (expensive and laborious) litigation for the residents.[50]

3 2 3 The Constitutional Court Order

In the Constitutional Court, the following order was granted:

> "It is declared that:
>
> (a) Section 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.
>
> (b) The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

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[47] *Grootboom and others v Oostenberg Municipality and others* 2000 JOL 5991 (C) 19.
[48] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 71.
[49] *Grootboom and others v Oostenberg Municipality and others* 2000 JOL 5991 (C) 26, part 2(c) of order states that "*the appropriate organ or department of state* is obliged to provide the applicant children, and their accompanying parents, with such shelter until such time as the parents are able to shelter their own children".
[50] M Ebadolahi "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83 *NYULR* 1565 1589.

> (c) As at the date of the launch of this application, the state housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements in paragraph (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.
>
> 3. There is no order as to costs".[51]

While the order granted in the High Court was problematic for the reasons set out above, the order granted in the Constitutional Court also left much to be desired because of the deferential approach adopted by the Constitutional Court. In the section that follows, the deferential approach adopted by the Constitutional Court will be illustrated with reference to the court order. I will argue that the Constitutional Court, during the exercise of its remedial role, invoked a strict understanding of the separation of powers doctrine to justify its adoption of a deferential approach.[52]

3 2 4 A Deferential Approach

In part (a) of the order, the Constitutional Court declared that section 26(2) obliges the state to conceive of and implement a comprehensive and coordinated programme to progressively realise the right of access to adequate housing.[53] The Court made this declaration to "clarify" the obligations of the state imposed by section 26(2).[54] In relation to the programme to be conceived of and implemented by the state, the Court indicated that national government must assume responsibility for ensuring that laws, policies, programmes, and strategies are adequate to meet the state's section 26(2) obligation. Moreover, that national government must allocate funds to the provinces and local government; and that national and provincial government must ensure that executive obligations imposed by housing legislation are met.[55] Importantly, the Court held that:

> "[t]he measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means… The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures

[51] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 99.
[52] See § 3 2 4 below. See also Liebenberg *Socio-economic Rights* 67 where Liebenberg observed that "the separation of powers doctrine may be ritually invoked by the courts as a way of avoiding their constitutional mandate to … enforce constitutionally guaranteed rights."
[53] Para 99 part (2)(a).
[54] Paras 34-38.
[55] Para 40 (footnotes omitted).

> they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met".[56]

The Court overly deferred its remedial role to the executive and legislature by expressing that the measures to be adopted are primarily a matter for those branches of government. In addition, the Court was overly deferential by limiting its remedial role to assessing the reasonableness of the measures adopted by the state.[57] The deferential approach of the Court was especially evident when the Court held that if a reasonable housing programme existed, the state had met its section 26(2) obligation,[58] and the Court's role was limited to assessing whether it was reasonable or not.[59] The only positive "obligation" that was placed on the state in terms of section 26(2) was the obligation to introduce a reasonable housing programme, but no real substantive content was given to the section. The deferential approach of the Court was evident once more when the Court held that since the measures directed towards the progressive realisation of section 26 were primarily a matter for the executive and legislature, the Court was limited in its provision of relief in relation to section 26(2) as it was implied that this fell within the executive or legislative domain.[60] This deferential approach was reminiscent of a strict understanding of the separation of powers doctrine favoured by the anti-constitutionalisers' because of its emphasis on the separate roles and functions allocated to the three branches of government that are, in the main, kept separate.[61] The Court reasoned here that there was no need to interfere any further with the executive's plans because there was an existing housing programme, the Accelerated Managed Land Settlement Programme,[62] introduced by the state. The Court therefore reasoned that it was justified in not dictating to the government

[56] Para 41.
[57] Bilchitz (2002) *SALJ* 496.
[58] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 41.
[59] Para 41.
[60] Para 41.
[61] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 183. See also chapter 2 § 2 2 3.
[62] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 60.

which measures were necessary to protect and promote the right of access to adequate housing because a housing programme was already formulated to fulfil this purpose.[63]

In relation to part (b) of the order, the Court held that the state was required to take reasonable legislative *and* other measures to progressively realize the right of access to adequate housing.[64] According to the Court, these other measures included the reasonable implementation of its housing programme because "[a]n otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations".[65] In spite of the Court stating the above, in its order, the Court was silent on a timeframe within which the state had to reasonably implement its housing programme. Since the judiciary has wide remedial powers,[66] the Court had the authority to advance a date by which the programme to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations had to be implemented by the state.[67] However, the Court reasoned that since this case was brought before it just three years after its establishment,[68] it would have been inappropriate for the Court not to offer the other branches of state sufficient discretionary leeway to determine the appropriate timeframe for the reasonable implementation of the housing programme.[69] As observed by Roux, the Court was well aware that the standard of review set in *Grootboom* would be a crucial determinant of the degree to which it would have to involved itself in controversial policy issues, and in the allocation of resources in particular.[70] Despite the Court's authority to issue a timeframe for the state's reasonable implementation of its housing programme, Klaaren suggested that it was critical for the Court to maintain a "delicate balance" between its powers and those of the other branches of government.[71] As Mbazira has noted, the Court opted for judicial deference and restraint in defining the content of the right of access to adequate housing, and in determining the remedies that

[63] *Grootboom and others v Oostenberg Municipality and others* 2000 JOL 5991 (C) 8 and 10.
[64] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 42.
[65] Para 42.
[66] Chapter 2 § 2 4.
[67] S 172(1)(b) of the 1996 Constitution states that "[w]hen deciding a constitutional matter within its power, a court may make any order that is just and equitable."
[68] *Grootboom and others v Oostenberg Municipality and others* 2000 JOL 5991 (C) 13.
[69] In *Soobramoney v Minister of Health* 1998 1 SA 765 (CC) para 29 the Court held that "[it] will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters." See D Bilchitz "Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance" (2002) 119 *SALJ* 484 500 for a critique of the Court failing to provide a timeframe for the implementation of the order in *Grootboom*. See also *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC) para 129.
[70] T Roux "Legitimating transformation: political resource allocation in the South African constitutional court" (2003) 10 *Democratization* 4 92 96.
[71] J Klaaren *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (2006).

should follow its infringement.[72] Therefore, though the approach adopted by the Constitutional Court in *Grootboom* was deferential in nature, the deferential approach would have been justifiable based on a strict understanding of the separation of powers doctrine. Since the housing programme at the launch of the application did not include reasonable measures to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations, the Court declared that the programme fell short of the reasonableness standard established above.[73] Bilchitz has argued that the Court ought to have specified general principles defining the obligations placed upon the state by section 26(2).[74] While the Court did specify a general standard that the measures adopted by the state ought to meet during the enforcement of the right of access to adequate housing, being the elusive reasonableness standard,[75] the Court side-stepped specifying general principles that define the obligations placed upon the state by the right.[76] An example of a general principle would have been for the Court to ascertain that every person in South Africa must have access to accommodation involving, at the very least, protection from the elements with access to basic services like taps and toilets.[77] Thereafter, a Court could properly determine whether the measures taken by the state are reasonable in light of the general principles imposed upon it by section 26.[78] However, the Court not specifying general principles defining the obligations placed upon the state by section 26 in *Grootboom* was arguably justified on the basis that an agreement between the parties was made an order of Court, placing an obligation upon local government to provide basic services.[79] These basic services included the construction of 20 permanent toilets,[80] the installation of 20 permanent taps,[81] and the provision of building material to each of the households on the Wallacdene sportsground.[82] The agreement that was made an order of court obliging the state to provide the residents with basic services, therefore justified the Court in part (c) of this order solely declaring that the housing programme fell short of the

[72] C Mbazira "Grootboom: A paradigm of individual remedies versus reasonable programmes" (2011) 26 *SAPL* 60 66.
[73] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 99, part 2(c).
[74] Bilchitz (2002) *SALJ* 487.
[75] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 63.
[76] B Ray "Evictions, Aspiration and Avoidance" (2014) 5 *CCR* 173 175.
[77] Bilchitz (2002) *SALJ* 487.
[78] 487. See also D Bilchitz "Towards reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence" (2003) 19 *SAJHR* 1 9.
[79] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 5.
[80] *Grootboom and Others v Government of the Republic of South Africa and Others* - Constitutional Court Order (CCT38/00) [2000] ZACC 14 (21 September 2000) para A.1.
[81] Para 2(1).
[82] Para 3.

reasonableness standard without specifying general principles defining the obligations placed upon the state by section 26.

3 2 5 Deference and Positive State Obligations

In *Grootboom*, Yacoob J, considered section 26 in its context, stating that subsection one aims to delineate the scope of the right, and at the very least, places a negative obligation on the state and all other parties to refrain from any interference with existing enjoyment of the right.[83] He continued, stating that "[t]he negative right is further spelt out in subsection (3) which prohibits arbitrary evictions".[84] Regarding subsection two, Yacoob J stated that it imposes a positive obligation on the state to "devise a comprehensive and workable plan to meet its obligations in terms of the subsection".[85] This imposition of positive duties on the state is affirmed in the 1996 Constitution because it places a duty on the state to promote and fulfil the rights within the Bill of Rights, including socio-economic rights.[86] The duty to promote and fulfil rights is asserted in the 1996 Constitution when it is stated that "[t]he state *must* take reasonable ... measures … to achieve the progressive realisation of [these rights]".[87] Yacoob J hastened to add that this obligation is not an absolute or unqualified one, but that the extent of the state's obligations is defined by three elements contained in the subsection.[88] The first of the three elements being the obligation to "take reasonable legislative and other measures", the second "to achieve the progressive realisation of the right", and the third being "within available resources".[89] While Yacoob J goes into great detail about what each element entails, I will summarise it briefly. The first

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[83] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 34. See also *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 20. See also S Wilson, J Dugard & M Clark "Conflict Management in an Era of Urbanisation: 20 Years of Housing Rights in the South African Constitutional Court" (2015) 31 *SAJHR* 472 475.

[84] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 34. See also Wilson, Dugard & Clarke (2015) *SAJHR* 475-476.

[85] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 38.

[86] S 7(3) of the 1996 Constitution states that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights." See also *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 24.

[87] S 25(5) of the 1996 Constitution states that "[t]he state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis." S 26(2) of the 1996 Constitution states that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right." S 27(2) of the 1996 Constitution states that [t]he state must take reasonable legislative and other measures, within its available
resources, to achieve the progressive realisation of each of these rights".

[88] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 38.

[89] Para 38. See also s 26(2) of the 1996 Constitution.

element places an obligation to take reasonable legislative and other measures on all spheres of government.[90] Yacoob J then states that national and provincial government ought to cooperate with one another to meet this obligation.[91] Regarding reasonableness, Yacoob J stated that a reasonable programme must allocate responsibilities to the different spheres of government and ensure that the necessary resources are available.[92] Since the subsection obliges the state to take reasonable legislative and other measures, Yacoob J stated that the "precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive".[93] While Yacoob J paved the way for an overly-deferential approach in housing rights cases by stating this, he does at least add that the measures which the state adopts must be reasonable.[94] This "reasonableness" standard is used to assess the measures taken by the state to provide access to adequate housing.[95] I agree with Bilchitz that the reasonableness standard is of little value until the Court delineates what positive obligations are imposed on the state by section 26.[96] The Court cannot properly assess the "reasonableness" of positive measures taken by the state to realise or enforce a particular right if the positive obligations imposed on the state by the said right has not been defined in any meaningful detail.[97] The result is that the obligations imposed on the state by section 26(2), a right considered to be positive in nature, has not been sufficiently outlined.[98] The Court did, however, provide a hint that the positive obligations imposed on the state by section 26(2) require more than legislation. The Court stated that legislation by itself is insufficient because legislation must be supported by "well-directed policies and programmes implemented by the executive".[99] Regarding the second element, Yacoob J stated that it was contemplated that the right of access to adequate housing could not be realised immediately.[100] Finally, regarding the third element, Yacoob J stated that "the obligation does not require the state to do more than its available resources

[90] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 39.
[91] Para 39.
[92] Para 39.
[93] Para 41.
[94] Para 41. See chapter 3 § 3 2 below.
[95] Wilson, Dugard & Clarke (2015) *SAJHR* 476.
[96] D Bilchitz "Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence" (2003) 19 *SAJHR* 1 6. See also Wilson, Dugard & Clarke (2015) *SAJHR* 476.
[97] Bilchitz (2003) *SAJHR* 6.
[98] Wilson, Dugard & Clarke (2015) *SAJHR* 477.
[99] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 42.
[100] Para 45.

permit".[101] Any positive obligation imposed on the state by section 26 is thus limited by the internal wording of the section and subject to the abovementioned elements.

The implication of this negative/positive rights dichotomy, and more specifically, the positive aspect of section 26, is that they are perceived to require the Court to encroach on the powers of the democratic branches of government by prescribing to them on matters which traditionally fall within the purview of their authority.[102] This gives rise to separation of powers concerns about the Court's capacity and legitimacy.[103] Not only does this positive and negative rights dichotomy lead to the Court adopting an overly-deferential approach to the interpretation of socio-economic rights that require positive state action, it also fails to recognise the positive action required during the enforcement of rights deemed to be negative in nature, like civil and political rights.[104] The courts have had no issue assigning interpretative meaning to the positive obligations imposed on the state by civil and political rights, yet is hamstrung by separation of powers concerns when it comes to giving substantive content to socio-economic rights.[105] The consequence of the arbitrary distinction between negative and positive rights is that interference with existing entitlements (so-called "negative rights") are subject to robust judicial enforcement and can only be limited in terms of the limitations clause,[106] while rights that require positive state action are treated as aspirational, subject to weaker forms of judicial review (cue reasonableness review) and enforcement, and subject to "progressive realisation" and "available resources".[107] For example, the fact that section 26(3) of the 1996 Constitution is couched in negative terms and categorised as negative in nature allows the Court ample room to enforce this right.[108] Moreover, since the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act ("PIE") provides the remedial framework was enacted to give effect to section 26(3) of the 1996 Constitution, judges are afforded greater flexibility (and legitimacy) when enforcing this right.[109] PIE affords judges more room to manoeuvre in eviction matters because it allows

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[101] Para 46.
[102] Liebenberg *Socio-economic Rights* 54.
[103] See chapter 1 § 1 3 3 above.
[104] Liebenberg *Socio-economic Rights* 55. See also § 2 3 3 above. See also Wilson, Dugard & Clarke (2015) *SAJHR* 502.
[105] S Wilson & J Dugard "Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights" (2011) 22 *Stell LR* 664 671,
[106] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 34.
[107] Liebenberg *Socio-economic Rights* 57. See also s 26(2) of the 1996 Constitution.
[108] S 26(3) of the 1996 Constitution states that "[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions." See also *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 34. See also Wilson & Dugard (2011) *Stell LR* 667.
[109] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC) para 7. See also L Chenwi "A New Approach to Remedies in Socio-

courts a wide margin of discretion to determine whether residents may be evicted from land based on justice and equity and relevant circumstances,[110] while the main consideration that is taken into account when addressing matters pertaining to section 26(2) is an elusive reasonableness standard. The implication is that courts are more willing to protect, promote, and fulfil the right not to be arbitrarily evicted because the substance of the right is outlined in PIE, and are wary of providing substantive content to the right of access to adequate housing because it sometimes requires imposing positive obligations on the state.

3 2 6 The Need for Subsequent Development

Two years after the *Grootboom* order was handed down, the order still had not been fully implemented by the government.[111] Pillay has noted that there had been little tangible or visible change in housing policy to cater for people in desperate need or crisis situations in the two years post the order granted in *Grootboom*.[112] The fact that two years had passed, but little was done to the housing policy to cater for those in desperate need or crisis situations illustrates the government's incompetence or intransigence in relation to the protection of the right of access to adequate housing.[113] It took almost a year to establish which organs/institutions were responsible for the implementation of the *Grootboom* order illustrating the government's incompetence to protect the right of access to adequate housing.[114] Even then, the organs/institutions found to be responsible failed to make the necessary policy changes to cater for housing in the short term.[115] Liebenberg also noted that "[t]here was a considerable delay in adopting the programme for urgent housing needs envisaged in the Court's declaratory orders".[116] The programme was only approved in

Economic Rights Adjudication: Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others" (2009) 2 *CCR* 371 376. See also Wilson, Dugard & Clarke (2015) *SAJHR* 478.

[110] S 8(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 states that "[n]o person may evict an unlawful occupier except on the authority of an order of a competent court". See also s 6(3)(a) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 which states that-

"(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to-

(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;

(b) the period the unlawful occupier and his or her family have resided on the land in question; and (c) the availability to the unlawful occupier of suitable alternative accommodation or land". See also S Liebenberg "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'" (2012) 12 *AHRLJ* 1 14.

[111] K Pillay "Implementation of Grootboom: Implications for the enforcement of socio-economic rights" (2002) 6 *Law, Democracy and Development* 255 264. See also Bilchitz (2003) *SAJHR* 25.

[112] Pillay (2002) *Law, Democracy and Development* 268.

[113] Ebadolahi (2008) *NYULR* 1603.

[114] Bilchitz (2003) *SAJHR* 25.

[115] 25.

[116] Liebenberg *Socio-economic Right*s 401.

August 2003 and came into operation in April 2004.[117] According to Pillay, the delay in the implementation of the *Grootboom* order could be attributed to the fact that the Court in *Grootboom* failed to include any timeframes within which the government had to comply with the order.[118] In addition, the Court in *Grootboom* failed to retain supervisory jurisdiction to ensure that government was clear on its responsibilities as set out in the order, and to ensure that the order was implemented.[119] Though the Court stated that the South African Human Rights Commission could supervise the implementation of the order,[120] this was not confirmed in the order, and was accordingly unenforceable. The failure of the Court to retain supervisory jurisdiction meant that holding government accountable for the implementation of the order in *Grootboom* and further challenges to the housing policy needed to be instituted afresh, through costly, time-consuming litigation.[121] Bilchitz had the following to say about a court's failure to retain supervisory jurisdiction:

> "A failure to retain such a supervisory element in the order rather displays an undue deference by the Court to the other branches of government and evinces an unwillingness on its part to retain responsibility for the effectiveness of its orders".[122]

It has been established above that the Court's strict understanding of the separation of powers doctrine dictated the deferential approach adopted in *Grootboom*,[123] and that the deferential approach in *Grootboom* enjoyed some support at the time.[124] However, due to the reverberations of the deferential approach adopted in *Grootboom*, the Court was no longer justified in employing a deferential approach in subsequent housing rights cases.[125] The government's incompetence and intransigence in relation to the fulfilment of the right of access to adequate housing and its unreasonable delay in the implementation of orders designed to protect the right of access to adequate housing eventually necessitated the Court's adoption of a more robust approach in relation to the provision of remedies and its understanding of the separation of powers doctrine in subsequent housing rights cases.[126] Below, the Court's post-*Grootboom* approach will be illustrated with reference to the

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[117] 401. National Housing Code, chapter 12, Housing Assistance in Emergency Housing Situations ('Emergency Housing Programme').
[118] Pillay (2002) *Law, Democracy and Development* 264.
[119] Bilchitz (2003) *SAJHR* 25.
[120] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 97.
[121] Bilchitz (2003) *SAJHR* 25.
[122] 26.
[123] See § 3 2 4 above.
[124] See § 3 2 4 above.
[125] See § 3 4 4 below.
[126] See § 3 4 below.

remedies provided in the housing rights cases post-*Grootboom*. In the discussion below, the factual background and the remedies provided will be analysed.

3 3 The Court's Post-*Grootboom* Approach

3 3 1 Introduction

It has been established above that the separation of powers, as once understood by the anti-constitutionalisers opposing the incorporation of socio-economic rights into the post-apartheid constitutions, dictated the deferential approach in *Grootboom*.[127] It is thus of important to investigate whether there has been any development in the Court's approach to socio-economic rights, especially housing rights, post-*Grootboom*. To determine whether there has been any development in the Court's approach, in the section below, certain housing rights cases post-*Grootboom* will be analysed. Though the facts of the cases below differ, they each interact with the section 26 right of access to adequate housing and are thus of importance for purposes of this study. Below, it will also be determined whether the Court's development has raised separation of powers concerns according to a strict understanding of the separation of powers doctrine.[128] Lastly, if the analysis reveals that there has been development in the Court's approach post-*Grootboom*, and the development raises separation of powers concerns, I will argue that the development was justified in accordance with a contemporary understanding of the separation of powers doctrine and in light of transformative constitutionalism.[129]

3 3 2 Modderklip

In *Modderklip*, the Daveyton township became overcrowded, prompting some of its residents to occupy land between the township and Modderklip's farm, establishing the Chris Hani Informal Settlement.[130] The Ekhuruleni Metropolitan Municipality ("the Municipality") evicted the residents from the Chris Hani Informal Settlement, resulting in about 400 people moving to the Modderklip farm and establishing Gabon Informal Settlement.[131] The Benoni City Council ("the Council") alerted Modderklip to the occupation of its land and gave it notice to institute eviction proceedings.[132] Modderklip refused with the

[127] See § 3 2 4 above.
[128] See § 3 4 1-3 4 3 below.
[129] See § 3 4 4 below.
[130] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC). para 3.
[131] Paras 3 and 8.
[132] S 6(4) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 states that "[a]n organ of state contemplated in subsection (1) may, before instituting such proceedings, give not less than

view that it was the responsibility of the Council to do so.[133] Despite seeking assistance from several organs of state, no help was forthcoming,[134] forcing Modderklip to institute eviction proceedings in the Johannesburg High Court,[135] and when that proved fruitless, Modderklip approached the Pretoria High Court.[136] Since the relief requested by Modderklip was substantially granted by the Pretoria High Court,[137] the state applied for leave to appeal to the Supreme Court of Appeal and eventually,[138] the Constitutional Court.[139]

The remedy granted by the Constitutional Court is quoted in relevant part as follows:

> "3. Save for the costs order made in sub-paragraph (c) of the order of the Supreme Court of Appeal, the order of that Court is set aside and replaced with the following order:
>
> (a) Declaring that the state, by failing to provide an appropriate mechanism to give effect to the eviction order of the Johannesburg High Court, infringed the right of Modderklip Boerdery (Pty) Ltd which is entrenched in section 34 read with section 1(c) of the Constitution.
>
> (b) Declaring that Modderklip Boerdery (Pty) Ltd is entitled to payment of compensation by the Department of Agriculture and Land Affairs in respect of the land occupied by the Gabon Informal Settlement from 31 May 2000.
>
> (c) Declaring that the residents are entitled to occupy the land until alternative land has been made available to them by the state or the provincial or local authority.
>
> (d) The compensation is to be calculated in terms of section 12(1) of the Expropriation Act 63 of 1975".[140]

In *Modderklip*, the relief sought by the applicants was wide-ranging, but at its crux was that the state be ordered to enforce the eviction order granted in the Pretoria High Court.[141] However, instead of enforcing the eviction order as Modderklip sought, the court was innovative in the formulation of its remedy by ordering the state to compensate Modderklip

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14 days' written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier." *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 4.

[133] Para 4.
[134] Para 6.
[135] Para 7.
[136] Para 10.
[137] Para 15 and 16.
[138] Paras 17-21.
[139] Para 22.
[140] Para 68.
[141] Para 11.

for the use of its land;[142] and by entitling the residents to the occupation of Modderklip's land until alternative accommodation was provided by the state.[143] The implication of the Court devising this innovative remedy was that Modderklip's enjoyment of its property was effectively balanced with the residents' right of access to adequate housing.[144]

Moreover, in *Modderklip*, the Court went further than solely issuing a declaratory order to the effect that the state in failing to assist Modderklip infringed on its section 34 constitutional right. After issuing this declaration, the Court did not defer the decision of how to protect the right of access to adequate housing to the executive and legislature.[145] The Court, instead, with reference to these specific facts, specified the general principles that define the obligations placed upon the state by section 26.[146] An example of the general principles presented by Bilchitz would be for a court to find that everyone should have access to accommodation that provides protection from the elements and includes basic services like toilets and running water.[147] The general principle that the Court specified in *Modderklip* was the obligation on the state to provide suitable alternative accommodation following eviction.[148] As opposed to echoing that the state had obligations in terms of the right of access to adequate housing and deferring to the state the determination of what its obligations were in terms of section 26,[149] the Court ordered that the state compensate Modderklip for breaching the enjoyment of its property rights, and pay rent to Modderklip for the continued occupation of its land.[150] Moreover, the Court ordered that the state provide the residents with temporary accommodation. As stated by Brand:

> "[t]he Court made this intrusive order without considering in any meaningful way the substantial resource consequences that its decision would have for the state and the extent to which its order prescribes a particular policy option to the state, in preference to others.

[142] *Fose v Minister of Safety and Security* 1997 3 SA 1 (CC) para 69 states that "[t]he courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal".
[143] S Wilson, J Dugard & M Clarke "Conflict Management in an Era of Urbanisation: 20 Years of Housing Rights in the South African Constitutional Court" (2015) 31 *SAJHR* 472 480.
[144] Wilson, Dugard & Clarke (2015) *SAJHR* 480.
[145] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 41.
[146] Bilchitz (2002) *SALJ* 487.
[147] 488.
[148] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 59.
[149] Bilchitz (2002) *SALJ* 487.
[150] Wilson, Dugard & Clarke (2015) *SAJHR* 480.

> This robust approach … is justified by the Court with reference to the conduct of the state, the landowner and the squatters during the course of the dispute".[151]

The Court in *Modderklip* therefore did not employ the deferential approach adopted in *Grootboom* based on a strict understanding of the separation of powers doctrine. The Court found that the state was ultimately to blame for the residents occupying Modderklip's farm because the residents occupied Modderklip's farm after being evicted from state-owned land without providing alternative accommodation.[152] I argue that the Court in *Modderklip* favoured a more contemporary understanding of the separation of powers doctrine by holding the state accountable to its constitutional duties.[153] Due to the intrusive nature of checks and balances, the more robust approach adopted in *Modderklip* raised separation of powers concerns based on a strict understanding of the separation of powers doctrine.[154]

The argument raised in terms of a strict understanding of the separation of powers doctrine would be that since each branch has authority that, in the main, should not be encroached upon in terms of the separation of powers doctrine,[155] the Court is not empowered to amend budgets and make policy through the remedies it issues because the allocation of budgets and policy formulation falls within the domains of the executive and legislative branches of government.[156] In *Modderklip*, the Court not only ordered that the state pay damages to Modderklip for breaching the enjoyment of its property, it also ordered the state to rent Modderklip's land to guarantee the residents shelter.[157] By ordering the state to alter its budget to rent Modderklip's land and provide temporary accommodation to the residents of Gabon Informal Settlement, the Court favoured a more contemporary reading of the separation of powers doctrine, with a greater focus on accountability (checks and balances) and thus encroached upon the domains of the executive and legislature.

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[151] D Brand Courts, *Socio-Economic Rights and Transformative Politics* LLD Thesis Stellenbosch University (2009) 109.
[152] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 35. See also Brand *Socio-Economic Rights* 109; Wilson, Dugard & Clarke (2015) *SAJHR* 480.
[153] Wilson, Dugard & Clarke (2015) *SAJHR* 480.
[154] See § 3 4 below.
[155] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 183.
[156] Chapter 2 § 2 3 3.
[157] C Ngang "Judicial enforcement of Socio-economic Rights in South Africa and the Separation of Powers objection: The obligation to take 'other measures'" (2014) 14 *AHRLJ* 655 676. See also Brand *Socio-Economic Rights* 109.

3 3 3 Olivia Road

In *Olivia Road*,[158] the City of Johannesburg ("the City") approached the Witwatersrand Local Division of the High Court ("the High Court") seeking the eviction of more than 300 people from six properties in the Johannesburg inner city.[159] The evictions were sought on the basis of section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 ("the NBRA") and section 20(1) of the Health Act 63 of 1977.[160] Notices to vacate the buildings were issued to that effect in terms of section 12(4)(b) of the NBRA. The City sought to secure the eviction of residents from various properties classified as "bad" buildings as part of its Inner-City Regeneration Strategy ("Strategy").[161] The goal of the Strategy was to raise private investment in the inner city leading to a steady rise in property values.[162] The Strategy thus denied the poor access to the inner City of Johannesburg.[163] While the eviction was not granted in the High Court,[164] it was granted in the Supreme Court of Appeal.[165] The residents thus applied for leave to appeal to the Constitutional Court. Two days after the application for leave to appeal was heard, on 30 August 2007,[166] the Constitutional Court issued an interim order obliging the City and the residents to engage meaningfully with a view of resolving the differences between the parties in light of their rights and duties; and to alleviate the plight of the residents affected by the evictions.[167]

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[158] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC).
[159] *City of Johannesburg v Rand Properties (Pty) Limited and Others* 2006 (6) BCLR 728 (W) para 2. The High Court application incorporated the Joel Street Applications, the 197 Main Street Applications, and the San Jose Applications.
[160] S 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 states that "[i]f the local authority in question deems it necessary for the safety of any person, it may by notice in writing, served by post or delivered order any person occupying or working or being for any other purpose in any building, to vacate such building immediately or within a period specified in such notice." S 20(1) of the Health Act 63 of 1977 states that "[e]very local authority shall take all lawful, necessary and reasonably practicable measures-
(a) to maintain its district at all times in a hygienic and clean condition;
(b) to prevent the occurrence within its district of:
(i) any nuisance;
(ii) any unhygienic condition;
(iii) any offensive condition or
(iv) any other condition which will or could be harmful or dangerous to the health of any person within its district or the district of any other local authority, or where a nuisance or condition referred to in sub paragraphs (i) to (iv), inclusive, has so occurred, to abate, or cause to be abated, such nuisance, or remedy, or cause to be remedied, such condition, as the case may be."
[161] *City of Johannesburg v Rand Properties (Pty) Limited and Others* 2006 6 BCLR 728 (W) para 23.
[162] Para 22.
[163] Para 23.
[164] Para 67.
[165] Para 78.
[166] Para 5.
[167] The order was issued on 30 August 2007.

In *Olivia Road*,[168] the Constitutional Court was the first to issue an order for meaningful engagement.[169] The Court obliged the parties to engage to safeguard the dignity of the residents and to balance the interests of both parties.[170] The Court held that since the City was aware that the residents might be rendered homeless by the eviction, and in light of its constitutional obligations to the residents,[171] there was an obligation on it to engage meaningfully with the residents both individually and collectively.[172] The Court additionally found that the City's duty to engage with the residents who might be rendered homeless by the eviction was grounded in section 26(2) of the 1996 Constitution because reasonable municipal conduct includes reasonable engagement.[173] Whether there has been engagement between the parties is also one of the circumstances that are relevant for the court's assessment of whether an eviction is just and equitable in terms of section 26(3) of the 1996 Constitution.[174] In *Olivia Road*, the Court also outlined the criteria for meaningful engagement. These include that the parties engage with each other reasonably and in good faith,[175] proactive solutions should be pursued,[176] civil society should facilitate the engagement process,[177] and the engagement process should be transparent.[178] The Court also stated that:

> "[i]n any eviction proceedings at the instance of a municipality, … the provision of a complete and accurate account of the process of engagement … would ordinarily be essential. The

[168] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC).
[169] Liebenberg *Socio-economic Rights* 418.
[170] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC) para 16.
[171] The Court continued in para 16 that "[t]he City has constitutional obligations towards the occupants of Johannesburg. It must provide services to communities in a sustainable manner, promote social and economic development, and encourage the involvement of communities and community organisations in matters of local government. It also has the obligation to fulfil the objectives mentioned in the preamble to the Constitution to "[i]mprove the quality of life of all citizens and free the potential of each person". Most importantly it must respect, protect, promote, and fulfil the rights in the Bill of Rights. The most important of these rights for present purposes is the right to human dignity and the right to life. In the light of these constitutional provisions a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of the constitutional obligations set out in this paragraph taken together (footnotes omitted)."
[172] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC) para 13. See also L Chenwi "A New Approach to Remedies in Socio-Economic Rights Adjudication: Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others" (2009) 2 *CCR* 371 376.
[173] Paras 17 and 18. See also Chenwi (2009) *CCR* 379.
[174] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 18 and 22. See also S Liebenberg "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'" (2012) 12 *AHRLJ* 1 15.
[175] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC) para 20.
[176] Para 20.
[177] Para 20.
[178] Para 21. See also Liebenberg (2012) *AHRLJ* 16.

> absence of any engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an ejectment order".[179]

The engagement culminated in the conclusion of an agreement between the City and the residents that dealt with measures to make the properties safer and more habitable and obliged the City to provide the residents with alternative accommodation in certain identified buildings.[180] The Court made an order endorsing this agreement.[181] The Court had the following to say about the agreement that was made an order of court:

> "The agreement makes explicit and meticulous provision for measures aimed at rendering both properties "safer and more habitable" in the interim… They include the installation of chemical toilets, the cleaning and sanitation of the buildings, the delivery of refuse bags, the closing of a certain lift shaft and the installation of fire extinguishers… The agreement obliged the City to provide all occupiers with alternative accommodation in certain identified buildings. It defined with reasonable precision the nature and standard of the accommodation to be provided and determined the way in which the rent in respect of this accommodation will be calculated. The agreement obliged all occupiers to move into alternative accommodation … and stipulated that this alternative accommodation is provided "pending the provision of suitable permanent housing solutions" being developed by the City "in consultation" with the occupiers concerned".[182]

The meaningful engagement order issued by the Court resulted in the residents and the City agreeing on measures to make the properties safer and more inhabitable and obliging the City to provide the residents with alternative accommodation of a reasonable standard, contributing to the residents' protection of their right of access to adequate housing.

In addition to the interim order, the Court issued a final order quoted in relevant part as follows:

> "3. The order of the Supreme Court of Appeal is set aside.
>
> 4. The order of the High Court is set aside.

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[179] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC) para 21. See also Liebenberg (2012) *AHRLJ* 17.
[180] Paras 6, 25-26 and 28. Measures included "the installation of chemical toilets, the cleaning and sanitation of the buildings, the delivery of refuse bags, the closing of a certain lift shaft and the installation of fire extinguishers."
[181] Para 27.
[182] Paras 25 and 26.

5. Section 12(6) of the National Building Regulations and Building Standards Act 103 of 1977 is declared to be inconsistent with the Constitution.

6. Section 12(6) of the National Building Regulations and Building Standards Act 103 of 1977 must be read as if the following proviso has been added at the end of it— 'This subsection applies only to people who, after service upon them of an order of court for their eviction, continue to occupy the property concerned'".[183]

The essence of the order is that section 12(6) of the NBRA is inconsistent with the Constitution.[184] Since section 12(6) of the NBRA compelled residents to vacate their homes on 5 March 2011 on pain of criminal sanction in the absence of a court order,[185] the Court found it to be inconsistent with section 26(3) of the Constitution which prohibits eviction unless a court order is issued after considering all relevant circumstances.[186] Following the declaration that section 12(6) of the NBRA was inconsistent with the Constitution, the Court found that it would not be just nor equitable to set section 12(6) aside because it is appropriate to encourage residents to vacate unsafe or unhealthy buildings in compliance with an issued eviction order.[187] The Court subsequently found that section 12(6) should rather provide for a criminal sanction after an eviction order has been issued, in compliance with section 26(3) of the Constitution.[188]

The Court in *Olivia Road* did not defer the decision of how to cure the section to the legislature even though the legislature is the branch responsible for legislation in terms of a strict understanding of the separation of powers doctrine.[189] The Court, after establishing that this was not an instance where there was a myriad of ways to cure the section, issued a reading-in order. [190] The Court issued a reading-in order to the effect that section 12(6) of the NBRA only allowed for criminal sanction after an eviction order was issued.[191] Though there were not a myriad of ways to cure the section, the reading-in order arguably raised separation of powers concerns in terms of a strict understanding of the separation of powers doctrine because the legislature is classically the branch of government that can legitimately

[183] Para 54.
[184] Para 54 part 5.
[185] Para 49.
[186] Para 49.
[187] Para 50.
[188] Para 50. S 26(3) of the 1996 Constitution states that "[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."
[189] Chapter 2 § 2 33.
[190] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC) para 50.
[191] Para 49.

make and.[192] Moreover, it is the branch of government with the necessary expertise to amend legislation.[193] Since making and amending law does not fall within the judiciary's domain, but that of the legislature in terms of the 1996 Constitution, supporters of a strict understanding of the separation of powers doctrine would argue that this decision was an encroachment by the judiciary into the legislative domain.

As stated above, the Court in *Olivia Road* also issued an order for and outlined the requirements of meaningful engagement.[194] The Court outlining the requirements of meaningful engagement was a significant development in the Court's approach because it affirmed the Court's authority to review the adequacy of engagement without engaging in active policy development.[195] The Court, by issuing an order for meaningful engagement was then able to insert itself more deeply into the legislative and policy-development process without usurping the authority of the democratic branches of government.[196] While the Court issuing a meaningful engagement order does not establish substantive constitutional principles for future housing rights litigations to rely on, it ensured that the Court exerted some level of judicial control over the policy or legislation that was developed to enforce housing rights in *Olivia Road*.[197]

The meaningful engagement order issued in *Olivia Road* was thus a significant development in that it facilitated a participatory, contextualised solution to the problem between the parties.[198] The Court, however, failed to address a few other legal issues of systemic significance to occupiers who find themselves in a similar position.[199] These legal issues included whether the notice to vacate issued by the City in terms of section 12(4)(b) of the NBRA constituted administrative action,[200] whether the eviction was subject to the requirements outlined in section 6 of PIE,[201] and whether the City had a reasonable plan for the permanent housing of the occupiers.[202] The two problems with the Court's failure to deal with these legal issues is that similarly placed occupiers aiming to enforce their housing rights must approach courts without knowing the basis of their claim. Would they rely on the

[192] See chapter 2 § 2 3 1 2.
[193] See chapter 2 § 2 3 1 1.
[194] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC) para 25-26.
[195] B Ray "Evictions, Aspiration and Avoidance" (2014) 5 *CCR* 173 191.
[196] Ray (2014) *CCR* 191.
[197] 91. See also Wilson, Dugard & Clarke (2015) *SAJHR* 502.
[198] Liebenberg (2012) *AHRLJ* 17.
[199] 18.
[200] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC) para 39.
[201] Para 38.
[202] Para 33 and 34.

Promotion of Administrative Justice Act 3 of 2000 ("PAJA"),[203] PIE, or section 26(2) to oblige the state to engage with them in eviction matters? Moreover, for access to permanent housing, the same *Olivia Road* residents would have had to institute expensive, time-consuming litigation again for a determination of whether the City had a reasonable plan for its provision, because the Court failed to make that determination in this case.[204] The impact of the Court's approach in this regard is that meaningful engagement is not applied "to resolve broader systemic issues pertaining to housing for the urban poor".[205] While the Court's approach in *Olivia Road* has developed since *Grootboom*, the Court still significantly reduced its remedial role by failing to establish substantive constitutional principles for future housing rights litigations to rely on, and failing to deal with relevant legal issues for fear of separation of powers concerns.

3 3 4 Joe Slovo

The Joe Slovo Settlement started as vacant, undeveloped land owned by the City of Cape Town ("the City").[206] When the land began being occupied in the early 1990s, occupants were repeatedly and forcibly removed and their possessions destroyed, but the occupants inevitably returned.[207] Post-1994, the forced evictions and demolitions ceased, and the City began adopting a more humane attitude to the residents as a result of consultation between the community and the City.[208] The City then started providing the residents with water, then container toilets and basic cleaning facilities.[209] By 2002, the City provided tap water, toilets, refuse removals, roads, drainage and electricity.[210] Despite the provision of these services by the City, the living conditions in the Joe Slovo settlement were lamentable.[211] The residents of Joe Slovo stayed in overcrowded conditions in makeshift accommodation of a poor standard that was fire prone. Moreover, the conditions in the Joe Slovo settlement were unhygienic due to the absence of water-borne sewerage.[212] Due to these conditions, the Joe Slovo settlement was targeted for housing development and reconstruction in terms of the national Breaking New Ground policy ("BNG"), which was aimed at eliminating

[203] Act 3 of 2000.
[204] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC) para 34.
[205] S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic J Hum Rts* 312 328.
[206] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 3 SA 454 (CC) para 20.
[207] Para 20.
[208] Paras 20 and 22.
[209] Para 21.
[210] Para 21.
[211] Para 24.
[212] Para 24.

informal settlements throughout South Africa.[213] In order for the development and reconstruction to take place in terms of the BNG, the residents of the Joe Slovo settlement needed to vacate the area.[214] The residents of Joe Slovo initially approved of and supported the project because they were promised subsidised low rental accommodation during all three phases of development.[215] Once development was underway, the residents learnt that the rent payable for the houses constructed did not accommodate poor people.[216] The residents thus petitioned and protested against the development of and relocation from the Joe Slovo settlement in the Western Cape High Court ("High Court").[217] However, the residents were unsuccessful and the relocation of 4,386 households was ordered in the High Court.[218] The residents consequently sought leave to appeal against this order before the Constitutional Court.[219] Though the order of the Constitutional Court has since been discharged,[220] it is still of particular importance for purposes of this study.

In the Constitutional Court, the residents were ordered to vacate the Joe Slovo settlement but the order to vacate was "conditional upon and subject to the [residents] being relocated to temporary residential units".[221] The Court issued this order because the City's plan according to BNG was to provide the families relocated from Joe Slovo, had they qualified in terms of the state criteria, with permanent accommodation in the newly developed housing.[222] While the residents expressed that promises of housing for poor people was broken, the Court found that they were not deliberately broken, but were the result of changing circumstances.[223] The Court accordingly held that these factors were

[213] Para 25.
[214] Para 29.
[215] Paras 28 and 31.
[216] Para 32. Paras 31-32 state that "[d]uring 2006 - 2007 there was considerable effort to persuade the residents to move to Delft in order to enable Thubelisha Homes to proceed with the development of phase 2 of the project but these efforts failed. The applicants say that while they were initially happy with the project, they later became dissatisfied because of what they called "broken promises". I have already pointed out that there was to be a three-phase development and that poor people were to be provided with subsidised low rental accommodation in all three phases. Indeed, the applicants state that those who voluntarily moved from that part of Joe Slovo settlement intended for phase 1 development were to be allocated houses in phase 1. More specifically, it is said that community leaders were informed that housing in phase 1 would be occupied at rents of between R150 and R300 per month. These proposed payments were acceptable to the applicants. According to the applicants, this promise was broken. In fact, the rent payable in respect of the houses in phase 1 ranged from R600 to R1050 per month. To make matters worse, phase 2 has no housing for poor people in it at all. According to the respondents, it is reasonably feasible to construct only bonded housing in phase 2."
[217] Para 34.
[218] Para 8.
[219] Para 8.
[220] *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others* 2011 7 BCLR 723 (CC).
[221] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 3 SA 454 (CC) para 7, part 7(4) and 7(9).
[222] Para 106.
[223] Para 109.

therefore not sufficient not to grant an order for relocation. Since the residents would not have been left out in the cold by the eviction,[224] the Court granted the eviction, making it subject to their relocation to temporary accommodation.

The Court in this case even went so far as to outline the form that the temporary residential units had to take.[225] The Court in this case significantly defined what constitutes "adequate housing" in the context of temporary housing. In this process, the Court laid down general principles related to the state's obligations flowing from section 26, at least in relation to the form that temporary housing should take. As I indicated in the earlier discussion about *Grootboom* above, one of the points of criticism raised against *Grootboom* was that the Court failed to specify the general principles defining the state's obligations in terms of section 26.[226] Being the chief interpreter of the Constitution, the Court "is responsible for expanding upon the nature of the obligations imposed by constitutional rights".[227] The Court outlining the form that the temporary residential units had to take gave some content to the state's obligations in terms of section 26 in relation to temporary housing. It was thus a significant development in the Court's approach since the Court did not defer this decision to the executive and legislature. In *Joe Slovo*, the Court unequivocally indicated that the obligation on the state in terms of section 26 was to provide temporary residential units built of fire-resistant material with electricity and ablution facilities.[228] The City was thus afforded a clearer picture of what its obligations were in terms of section 26 in relation to temporary housing, making it easier for the judiciary to hold the executive accountable for its conduct in this regard.

Moreover, the residents and the City, including all the other respondents, were ordered to engage meaningfully to reach agreement on a number of issues regarding the relocation.[229] These issues included a date and timetable for the relocation, as well as any other relevant matter.[230] The Court issued the order for meaningful engagement because of

[224] Para 106.
[225] Para 7, part 9 and 10. See also C Mbazira "Grootboom: A paradigm of individual remedies versus reasonable programmes" (2011) 26 *SAPL* 60 79 and S Liebenberg "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'" (2012) 12 *AHRLJ* 1 22.
[226] Bilchitz (2002) *SALJ* 492.
[227] 487.
[228] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 3 SA 454 (CC) para 105.
[229] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 3 SA 454 (CC) para 7, part 7(5) and 7(11). See also Liebenberg (2012) *AHRLJ* 22.
[230] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 3 SA 454 (CC) para 7, part 5.

the requirement to treat the residents with respect and care for their dignity.[231] The Court held that meaningful engagement enables the government to understand the needs and concerns of the residents in order to take the necessary steps to address them.[232] The Court relied on *Olivia Road*, expressing that engagement must precede eviction.[233] Once the engagement resulted in an agreement, the agreement had to be brought before the Court by 7 July 2009 for consideration whether it ought to be made an order of court.[234] The Court in *Joe Slovo* therefore maintained supervisory jurisdiction by providing a timeframe within which the state was required to act. This supervisory jurisdiction was supposed to ensure that the executive had a limited timeframe within which to act and hold the executive accountable by not allowing it to get away with complete passivity as it did post-*Grootboom*.[235]

While the order issued in *Joe Slovo* was supposed to ensure that the parties meaningfully engage, and that the order be implemented according to a timeframe, it failed to do so. The engagement process in *Joe Slovo* was defective, yet the Court concluded that the overall objective of the housing development project outweighed the defects in the engagement process,[236] effectively condoning an inadequate engagement process.[237] The effect being that engagement was used to relay decisions already taken by the City to the residents affected by the eviction.[238] While the Court gave lip service to the *Olivia Road* principle that engagement must precede eviction,[239] the Court departed from the principle by condoning a defective engagement process. While the Court illustrated development in its approach by specifying the form that the temporary housing had to take, and issuing an order for meaningful engagement, the order was still problematic because the issue of permanent housing was left unresolved, and the Court condoned a defective engagement process. The effect was that the residents were not involved in making the decisions that affected them, and the housing that was ultimately (and finally) provided was inhumane.[240]

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[231] Para 238.
[232] Para 238.
[233] Para 166.
[234] Para 7, part 7(7).
[235] See § 3 2 5 and § 3 3 1.
[236] S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic J Hum Rts* 312 326.
[237] Liebenberg (2012) *AHRLJ* 22.
[238] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 3 SA 454 (CC) para 378 (footnotes omitted).
[239] Para 166.
[240] See § 3 3 8 below.

3 3 5 Pheko

In *Pheko*,[241] the Ekurhuleni Metropolitan Municipality ("the municipality"), after conducting investigations and receiving information about the formation of sinkholes in the Bapsfontein area,[242] advised the residents of Bapsfontein that they be relocated.[243] Due to resistance to the relocation, the municipality enlisted the services of the "Red Ants" to demolish the homes of the Bapsfontein residents on 5 March 2011.[244] The residents of Bapsfontein thus applied for urgent relief in the North Gauteng High Court ("the High Court"), to restrain the municipality from unlawfully evicting them, demolishing their homes, and intimidating them to vacate Bapsfontein.[245] Moreover, the residents sought the provision of alternative accommodation to those residents whose homes had been demolished during the eviction.[246] In the High Court, the application was dismissed with costs because the court was of the view that it lacked urgency and the Prevention of Illegal Eviction and Unlawful Occupation of Land Act ("PIE") was not applicable.[247] Having been refused leave to appeal, the applicants sought leave to appeal directly to the Constitutional Court to challenge the decision of the High Court.[248] Before the Constitutional Court, the main question was whether section 55(2)(d) of the Disaster Management Act 53 of 2005 ("DMA") permitted evictions without a court order in emergency situations.[249]

After leave to appeal was granted, the High Court order was set aside and substituted with the order granted in the Constitutional Court set out in relevant part as follows:

> "5. It is declared that the removal of the applicants from their homes, the demolition of the homes, and their relocation by the Ekurhuleni Metropolitan Municipality were unlawful.
>
> 6. The Municipality must identify land in the immediate vicinity of Bapsfontein for the relocation of the applicants and engage meaningfully with them on the identification of the land.

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[241] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC).
[242] Para 5. See also S Wilson, J Dugard & M Clarke "Conflict Management in an Era of Urbanisation: 20 Years of Housing Rights in the South African Constitutional Court" (2015) 31 *SAJHR* 472 497.
[243] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) paras 8 and 11. See also Wilson, Dugard & Clarke (2015) *SAJHR* 497.
[244] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) paras 4 and 11. See also Wilson, Dugard & Clarke (2015) *SAJHR* 497.
[245] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 12.
[246] Para 12.
[247] Act 19 of 1998. *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 15.
[248] Para 2.
[249] Act 57 of 2002. See also Wilson, Dugard & Clarke (2015) *SAJHR* 497.

7. The Municipality must ensure that the amenities provided to the applicants and people resettled in terms of this order are no less than the amenities and basic services provided to them as a result of the relocation of March 2011.

8. The Municipality must file a report in this Court confirmed on affidavit by no later than 1 December 2012 regarding steps taken in compliance with paragraph 6 of this order to provide access to adequate housing for the applicants.

9. The applicants may, within 15 days of the filing of the Municipality's report, lodge affidavits in response to the report".[250]

Though this order has also been discharged,[251] it is of importance for purposes of this study as explained below. In part 5 of the order, the Court declared that the removal of Bapsfontein residents and demolition of their homes was unlawful because it was done in the absence of a court order on the basis of section 55(2)(d) of the DMA. The Court found that the municipality was seeking the permanent eviction of the residents from Bapsfontein using the DMA, and that the DMA does not authorise eviction or demolition without a court order.[252] The Court thus held that the Municipality acted outside of the authority of the DMA and contrary to section 26(3) of the Constitution by evicting the residents of Bapsfontein from and demolishing their homes without a court order.[253] In *Pheko*, the Court did not fulfil a solely reviewing role, but also provided appropriate relief to the residents by mandating the municipality to identify land, to engage with the residents regarding the identification of land for their relocation, and to ensure that amenities and basic services be provided to the residents in part 6 of the order. The Court reached this conclusion with reference to its authority in terms of section 172(1)(b) to make any order that is just and equitable.[254] Since the Court found the eviction and demolition to be unlawful, and the Court can issue any order that is just and equitable, the Court held that the municipality was under an obligation to provide the residents of Bapsfontein with suitable temporary accommodation.[255] In *Pheko*, the Court gave content to the obligations placed upon the municipality in relation to temporary accommodation, thus ensuring that the municipality was certain of its

[250] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 53.
[251] See *Pheko and Others v Ekurhuleni Metropolitan Municipality and Others* (No 3) [2016] ZACC 20.
[252] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) paras 38 and 45. See also Wilson, Dugard & Clarke (2015) *SAJHR* 498.
[253] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 45. S 26(3) of the 1996 Constitution states that "[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions." See also Wilson, Dugard & Clarke (2015) *SAJHR* 498.
[254] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 48.
[255] Para 49.

responsibilities toward the residents in this regard.[256] The Court did not just leave the municipality with the amorphous reasonable standard with which to judge its own conduct, but by defining its obligation to provide temporary housing, provided the municipality with clear benchmarks to fulfil the right of access to adequate housing in relation to temporary accommodation.[257]

In parts 7 and 8 of the order, the Court retained supervisory jurisdiction after submitting that it was uncertain how long it would take for the municipality to identify land.[258] In *Pheko*, the Court therefore placed a time limit on the municipality's actions and ensured that its order was implemented by retaining supervisory jurisdiction.[259] In doing so, the Court did not allow too much leeway for delay and inefficiency in the provision of the residents most basic needs.[260] Though a decision by a Court to supervise the implementation of its order raises separation of powers concerns in terms of a strict understanding of the separation of powers doctrine because of the Court's supposed interference in the other branches of government, the Court was justified in adopting this approach to the provision of remedies in accordance with a contemporary understanding of the separation of powers doctrine, as explained above.[261]

3 3 6 Schubart Park

In *Schubart Park*,[262] a residential complex had markedly deteriorated, and the water and electricity supply were stopped.[263] On 21 September 2011, a number of residents then protested about the living conditions at the complex.[264] During the protest, two localised fires broke out in two blocks of the building.[265] Thereafter, the police cordoned off the streets around the complex, removed the residents from and denied them access to the complex, without a court order.[266] On 22 September 2011, after fruitless negotiations between the legal representatives of the residents and officials from the City of Tshwane Metropolitan Municipality ("the City") about, *inter alia*, temporary accommodation for the people who were

[256] Bilchitz (2002) *SALJ* 487.
[257] Bilchitz (2003) *SAJHR* 10.
[258] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 50.
[259] Bilchitz (2003) *SAJHR* 5.
[260] 5.
[261] See § 3 3 above.
[262] *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 1 BCLR 68 (CC).
[263] Para 2.
[264] Para 3.
[265] Para 3.
[266] Paras 3, 17, 18, 30, 34 and 39.

left out in the streets by the police action,[267] the residents brought an urgent application before the North Gauteng High Court ("the High Court") seeking an order to allow them to return to their homes.[268] The application for re-occupation was dismissed in the High Court.[269] When the parties approached the High Court the next day on 23 September 2011, a second order was issued upholding the temporary arrangement of the previous day's order, and the matter was postponed to 3 October 2011.[270] The following week, the residents who remained in the buildings during the police action of 21 September 2011 were also forcibly removed.[271] By the end of September 2011, between 3000 and 5000 people were either on the streets or in temporary shelter because the High Court was of the opinion that re-occupation of the building would endanger the lives of the residents.[272] The residents sought leave to appeal to the Constitutional Court after leave to appeal was refused by both the High Court and the Supreme Court of Appeal.[273] Since the eviction and refusal of re-occupation in the High Court rendered the residents homeless, before the Constitutional Court, the residents sought leave to introduce further evidence proving that the condition of the buildings did not endanger their lives; that the High Court orders be set aside; and declaratory orders declaring that their removal from and refusal of re-occupation of the buildings were unlawful; that the residents be allowed to return to their homes and the City be ordered to reconnect the water and electricity.[274] This case concerned the right under section 26(3) of the 1996 Constitution.[275]

After leave to appeal was granted,[276] the Constitutional Court granted the following order (quoted in relevant part):

> "4. It is declared that the High Court orders did not constitute an order for the residents' eviction as required by section 26(3) of the Constitution and that the residents are entitled to occupation of their homes as soon as is reasonably possible.

[267] Para 3.
[268] Para 5.
[269] Para 6.
[270] Para 7.
[271] Para 8.
[272] Paras 8 and 13.
[273] Para 10.
[274] Para 10.
[275] S 26(3) of the 1996 Constitution states that "[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions". *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 1 BCLR 68 (CC) para 17.
[276] *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 1 BCLR 68 (CC) para 17.

> 5. The applicants and the City of Tshwane Metropolitan Municipality must, through their representatives, engage meaningfully with each other in order to give effect to the declaratory order in paragraph 4 above.
>
> 7. The parties must on affidavit report to the High Court by 31 January 2013 on what agreement has been reached in respect of paragraphs 5.1, 5.2, 5.3, 5.4 and 5.6 above".[277]

After concluding that none of the High Court orders could serve as a justification for the eviction of the residents from their homes,[278] in part 4 of the order, the Constitutional Court issued an order declaring that the three High Court orders did not constitute eviction orders as required by section 26(3) of the Constitution. None of the High Court orders permitted the residents to re-occupation of their homes and failed to make clear that its refusal to order re-occupation did not lay the foundation for lawful eviction under section 26(3) of the Constitution.[279] This failure necessitated the Court's declaration that none of the High Court orders could serve as a justification for the eviction of the residents from their homes. The Court additionally held that the removal of the residents from their homes was temporarily necessary in order to save their lives,[280] and thus declared that the residents were entitled to re-occupation of their homes as soon as reasonably possible.

In *Schubart Park*, since the matter was argued on the basis of section 26(3), the Court was afforded more leeway to stringently evaluate whether the eviction by the City was just and equitable after considering all the relevant circumstances.[281] The Court ordered meaningful engagement because meaningful engagement with affected residents enabled the City to understand their needs and concerns so that steps could be taken to address them.[282] The Court in part 5 of the order also specified what the residents and the City had

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[277] Para 53. Para 53 part 5 also stated that "[t]he engagement must occur with a view to reaching agreement on:
5.1. the identification of the residents who were in occupation of Schubart Park before the removals that started on 21 September 2011;
5.2. the date when the identified residents' occupation of Schubart Park will be restored;
5.3. the manner in which the City will assist the identified residents in the restoration of their occupation of Schubart Park;
5.4. the manner in which the identified residents will undertake to pay for services supplied to Schubart Park by the City on restoration of occupation;
5.5. alternative accommodation that must be provided to the identified residents by the City until restoration of their occupation of Schubart Park; and
5.6. a method of resolving any disagreements in relation to the issues mentioned in 5.1 to 5.5. 6. The parties must on affidavit report to the High Court by 30 November 2012 on what plans have been agreed upon to provide alternative accommodation to the identified residents in terms of paragraph 5.5 above."
[278] Para 30.
[279] Para 38.
[280] Para 41.
[281] S 26(3) of the 1996 Constitution.
[282] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 3 SA 454 (CC) para 238.

to reach agreement on. The implication of the Court issuing a meaningful engagement order was that those affected by the violation of their section 26 right could participate in the implementation of the remedy being the restoration of their occupation.[283] The Court in this case did not defer to another branch of government how the rights violation should be remedied for the following reasons. First, since the matter concerned section 26(3),[284] PIE outlined the remedial framework. PIE clearly states the considerations the Court must take into account when determining when an eviction is just and equitable,[285] and that if an eviction is not just and equitable, and a court order is not granted, the eviction is prohibited.[286] Second, the Court was not required to outline the positive obligations placed on the City as would have been the case if the matter concerned section 26(2). Had it concerned section 26(2), the Court may have deferred the decision of what positive obligations the section places on the state. The Court maintained supervisory jurisdiction over the implementation of its order. In part 6 and 7 of the order, the Court obliged the parties to report back on the outcome of the engagement by a certain date. The Court also imposed a deadline on the state for the implementation of the order and the restoration of the resident's occupation, preventing the state from unreasonably delaying the implementation of the Court's order, and leaving the residents affected by the removal remediless. This part of the order too raised separation of powers concerns in terms of a strict understanding of the separation of powers doctrine which will be discussed later in the chapter.[287]

3 3 7 Blue Moonlight

In *Blue Moonlight*,[288] 86 people occupied old and dilapidated buildings which was the property of Blue Moonlight.[289] Blue Moonlight as the owner wished to develop its property,[290] and thus instituted eviction proceedings in the South Gauteng High Court ("High Court") in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act ("PIE") on 25 May 2006.[291] The residents opposed the eviction application on the basis that it would

[283] S Liebenberg "Remedial Principles and Meaningful Engagement in Education Rights Disputes" (2016) 19 *PER/PELJ* 1 6.
[284] *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 1 BCLR 68 (CC) para 17.
[285] S 4(6) and 6(3) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
[286] S 8(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
[287] See § 3 4 below.
[288] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 2 SA 104 (CC).
[289] Para 1.
[290] Para 3.
[291] Act 19 of 1998. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 2 SA 104 (CC) para 11.

render them homeless.[292] In the High Court, it was found that the City's housing policy as set out in its 2010 Housing Report only made provision for temporary housing to occupiers evicted from state-owned land, and not private land.[293] The High Court thus found the City's housing policy unconstitutional to the extent that it discriminated against people rendered homeless by evictions from private land; and ordered the City to remedy the defect in terms of a structural interdict.[294] The High Court issued the eviction order for 31 March 2010, and ordered the City to pay Blue Moonlight monthly rental for the continued occupation from 1 July 2009 until the eviction date.[295]

On 30 March 2011, the Supreme Court of Appeal ("SCA") set aside the High Court's structural interdict, and the compensation order awarded in favour of Blue Moonlight.[296] However, the eviction order was upheld, and the residents were ordered to vacate Blue Moonlight's property by 1 June 2011. The SCA additionally upheld the declaration of unconstitutionality and required the City to provide the residents with temporary emergency accommodation.[297] The City appealed to the Constitutional Court the parts of the SCA order that declared its housing policy to be unconstitutional and that obliged the City to provide accommodation to the residents.[298] The crucial question before the Constitutional Court was whether it was just and equitable to evict the residents considering all the circumstances, including the availability of other land, as well as the date on which the eviction must take place on the basis of section 26(3) of the 1996 Constitution and PIE.[299] The Constitutional Court issued an order which provides (in relevant part):

> "(e) Paragraphs 5.1 to 5.4 of the order of the Supreme Court of Appeal are set aside and replaced with the following:
>
> > "(i) The first respondent in the South Gauteng High Court, Johannesburg and all persons occupying through them (collectively, the Occupiers) are evicted from the immovable property situate at Saratoga Avenue, Johannesburg, and described as Portion 1 of Erf 1308, Berea Township, Registration Division IR, Gauteng (the property).

[292] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 2 SA 104 (CC) para 11.
[293] Para 13.
[294] Para 12.
[295] Para 12.
[296] Para 13.
[297] Para 13.
[298] Para 14.
[299] Para 30. See also Wilson, Dugard & Clarke (2015) *SAJHR* 485.

> (ii) The Occupiers are ordered to vacate the property by no later than 15 April 2012, failing which the eviction order may be carried out.
>
> (iii) The housing policy of the second respondent in the South Gauteng High Court, Johannesburg, the City of Johannesburg Metropolitan Municipality, is declared unconstitutional to the extent that it excludes the Occupiers and other persons evicted by private property owners from consideration for temporary accommodation in emergency situations.
>
> (iv) The City of Johannesburg Metropolitan Municipality must provide those Occupiers whose names appear in the document entitled 'Survey of Occupiers of 7 Saratoga Avenue, Johannesburg' filed on 30 April 2008 with temporary accommodation in a location as near as possible to the area where the property is situated on or before 1 April 2012, provided that they are still resident at the property and have not voluntarily vacated it".[300]

In parts (i) and (ii) of the order, the Court issued the eviction order because it held that a property owner cannot be expected to provide free housing on its property for an indefinite period,[301] but rather that the duty created by section 26 falls on the state.[302] As opposed to solely granting the eviction order, and deferring to the City the determination of how to address the ensuing homelessness of the residents post the eviction, the Court obliged the City to provide the residents with temporary accommodation following the eviction.[303] The City, however, argued that it should not have been held responsible for the provision of accommodation because the eviction was sought by Blue Moonlight as a private landowner.[304] The City relied on its housing policy which differentiated between residents relocated by the City and those evicted by private landowners.[305] In terms of the policy, temporary accommodation was not available to residents evicted by private landowners, only those evicted by the state.[306] Since this differentiation was in violation of the residents' right to equality,[307] the Court declared the housing policy to be unconstitutional.[308] After

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[300] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 2 SA 104 (CC) para 104.
[301] Para 40.
[302] Para 42.
[303] Bilchitz (2002) *SALJ* 487.
[304] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 2 SA 104 (CC) para 32. See also Wilson, Dugard & Clarke (2015) *SAJHR* 485.
[305] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 2 SA 104 (CC) para 76. S 25(1) of the 1996 Constitution states that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."
[306] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 2 SA 104 (CC) paras 79-80 and 94.
[307] Para 84.
[308] Para 95. See also Wilson, Dugard & Clarke (2015) *SAJHR* 485.

finding that the exclusion from access to temporary accommodation to those evicted by private landowners was unreasonable and unconstitutional,[309] the Court ordered the City to provide temporary accommodation for the residents. Though the City alternatively argued that it lacked the necessary resources to provide the residents with temporary accommodation and it thus became the responsibility of provincial government to provide such temporary accommodation,[310] the Court obliged the City to fund itself in the sphere of emergency housing.[311]

By disallowing the City to circumvent its obligations to the residents in terms of section 26, and effectively interfering in budgetary allocations of the City, the Court once more illustrated development in its approach to the provision of remedies in housing rights cases its understanding of the separation of powers doctrine post-*Grootboom*. However, the Court's approach in *Blue Moonlight* was not without its shortcomings. During the judgement, the Court, contrary to *Olivia Road* and *Joe Slovo*, failed to give effect to the City's obligation to meaningfully engage with the residents affected by the eviction.[312] Moreover, the Court failed to maintain oversight of the implementation of its order.[313] The effect was that after the judgement was issued, despite multiple attempts by the residents' lawyers to begin discussions with the City about alternative accommodation, no engagement took place, and two days before the eviction order was due to be executed, the City still had not provided accommodation to the residents.[314] To add insult to injury, this was after the residents approached the Court on an urgent basis requesting that it compel the City to engage meaningfully with the residents,[315] and the Court dismissed the application, concluding that no urgency existed regarding housing development.[316] After the residents approached the South Gauteng High Court ("High Court") on an urgent basis, the High Court *inter alia* temporarily suspended the execution of the eviction order and ordered the City to provide shelter to the residents by 30 April 2012.[317] While this seemed like a victory for the residents, the first shelter, the Ekuthuleni accommodation, was gender-segregated and imposed a lock-out during the day.[318] At the second shelter, the MBV Building, to be allocated a space,

[309] Wilson, Dugard & Clarke (2015) *SAJHR* 486.
[310] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 2 SA 104 (CC) para 49.
[311] Paras 50 and 53. See also Wilson, Dugard & Clarke (2015) *SAJHR* 485-486.
[312] J Dugard "Beyond Blue Moonlight: The Implications of Judicial Avoidance in Relation to the Provision of Alternative Housing" (2013) 5 *CCR* 265 270.
[313] Dugard (2013) *CCR* 270.
[314] 271.
[315] 269.
[316] 270.
[317] 271.
[318] 271.

residents had to sign sworn affidavits at the police station stating that they could afford the R600 per month rental fee.[319] The lack of meaningful engagement, delays in enforcing the court order and provision of problematic accommodation all could have been avoided,[320] had the Court played a supervisory role, issued an order for meaningful engagement and provided substantive content to the right of access to adequate housing.[321] The outcome of all of the post-*Grootboom* cases illustrates that the Court still has some way to go in its approach to the enforcement and protection of housing rights.[322]

3 4 The Court's Post-*Grootboom* Approach and Separation of Powers Concerns

3 4 1 Introduction

In the preceding sections of this chapter, I aimed to illustrate that the strict understanding of the separation of powers doctrine dictated the deferential approach in relation to the provision of remedies adopted by the Court in *Grootboom*.[323] Thereafter, I aimed to illustrate that the Court indicated a move away from its deferential approach in subsequent housing rights cases.[324] The post-*Grootboom* approach involved the Court issuing remedies like orders for meaningful engagement and mandatory orders for the provision of benefits or services. It also involved the Court being more assertive in the exercise of its interpretative and remedial role by providing substantive content to section 26 regarding temporary housing and by maintaining supervisory jurisdiction irrespective of potential implications for the other branches of government. Though the post-*Grootboom* approach was necessary for the respect, protection, promotion, and fulfilment of the right of access to adequate housing, the remedies provided by the Court post-*Grootboom* has raised separation of powers tensions in terms of the strict understanding of the separation of powers doctrine. Since these separation of powers tensions was briefly discussed in chapter 2,[325] how the post-*Grootboom* approach raised separation of powers tensions will be explored below. Lastly, it will be illustrated that though the post-*Grootboom* approach raised separation of

[319] 271.
[320] The accommodation that the City provided led to a string of litigation. See *Dladla and Others v City of Johannesburg and MES*, South Gauteng High Court 01-12-2017 case no: 39502/2012; *Changing Tides v Unlawful Occupiers*, South Gauteng High Court 14-06-2012 case no: 14225/2011; *City of Johannesburg v Changing Tides* 74 (Pty) Ltd, *Unlawful Occupiers of Tikwelo House*, No 48 and 50 Davies Street, Doornfontein, Johannesburg and others (2012) ZASCA 116, 2012 6 SA 294 (SCA); *Mthimkulu and Another v Mahomed and Others* (2010) ZAGPJHC 125, 2011 6 SA 147 (GSJ).
[321] Dugard (2013) *CCR* 271. See also Wilson, Dugard & Clarke (2015) *SAJHR* 502.
[322] 278-279.
[323] See § 3 2 4 above.
[324] See § 3 3 above.
[325] See chapter 2 § 2 3 1.

powers tensions based on a strict understanding of the separation of powers doctrine, it was justified in light of a contemporary understanding of the separation of powers.

3 4 2 Mandatory Orders for Meaningful Engagement

In several of the housing rights cases post-*Grootboom*, the Court issued a mandatory order for meaningful engagement.[326] While the Court in *Grootboom* only briefly referred to the necessity of engagement between the parties,[327] in the cases post-*Grootboom,* the Court specifically ordered the parties to engage.[328] The Court did this because an eviction without meaningful engagement is broadly at odds with the constitutional obligation to respect, protect, promote and fulfil the rights in the Bill of Rights;[329] as well as the right to human dignity and the right to life.[330] The Court in *Olivia Road* ordered meaningful engagement after it found that the duty to engage with those who could be rendered homeless by an eviction was rooted squarely in section 26(2) of the Constitution, because the reasonable measures referred to in this section encompasses meaningful engagement.[331] Liebenberg has observed that a meaningful engagement order is a remedy crafted by the courts to provide effective relief for constitutional rights violations whilst avoiding undue intrusion into the policy-making discretion of the executive and legislative branches of government.[332] Meaningful engagement surmounts separation of powers concerns by giving the government sufficient leeway for policy decisions while maintaining transparency and accountability.[333] Moreover, Chenwi has observed that meaningful engagement aligns with the 1996 Constitution's vision of participatory democracy by fostering participation by those faced with eviction.[334] As expounded on in chapter two, courts issuing mandatory orders could bring the capacity and legitimacy of the Court and its decisions as separation of

[326] See § 3 3 2, § 3 3 3, § 3 3 4 and § 3 3 5 above.
[327] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 87 states that "[t]he respondents began to move onto the New Rust land during September 1998 and the number of people on this land continued to grow relentlessly. I would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation. I would have also thought that some effort would have been made by the municipality to resolve the difficulty on a case-by-case basis after an investigation of their circumstances before the matter got out of hand. The municipality did nothing and the settlement grew by leaps and bounds."
[328] See § 3 4 1 above.
[329] S 7(2) of the 1996 Constitution.
[330] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC) para 16. See also L Chenwi "A New Approach to Remedies in Socio-Economic Rights Adjudication: Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others" (2009) 2 *CCR* 371 381.
[331] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC) para 17.
[332] Liebenberg 2016 *PER/PELJ* 10.
[333] Chenwi (2009) *CCR* 382. See also B Ray "Proceduralisation's Triumph and Engagement's Promise in Socio-Economic Rights Litigation" (2011) 27 *SAJHR* 107 109.
[334] Chenwi (2009) *CCR* 381. See also Ray (2011) *SAJHR* 107 113.

powers concerns into question.[335] However, the issuing of the meaningful engagement order in *Olivia Road* illustrates how the Court balanced respect for the separation of powers doctrine with its responsibility to craft an innovative remedy by affording the parties with a broad discretion to determine, through engagement, the policy measures required to remedy the rights violation.[336] The Court issuing a meaningful engagement order resulted in the Court fulfilling its constitutional mandate to provide appropriate relief whilst providing the relevant state organs with sufficient leeway to resolve the housing dispute.[337]

3 4 3 Mandatory Orders for the Provision of Benefits or Services

In *Modderklip*,[338] the Court issued a mandatory interdict for compensation. The Court held that Modderklip was entitled to compensation because the residents were entitled to occupy Modderklip's land until alternative land was made available by the state.[339] This compensation award afforded the state some time to make alternative land available to the residents to prevent them from being rendered homeless after ceasing occupation of Modderklip's land, whilst compensating Modderklip for the continued occupation of its land.[340] This remedy, raised separation of powers concerns in terms of a strict understanding of the separation of powers doctrine, namely judicial capacity, because the Court had to evaluate how public funds had to be spent, and how much public funds needed to be spent.[341] The Court obliging the state to pay rent to Modderklip raised separation of powers concerns because the state would have had to re-allocate its budget to do so, and budgetary allocations fall within the domain of the executive.[342] Similarly, the Court obliging the state to avail alternative land to the residents raised separation of powers concerns because resource allocations also fall within the domain of the executive.[343] The Court issuing a mandatory interdict for compensation against the state was thus an encroachment into the executive domain in terms of a strict understanding of the separation of powers doctrine.[344]

In *Joe Slovo*,[345] the Court issued a mandatory order to the effect that the City provide low-cost government housing at low rental to current residents of Joe Slovo, and previous

[335] See chapter 2 § 2 3 3.
[336] Liebenberg (2016) *PER/PELJ* 10.
[337] Chenwi (2009) *CCR* 373.
[338] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).
[339] See § 3 3 1 above.
[340] See § 3 3 1 above.
[341] Chapter 2 § 2 3 2.
[342] Chapter 2 § 2 4 3.
[343] Chapter 2 § 2 3 3.
[344] Chapter 2 § 2 4 3.
[345] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 3 SA 454 (CC).

residents of Joe Slovo that moved after being requested to do so by the City.[346] The Court issued this order because the City had promised the residents that 70% of the houses built in Joe Slovo would be allocated to current Joe Slovo residents, and that they would be relocated to temporary residential units,[347] but this promise was not kept during phase 1 and 2 of the building project.[348] Although the City maintained that it had not kept this promise due to circumstances beyond their control,[349] it was necessary that the Court grant this order to hold the City accountable to its constitutional obligations in terms of section 26. The Court *Joe Slovo* even went so far as to outline the form that the temporary residential units had to take,[350] and in addition, made provision for the allocation of permanent housing.[351] This order raised separation of powers concerns in terms of a strict understanding of the separation of powers doctrine by obliging the City to amend its budget and re-allocate the funds necessary to provide the residents of Joe Slovo with temporary and alternative accommodation. Since budgetary allocations classically fall within the purview of the executive's authority, this order was an encroachment into the executive's domain in terms of a strict understanding of the separation of powers doctrine.[352]

In *Pheko*,[353] the Court obliged the municipality to identify and provide land for the relocation of the residents from Bapsfontein because the municipality kept trying to place this obligation on provincial government.[354] The Court obliging the municipality to file a report to Court about the steps taken to provide access to adequate housing for the residents of Bapsfontein, as stated above, resulted in the Court retaining supervisory jurisdiction.[355] These orders raised separation of powers tensions in terms of a strict understanding of the separation of powers doctrine because of the budgetary and policy implications for the executive and legislature. The municipality would have had to self-fund and re-allocate its budget in order to provide land for the relocation of the Bapsfontein residents. Moreover, the Court's supervisory role could have been construed by some as excessive interference with the government's implementation of the Court's order,[356] which is in direct contrast to the

[346] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 3 SA 454 (CC) para 7, part 17.
[347] Para 178.
[348] Para 33. See § 3 3 3 above.
[349] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 3 SA 454 (CC) para 110.
[350] Para 7, part 9 and 10.
[351] Para 7, part 7(16).
[352] Chapter 2 § 2 3 3.
[353] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC).
[354] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 50.
[355] See § 3 3 4 above.
[356] Bilchitz (2003) *SAJHR* 25.

functional boundaries between the three branches of government in terms of a strict understanding of the separation of powers doctrine.[357]

The remedy in *Blue Moonlight* also raised separation of powers tensions in terms of a strict understanding of the separation of powers doctrine because of the budgetary and policy implications for the state. The budgetary implications for the state were raised when the Court found that even if financial assistance was refused by provincial government,[358] the City was entitled to self-fund during emergency situations.[359] Stated differently, the City needed to re-arrange its budget and when necessary, self-fund to provide temporary accommodation to those rendered homeless by evictions.[360] The policy implications for the state were raised when the Court declared the housing policy unconstitutional to the extent that it excluded residents evicted by private landowners from access to temporary accommodation. The City accordingly needed to amend its policy by removing the differentiation between residents evicted by the state and those evicted by private landowners.

3 4 4 Declarations of Invalidity

In *Olivia Road*,[361] the Court declared section 12(6) of the NBRA to be inconsistent with the Constitution and issued a reading-in order to cure its unconstitutionality.[362] Since section 12(6) of the NBRA permitted eviction in the absence of a court order, while section 26(3) of the Constitution expressly prohibits eviction without a court order, the Court held that section 12(6) of the NBRA was inconsistent with the Constitution and thus unconstitutional.[363] Though the Court was authorised to issue a declaration of unconstitutionality in terms of section 172 of the Constitution,[364] the Court issuing this declaration raised separation of powers concerns in terms of a strict understanding of the separation of powers doctrine because the legislature is the governmental branch responsible for enacting legislation giving effect to rights in terms of the 1996 Constitution.[365] The Court's capacity, as a separation of powers concern, is brought to the fore because the formulation and

[357] Chapter 2 § 2 3 3.
[358] See § 3 3 6 above.
[359] See § 3 3 6 above.
[360] See § 3 3 6 above.
[361] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC).
[362] See § 3 2 3 above.
[363] See § 3 2 3 above.
[364] Chapter 2 § 2 4 2.
[365] Chapter 2 § 2 4 3.

introduction of law is primarily within the domain and area of expertise of the legislature.[366] The reading-in order raised separation of powers concerns because though enacting legislation is not within the purview of the judiciary's authority,[367] the Court cured the legislative defect. The Court's legitimacy as a separation of powers concern is thus brought to the fore because the legislature is a democratically elected branch of government that is directly accountable to the citizenry, while the judiciary is not.[368] However, though legislation falls within the legislature's area of expertise, when any law or conduct is inconsistent with the Constitution, a court must declare the law or conduct invalid to the extent of its inconsistency.[369] The Court was therefore well within its purview of authority by issuing the declaration of invalidity. Moreover, due to the Court's duty to provide appropriate relief,[370] the Court was justified in stepping into the law-making domain of the legislature because "[this was] not a case in which there [were] a myriad ways in which the legislature could cure … section 12(6) of the National Building Regulations and Building Standards Act 103 of 1977".[371] Had there been a number of ways to cure the section, the Court would have been under an obligation to defer it to the legislature and allow the legislature sufficient discretionary leeway to cure it because law-making, in terms of a strict understanding of the separation of powers doctrine, falls within the domain of the legislature.[372] However, upon finding that section 12(6) of the NBRA was inconsistent with the Constitution, the Court is obliged to declare it invalid to the extent of its inconsistency.[373] The judicial "intrusion" was therefore constitutionally mandated.

In *Blue Moonlight*,[374] the Court declared that the City's housing policy was unconstitutional to the extent that it excluded residents evicted by private landowners from consideration for temporary accommodation in emergency situations.[375] The Court issued this order because in terms of the housing policy, only residents evicted from land owned by the state had access to temporary accommodation,[376] and this differentiation was in contravention of section 9 and section 26 of the Constitution.[377] This order raised separation

[366] Chapter 2 § 2 3 3.
[367] Chapter 2 § 2 3 3.
[368] Chapter 2 § 2 3 3.
[369] S 172(1)(a) of the 1996 Constitution.
[370] Chapter 2 § 2 4 1.
[371] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC) para 51.
[372] Chapter 2 § 2 3 3.
[373] S 172(1)(a) of the 1996 Constitution.
[374] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 2 SA 104 (CC).
[375] See § 3 3 6 above.
[376] See § 3 3 6 above.
[377] See § 3 3 6 above.

of powers concerns in terms of a strict understanding of the separation of powers doctrine because the formulation of policy falls within the domain of the executive,[378] yet the Court could declare it invalid because of its authority in terms of section 172 of the Constitution.[379] After the Court found that the City's housing policy's exclusion from access to temporary accommodation to those evicted by private landowners was unreasonable and unconstitutional, the Court ordered the City to provide temporary accommodation for the residents.[380] The Court issued this order because the City maintained that since it lacked the necessary resources to provide the residents with temporary accommodation, it became the responsibility of provincial government.[381] The Court disagreed with this submission and accordingly ordered the City to provide the residents with temporary accommodation. This order raised budgetary implications for the City when the Court found that even if financial assistance was refused by provincial government,[382] the City was obliged to self-fund during emergency situations.[383] Stated differently, the City needed to re-arrange its budget and when necessary, self-fund to provide temporary accommodation to those rendered homeless by evictions.[384] This too constituted an encroachment by the judiciary into the domain of the executive in terms of a strict understanding of the separation of powers doctrine.[385]

3 5 Post-*Grootboom* Observations

3 5 1 The Limits of the Court's Role

While the Court's post-*Grootboom* approach is more in line with a contemporary understanding of the separation of powers doctrine, it is important to note the limits of this approach, and of the Court's role.[386] First and foremost, the Court's post-*Grootboom* approach, while more in line with the role of the Court envisaged by the 1996 Constitution, is arguably more "inclusionary" rather than fully "transformative" in nature.[387] Wilson, Dugard

[378] Chapter 2 § 2 3 3.
[379] Chapter 2 § 2 4 2.
[380] See § 3 3 6 above.
[381] See § 3 3 6 above.
[382] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 2 SA 104 (CC) paras 50 & 96.
[383] Para 57. S 139(1) and (4) of the 1996 Constitution states that the Municipality is a local level of government that fulfils both executive and legislative obligations.
[384] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 2 SA 104 (CC) para 63.
[385] Chapter 2 § 2 4 3.
[386] K Young "The New Managerialism: Courts, Positive Duties, and Economic and Social Rights" (2021) *Boston College Law School Faculty Papers* 1 13.
[387] C Albertyn "Substantive Equality and Transformation in South Africa" (2017) 23 *SAJHR* 2 253 256.

and Clarke consider the Court to have concerned itself with the resolution of conflict by developing frameworks within which housing disputes can be resolved on an equitable basis to protect vulnerable residents.[388] In this way, residents are (in principle) included in the determination of their fate in housing rights disputes.[389] The Court's post-*Grootboom* approach is more inclusionary in that it remedies infringements of the right of access to adequate housing whilst leaving the underlying conditions that generate these infringements untouched.[390] Moreover, the Court's continued failure to develop any substantive content of the right of access to adequate housing means that residents hoping to enforce their housing rights are still unsure of what to expect from the Court.[391] This leads us to the limits of the Court's role. The Court can only address matters before it, and in the main, issue orders which impact the parties before it — it is reactionary.[392] A properly transformative role, on the other hand, addresses the conditions giving rise to the infringements — the unequal distribution of resources and power.[393] The branches of government that could take proactive steps to address the unequal distribution of resources and power are the executive and legislature. This is because the allocation of budgets and policy formulation falls within their domains.[394] Therefore, while the Court's post-*Grootboom* approach in relation to the provision of remedies in housing rights cases is more in line with the transformative approach to adjudication in light of transformative constitutionalism, it is insufficient to bring about, in its fullness, the transformation that the 1996 Constitution envisions.[395]

3 5 2 The Court's Avoidance

The Court's continued failure to develop any substantive content of the right of access to adequate housing is due to the Court employing what Ray terms "avoidance" techniques.[396] Ray describes avoidance techniques as:

> "a strong preference for relying on legislative and executive measures to define the substance of these rights; creating or expanding procedural remedies (especially remedies that emphasise expanding political access); interpreting the socio-economic rights either at

[388] Wilson, Dugard & Clarke (2015) *SAJHR* 502.
[389] 502.
[390] Albertyn (2017) *SAJHR* 256.
[391] 502.
[392] B Ray "Evictions, Aspiration and Avoidance" (2014) 5 *CCR* 173 174, 230 & 186.
[393] Albertyn (2017) *SAJHR* 256.
[394] Chapter 2 § 2 3 3.
[395] Young (2021) *Boston College Law School* 13.
[396] 175.

> a highly abstract or factually specific level; and limiting direct interventions to cases featuring clearly unconstitutional conduct".[397]

Though some of the housing rights cases post-*Grootboom* were more inclusive, the danger of the Court employing avoidance techniques is the scope of substantive constitutional development, and the Court's role in this development, is still limited.[398] This leads to, for example, the Court applying a remedy like meaningful engagement inconsistently, as it did in *Olivia Road* and *Joe Slovo*. Below, the different avoidance techniques that the Court still employs will be discussed.

The first avoidance technique that the Court employs is an interpretive approach that involves the Court, during consideration of the positive obligations contained in section 26 of the 1996 Constitution, beginning with the section's limiting provisions. The section's limiting provisions are the state's obligation to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right".[399] This form of avoidance allows the Court to avoid interpreting section 26 in a manner that gives the right independent substance.[400] The substance of the right is dependent on the legislative and other measures taken by the state meaning the Court relies on the executive and legislative to identify the concrete requirements that section 26 imposes. This reliance significantly limits the Court's role because its role in developing the substance of the positive obligations in terms of section 26 is reactive and secondary to that of the executive and legislature.[401] A more moderate form of this avoidance technique involves the Court, while not giving a right independent substance, expanding existing government policies or programmes on the basis of the right.[402] The Court did this in *Blue Moonlight* when it rejected the City of Johannesburg's decision to limit its housing policy to include only people evicted by the City and exclude those evicted by private landowners.[403] While this is

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[397] 175.
[398] 175. See also Wilson, Dugard & Clarke (2015) *SAJHR* 502.
[399] S 26(2) of the 1996 Constitution,
[400] Ray (2014) *CCR* 183.
[401] 183. This was outlined in *Mazibuko and Others v City of Johannesburg and Others* 2010 3 BCLR 239 (CC) at para 61 when the Court stated that "[s]econdly, ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps the government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice."
[402] Ray (2014) *CCR* 183-184.
[403] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 2 SA 104 (CC) para 89.

a much-needed development, the Court still avoided giving section 26 independent substance.[404]

The second avoidance technique that the Court employs is, during constitutional deliberation, the Court operates at an overly fact-specific level.[405] The Court, by reaching a result based on fact-specific grounds, provides concrete relief to the individuals before it without tying that relief to a broader constitutional requirement.[406] The result is that the Court establishes some guidelines for what the right entails on those specific facts.[407] However, it lacks precedential effect for similar cases with different facts and fails to establish a consistent or coherent constitutional framework over time.[408]

3 5 3 The Court's Inconsistency

In addition to the Court employing avoidance techniques, the Court has also been inconsistent in its application of meaningful engagement.[409] In *Joe Slovo*, though the Court found fault with the engagement process, it still ordered the mass eviction sought by the City, stating the following:

> "It is certainly true that the state could and should have been more alive to the human factor and that more intensive consultation could have prevented the impasse that had resulted. Having given these issues careful consideration, I do not think that these factors in themselves are sufficient to tilt the scale against eviction and relocation".[410]

The Court illustrated its shift away from a deferential approach by issuing a mandatory order for meaningful engagement, and by setting out in detail the issues that the parties were required to consult on.[411] However, since the residents had little to say in the determination of what was delivered to them, their participation in the engagement process was meaningless because the Court condoned an inadequate consultation process.[412] To assist the Court with adopting a more consistent approach to meaningful engagement, the state should develop engagement policies and procedures.[413] Civil society's role in this

[404] Ray (2014) *CCR* 184.
[405] 185.
[406] 186.
[407] 187.
[408] 187.
[409] 382. See also Ray (2011) *SAJHR* 109.
[410] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 3 SA 454 (CC) para 113.
[411] Para 5 and 11. See also Chenwi (2009) *CCR* 383.
[412] Chenwi (2009) *CCR* 382. See also Ray (2011) *SAJHR* 123.
[413] Ray (2011) *SAJHR* 115, 122, 125.

regard involves advocating for the development and institutionalisation of engagement policies and procedures.[414] The institutionalisation of engagement will assist the Court, on the basis of engagement policies and procedures, to determine at what stage during litigation the government should engage with affected communities, which stakeholders and communities are relevant, facilitating effective communication during the engagement process and when effective engagement has taken place in the absence of clear agreement on relevant issues.[415]

While there has been development in the Court's approach to housing rights post-*Grootboom*, the Court still has a long way to go. As long as the Court employs avoidance techniques and is inconsistent in its application of certain remedies during housing rights litigation, it fails to fully exercise its constitutional authority to promote, protect, and enforce the right of access to adequate housing. This is especially so regarding the positive obligations placed on the state in terms of section 26.[416]

3 6 Conclusion: The Way Forward

As illustrated above, the Court's post-*Grootboom* approach raised separation of powers tensions in terms of a strict understanding of the separation of powers doctrine. Despite these separation of powers tensions, the post-*Grootboom* approach was justified because of the government's incompetence and intransigence in relation to the fulfilment of the right of access to adequate housing, and its unreasonable delay in the implementation of orders designed to protect the right of access to adequate housing. Moreover, the post-*Grootboom* approach is justified because the 1996 Constitution encapsulates a contemporary understanding of the separation of powers doctrine that favours both separation of governmental authority and a system of checks and balances to ensure governmental accountability. In the next chapter, I will argue that while the remedies issued post-*Grootboom* is justifiable from a contemporary separation of powers perspective, transformative constitutionalism justifies and calls for a reconceptualization of the separation of powers doctrine. Not only does the 1996 Constitution grant the Court wide remedial powers in terms of section 38 and 172,[417] it also contains a mandate for the transformation of South African society "from its racist and unequal past to a society in which all can live

[414] 116.
[415] 116.
[416] See § 3 2 5 above.
[417] Chapter 2 § 2 4 1 and 2 4 2.

with dignity".[418] Since a commitment to transform society is now at the heart of the new constitutional order,[419] courts can no longer be passive in the face of injustice imputable to executive or legislative decisions because those courts have a role to play in the Constitution's transformative project.[420] This role involves providing appropriate relief in housing rights cases even if the remedial provisions could be construed as an intrusion into the executive or legislative branches of government because they are intrusions mandated by the Constitution itself.[421]

[418] *Rates Action Group v City of Cape Town* 2004 12 BCLR 1328 (C). See also *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 6 BCLR 728 (W) para 51-52.
[419] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 8.
[420] Chapter 2 § 2 5 2.
[421] *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC) para 113.

CHAPTER 4: TOWARDS AN APPROPRIATE REMEDIAL ROLE

4 1 Introduction

It has been illustrated in preceding chapters that the Court's post-*Grootboom* approach raised separation of powers concerns in terms of a strict understanding of the separation of powers doctrine.[1] I have argued above that despite these separation of powers concerns, the post-*Grootboom* approach is justified in light of a contemporary understanding of the separation of powers doctrine. In this chapter, I will argue that the transformative nature of the 1996 Constitution justifies and requires something even more – a reconceptualization of the separation of powers doctrine. This chapter thus begins with a brief explanation of the notion of transformative constitutionalism. In the second section of the chapter, the link between transformative constitutionalism and the role of the judiciary will be explored, and an explanation of a transformative approach to adjudication will follow. In the third section of the chapter, I will argue that transformative constitutionalism serves as justification of the Court's post-*Grootboom* approach in relation to the provision of remedies in housing rights cases and to the Court's understanding of the separation of powers doctrine. This argument will be made with reference to the key aspects of the 1996 Constitution's transformative character of importance for purposes of this study. These key aspects include the social, affirmative, and participatory nature of the 1996 Constitution. Finally, it will be illustrated that transformative constitutionalism requires a reconceptualisation of the separation of powers doctrine — at a minimum from a "strict separation" understanding towards a "checks and balances" understanding" — in order to realise the 1996 Constitution's transformative goals. A reconceptualised separation of powers doctrine will thus be considered below.

4 2 Transformative Constitutionalism

4 2 1 The Constitution as an Historic Bridge

As briefly mentioned in preceding chapters,[2] South Africa's apartheid past was deeply divided, and "characterized by strife, conflict, untold suffering and injustice".[3] There was thus a need for change;[4] a decisive break from the past,[5] to a "a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for

[1] See chapter 3 § 3 4.
[2] See chapter 2 § 2 2 2.
[3] Postamble of the Constitution of the Republic of South Africa, Act 200 of 1993.
[4] P Langa "Transformative Constitutionalism" (2006) 17 *Stell LR* 352 351-360.
[5] *S v Makwanyane* 1995 6 BCLR 665 (CC) para 262.

all South Africans".[6] The necessity for change was the reason the 1996 Constitution was introduced as a "blueprint for the transformation of our society".[7] Therefore, the goal of the 1996 Constitution was to create a new South African society that is markedly "different from our socially degrading and economically exploitative apartheid past".[8] Since a commitment to transform South African society lies at the heart of the 1996 Constitution, Klare posed the question in his seminal article "whether transformative constitutionalism is a viable project for South African judges and lawyers".[9] The transformation that Klare contemplated is more expansive than reform but short of revolution — it is a long-term project.[10] The goal of the long-term transformative project that Klare had in mind is the achievement of a "highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and the private sphere".[11] Klare envisioned that the long-term transformative project be achieved through law-grounded processes.[12] As such, it entails constitutional enactment, interpretation and enforcement committed to the realisation of the community envisioned above.[13] To Klare, transformative constitutionalism means:

> "a long-term project of constitutional enactment, interpretation, and enforcement committed … to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law".[14]

In terms of the 1996 Constitution, constitutional enactment falls within the domain of the legislature,[15] interpretation falls within the domain of the judiciary,[16] while enforcement

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[6] Postamble of the Constitution of the Republic of South Africa, Act 200 of 1993.
[7] *Rates Action Group v City of Cape Town* 2004 12 BCLR 1328 (C) para 100.
[8] D Moseneke "The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication" (2002) 18 *SAJHR* 309 315.
[9] Klare (1998) *SAJHR* 150.
[10] 150.
[11] 150.
[12] 150.
[13] 150.
[14] 150. Transformative constitutionalism is not beyond criticism: See S Sibanda "Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty" (2011) 22 *Stell LR* 3 482-500; S Sibanda *'Not Yet Uhuru' — The Usurpation of the Liberation Aspirations of South Africa's Masses by a Commitment to Liberal Constitutional Democracy* DPhil thesis University of Witwatersrand (2018); E Zitzke "A decolonial critique of private law and human rights" (2018) 34 *SAJHR* 3 492-516; J Modiri "Conquest and constitutionalism: first thoughts on an alternative jurisprudence" (2018) 34 *SAJHR* 3 300-325; J Modiri "Race, history, irresolution: Reflections on City of Tshwane Metropolitan Municipality v Afriforum and the limits of "post"-apartheid constitutionalism" (2019) *De Jure* 27-46. J Modiri "Law's poverty" (2015) 18 *PER/PELJ* 2 224-274.
[15] S 85(2)(d) and s 125(2)(f) of the 1996 Constitution.
[16] S 39(1) and (2); s 167(4)(e) and 167(5) of the 1996 Constitution. See also Liebenberg *Socio-economic Rights* 37. See also Pieterse (2004) *SAJHR* 383.

falls within the domain of the executive.[17] It is therefore implied that all three branches of government have a role to play in transforming the country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Given that a mandate to transform South African society lies at the heart of the 1996 Constitution, Klare argues that "South Africans have adopted a post-liberal Constitution … [because the Constitution is] committed to large-scale, egalitarian social transformation".[18] Klare thus argues that a post-liberal interpretation is the best interpretation of the 1996 Constitution though there are other plausible readings of it too.[19] According to Klare, the 1996 Constitution illustrates an indisputable move from liberalism "toward an 'empowered' model of democracy".[20] While the main purpose of classical liberal constitutions is to protect individual freedom and property from state interference, the goal of the South African 1996 Constitution is the achievement of collective freedom.[21] Unlike classic liberal constitutions, the 1996 Constitution is "social, redistributive, caring, positive, … horizontal, participatory, multicultural and self-conscious about its historical setting and transformative role and mission".[22] As stated in *Makwanyane*,[23] the 1996 Constitution is different because it represents a decisive break and ringing rejection of a "disgracefully racist, authoritarian, insular, and repressive" past.[24] The 1996 Constitution also represents "a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos".[25]

The social, redistributive, caring, positive, horizontal, participatory, multicultural, and historically self-conscious nature of the 1996 Constitution is explored in detail by Klare in support of a post-liberal interpretation of it.[26] However, the key aspects that I will analyse because of its importance for this study are the 1996 Constitution's social, affirmative, and participatory nature. Below it will be discussed why the 1996 Constitution can be characterised as social, affirmative, and participatory in nature. Moreover, how these characteristics serve to justify a reconceptualization of the separation of powers doctrine.

[17] See chapter 2 § 2 3 3. See also ss 85(2)(b) and 125(2)(d) of the 1996 Constitution.
[18] 150-151.
[19] 151-152.
[20] 152.
[21] 153.
[22] 152-153 (footnotes omitted).
[23] *S v Makwanyane* 1995 6 BCLR 665 (CC).
[24] Para 262.
[25] Para 262.
[26] Klare (1998) *SAJHR* 153-156.

4 2 2 The Constitution as "Social": The Inclusion of Socio-Economic Rights and the Notion of Substantive Equality

Klare describes the 1996 Constitution as social in nature because of its inclusion of justiciable socio-economic rights and its commitment to a substantive conception of equality.[27] The 1996 Constitution, unlike classically liberal documents, is not solely committed to protecting individual rights and property by proclaiming democratic political rights.[28] The 1996 Constitution is committed to the creation of society in which everyone has the social resources necessary to exercise their civil and political rights.[29] Klare then illustrates the social nature of the 1996 Constitution, firstly, with reference to its Preamble which states that one of its purposes is to establish a society based on *social* justice.[30] Secondly, with reference to the fact that one of the founding values of the 1996 Constitution is the achievement of equality.[31] Klare then continues that the equality that the 1996 Constitution is committed to is not just a formal conception of equality, but a substantive form of equality.[32] Klare defines substantive equality as "equality in lived, social and economic circumstances and opportunities needed to experience human self-realization".[33] The commitment to a substantive conception of equality is evident with reference to the Preamble and section 9 of the 1996 Constitution where it is stated that "every citizen is equally protected by law",[34] and "[e]veryone is equal before the law and has the right to equal protection and benefit of the law".[35] The creation of a substantively equal society as envisaged by the 1996 Constitution, however, cannot be realised without a redistribution of power and resources along equal lines in society.[36] To Albertyn and Goldblatt, the

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[27] 153. See also chapter 2 § 2 3 3.
[28] Klare (1998) *SAJHR* 153.
[29] 153.
[30] Preamble of the 1996 Constitution. See also Klare (1998) *SAJHR* 153.
[31] S 1 of the 1996 Constitution. See also Klare (1998) *SAJHR* 153.
[32] Klare (1998) *SAJHR* 153-154.
[33] 154.
[34] Preamble of the 1996 Constitution.
[35] S 9 of the 1996 Constitution. S 9 goes on to say that:
"(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."
[36] C Albertyn & B Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 *SAJHR* 248, 249. See also Moseneke (2002) *SAJHR* 316. See also *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 74 states that "The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable

achievement of equality as encapsulated in the 1996 Constitution involves "the eradication of systematic forms of domination and material disadvantages based on race, gender, class and other grounds of inequality".[37] The 1996 Constitution therefore envisions a redistribution of social and economic power and opportunities amongst South Africans.[38] The necessity for a redistribution of power was underscored by the fact that rights violations in pre-1994 South Africa often occurred in the context of power imbalances in society.[39]

4 2 3 The Constitution as "Positive": Affirmative State Duties

Linked to the achievement of substantive equality, is Klare's second descriptor of the 1996 Constitution being its affirmative nature.[40] The 1996 Constitution does more than constrain government interference with the enjoyment of fundamental rights;[41] it also imposes affirmative or positive duties on the state to protect and fulfil the rights contained in the 1996 Constitution.[42] This obligation to take positive steps is clear from the wording of the right which forms the topic of this thesis. Section 26 clearly instructs the state to:

> "*take* reasonable legislative and other measures, within its available resources, to *achieve* the progressive realisation of the right of access to adequate housing".[43]

The affirmative nature of 1996 Constitution is evident with reference to the wording of section 26, and section 7 of the 1996 Constitution. Section 7 is of relevance to the reading of section 26, and the Bill of Rights generally because it states that the rights contained in the Bill of Rights "enshrines the rights of all people in our country".[44] Moreover, section 7 obliges the state to "respect, protect, promote and fulfil the rights in the Bill of Rights".[45] Heyns and Brand have applied section 7 in the context of socio-economic rights in the following way. To them, the section 7 obligation to respect places a negative duty on the

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constitutional states may underscore other principles and rights, but in the light of our particular history and our vision for the future, a constitution was written with equality at its centre. Equality is our Constitution's focus and its organising principle."

[37] Albertyn & Goldblatt (1998) *SAJHR* 249.

[38] Klare (1998) *SAJHR* 154.

[39] Moseneke (2002) *SAJHR* 317.

[40] Klare (1998) *SAJHR* 154.

[41] S 7 of the 1996 Constitution. See also *Du Plessis and Others v De Klerk and Another* 1996 5 BCLR 658 (CC) para 147. See also M Ebadolahi "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83 *NYULR* 1575 1589.

[42] S 7(2) of the 1996 Constitution states that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights." See also Klare (1998) *SAJHR* 156.

[43] S 26 of the 1996 Constitution (own emphasis).

[44] S 7(1) of the 1996 Constitution states that "[t]his Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom."

[45] S 7(2) of the 1996 Constitution states that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights."

state not to interfere with existing access or enjoyment of the right in question.[46] The duty to protect, by contrast, places a two-fold duty on the state. The first duty entails taking positive action to prevent unwarranted interference with the enjoyment of or access to existing rights by private parties.[47] The second duty entails providing effective remedies in instances where enjoyment of or access to existing rights have been interfered with.[48] The duty to protect applied to section 26 obliges the state to prevent evictions, and the demolition of homes without a court order by state and non-state parties.[49] Moreover, it places a duty on the state to ensure that no legislation permits arbitrary evictions.[50] The duty to promote places a duty on the state to ensure that rights-bearers are aware of their rights.[51] Finally, the duty to fulfil places a positive obligation to ensure that the rights guaranteed within the 1996 Constitution are realised.[52] Applied to section 26, the duty to fulfil obliges the state to take reasonable legislative and other measures to progressively realise the right of access to adequate housing.[53]

Section 7, therefore illustrates that section 26, and all the other rights contained in the Bill of Rights are the rights of all people in South Africa. Moreover, that because they must be respected, protected, promoted, and fulfilled by the state, they are affirmative in nature. The affirmative nature of socio-economic rights generally and section 26 specifically imposes on the state the obligation to take proactive, concrete action to facilitate access to adequate housing.[54]

4 2 4 The Constitution as "Participatory": Participatory Governance

The third and final descriptor of the 1996 Constitution that is of importance to this study is the Constitution's commitment to participatory governance.[55] As observed by Klare, the "Constitution envisages inclusive, accountable, participatory, decentralized and transparent

[46] C Heyns & D Brand "Introduction to Socio-economic Rights in the South African Constitution" (1998) 2 *Law, Democracy and Development* 153 158.
[47] Heyns & Brand (1998) *Law, Democracy and Development* 158.
[48] 158.
[49] S 26(3) of the 1996 Constitution states that "[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."
[50] S 26(3) of the 1996 Constitution.
[51] Heyns & Brand (1998) *Law, Democracy and Development* 158.
[52] 158.
[53] S 26(2) of the 1996 Constitution states that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."
[54] Ebadolahi (2008) *NYULR* 1576. See also S Liebenberg "Interpretation of Socio-Economic Rights" S Woolman & M Bishop (eds) *CLoSA* (2003) 33-1.
[55] Klare (1998) *SAJHR* 150 and 155.

institutions of governance" and a culture of democracy.[56] Not only does the 1996 Constitution establish formal state institutions where citizens can participate in decision-making,[57] it also expands the opportunities for people's active participation in decision-making processes through non-state institutions.[58] The 1996 Constitution promotes public participation through courts,[59] and civil society.[60] The form of democracy that the 1996 Constitution envisions through its commitment to participatory governance thus requires more than the establishment of formal democratic institutions.[61] It requires government to facilitate and promote public participation in decision-making through these formal

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[56] 155. See also s 34 of the 1996 Constitution states that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."
S 38 of the 1996 Constitution states that "[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."
S 41(1) of the 1996 Constitution states that "[a]ll spheres of government and all organs of state within each sphere must—
(a) preserve the peace, national unity and the indivisibility of the Republic;
(b) secure the well-being of the people of the Republic;
(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
(d) be loyal to the Constitution, the Republic and its people;
(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
(f) not assume any power or function except those conferred on them in terms of the Constitution;
(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional, or institutional integrity of government in another sphere; and
(h) co-operate with one another in mutual trust and good faith by—
(i) fostering friendly relations;
(ii) assisting and supporting one another;
(iii) informing one another of, and consulting one another on, matters of common interest;
(iv) co-ordinating their actions and legislation with one another;
(v) adhering to agreed procedures; and
(vi) avoiding legal proceedings against one another.
See also s 32(1) of the 1996 Constitution which states that "[e]veryone has the right of access to—
(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise or protection of any rights."
See also s 33(1) of the 1996 Constitution which states that "[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair."
See also s 234 of the 1996 Constitution that which states that "[i]n order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution."
[57] See chapter 9 of the 1996 Constitution.
[58] S Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution* (2010) 30. See also D Brand "Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa" (2011) 22 *Stell LR* 614 622.
[59] S 34 of the 1996 Constitution states that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." See also s 38 of the 1996 Constitution which states that "[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."
[60] S 59(1) of the 1996 Constitution states that "[t]he National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees; and conduct its business in an open manner, and hold its sittings, and those of its committees, in public".
See also s 193(6) of the 1996 Constitution which states that "[t]he involvement of civil society in the recommendation process may be provided for as envisaged in section 59(1)(a)."
[61] Brand (2011) *Stell LR* 624.

democratic institutions, and through other mediums as well.[62] Moreover, a commitment to participatory governance and deepening a culture of democracy involves recognising the obstacles impeding participation in decision-making.[63] As stated above,[64] social resources are necessary to meaningfully exercise rights.[65] Therefore, without an equitable distribution of resources necessary to facilitate parity of participation, participatory governance is weakened. The implications of the social, positive, and participatory nature of the Constitution for purposes of housing rights adjudication are explored further below.

4 3 Transformative Constitutionalism and the Judiciary

4 3 1 A Transformative Approach to Adjudication

As stated above, transformative constitutionalism involves constitutional enactment, interpretation, and enforcement.[66] Constitutional enactment falls within the domain of the legislature,[67] interpretation falls within the domain of the judiciary,[68] and enforcement falls within the domain of the executive.[69] It is therefore implied that all three branches of government have a role to play in realisation of the transformative vision of the 1996 Constitution. However, of importance for purposes of this study is the role of the judiciary in the realisation of this transformative vision, which will be discussed in the section below. Regarding the role of the judiciary in the realisation of the 1996 Constitution's transformative vision, Klare has observed the following:

> "[t]he Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals. By implication, new conceptions of judicial role and responsibility are contemplated. Judicial mindset and methodology are part of the law, and therefore they must be examined and revised so as to promote equality, a culture of democracy and transparent governance. Accordingly, the drafters cannot have intended dramatically to alter substantive constitutional foundations and assumptions, yet to have left these new rights and duties to be interpreted through the lens of classical legalist methods".[70]

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[62] 624.
[63] Liebenberg *Socio-Economic Rights* 31.
[64] See § 4 2 2 above.
[65] Klare (1998) *SAJHR* 153.
[66] See § 4 2 1.
[67] S 85(2)(d) and s 125(2)(f) of the 1996 Constitution.
[68] S 39(1) and (2); s 167(4)(e) and 167(5) of the 1996 Constitution. See also Liebenberg *Socio-economic Rights* 37. See also Pieterse (2004) *SAJHR* 383.
[69] See chapter 2 § 2 3 3. See also ss 85(2)(b) and 125(2)(d) of the 1996 Constitution.
[70] Klare (1998) *SAJHR* 156.

Transformative constitutionalism contemplates a new conception of the judicial role and responsibility. This new role is inferred from the supremacy of the 1996 Constitution.[71] The supreme nature of the 1996 Constitution and the fact that the Court is its guardian implies that the Court's interpretive role ought to be executed in a manner that is consistent with the 1996 Constitution's transformative goals, and no longer through the lens of classical legalist methods.[72] The classical legalist methods that Klare referred to was maintaining the disjunction between law and politics, and the role differentiation between judges, politicians, and political theorists.[73] The implication of the classical legalist methods was that judges were required "to check their politics at the courthouse door" by neutrally enforcing laws set down by the other branches of government, "not to make politics" by considering factors external to a legal text.[74] The judiciary, therefore, had no duty to dispense justice other than permitted by law.[75] Transformative constitutionalism, however, requires judges to interpret the law in light of factors external to the legislation under consideration like the promotion of equality, a culture of democracy, and transparent governance.[76] In addition to the values contained in the 1996 Constitution, judges ought to consider the material context of litigants and the social aftermath of a particular rule's application during the interpretation of rights and duties.[77] In addition to considering the values of the 1996 Constitution, the material context of litigants and the social aftermath of a particular rule's application, judges are required to intervene in circumstances when there is an unjust, uneven and impermissible exercise of power and resource distributions.[78] As stated above, judges cannot neutrally enforce the law without considering extra-legal factors. Judges are now invited, during the exercise of their roles, to accomplish political projects based on the values of the Constitution.[79] The Court must search for substantive justice during the exercise of its role inferred from the foundational values of the Constitution.[80] As stated by Dube, the Court

[71] Chapter 2 § 2 3 4. See also s 1(c) of the 1996 Constitution.
[72] 156. See also F Dube "Separation of powers and the institutional supremacy of the Constitutional Court over Parliament and the executive" (2021) *SAJHR* 1 2 who argues "that the Constitutional Court is institutionally supreme to Parliament and the executive owing to its establishment as a *sui generis* institution with a legal and political mandate in post-apartheid South Africa."
[73] Klare (1998) *SAJHR* 157.
[74] 157.
[75] Moseneke (2002) *SAJHR* 316.
[76] Klare (1998) *SAJHR* 156.
[77] Moseneke (2002) *SAJHR* 316.
[78] 318. Klare (1998) *SAJHR* 147 states that "[i]n Etienne Mureinik's memorable words, democratic transition in South Africa is intended to be a bridge from authoritarianism to a new culture of justification, 'a culture in which every exercise of power is expected to be justified. Among types of law-making, adjudication is, or is supposed to be, the most reflective and self-conscious, the most grounded in reasoned argument and justification, and the most constrained and structured by text, rule, and principle. We may therefore legitimately expect constitutional adjudication to innovate and model intellectual and institutional practices appropriate to a culture of justification (footnotes omitted)".
[79] Moseneke (2002) *SAJHR* 316.
[80] 316.

should no longer hide behind a strict understanding of the separation of powers doctrine but boldly confront the political matters before it in its search for substantive justice in accordance with a reconceptualised separation of powers doctrine.[81] In view of the Court being the ultimate guardian of a supreme Constitution, the Court has legitimate constitutional authority to confront political matters before it because of its new role contemplated by transformative constitutionalism.[82] It can thus be inferred in light of transformative constitutionalism that the limit on the Court's power is not the separation of powers doctrine (which it ought to nevertheless respect as one of the principles of South Africa's constitutional democracy).[83] The only limit on the Court's power is ultimately the supreme Constitution "in accordance with which it must always decide disputes".[84]

It has been established above what the role of the judiciary is as contemplated by the transformative vision of the 1996 Constitution. In the section below, it will therefore be analysed whether the Court's post-*Grootboom* approach in relation to the provision of remedies in housing rights cases and its understanding of the separation of powers doctrine is in conformity with this role. The three key aspects of the 1996 Constitution's transformative nature explored above will be used as the criteria to measure whether the Court's robust approach is more compatible with the role of the judiciary as contemplated by the transformative vision of the 1996 Constitution than the Court's role as contemplated by a strict understanding of the separation of powers doctrine. Reference will also be made to some of the housing rights cases previously analysed to do so.[85]

4 3 2 Transformative Constitutionalism and the Court's Approach Post-*Grootboom*

As stated above, the main purpose of classical liberal constitutions is to protect individual freedom and property from state interference, while the goal of the South African 1996 Constitution is the achievement of collective freedom.[86] Given South Africa's apartheid past, the 1996 Constitution embraces the connection between collective freedom and social justice and thus the link between the enjoyment of civil and political rights and socio-economic rights.[87] The 1996 Constitution therefore does not only guarantee civil and political rights because it recognises that certain social resources are necessary to meaningfully

[81] Dube (2021) *SAJHR* 25.
[82] Klare (1998) *SAJHR* 156.
[83] Dube (2021) *SAJHR* 25.
[84] 25.
[85] See chapter 3 § 3 3.
[86] See § 4 2 1 above. See also Klare (1998) *SAJHR* 153.
[87] 153.

exercise these rights, as encapsulated by socio-economic rights.[88] As stated in *Du Plessis v De Klerk*,[89] the 1996 Constitution proclaims the need to create a new order in which all can exercise their fundamental rights.[90]

The inclusion of justiciable socio-economic rights coupled with the fact that the founding values of the 1996 Constitution include the achievement of equality and the advancement of human rights and freedoms illustrates that the 1996 Constitution embraces a substantive, and not just a formal conception of equality.[91] Substantive equality is not just concerned with whether everyone is treated identically, as is the case with formal equality.[92] Substantive equality is concerned with advancing the equal enjoyment of the rights and freedoms promised by the 1996 Constitution that have not yet been achieved.[93] As stated in *Minister of Finance v Van Heerden*,[94] substantive equality recognises patterns of systemic advantage and disadvantage on the basis of race and gender that ought to be confronted and addressed if true equality is to be achieved.[95]

I therefore argue that the 1996 Constitution's commitment to collective freedom and its new conception of the judicial role and responsibility requires that socio-economic rights and duties be interpreted considering the achievement of substantive equality. The Court post-*Grootboom* was more willing to do so. This will be illustrated with reference to, for example, *Modderklip*.[96]

Since the facts and remedy of Modderklip was previously discussed,[97] it suffices to say here that Modderklip was arbitrarily deprived of the enjoyment of its property when it was illegally occupied, and the state did nothing to address the illegal occupation of Modderklip's land.[98] As opposed to issuing an eviction that would render the occupants homeless, the Court, ordered the state to compensate Modderklip for breaching its property rights.[99] Moreover, the Court ordered that the state pay Modderklip rent for the continued occupation of its land until the state provided temporary accommodation for the occupants. In so doing,

[88] 153.
[89] 1996 3 SA 850 (CC).
[90] Para 132.
[91] Klare (1998) *SAJHR* 154. See also s 1(a) of the 1996 Constitution.
[92] *Minister of Finance v Van Heerden* 2004 11 BCLR 1125 (CC) para 142.
[93] Para 142.
[94] 2004 11 BCLR 1125 (CC).
[95] Para 142.
[96] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).
[97] Chapter 3 § 3 3 2.
[98] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 48.
[99] Para 65.

the Court protected Modderklip's civil and political right to the enjoyment of its property. In addition, the Court protected the occupants' right of access to adequate housing. The Court did not only protect Modderklip's individual freedom and property from state interference; it also contributed to the achievement of collective freedom by safeguarding the rights of the occupants. Thus, the Court was sensitive to the patterns of advantage and disadvantage in operation between the landowners and the occupants. If the landowners' rights were protected with the effect that the occupants were left homeless, this judgment would have done nothing towards the realisation of the Constitution's transformative substantive equality goals. The Court skilfully adjudicated the matter to ensure equal protection to the civil and political rights of Modderklip and the socio-economic rights of the occupants, having due regard for the historical patterns of disadvantage suffered by landless occupants and the state's obligations in terms of undoing this inequality. This, in my view, illustrates that the Court's post-*Grootboom* approach was more in line with a contemporary understanding of the separation of powers doctrine and the transformative approach to adjudication encapsulated by transformative constitutionalism.

The second aspect of the 1996 Constitution important for purposes of this study is its affirmative nature through the imposition of positive state duties. This aspect is especially crucial in the context of socio-economic rights litigation because, as Liebenberg has noted, "the enforcement of socio-economic rights frequently requires the imposition of positive duties on the State".[100] In *Grootboom*, the Court held that, at the very least, section 26 of the Constitution places a negative duty on the state and all others "to desist from preventing or impairing the right of access to adequate housing".[101] As stated above,[102] the duty to respect places a negative duty on the state not to interfere with existing access or enjoyment of the right in question. Previously, the Court was willing to impose a duty on the state to respect the right of access to adequate housing.[103] However, post-*Grootboom*, the Court has been more willing to impose positive duties on the state to protect and fulfil the right of access to adequate housing when existing access has been interfered with, either by a state or non-state party. This is illustrated by the Court issuing mandatory orders for alternative, temporary accommodation when the right of access to adequate housing is threatened.[104]

[100] Liebenberg *Socio-economic Rights* 75.
[101] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 34.
[102] See § 4 2 3 above.
[103] See § 4 2 3 above.
[104] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 3 SA 454 (CC); *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 2 SA 104 (CC).

post-Grootboom, when the state has failed to respect and protect the right of access to adequate housing, the Court has enforced the state's obligation to do so by issuing mandatory orders for alternative, temporary accommodation. The Court issuing mandatory orders for alternative, temporary accommodation is also relevant for the duty to fulfil the right of access to adequate housing. In relation to the duty to fulfil, the Court previously limited the state's duty to fulfil the right of access to adequate housing to introducing a reasonable housing policy.[105] However, post-*Grootboom*, the Court has, in some cases, expanded the state's duty to fulfil the right of access to adequate housing by defining in better detail the content of this right, especially in relation to temporary housing.[106] By issuing mandatory orders for alternative, temporary accommodation in matters where rights-bearers have been deprived of their existing access, the Court has defined the obligation on the state in terms of section 26 to include the provision of alternative, temporary accommodation. While this is a significant development in the Court's approach, the Court has still failed to develop a substantive account of the obligations placed on the state by section 26(2) of the 1996 Constitution.[107] While the Court post-*Grootboom* is exercising more of its institutional authority and checking the state's power in accordance with a contemporary understanding of the separation of powers doctrine, the Court still unnecessarily limits its role to give substantive content to housing rights.[108]

The third aspect of the 1996 Constitution of importance to this study is its commitment to participatory governance. The Court's post-*Grootboom* approach in relation to the provision of remedies in housing rights cases promotes participatory governance in South Africa because of its innovative remedy, mandatory orders for meaningful engagement. The meaningful engagement orders issued by the Court in *Olivia Road*,[109] *Joe Slovo*,[110] *Pheko,*[111] and *Schubart Park*,[112] obliged the parties to reach agreement on important issues. Engagement on these issues, especially if one of the parties was the state, resulted in vulnerable litigants participating in policy formulation. If agreement between the parties

[105] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 99. See also S Wilson & J Dugard "Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights" (2011) 22 *Stell LR* 664.
[106] Ebadolahi M "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83 *NYULR* 1565 1586.
[107] B Ray "Evictions, Aspiration and Avoidance" (2014) 5 *CCR* 173 175, 182. See also Wilson & Dugard (2011) *Stell LR* 664.
[108] Wilson & Dugard (2011) *Stell LR* 667. See also Wilson, Dugard & Clarke (2015) *SAJHR* 502.
[109] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC).
[110] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 3 SA 454 (CC).
[111] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC).
[112] *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 1 BCLR 68 (CC).

followed engagement, the state party involved would often need to formulate or re-formulate policy according to the agreement reached between the parties. The Court in this way facilitates participation by vulnerable litigants in political discourse, and their orders for meaningful engagement even become a medium for political discourse.[113] Brand has observed that the work of courts during socio-economic rights litigation, of which housing rights litigation form part, thus becomes part of political discourse about impoverishment, and even a medium for it.[114] Therefore, vulnerable litigants hoping to enforce their right of access to adequate housing during housing rights litigation also become participants and influencers of the political discourse about impoverishment.[115] According to Brand, socio-economic rights litigation is used as a tool for democratic political action, "with judgments becoming political currency in political struggles".[116] A deferential approach based on a strict understanding of the separation of powers doctrine as opposed to the Court's post-*Grootboom* approach based on a contemporary understanding of the separation of powers doctrine was therefore at odds with the 1996 Constitution's vision of participatory governance.[117] A deferential approach replicates the depoliticisation of issues that affect the poor, hindering rather than promoting the political capacity of the poor and thus the establishment of a truly participatory democracy envisioned by the 1996 Constitution.[118] While the Court's post-*Grootboom* approach is justified in light of a contemporary understanding of the separation of powers doctrine, transformative constitutionalism calls for a reconceptualization of the separation of powers doctrine.

4 3 3 A Reconceptualization of the Separation of Powers Doctrine and Transformative Constitutionalism

One of the implications of the transformative nature of the 1996 Constitution is that it requires a reconceptualisation of the separation of powers doctrine.[119] As illustrated above, the Court's understanding of its role based on the "strict separation" approach to the separation of powers doctrine can and has led to the Court adopting an overly deferential approach in relation to the provision of remedies in housing rights cases, especially in the formative years of the Court's housing rights jurisprudence.[120] Klare has noted that too often, South African jurists default back to anachronistic conceptions of the separation of powers

[113] Brand (2011) *Stell LR* 629. See also Ray (2011) *SAJHR* 113.
[114] Brand (2011) *Stell LR* 629.
[115] 629.
[116] 629-630.
[117] 630.
[118] 630.
[119] Pieterse (2004) *SAJHR* 404.
[120] Chapter 1 § 3 2 1, 3 2 4.

doctrine that lacks in transformative ambition,[121] especially during socio-economic rights adjudication.[122] Such a conception of the separation of powers doctrine and the Court's initial overly deferential approach has had negative implications for the realisation of the right of access to adequate housing due to the state's incompetence, intransigence, and unreasonable delay in its protection and fulfilment.[123] The Court has thus moved away from its deferential approach based on a strict understanding of the separation of powers doctrine in favour of an approach that encapsulates a contemporary understanding of the separation of powers doctrine.[124] Any separation of powers concerns brought to the fore post-*Grootboom* is thus justified in light of a contemporary understanding of the separation of powers doctrine.

As I have explained above, the 1996 Constitution contemplates a new role and responsibility for the judiciary that is consistent with the 1996 Constitution's transformative goals.[125] My argument is that while the Court's post-*Grootboom* approach is more consistent with a contemporary understanding of the separation of powers doctrine, the new judicial role and responsibility envisaged by the transformative Constitution encapsulates a conception of the separation of powers doctrine that does not lack in transformative ambition. Transformative constitutionalism calls for a reconceptualization of the separation of powers doctrine.[126] It is thus important for purposes of this study to theoretically frame a reconceptualised separation of powers doctrine in light of transformative constitutionalism.[127] Drawing on Hodgson, who developed some basic aspects of a distinctively South African doctrine of the separation of powers, I argue that a reconceptualised separation of powers doctrine could be contextual and purposive, recognise the institutions listed in chapter 9 of the 1996 Constitution as a fourth branch of government, and involve an evolving and flexible relationship between the different branches of government.[128] These features will be explored in more detail below.

A reconceptualised separation of powers doctrine should be contextual and informed by South Africa's history and the new dispensation.[129] It should encapsulate a separation of powers doctrine that is understood and applied by the Court with the achievement of the

[121] Klare (2015) *Stell LR* 446.
[122] Liebenberg *Socio-economic Rights* 67.
[123] Chapter 3 § 3 2 5.
[124] Chapter 2 § 2 2.
[125] See § 4 3 2 above. See also Klare (1998) *SAJHR* 156.
[126] See § 4 3 2 above. See also Klare (2015) *Stell LR* 446.
[127] Pieterse (2004) *SAJHR* 385.
[128] T F Hodgson "The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers: Toward a Distinctly South Africa Doctrine for a More Radically Transformative Constitution" (2018) 34 *SAJHR* 57 88-89.
[129] *De Lange v Smuts* 1998 3 SA 785 (CC) para 60.

transformative aims of the 1996 Constitution in mind.[130] Notably, this would involve taking more seriously the social, affirmative, and participatory dimensions of the transformative Constitution that I have explained above.

A reconceptualised separation of powers doctrine should also be purposive because the Court's approach to the interpretation of the 1996 Constitution is purposive.[131] Since the Court follows a purposive approach to the interpretation of the 1996 Constitution, Hodgson argues that a distinctively South African separation of powers ought to be applied purposively as well.[132] Following on Hodgson, I argue that the Court's purposive interpretative approach be extended to a reconceptualised separation of powers doctrine.[133] As stated by Hodgson, a purposive approach to the separation of powers doctrine has three elements: "a doctrinal (power-controlling) element, a pragmatic (efficiency-driven) element and a normative (human-rights-based and focused) component".[134] The power-controlling element involves separating power between different governmental branches and by enforcing checks and balances to avoid power abuses.[135] The efficiency-driven element involves allocating power to a branch with the necessary expertise to exercise it.[136] The first two elements clearly characterise the traditional separation of powers doctrine.[137] The third element involves the separation of powers doctrine being applied in a manner which contributes to the realisation and protection of human rights,[138] and for purposes of this study, housing rights. A reconceptualised separation of powers doctrine should especially exhibit the third element and be applied in a manner that contributes to the protection and realisation of human rights.[139] As Hodgson explained, chapter 1 to chapter 9 of the 1996 Constitution illustrates that the separation of powers doctrine cannot be divorced from a substantive rights-based and rights-informed approach to democracy.[140] A reconceptualised separation of powers doctrine that truly supports the transformative objectives of South Africa's constitutional democracy cannot solely be based on participatory democracy.[141] It ought to be informed by and protect the rights guaranteed in the 1996 Constitution.

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[130] See § 4 3 2 above.
[131] Hodgson (2018) *SAJHR* 75.
[132] 75.
[133] 75.
[134] 75.
[135] *De Lange v Smuts* 1998 3 SA 785 (CC) para 60.
[136] Hodgson (2018) *SAJHR* 75.
[137] See chapter 1 § 1 3 1 above.
[138] Hodgson (2018) *SAJHR* 75.
[139] Hodgson (2018) *SAJHR* 71.
[140] 71.
[141] 72. See also D Davis "Separation of Powers: Juristocracy or Democracy" (2016) 133 *SALJ* 258 270.

In chapter 9 of the 1996 Constitution, state institutions that support constitutional democracy were established.[142] These institutions include the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission.[143] The functions of each of these institutions as stated in the 1996 Constitution illustrates that these institutions strengthen constitutional democracy by promoting respect for and protection of the rights of all South Africans,[144] regardless of culture,[145] religion,[146] and gender.[147] These institutions also strengthen constitutional democracy by monitoring state conduct,[148] auditing state expenditure,[149] and managing elections.[150] As Hodgson has noted, the wording of chapter 9 illustrates that these institutions are part of the state and accordingly duty-bound with the state to respect, protect, promote and fulfil the rights in the Bill of Rights.[151] I agree with Hodgson that the wording of chapter 9 also illustrates that the powers, functions and stature of these institutions are directly comparable to those allocated to the three traditional branches of government.[152] The comparability of the three branches of government and chapter 9 institutions illustrate that chapter 9 institutions are basically a fourth branch of government, and should be regarded as such.[153] Not only would a fourth branch of government serve as an additional safeguard against rights infringements and an abuse of state power, it would also ensure multiple avenues for democratic and legal contestation.[154] A reconceptualised separation of powers doctrine thus goes beyond the traditional three branches of government and recognises the chapter 9 institutions as a fourth branch of government.

A reconceptualised separation of powers doctrine should also enable evolving and flexible relationships between the branches of government.[155] Instead of strict demarcations between the three government branches, there is cooperation between them, indicating that

[142] See chapter 6 of the 1996 Constitution.
[143] See s 181(1) of the 1996 Constitution.
[144] See s 184 of the 1996 Constitution.
[145] See s 185 of the 1996 Constitution.
[146] See s 185 of the 1996 Constitution.
[147] See s 187 of the 1996 Constitution.
[148] See s 182 of the 1996 Constitution.
[149] See s 188 of the 1996 Constitution.
[150] See s 190 of the 1996 Constitution.
[151] Hodgson (2018) *SAJHR* 74. See also s 7(2) of the 1996 Constitution.
[152] Hodgson (2018) *SAJHR* 74.
[153] 74.
[154] H Klug "Accountability and the role of independent constitutional institutions in South Africa's post-apartheid constitutions" (2015–2016) 60 *NYLSR* 153 155.
[155] Hodgson (2018) *SAJHR* 76.

a reconceptualised separation of powers doctrine should facilitate cooperation between the three (or four) branches of government.[156] In addition to a flexible relationship between the branches, a reconceptualised separation of powers doctrine should also allow for the boundaries between the branches to evolve when necessary.[157] For example, if one branch lacks the political will to take expeditious action in the public interest, another willing branch should be able to take exceptional measures in pursuit of the purposes of the separation of powers doctrine, identified by Hodgson to be the eradication of poverty and the elimination of inequality.[158] The judiciary's role in relation to an evolving and flexible relationship between the branches based on a reconceptualised separation of powers doctrine is to monitor the boundaries between the branches and determine when one branch usurps the powers of another.[159] While evolving and flexible relationships between the branches seems to mirror the maintenance of checks and balances which characterises a contemporary understanding of the separation of powers doctrine,[160] the former goes a step further by not just checking the abuse of governmental power, but by acting in the public interest when another branch fails to, even if that specific power does not fall within that particular branch's traditional purview of authority.[161] In this regard, I agree with Hodgson when he states the following:

> "In the view I take, an action that may, at one stage, amount to impermissible trespassing into another branch's territory may well, at another stage, be a permissible and even constitutionally mandated intervention".[162]

4 4 Conclusion

It has been illustrated above that the 1996 Constitution contains transformative goals, leading to the notion of transformative constitutionalism.[163] Thereafter, the three key aspects of transformative constitutionalism of importance to this study were analysed, namely the 1996 Constitution's social, affirmative, and participatory nature.[164] It was then illustrated that in the same way the "strict separation" understanding of the separation of powers doctrine dictated the Court's deferential approach in relation to the provision of remedies in housing

[156] S 41(1)(h) of the 1996 Constitution.
[157] Hodgson (2018) *SAJHR* 76.
[158] 76. See also *De Lange v Smuts* 1998 3 SA 785 (CC) para 60.
[159] Hodgson (2018) *SAJHR* 77.
[160] 77. See also s 1(d) and the Preamble of the 1996 Constitution.
[161] *De Lange v Smuts* 1998 3 SA 785 (CC) para 60.
[162] Hodgson (2018) *SAJHR* 77 (footnotes omitted).
[163] See § 4 2 1 above.
[164] See § 4 2 2 above.

rights cases,[165] transformative constitutionalism requires a reconceptualised separation of powers doctrine.[166]

[165] See chapter 3 § 3 2 4.
[166] See § 4 3 4 above.

CHAPTER 5: CONCLUSION

5 1 Introduction

The question that this thesis addressed is how the separation of powers doctrine has impacted on the Court's exercise of its remedial role. With this question in mind, in Chapter 2, I explored the separation of powers doctrine in the abstract and as applied in the South African context, specifically in relation to the question of whether socio-economic rights ought to have been included in the 1996 Constitution.[1] Those arguing against the incorporation of socio-economic rights into the 1996 Constitution (the "anti-constitutionalisers") at the time of democratisation relied heavily on a strict understanding of the separation of powers doctrine.[2] Those arguing in favour of the incorporation of said rights (the "constitutionalisers"), were inspired by the contemporary understanding of the separation of powers doctrine that was more concerned with checks and balances to maintain governmental accountability than strict separation between governmental branches.[3] Socio-economic rights were, of course, eventually included in the 1996 Constitution. However, as I illustrated in Chapter 3, the initial debate about the separation of powers/socio-economic rights interface subtly re-emerged and impacted the Court's reasoning in different housing rights cases in different ways.[4] I showed that the court ultimately started by following an approach to the separation of powers and housing rights remedies that was reminiscent of the anti-constitutionalising arguments raised before.[5] I illustrated that the Court adopted an overly deferential approach to housing rights remedies as a result of its strict understanding of the separation of powers doctrine. However, over time, the Court moved away from this approach, in favour of one which was more in line with the constitutionalisers' arguments raised before, and a contemporary understanding of the separation of powers doctrine.[6] In chapter 4, I then evaluated to what extent the Court's shift in its understanding of the separation of powers doctrine and housing rights remedies could be justified in light of the tenets of transformative

[1] Chapter 2 § 2 2.
[2] Chapter 2 § 2 3 2.
[3] Chapter 2 § 2 3 3.
[4] Chapter 3 § 3 2 1.
[5] Chapter 3 § 3 2 1-3 2 4.
[6] Chapter 3 § 3 2 5-3 3 6.

constitutionalism.[7] This chapter will briefly summarise the key findings and arguments made in this study.

5 2 Trias Politica

In chapter two, I sought to analyse the separation of powers doctrine in the abstract.[8] *Trias politica* or the separation of powers is the theory of governance aimed at a separation of the functions, duties, and responsibilities between distinct institutions.[9] From this definition flows two main purposes of the separation of powers doctrine. The first purpose is to prevent an overconcentration of political power in one institution to avoid abuse.[10] The second is to allow complex tasks like law-making and law enforcement to be performed by the institution best capable and equipped to perform these functions.[11] With the initial form of the separation of powers doctrine, governmental power was notionally separated. The initial separation of powers doctrine thus emphasises strict separation. A more contemporary separation of powers doctrine separates governmental power whilst incorporating a system of checks and balances to maintain governmental accountability. Thereafter, I analysed the separation of powers doctrine as it applied during apartheid South Africa,[12] and in post-apartheid South Africa.[13] The separation of powers doctrine in apartheid South Africa existed only in form and not substance, enabling the enactment of oppressive, racist laws by a supreme parliament, largely leaving the judiciary with only blunted powers of procedural review.[14] There was thus a need to avoid such a concentration and abuse of power in one governmental branch. Moreover, there was a need to maintain accountability between the branches of government with a system of checks and balances. A more contemporary understanding of the separation of powers doctrine was thus incorporated into the 1996 Constitution.[15] Prior to analysing the impact of the inclusion of justiciable socio-economic rights in the 1996 Constitution on the Court's understanding and application of the separation of powers doctrine, the

[7] Chapter 4.
[8] Chapter 2 § 2 2 1.
[9] Chapter 2 § 2 2 1.
[10] S Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution* (2010) 67.
[11] 67.
[12] Chapter 2 § 2 2 2.
[13] Chapter 2 § 2 2 3.
[14] Chapter 2 § 2 2 2.
[15] Chapter 2 § 2 3 4.

arguments for and against the inclusion of justiciable socio-economic rights was discussed.[16] The arguments raised against the inclusion of socio-economic rights in the 1996 Constitution was especially important for purposes of this study because they were raised in light of a strict understanding of the separation of powers doctrine.[17] Those against the inclusion of socio-economic rights in the 1996 Constitution raised the following arguments: Firstly, the judiciary lacked the capacity to address the expense implications, and the positive and the indeterminate nature of justiciable socio-economic rights.[18] Secondly, the judiciary lacked the necessary legitimacy to enforce justiciable socio-economic rights.[19] Those in favour of the inclusion of socio-economic rights in the 1996 Constitution argued that the 1996 Constitution would lack legitimacy among South Africans had it only promised freedom without bread.[20] Moreover, those in favour of the inclusion of socio-economic rights in the 1996 Constitution argued that the same arguments that were raised against socio-economic rights could be levelled against civil and political rights in much the same way.[21] In chapter two, I argued that the 1996 Constitution envisaged a contemporary understanding of the separation of powers doctrine because of its incorporation of a system of checks and balances between governmental branches, and its commitment to governmental accountability, transparency and openness. In this chapter, it was found that though a contemporary understanding of the separation of powers doctrine and socio-economic rights were included in the 1996 Constitution, the separation of powers concerns raised against the inclusion of socio-economic rights had a lingering effect on judicial reasoning on the basis of the Court's strict understanding of the separation of powers doctrine.

5 3 Housing Rights Remedies Jurisprudence

In chapter three, the facts and remedies granted in *Grootboom* were discussed. I argued that the Court's understanding and application of a strict separation of powers doctrine resulted in the Court's adoption of a deferential approach in *Grootboom*.[22] The Court's deferential approach illustrated in *Grootboom* simply required the

[16] Chapter 2 § 2 3 2-2 3 4.
[17] Chapter 2 § 2 3 2.
[18] Chapter 2 § 2 3 2.
[19] Chapter 2 § 2 3 2.
[20] Chapter 2 § 2 3 3.
[21] Chapter 2 § 2 3 3.
[22] Chapter 3 § 3 2.

government to introduce a reasonable plan to progressively realise the right of access to adequate housing.[23] Though the Court in *Grootboom* held that a reasonable programme includes reasonable implementation of the programme,[24] the Court failed to maintain supervisory jurisdiction to ensure reasonable implementation of the reasonable programme, largely deferring its role to the executive and legislative branches of government in this regard.[25] The effect of the Court's deferential approach in *Grootboom* was that two years after the order was handed down, it still had not been fully implemented by the government.[26] The fact that two years had passed, but little was done to the housing policy to cater for those in desperate need or crisis situations illustrated the government's incompetence or intransigence in relation to the protection of the right of access to adequate housing.[27] The Court's deferential approach in *Grootboom* thus set the tone for state incompetence and intransigence to flourish, illustrating the need for a change in the Court's understanding of the separation of powers doctrine and in relation to the provision of remedies in housing rights cases.[28] After some time, the Court then indicated a shift away from its deferential approach, which was illustrated with reference to the housing rights cases post-*Grootboom*. These housing rights cases were limited to *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd ("Modderklip"),*[29] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others ("Olivia Road"),*[30] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others ("Joe Slovo"),*[31] *Pheko and Others v Ekurhuleni Metropolitan Municipality ("Pheko"),*[32] *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another ("Schubart Park"),*[33] *and City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another ("Blue Moonlight").*[34]

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[23] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 99 part (2)(a).
[24] Para 42.
[25] Chapter 3 § 3 2 4.
[26] Chapter 3 § 3 2 4-3 2 6.
[27] Chapter 3 § 3 2 6.
[28] Chapter 3 § 3 2 6.
[29] 2005 5 SA 3 (CC).
[30] 2008 5 BCLR 475 (CC).
[31] 2010 3 SA 454 (CC).
[32] 2012 4 BCLR 388 (CC).
[33] 2013 1 BCLR 68 (CC).
[34] 2012 2 SA 104 (CC).

With reference to *Modderklip*, I argued that the Court illustrated a move away from its deferential approach. This was evident in *Modderklip* when the Court, during its formulation of an appropriate remedy, effectively protected Modderklip's section 25 property right whilst holding the Benoni City Council ("the Council") accountable to the protection of the resident's section 26 right.[35] In *Modderklip*, Modderklip's farm was unlawfully occupied, prompting Modderklip to approach Johannesburg High Court and then the Pretoria High Court for an eviction order.[36] Eventually, the matter reached the Constitutional Court. To balance the competing interests of Modderklip and the residents, the Constitutional Court entitled the residents to the occupation of Modderklip's land until alternative accommodation was provided by the state and obliged the state to pay compensation to Modderklip for the continued use of its land.[37] I argued that the Court in *Modderklip* did not defer the decision of how to protect the right of access to adequate housing to the executive and legislature on the basis of a strict understanding of the separation of powers doctrine.[38] The Court, instead, specified the general principles defining the obligations placed upon the state by section 26 in relation to temporary housing in accordance with a contemporary understanding of the separation of powers doctrine.[39] The Court did so by ordering that the state compensate Modderklip for breaching the enjoyment of its property rights, and by ordering that the state pay rent to Modderklip for the continued occupation of its land.[40]

In *Olivia Road*,[41] the City of Johannesburg ("the City") sought the eviction of more than 300 people from several properties in the Johannesburg inner city.[42] The evictions were sought on the basis of section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 ("the NBRA") and section 20(1)

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[35] Chapter 3 § 3 3 2.
[36] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 7 and 10.
[37] *Fose v Minister of Safety and Security* 1997 3 SA 1 (CC) para 69 states that "[t]he courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal".
[38] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 41.
[39] Bilchitz (2002) *SALJ* 487.
[40] Chapter 3 § 3 3 2.
[41] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC).
[42] *City of Johannesburg v Rand Properties (Pty) Limited and Others* 2006 (6) BCLR 728 (W) para 2. The High Court application incorporated the Joel Street Applications, the 197 Main Street Applications, and the San Jose Applications.

of the Health Act 63 of 1977.[43] In *Olivia Road*, the Court issued an interim order obliging the City and the residents to engage meaningfully with a view of resolving the differences between the parties in light of their rights and duties; and to alleviate the plight of the residents affected by the evictions.[44] The meaningful engagement between the City and the residents culminated in an agreement that dealt with measures to make the properties safer and more habitable and obliged the City to provide the residents with alternative accommodation in certain identified buildings.[45] Moreover, it was held that section 12(6) of the NBRA that compelled residents to vacate their homes on pain of criminal sanction in the absence of a court order was inconsistent with section 26(3) of the Constitution which prohibits eviction unless a court order is issued after considering all relevant circumstances.[46] Following the declaration that section 12(6) of the NBRA was inconsistent with the Constitution, the Constitutional Court found that it would not be just nor equitable to set section 12(6) aside because it is appropriate to encourage residents to vacate unsafe or unhealthy buildings in compliance with an issued eviction order.[47] The Constitutional Court subsequently found that section 12(6) should rather provide for a criminal sanction after an eviction order has been issued, in compliance with section 26(3) of the Constitution.[48] With reference to *Olivia Road*, I argued that the Constitutional Court did not defer the decision of how to cure the section to the legislature even though it would have been justifiable according to a strict understanding of the separation of powers doctrine because the legislature is the branch responsible for legislation.[49] The Constitutional Court instead, after establishing that this was not an instance where there were a myriad of ways to cure the section, issued a reading-in order.[50] Though there were not a myriad of ways to cure the section, the reading-in order arguably raised separation of powers concerns in accordance with a strict understanding of the separation of powers doctrine because the legislature is the branch of government

[43] Chapter 3 § 3 3 3.
[44] Chapter 3 § 3 3 3.
[45] Chapter 3 § 3 3 3.
[46] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC) para 49.
[47] Para 50.
[48] Para 50. S 26(3) of the 1996 Constitution states that "[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."
[49] Chapter 2.
[50] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC) para 50.

that can legitimately make and amend legislation because it is democratically elected.[51] Moreover, it is the branch of government with the necessary expertise to amend legislation.[52] I argued that the Court nevertheless issued the reading-in order because of its post-*Grootboom* approach on the basis of a contemporary understanding of the separation of powers doctrine.

In *Joe Slovo*, vacant state-owned land was occupied, leading to the establishment of the Joe Slovo Settlement. The City of Cape Town ("the City") then started providing the residents with water, then container toilets and basic cleaning facilities.[53] Eventually, the Joe Slovo Settlement was targeted for housing development in terms of the City's Breaking New Ground Policy. In order for development to take place, the residents of Joe Slovo had to be relocated from their homes. Satisfied that they would be accommodated post the housing development, the residents accepted the project. That changed when the residents learnt that the rent payable for the houses constructed did not accommodate poor people.[54] The residents thus petitioned and protested the development of and relocation from the Joe Slovo settlement in the Western Cape High Court ("High Court").[55] The residents were unsuccessful in the High Court and the relocation of 4,386 households was ordered.[56] When *Joe Slovo* reached the Constitutional Court, the residents were ordered to vacate the Joe Slovo settlement but the order to vacate was "conditional upon and subject to the [residents] being relocated to temporary residential units".[57] The Constitutional Court issued this order to ensure that the City provide the families relocated from Joe Slovo with permanent accommodation in the newly developed housing.[58] I argued that, post-*Grootboom*, the Court significantly defined the obligations on the state in terms of the right of access to adequate housing in relation to temporary housing by expressing the form that the temporary units should take. I argued that the Court in this way, not only defined the section 26 obligations on the state in this regard but held the state accountable to the fulfilment of its obligations

[51] See chapter 2 § 2 3 1 2.
[52] See chapter 2 § 2 3 1 1.
[53] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 5 BCLR 475 (CC) para 21.
[54] Para 32.
[55] Para 34.
[56] Para 8.
[57] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 3 SA 454 (CC) para 7, part 7(4) and 7(9).
[58] Para 106.

according to a contemporary understanding of the separation of powers doctrine. In *Joe Slovo*, the Court unequivocally indicated that the obligation on the state in terms of section 26 in relation to temporary housing was to provide temporary residential units built of fire-resistant material with electricity and ablution facilities.[59]

In *Pheko*, the City executed an eviction against the residents of the Bapsfontein Informal Settlement in terms of the Disaster Management Act 53 of 2005 ("DMA") due to the formation of sinkholes in the area.[60] Since the residents opposed the eviction, the Ekurhuleni Metropolitan Municipality ("the Municipality") involved the Red-Ants to demolish the homes of the residents. The residents of Bapsfontein thus applied for urgent relief in the North Gauteng High Court ("the High Court"), to restrain the Municipality from unlawfully evicting them, demolishing their homes, and intimidating them to vacate Bapsfontein.[61] Moreover, the residents sought the provision of alternative accommodation to those residents whose homes had been demolished during the eviction.[62] In the High Court, the application was dismissed with costs. The applicants thus sought leave to appeal directly to the Constitutional Court ("the Court") to challenge the decision of the High Court.[63] The Constitutional Court held that the DMA did not authorise eviction or demolition without a court order.[64] In addition, the Constitutional Court held that the municipality was obliged to identify land for the resident's relocation and to ensure the provision of amenities for them.[65] I argued that the Court in Pheko, post-*Grootboom*, also specified general principles defining the obligations placed upon the municipality in relation to temporary housing.[66] The Court did not just leave the municipality with the amorphous reasonable standard with which to judge its own conduct, but specified the obligations of the municipality in terms of section 26.[67] I argued that the Court specifying the obligations on the municipality not only provided it with clear benchmarks, it also held the municipality accountable to the fulfilment of its section 26 obligations in terms of a contemporary understanding of the separation of powers doctrine. Moreover, the Court in *Pheko* retained supervisory

[59] Para 105.
[60] Chapter 3 § 3 3 5.
[61] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 3 SA 454 (CC) para 12.
[62] Para 12.
[63] Para 2.
[64] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) paras 38 and 45.
[65] Chapter 3 § 3 3 5.
[66] Chapter 3 § 3 3 5.
[67] Chapter 3 § 3 3 5.

jurisdiction after submitting that it was uncertain how long it would take for the municipality to identify land for purposes of affording the residents access to adequate housing.[68] In doing so, the Court did not allow too much leeway for delay and inefficiency in the provision of the residents most basic needs.[69] I argued that the Court in this way also held the municipality accountable for the fulfilment of its section 26 obligations, at least in relation to temporary housing. Though a decision by a Court to supervise the implementation of its order can raise separation of powers concerns in terms of a strict understanding of the separation of powers doctrine, I argued that it is justifiable from a contemporary separation of powers doctrine point of view.[70]

In *Schubart Park*, the conditions of a residential complex markedly deteriorated, and the electricity and water supply were cut.[71] The residents then protested about the living conditions and a fire broke out. The police then forcibly removed the residents and prevented them from returning to their homes. The residents thus brought an urgent application before the North Gauteng High Court ("the High Court") seeking an order to allow them to return to their homes.[72] The application for re-occupation was dismissed in the High Court, and several orders were issued in the High Court.[73] The residents thereafter applied to the Constitutional Court. The Constitutional Court held that none of the High Court orders permitted the residents to re-occupation of their homes.[74] The Court thus declared that the residents were entitled to re-occupation of their homes as soon as reasonably possible. The Court additionally issued an order for meaningful engagement and obliged the parties to report back on the outcome of the engagement by a certain date. As stated above, though a decision by a Court to supervise the implementation of its order could raise separation of powers concerns in terms of a strict understanding of the separation of powers doctrine, I argued that it is justifiable from a contemporary separation of powers doctrine point of view.

[68] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 50.
[69] Chapter 3 § 3 3 5.
[70] See § 3 3 above.
[71] Chapter 3 § 3 3 6.
[72] *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 1 BCLR 68 (CC) para 5.
[73] Para 6.
[74] Para 38.

In *Blue Moonlight*, 86 people occupied old and dilapidated buildings belonging to Blue Moonlight.[75] Blue Moonlight wished to develop its property,[76] and instituted eviction proceedings in the South Gauteng High Court ("High Court") in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE") on 25 May 2006.[77] The residents opposed the eviction application on the basis that it would render them homeless.[78] In the High Court, it was found that the City's housing policy as set out in its 2010 Housing Report only made provision for temporary housing to occupiers evicted from state-owned land, and not private land.[79] The High Court thus found the City's housing policy unconstitutional to the extent that it discriminated against people rendered homeless by evictions from private land; and ordered the City to remedy the defect in terms of a structural interdict.[80] This matter proceeded from the High Court to the Constitutional Court. The Constitutional Court issued the eviction order after finding that a property owner cannot be expected to provide free housing on its property for an indefinite period,[81] but rather that the duty created by section 26 of the Constitution falls on the government.[82] With reference to Blue Moonlight, I once again argued that the Court post-*Grootboom* specified the general principles defining the obligations placed upon the City by section 26 in relation to temporary housing by obliging the City to provide the residents with temporary accommodation following the eviction.[83] As opposed to solely granting the eviction order, and deferring to the City the determination of how to address the ensuing homelessness of the residents post the eviction, the Constitutional Court defined the section 26 obligations of the City, and held it accountable to their fulfilment in terms of a contemporary understanding of the separation of powers doctrine. Moreover, though the City cried poverty, the Court disallowed it from circumventing its section 26 obligations by obliging the City to self-fund, illustrating once more a contemporary understanding of the separation of powers doctrine.[84]

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[75] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 2 SA 104 (CC) para 1.
[76] Para 3.
[77] Para 11.
[78] Para 11.
[79] Para 13.
[80] Para 12.
[81] Para 40.
[82] Para 42.
[83] Chapter 3 § 3 3 7.
[84] Chapter 3 § 3 3 7.

Based on the analyses of the above cases, I argued in this chapter that the Court indicated a shift from the deferential approach on the basis of a contemporary understanding of the separation of powers doctrine.[85] The Court's shift from its traditionally deferential approach is evident from the Court introducing meaningful engagement orders, issuing affirmative orders like compensation orders against the state, obliging the state to provide alternative accommodation, the re-allocation of state funding and legislative invalidation, all in favour of the right of access to adequate housing.[86] In this chapter, I argued that though the remedies issued by the Court post-*Grootboom* raised separation of powers concerns in terms of a strict understanding of the separation of powers doctrine, it was justified in light of a contemporary understanding of the separation of powers.[87]

5 4 Transformative Constitutionalism

As stated above, the Court's post-*Grootboom* approach was justified in light of a contemporary separation of powers doctrine. However, the transformative nature of the 1996 Constitution requires something more. Thus, in chapter four, the notion of transformative constitutionalism was generally discussed.[88] Transformative constitutionalism as a notion basically asserts that the 1996 Constitution has the transformation of law and society in a more egalitarian, free, and democratic direction as its central goal.[89] Transformative constitutionalism involves taking the post-liberal ideals of the 1996 Constitution seriously. The three post-liberal ideals of importance to this study were the social,[90] affirmative,[91] and participatory nature of the 1996 Constitution.[92] Regarding the social nature of the 1996 Constitution, the fact that justiciable socio-economic rights are included in the 1996 Constitution cannot be ignored. The 1996 Constitution envisages the achievement of substantive equality which moves hand in hand with addressing historical injustices related to unequal distribution of power, land, and so on. In chapter four, I argued that practically, this involves the Court being sensitive to the plight of the poor and landless during the

[85] Chapter 3 § 3 3.
[86] Chapter 3 § 3 4.
[87] Chapter 3 § 3 4 5.
[88] Chapter 4 § 4 2.
[89] Chapter 4 § 4 2.
[90] Chapter 4 § 4 2 2.
[91] Chapter 4 § 4 2 3.
[92] Chapter 4 § 4 2 4.

provision of remedies in housing rights cases. The Court has been more sensitive to the plight of the poor and landless by expressing greater willingness to hold the other branches of government accountable to the fulfilment of their constitutional obligations in accordance with a contemporary understanding of the separation of powers doctrine. This was evident from *Modderklip* because the Court protected Modderklip's section 25 property right by holding the state accountable to the protection of the occupier's section 26 right.[93] The Court should be able to hold the state accountable for breaches of its obligation in terms of the right of access to adequate housing whether the breaches are due to poor legislative drafting, poor plan drafting, incompetence or intransigence.[94] In this chapter, it was concluded that one of the implications of the transformative nature of the 1996 Constitution is that it requires a reconceptualisation of the separation of powers doctrine.[95] Since a contemporary understanding of the separation of powers doctrine is part of South Africa's constitutional design,[96]this means that the separation of powers doctrine cannot simply mean rigidly isolating the three branches of government based on a strict understanding of the separation of powers doctrine. While a contemporary understanding of the separation of powers doctrine does not venerate a strict separation between the branches of government, but instead prioritises co-operation and checks and balances between them,[97] the separation of powers doctrine requires a reconceptualisation in light of transformative constitutionalism. A reconceptualised separation of powers doctrine should not only avoid a concentration of governmental authority and ensure governmental accountability with a system of checks and balances, it should be transformation driven and context specific.[98] A reconceptualised separation of powers doctrine should be flexible enough to be squared against the social equality envisaged by the 1996 Constitution; the fact that the state bears affirmative duties; and encourages a participatory model of responsible governance.[99] Within this reconceptualised separation of powers doctrine, the Court would not be

[93] Chapter 3 § 3 3 2.
[94] Chapter 3 § 3 2 6.
[95] Chapter 4 § 4 3 3.
[96] Chapter 2 § 2 3 4.
[97] Chapter 4 § 4 3 2.
[98] Chapter 4 § 4 3 2.
[99] Chapter 4 § 4 2.

hampered from issuing remedies that would provide better protection of the right of access to adequate housing.

5 5 Conclusion

In conclusion, I argued that the separation of powers doctrine has impacted on housing rights remedies in three ways. Firstly, a strict understanding of the separation of powers doctrine has featured prominently in the arguments raised against the inclusion of socio-economic rights in the 1996 Constitution.[100] In this study I argued that the same separation of powers concerns raised against the inclusion of socio-economic rights in the 1996 Constitution were ritually invoked by the Court in housing rights cases during the remedy stage of adjudication.[101] These separation of powers concerns include judicial capacity and legitimacy.[102] Secondly, a strict understanding of the separation of powers doctrine formed the basis of the Court unduly limiting its remedial reach in *Grootboom* by overly deferring the decision of what obligations are on the state in terms of the right of access to adequate housing to the executive and legislative branches of government.[103] The aftermath of *Grootboom* illustrated that the Court can and has circumvented its duty to provide appropriate relief in housing rights cases because of the potential budgetary and policy implications of its remedies for the executive and legislature based on a strict understanding of the separation of powers doctrine.[104] Thirdly, the Court's contemporary understanding of the separation of powers doctrine impacted on housing rights remedies jurisprudence by enabling it to hold the other branches of government accountable to the fulfilment of their section 26 obligations. Fourthly, while the Court has moved away from its overly deferential approach based on a strict separation of powers doctrine in favour of its post-*Grootboom* approach based on a contemporary separation of powers doctrine, this approach still unduly limits the Court's remedial role.[105] Furthermore, I argued that while the Court's post-*Grootboom* approach was a step in the right direction,[106] transformative constitutionalism requires a reconceptualization of the separation of

[100] Chapter 2 § 2 3 2.
[101] Chapter 2.
[102] Chapter 2 § 2 3 2.
[103] Chapter 3 § 3 2 1-3 2 5.
[104] Chapter 3 § 3 2 1.
[105] Chapter 3 § 3 5.
[106] Chapter 4 § 4 3 2.

powers doctrine.[107] The Court's understanding of the separation of powers doctrine ought to be reconceptualised in a manner which more readily accommodates the transformative vision of the 1996 Constitution insofar as it relates to the realisation of substantive equality, affirmative state duties, and participatory governance.[108] The reconceptualised separation of powers doctrine that I have in mind encapsulates a separation of powers doctrine that separates governmental authority and maintains governmental accountability with a system of checks and balances, but one that is also understood and applied by the Court with the achievement of the transformative aims of the 1996 Constitution in mind.[109] In chapter four, it was additionally found that the Court's role must be shaped and exercised in accordance with the transformative aims of the 1996 Constitution, not determined or unduly limited by a strict understanding of the separation of powers doctrine.

[107] Chapter 4 § 4 3 3.
[108] Chapter 4 § 4 3 3.
[109] Chapter 4 § 4 3 3.

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