GROOTBOOM, THE RIGHT OF ACCESS TO HOUSING AND SUBSTANTIVE EQUALITY AS CONTEXTUAL FAIRNESS

PIERRE DE VOS*

ABSTRACT

This article explores the relationship between social and economic rights and the right to equality through an analysis of the decision in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC). Arguing that the transformative vision of the 1996 South African Constitution is one that is committed to remedying social and economic inequality, the article explores how the right of access to housing and the right to equality are interrelated and mutually supportive in pursuit of this goal.

I INTRODUCTION

If, as the old maxim has it, hard cases make bad law, then the decision in *Government of the Republic of South Africa v Grootboom*[1] demonstrates that easy cases can produce (relatively) good law. At first blush, the claim that this was an 'easy' case for the justices of the Constitutional Court to decide might appear strange or even counterintuitive. After all, the exact nature of the duties engendered by the social and economic rights contained in South Africa's 1996 Bill of Rights, and the role of the courts in enforcing those duties, have been highly controversial and contested.[2] Moreover, in *Soobramoney v Minister of Health, KwaZulu-Natal*[3] — the first case in which the Constitutional Court was called upon to consider the scope and content of the duties engendered by the social and economic rights — the Constitutional Court declined to engage in any

* Associate Professor, Faculty of Law, University of the Western Cape.

1 2001 (1) SA 46 (CC).

2 See, generally, N Haysom 'Constitutionalism, Majoritarian Democracy and Socio-Economic Rights' (1992) 8 *SAJHR* 451; E Mureinik 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *SAJHR* 464; D Davis 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *SAJHR* 475; B de Villiers 'Social and Economic Rights' in D Van Wyk, J Dugard, B De Villiers & D Davis *Rights and Constitutionalism: the New South African Legal Order* (1994) 599; S Liebenberg 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 *SAJHR* 359; P de Vos 'The Economic and Social Rights of Children and South Africa's Constitution' (1995) 10 *SA Public Law* 233; and P de Vos 'Pious Wishes of Directly Enforceable Human Rights? Social and Economic Rights in South Africa's Constitution' (1997) 13 *SAJHR* 67.

3 1998 (1) SA 765 (CC).

meaningful way with the very difficult issues presented by the inclusion of social and economic rights in the Constitution.[4] Instead, the Court stated that it would be 'slow to interfere with rational decisions taken in good faith by the political organs and medical authorities'.[5] In the *Grootboom* decision, however, the Court demonstrated what seems like a remarkable new commitment to finding ways of enforcing the social and economic rights guaranteed in the Constitution. In the process it moved away from its insistence on the mere rationality of state actions to a standard that requires the state and other relevant stakeholders to act reasonably to fulfil their constitutional duties regarding social and economic rights.

The apparent divergence between these two judgments might reasonably bring one to conclude that the Constitutional Court has had a change of heart about the importance—and the nature and scope—of the social and economic rights protected in the Bill of Rights.[6] The two judgments could, however, also be seen as perfectly consistent, as long as one viewed them within the context of the Constitutional Court's transformative vision of the Constitution and its attendant acceptance of the substantive idea of equality.[7] I would therefore argue that at the heart of the Constitutional Court's approach to social and economic rights—in both *Soobramoney* and *Grootboom*—lies a particular understanding of the role of the Bill of Rights (particularly the equality provisions and the provisions guaranteeing social and economic rights) as a transformative document aimed at addressing the deeply entrenched social *and* economic inequality in our society.[8]

The difference in the tone and content of the two judgments can therefore be explained primarily with reference to the distinct differences in the facts of the two cases. In *Soobramoney* the applicant sought an order compelling the KwaZulu-Natal health department to provide him with access to extremely expensive dialysis treatment at a time when

4 All references to 'the Constitution' in this article are to the Constitution of the Republic of South Africa, Act 200 of 1996.

5 *Soobramoney* (note 3 above) para 29.

6 Such a view might find support in an analysis of the (remarkably forthright) Third Bram Fischer memorial lecture, delivered by the President of the Constitutional Court, Arthur Chaskalson in May 2000, just as the judges were sitting down to write the *Grootboom* decision. See A Chaskalson 'The Third Bram Fischer Memorial Lecture: Human Dignity as a Foundational Value of Our Constitutional Order' (2000) 16 *SAJHR* 193, 202-04.

7 On substantive equality see C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248, 255; L'Heureux-Dubé 'Making a Difference: The Pursuit of Equality and a Compassionate Justice' (1997) 13 *SAJHR* 335, 338-41; Pierre de Vos 'Equality for All?: A Critical Analysis of the Equality Jurisprudence of the Constitutional Court' (2000) 63 *THRHR* 62, 66-68.

8 I am not contending that the decisions in the two cases reflect exactly the same view of social and economic rights. Clearly, the *Grootboom* judgment represents a far more nuanced understanding of social and economic rights. Instead, I argue that the underlying reasons for the Court's rejection of the applicant's claim in *Soobramoney* are the same as those which prompted the Court to find that an infringement of the right of access to housing had indeed occurred in the case of *Grootboom*.

many poor people in that province had little or no access to any form of even primary health care services. In *Grootboom*, however, the applicants — who were effectively homeless — came to court to challenge the failure by the state to take any action to assist them while it continued to implement a housing programme that effectively ignored the housing plight of the most vulnerable sections of society. Given the Constitutional Court's transformative vision of the Constitution — a vision that seems to rely on a contextual approach to the interpretation of the Constitution in general and the provisions of the Bill of Rights in particular — it had little choice but to reject Mr Soobramoney's claim while endorsing the claim by the applicants in the *Grootboom* case.

II The Transformative Nature of the Constitution

Several authors have now endorsed Karl Klare's idea that South Africa's Constitution can be understood to establish a project of transformative constitutionalism.[9] This project explicitly rejects the fiction, associated with liberal constitutionalism, that a country's constitution represents a snapshot of a political community whose meaning is frozen forever. Such a traditional view usually pays scant attention to the political, social and economic context within which a constitution came into existence and to the fact that this context will change in future. Instead, this traditional approach is usually based on the assumption that the constitution is an end in itself; a document aimed at regulating the exercise of power and preserving — in a formal way — the (existing but sometimes newly recognised) rights of individuals in that political community. It would be difficult to view the 1996 South African Constitution in such terms because it engages seriously, not only the past that produced it, but also the future that it will partly shape. It is a document that requires continual reinvention to make sense of the changing world and country we live in.[10] Viewed thus, the constitutional project becomes a 'long-term project of constitutional enactment, interpretation, and enforcement' committed to transforming South Africa's 'political and social institutions and power relationships in a democratic, participatory, and egalitarian direction'.[11] Thus, the Constitution explicitly rejects the social *and* economic status quo and sets as one of its primary aims the transformation of society into a more just and equitable place where people would better be able to realise their full potential as human beings. Implicit in this transformative vision of the Constitution is the assumption that such a document burdens the state with both negative

9 See K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146, 155 and the references to him in Albertyn & Goldblatt (note 6 above); P de Vos 'A Bridge Too Far? History as Context in the Interpretation of the South African Constitution' (2001) 17 *SAJHR* 1.

10 Klare (note 9 above) 155.

11 Ibid 150.

and positive obligations, obligations that might sometimes be at variance or, at the very least, might have to be reconciled with one another within a specific context.

The Constitutional Court has implicitly embraced this transformative vision of the Constitution, most notably in its acceptance of a contextual approach to interpretation.[12] As Yacoob J has reiterated in *Grootboom*, the contextual interpretation of rights requires the consideration of two types of context. First, regard must be had to the textual context, which requires a consideration of Chapter 2 and the Constitution as a whole. Second, the scope and meaning of the rights in the Bill of Rights may only be determined with reference to the social and historical context of the country.[13]

The constitutional text itself—particularly various sections of the Bill of Rights—alludes to the transformative nature of the obligations imposed by its various provisions. The text stipulates, firstly, that the Bill of Rights places both positive and negative duties on the state. This is done in s 7, which requires the state not only to *respect* the various rights, but also to *protect, promote and fulfil* them.[14] This implies that the Bill of Rights is not merely a document that preserves and protects entrenched privileges and freezes the status quo, but that it also aims to facilitate the extension of the enjoyment of rights to all. Because rights are not viewed merely as pre-existing entitlements that are activated as soon as a justiciable Bill of Rights comes into existence, the state is required to act positively to ensure the progressive realisation of *all* rights. The state is thus constitutionally required to take steps to reach rights-based goals that might at present seem difficult or even impossible to attain. For example, the equality guarantee in s 9 of the Constitution places a negative obligation on the state (and other relevant actors) that prohibits it from unfairly discriminating against an individual. At the same time, this guarantee also places a positive duty on the state to take steps that would assist in creating an environment in which individuals will be able to reach their full potential as human beings and live their lives in dignity. This latter goal will be impossible to attain in the foreseeable future (or perhaps ever), but this does not mean that there is no duty on the state to

12 I am not claiming that the Court always uses a contextual approach when interpreting the provisions of the Constitution, or that it always uses it in the same manner (or even that the different judges understand and apply this approach in the same way). I do claim that the various judges of the Court often take care to sketch the textual as well as the political and social context within which the constitution operates, before proceeding to give an interpretation of the relevant provision of the Constitution. See *S v Zuma* 1995 (2) SA 642 (CC) para 15 (reference to *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321; *S v Makwanyane* 1995 (3) SA 391 (CC) para 266; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41 and *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 32 (quoting from *Egan v Canada* (1995) 29 CRR (2d) 79, 104-05). For a short review of contextual interpretation by the Constitutional Court see J De Waal, I Currie & G Erasmus *The Bill of Rights Handbook* 3 ed (2000) 126.

13 *Grootboom* (note 1 above) para 22.

14 For a detailed analysis of these duties see De Vos (note 2 above).

take positive steps to work towards this goal: to neglect to do so would entail a failure to engage meaningfully with the transformative vision of the Constitution.

This view is augmented, secondly, with reference to the way in which sections of the Constitution — including various provisions of the Bill of Rights — are phrased.[15] The prime textual examples of the transformative nature of the various rights in the Bill of Rights are the ways in which the right to equality and the various social and economic rights are defined. Thus, s 9(2) acknowledges that the guarantee of equality before the law[16] and the prohibition of unfair discrimination,[17] will not automatically and immediately lead to the achievement of 'real' equality in our society.[18] Hence the state may (and might be constitutionally obliged to) take steps that would promote the achievement of 'real' equality in the long term.[19] Similarly, the various social and economic rights are phrased in such a way as to acknowledge that despite the immediate negative obligations they impose on the state, these rights will essentially only be realised in the long term (if ever). This is made clear by the text of ss 26(2) and 27(2), which clearly states that the realisation of these rights will require the state to take all reasonable measures to achieve their progressive realisation. The text of the various provisions of the Bill of Rights thus reflects the view that the Constitution should facilitate the transformation of South African society, and sometimes places a duty on the state to hurry this transformation along.

But it is not only the constitutional *text* that forms the context within which the rights in the Bill of Rights must be viewed. In order to trace the direction in which the transformative project is supposed to move it is necessary to come to grips with the larger context within which the text of the Bill of Rights is to be interpreted. Thus, the Constitutional Court has often stated that the historical, social and economic context must also be taken into account when interpreting the provisions of the Bill of Rights.[20] This seems to suggest, first, that any understanding of the scope and content of the various rights in the Bill of Rights is at least partly

15 See, for example, s 1(a) (equality must be *achieved*; human rights and freedoms must be *advanced*); s 9(2) (to *promote the achievement* of equality, certain measures may be taken), s 26 (the state must take reasonable steps in order to *achieve* the progressive realisation of the right of access to housing).

16 Section 9(1).

17 Section 9(3).

18 I use the term 'real' equality not to suggest that we could ever create a society in which all people were perfectly equal in terms of talent, opportunities or goods and lived in equal dignity alongside each other. As I have argued above, the equality guarantee entails both a negative and a positive aspect. This requires a rejection of a formal ideal of equal treatment and an acceptance of the idea that the state should take steps in order to progressively bring into existence a society in which individuals would be able to realise their full potential as human beings. This idea of 'real' equality is thus related to the concept of 'substantive equality' that will be discussed below.

19 Section 9(2).

20 See, for example, *Grootboom* (note 1 above) para 25.

dependent on an understanding of the nature of the history that produced the new constitutional dispensation.[21] The Constitutional Court has interpreted this history to be the specific apartheid history in which race became the fundamental basis for both political and economic advancement in our society. It is therefore a history in which the vast majority of South Africans were deprived not only of their political freedom, but also of the means of securing their economic prosperity.[22] Understood in this context, it becomes clear that the Constitution does not only facilitate and necessitate the *political* transformation of South African society into an open and democratic one based on respect for difference, but also aims to facilitate the country's *social and economic* transformation. Without addressing the social and economic woes of the people of South Africa, the guarantees of freedom, dignity and equality would have a 'hollow ring'.[23]

Second, one must make sense of the provisions of the Bill of Rights with reference to the actual social and economic conditions existing in the country in general, and in the area in which the applicants find themselves in particular.[24] Fundamental to an understanding of these conditions is the acceptance that there are great and unacceptable discrepancies in wealth in the country. These discrepancies must be viewed against the backdrop of a high level of unemployment and the fact that millions of South Africans live in conditions of great poverty.[25] Given these circumstances, and given the overall goal of the Constitution to assist in the transformation of society into one in which all South Africans will be able to live in dignity and thus fulfil their human potential, the provisions of the Bill of Rights must be interpreted in such a way as to facilitate economic transformation.

Once it is established that the Constitutional Court has accepted the transformative nature of the Bill of Rights, it becomes easier to show that the right to equality and the social and economic rights are closely related, and that both *Soobramoney* and *Grootboom* are just as much about the achievement of a specific contextual form of equality as the realisation of particular social and economic rights. I shall now proceed to take this argument further.

21 See, for example, *Zuma* (note 12 above) para 15; *Makwanyane* (note 12 above) para 39 and para 264; *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC); *Prinsloo* (note 12 above) para 21; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 126; *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development; Executive Council, KwaZulu-Natal v President of the Republic of South Africa* 2000 (1) SA 661 (CC) para 44; *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35.

22 *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) para 7. See also *Makwanyane* (note 12 above) para 262; and *Du Plessis* (note 21 above) para 125.

23 *Soobramoney* (note 3 above) para 8.

24 Ibid.

25 See *Soobramoney* (note 3 above) para 8; *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) para 43.

III The Interrelated, Interdependent and Mutually Supporting Nature of the Right to Equality and Social and Economic Rights

If one accepts that the Constitution encompasses a transformative vision, a vision that requires the state to be more than a passive bystander in shaping the society in which individuals can fully enjoy their rights, then it becomes difficult not to accept that the various rights in the Bill of Rights must be viewed as interdependent, interrelated and mutually supporting. Recall that I have argued that the Constitution places both negative and positive duties on the state in order to ensure that the state advances the political, social and economic transformation of South African society. Viewed thus, the Constitution sets out to help create a society in which people will be able to fulfil their full potential and to live with dignity and respect. Logically this implies that many (if not all) of the rights set out in the Bill of Rights facilitate the achievement of this goal (or at least ensure that the achievement of this goal is not impeded). Depending on the particular context, many of the rights would thus be interrelated and would be mutually supportive.

This view of rights as interrelated, interdependent and mutually supportive finds support in the structure and text of the Constitution itself. Thus, all the rights, without distinction, are placed in one chapter of the Constitution and made subject to the same limitation clause. At the same time, s 7 confirms that all the rights in the Bill of Rights impose both positive and negative obligations on the state. This view also finds confirmation in the growing body of academic opinion that there is no *conceptual* difference between civil and political rights, on the one hand, and economic and social rights, on the other. The different rights will often operate in support of each other, since the realisation of one right may be dependent on the realisation of another. Starving people may find it difficult to exercise their right to freedom of speech while a restriction on this right may make it difficult for individuals to enforce their right of access to housing.[26] Moreover, the Constitutional Court has on various occasions confirmed that the rights in the Bill of Rights are interdependent, interrelated and often mutually supporting.[27]

26 C Scott 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 *Osgoode Hall LJ* 769-878; UN Economic and Social Council 'Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' E/CN.4/1987/17 paras 2 and 3; 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' para 6, published in (1998) 20 *Human Rights Quarterly* 691. See also Memorandum of Panel of Constitutional Experts 'The Meaning of "Progressive" (ss 25 and 26)', dated 6 February 1996, where the 'interrelationship and indivisibility' of the different kinds of rights are accepted by the advisors to the drafters of the South African Constitution. See also De Vos (note 2 above) 70-71.

27 *Bernstein v Bester NO* 1996 (2) SA 751 (CC) para 67; *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) para 16; and *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) 1537 para 31 (per Ackermann J) and para 114 (per Sachs J).

This insight has important implications for our understanding of the nature and scope of the obligations imposed by social and economic rights. It implies that any interpretation of the scope and content of social and economic rights must be undertaken with reference to how they relate to other rights in the Bill of Rights, most notably the right to equality.[28] To put it more forcefully: it would be difficult to come to grips with the nature of the obligations imposed by social and economic rights without a solid understanding of the way in which the Constitutional Court has developed the concept of substantive equality. At the heart of this approach is an understanding that the right to equality — and the concomitant interlinking value of human dignity — and the social and economic rights are two sides of the same coin. Both sets of rights have been included in the Bill of Rights to ensure the achievement of the same objective, namely the creation of a society in which all people can achieve their full potential as human beings, despite apparent differences created by race, gender, disability and sexual orientation, and despite differences in the social and economic status of such individuals.[29]

(a) The right to equality: substantive equality and the transformative vision of the Constitution

It goes without saying that a very particular conception of the right to equality is required to give effect to the transformative vision of the Constitution. The Constitutional Court has accepted as much, and in *Hugo* Goldstone J explicitly referred to the need for measures to alleviate the disadvantages created by past discrimination:

> We need therefore to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved.[30]

The Court has thus adopted what can be described as a 'contextual approach' to the interpretation of the right to equality in order to achieve the transformative goal set out in *Hugo*.[31] This approach rejects 'a

28 At the same time, the interpretation of the civil and political rights — particularly the right to equality — will often require of courts to have regard to the nature and scope of the social and economic rights.

29 As I shall argue below, this does not mean the achievement of this objective is the only consideration to be taken into account when delimiting the nature and scope of these rights. The *way* in which this objective is achieved is also important and often a right will be infringed because the manner in which the state or other relevant parties acted did not conform to the constitutionally prescribed limits placed on the conduct of the state or other relevant party.

30 *Hugo* (note 12 above) para 41.

31 In *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 54, the Constitutional Court purported to set out the various stages of the equality clause enquiry. This 'test' has been severely criticised on a number of grounds. Regardless of the merits of such criticism, the 'test' is rather formalistic and is therefore not very helpful in coming to grips with the essence of the Constitutional Court's approach to equality.

passive or purely negative' concept of equality[32] that would merely require the state (or other relevant actors) to guarantee the equal treatment of individuals. This is because the acceptance of such a view of equality would disregard the entrenched structural inequality in South African society. In other words, it would ignore the actual social and economic disparities between people and would perpetuate present patterns of social and economic disadvantage.[33] In line with the transformative vision of the Constitution, the right to equality has therefore been interpreted more broadly to encompass an active or positive component that goes beyond requiring a respectful hands-off approach from the state. This means that the right to equality must be understood as placing a duty on the state to take steps towards achieving a society in which individuals can reach their full potential. At such a stage, 'true' equality would have been reached, but it will be difficult if not impossible ever to reach this goal.

It is of utmost importance to note that this contextual approach requires courts to examine the actual *impact* of an alleged violation of the right to equality on the individual within and outside different socially relevant groups in relation to prevailing social, economic and political circumstances.[34] This has been clearly recognised by the Constitutional Court.[35] In each case the Court asks whether the overall impact of the impugned provision would further the transformative goal of equality or not.[36] Thus, acts or omissions on the part of the state that assist in the creation or perpetuation of patterns of group disadvantage for groups disfavoured in the past, or groups who continue to be disfavoured in society, will be constitutionally suspect. Legislation or state policies designed to achieve the realisation of the transformative goals set out in the Constitution will become problematic if they fail to take into account the social and economic context in which they have to be implemented. In particular, such laws or policies that fail to take into account the position of particularly disadvantaged and vulnerable groups will be problematic.[37]

32 *National Coalition* (note 27 above) para 16.

33 See C Albertyn & J Kentridge 'Introducing the Right to Equality (1994) *SAJHR* 149, 152-53.

34 See Albertyn & Goldblatt (note 6 above) 255-60; L'Heureux-Dubé (note 6 above) 338-41.

35 *Hugo* (note 12 above) para 41.

36 Ibid, where Goldstone J stated: 'Each case ... will require a careful and thorough understanding of the impact of the discriminatory action upon the paraticular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.'

37 Of course, not all action by the state or other relevant parties purportedly aimed at achieving the equality goals set out in the Constitution will be deemed to be acceptable. This is because the Constitution requires this goal to be achieved in a specific manner, namely through action that is not unfair, given the specific social and economic context. Thus, in *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) paras 73-81, the majority found that the Pretoria City Council's 'policy' of selective enforcement of debts constituted unfair discrimination, despite the fact that it formed part of the Council's attempt to address the imbalances of the past.

(b) Social and economic rights understood in the light of substantive equality

I have argued that the scope and content of the social and economic rights can only be determined with reference to the transformative vision of the Constitution. I have furthermore argued that the various rights—particularly the right to equality and the various social and economic rights—are interrelated and mutually supporting. In the light of these insights, I suggest that the scope and content of social and economic rights must be viewed with reference to the Constitutional Court's understanding of substantive equality. What does this mean in practice?

At the very least, it implies that any determination of the constitutional acceptability of state action or inaction regarding the realisation of social and economic rights must be conducted with reference to the *impact* of that act or omission on the group under discussion. This in turn would require an understanding of the structural inequalities in society in general and the specific inequalities between groups in the specific context within which the determination is to take place. Failure by the state to take these factors into account when devising and implementing plans to realise social and economic rights might result in the state being found not to have fulfilled its constitutional duties. Given that the Constitutional Court has interpreted the right to equality to go far beyond a formal guarantee of equal treatment, social and economic rights should be understood as requiring the state to do more than merely advance the social and economic rights of all South Africans without regard to the different social and economic circumstances in which different groups find themselves. What is required is to take into account the *impact* of the state's action or omission on a specific group with reference to the social and economic context within which the group finds itself. State plans aimed at the progressive realisation of any of the social and economic rights guaranteed in the Constitution that fail to take cognisance of the different ways in which the plan will impact on groups within different social and economic contexts will be constitutionally suspect. Some groups would have suffered from 'patterns of disadvantage and harm' in the past due to their race, sex, gender, class or geographical location and will be economically particularly vulnerable. The more economically disadvantaged and vulnerable a group is found to be, the greater the possibility that a court may find that there was a constitutional duty on the state to pay special attention to the needs of such a group. This means that state plans and actions aimed at the realisation of social and economic rights, that fail to take cognisance of the position of the economically most vulnerable groups, would be difficult to justify constitutionally. For example, it is widely accepted that rural women in South Africa are in a particularly vulnerable position. State plans to realise the right, of access to health care services that fail to take note of this fact and fail to begin to address the needs of this particularly vulnerable group, might become constitutionally suspect.

IV The *Grootboom* Judgment: Substantive Equality, the Right of Access to Housing and Contextual Fairness

(a) Introduction

The decision in *Grootboom*[38] confirms that the Bill of Rights is a transformative document aimed at achieving a society where people will be able to live their lives in dignity, free from poverty, disease and hunger. The judgment confirms that the full transformative power of the rights in the Bill of Rights will only be realised when they are interpreted with reference to the specific social and economic context prevalent in the country as a whole, and the social and economic context within which the applicant group finds itself in particular. This context is one that acknowledges the vast social and economic inequalities between different groups that leave many people extremely vulnerable and even desperate, far removed from the ideal of a life lived in dignity and respect. This approach acknowledges that people cannot live with a semblance of human dignity and cannot fulfil their full potential as human beings where structural inequality prevails and where the state fails to take steps to address such structural inequality and its causes. In this approach, too, any interpretation of constitutional rights must be based on the understanding that one of the aims of the Bill of Rights is to facilitate the transformation of society, and that this cannot be done when the state fails to address its citizens' basic social and economic needs. Nor can it be achieved where the state fails to address the special needs of the most vulnerable sections of society.

The facts in *Grootboom* present a stark reminder that the realisation of 'true' equality—and the attendant attainment of a society in which all South Africans are guaranteed access to housing—remains a laudable but unattainable goal—at least for the foreseeable future. For the purposes of my argument the most pertinent facts of the case were as follows. The applicants—almost 1000 women, children and men—were in fact homeless due to their (possibly illegal) eviction from land where they were illegally residing.[39] They lived in the Western Cape where influx control policies implemented as part of the apartheid master-plan sought to control the influx of Africans to the region, and thus created an acute shortage of housing, especially for Africans.[40] The state's extensive housing programme, instituted through both legislative and other measures, although a major achievement, failed to provide in any way for those people in desperate need who find themselves in a crisis situation.[41] This housing plan provided for the progressive realisation of access to formal housing, to be accessed via a waiting list after a waiting

38 Note 1 above.
39 Ibid para 2-5.
40 Ibid para 6.
41 Ibid para 53, para 61-65.

period of up to seven years or even longer.[42] The applicants claimed, amongst others, that the state inaction constituted an infringement of their right of access to housing guaranteed in s 26 of the Constitution,[43] and requested the Court to order the respondents to provide adequate basic temporary shelter or housing to them and their children pending their obtaining permanent accommodation.[44]

A unanimous Court agreed that the existing housing policies (and their implementation) did not meet the obligations set out in s 26 of the Bill of Rights,[45] but stated that this did not entitle the applicants to demand shelter or housing immediately.[46] What was required was for the state to 'devise and implement a coherent, co-ordinated programme designed to meet its s 26 obligations'.[47] It is important to note that the court order provided no individual relief to the applicants, although the national government and the Western Cape government had agreed to provide certain forms of relief to the applicants. This agreement was seemingly not kept and had to be made an order of court by the Constitutional Court several months after the oral hearing but a few weeks before it gave judgment in the case.[48] Despite this disappointing turn, the reasoning employed by the Court is of the utmost importance as it confirms the important and inextricable link between the aspirations or goals expressed by the equality guarantee in s 9 and those goals and aspirations articulated by the various social and economic rights. I shall now analyse the pertinent aspects of this judgment to support this view.

(b) Grootboom and the transformative nature of the Bill of Rights

The judgment in *Grootboom* places the transformative constitutional project at the heart of the Court's interpretation of the right of access to housing. In the very first sentence Yacoob J affirms that the Constitution commits all the people of South Africa to the goal of achieving 'social justice and the improvement of the quality of life for everyone'. What the Constitution sets out to do, according to the judgment, is to create a legal framework that would facilitate the realisation of one overarching goal, namely the achievement of a society that was based on the principles of equality, human dignity and freedom.[49] This transformative vision of the

42 Ibid para 8, para 51.

43 Ibid para 20. In the judgment in the Cape High Court (*Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C)) Davis J rejected the applicant's claim based on s 26, but concluded that the state's inaction constituted a breach of s 28(1)(c). The Constitutional Court overturned this ruling. It is beyond the scope of this article to deal with this aspect of the judgment.

44 Ibid para 13.

45 Ibid para 91.

46 Ibid para 95.

47 Ibid.

48 *Grootboom v Government of the Republic of South Africa* (CCT Case 38/00, order made on 21 September 2000, unreported).

49 *Grootboom* (note 1 above) para 1.

Constitution is based on the Constitutional Court's understanding of the inegalitarian context within which it was called upon to interpret the Bill of Rights. Once it is fully appreciated that any interpretation of the Bill of Rights must be undertaken from South Africa's specific social and economic context, it becomes difficult not to acknowledge the transformative nature of the various provisions of the Bill of Rights. The Constitutional Court in *Soobramoney* had already accepted this view when describing the context in which the Bill of Rights was to be interpreted:

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.[50]

The realisation of this transformative vision of the Constitution, in turn, is linked to the interrelated and mutually supporting nature of the right to equality and the right of access to housing. In *Grootboom*, the Constitutional Court confirmed that if the Constitution is to operate as a vehicle to facilitate and advance the transformative goals set out in s 1, then all the rights in the Bill of Rights must be viewed as interrelated and mutually supporting:

> There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.[51]

The Court seems to suggest that where it finds that an infringement of one of the social and economic rights has occurred, this would bear strongly on the unfairness of any alleged discrimination in terms of s 9(3) and vice versa. In *Grootboom*, for example, the fact that the failure by the state housing plan in the Western Cape to provide for the eradication of homelessness was found to be unreasonable, and hence an infringement of s 26 of the Constitution, could have a strong bearing on whether the inaction of the state would not also constitute an infringement of s 9(3) of the Constitution. Reading the various sections of the Constitution together in this manner reinforces the transformative nature of the Constitution in general and of the right to equality in particular. Where the state acts in a way that unreasonably fails to address the social and economic needs of the most vulnerable sections of society, it will be a

50 *Soobramoney* (note 3 above) para 8 (quoted in *Grootboom* (note 1 above) para 25.
51 *Grootboom* (note 1 above) para 23.

strong indication that such action or inaction also constitutes unfair discrimination.

(c) Positive obligations on the state to achieve the goals of transformation: the test of reasonableness

The judgment in *Grootboom* confirms that the right of access to housing creates both negative[52] and positive[53] obligations for the state. Although the Court found that the manner in which the eviction was conducted resulted in a breach of the negative duty on the state to guarantee respect for the right of access to housing,[54] it is beyond the scope of this article to deal with this matter. I shall thus focus only on the nature of the positive obligation placed on the state by s 26, with special reference to s 26(2). It is important to note that the Court shied away from any interpretation of the positive obligation to 'promote and fulfil' the right of access to housing that would have entitled the applicants to *individual* relief. As part of its transformative vision of the Constitution, the Court stressed that the Constitution placed a duty on the state to act positively to ameliorate the deplorable living conditions in which hundreds of thousands of South Africans live.

> The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.[55]

But the fact that s 26 creates a right that can be enforced by individuals does not mean that individuals have a right to claim access to shelter or housing on demand. The individual has a right, yes, but a right to demand that the state take action to begin to address the housing needs of those individuals who cannot provide for themselves or who need assistance from the state before they would be able to gain access to adequate housing.[56] The positive component of the right of access to housing thus places a duty on the state to take steps to address the housing needs of society. Given the constitutional vision of a society in which all individuals will have access to adequate housing, the failure by the state to take adequate steps to achieve this goal would constitute a failure to engage meaningfully with the transformative vision of the Constitution. In enforcing this right, a court will be required to evaluate the state's action, first, to determine whether *any* steps have been taken and second, whether *appropriate* steps have been taken. At the heart of the *Grootboom* judgment is the Court's interpretation of what would constitute such appropriate steps and when the steps taken by the state

52 Ibid paras 20 and 34.
53 Ibid para 38.
54 Ibid paras 88 and 89.
55 Ibid para 93.
56 Ibid paras 94-95.

would not be satisfactory from a constitutional point of view. Where courts are called upon to consider whether the state has fulfilled its positive obligations to take appropriate steps to realise the right of access to housing, the question will revolve around the *reasonableness* or not of the state's plan and the implementation of this plan.

This focus on the reasonableness of state action derives from the text of s 26(2), which states that the positive obligation to provide access to housing requires the state to take '*reasonable* legislative or other measures, within its available resources, to achieve the progressive realisation of this right'. Almost any case alleging failure on the part of the state substantively to fulfil its positive obligations in terms of s 26 will stand or fall on the question whether the state acted 'reasonably' or not. And to determine whether the state's action is reasonable, according to the Court, it would be essential to evaluate the state action against the background of the constitutional commitment to substantive equality. The interrelated and mutually supporting nature of the rights of access to housing and equality, and the overarching goal of striving for 'real' equality and a respect for dignity, mean that state action or inaction that fails to take into account the structural inequalities in society, or the impact of that action on particularly vulnerable groups, is unlikely to be found to be reasonable. As is the case in equality jurisprudence, the impact of the acts or omissions must be judged with reference to the very specific context in which the complainants find themselves.

Thus, in the context of the right of access to housing, the court argued that for state policy to be reasonable, it had to take account of different economic levels in our society. A reasonable housing policy had to target both those who could afford to pay for housing and those who could not. What had to be remembered was that 'the poor [were] particularly vulnerable and their needs require[d] special attention.'[57] The reasonableness of state action in relation to the duty to provide access to housing had to be considered in its social, economic and historical context:

> The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review.[58]

Moreover, state measures to realise the right in s 26 should also account for the extent to which the measures denied access to the right. In particular, those whose needs were most urgent and whose ability to enjoy all rights was most in peril, could not be ignored by the measures. Because the Constitution requires everyone to be treated with equal care and concern, measures, though statistically successful, could be unreasonable if they failed to respond to the needs of the most desperate

57 Ibid para 36.
58 Ibid para 43.

and vulnerable individuals or groups in society.[59] To determine the reasonableness of the state's action or inaction, one also has to take into account the resources available to actually realise the right in question. There always has to be a balance between goal and means. The measures have to be calculated to attain a goal expeditiously and effectively, but the availability of resources will always be an important factor in determining what is reasonable in a particular case.[60] Put differently, measures put in place to realise the right will only be found to be reasonable if — at the very minimum — they are aimed at, and capable of responding to, the minimum core needs of the most vulnerable members of society.

These passages confirm the centrality of equality concerns when dealing with the adjudication of social and economic rights. What is required, in essence, is for the state to demonstrate that at least some effort has been made to achieve the realisation of core minimum entitlements. Thus, any programme aimed at achieving the realisation of the particular right has to be balanced and flexible in order to address the needs of society as a whole — not only the most needy and vulnerable. In the context of housing rights this means that any housing policy and measures to implement such a policy must take cognisance of short, medium and long-term needs. A programme that excluded a significant segment of society could therefore not be said to be reasonable.[61]

V Consequences of the Grootboom Judgment for our Understanding of Substantive Equality

The *Grootboom* judgment confirms the important place of the concept of substantive equality in determining the scope and content of social and economic rights. The question can also be asked, however, if the judgment casts any new light on the Constitutional Court's approach to the right to equality. I would argue that it does, not only because it alerts us to the fact that we will often have to consider the social and economic position of applicants when considering the validity of allegations of unfair discrimination, but also because it might hint at the driving force behind the Constitutional Court's approach to equality. The *Grootboom* judgment alerts us to the fact that the transformative vision of the Constitution allows us to view the various rights protected in the Bill of Rights — including the right to quality — differently. It reminds us that rights have two interrelated but distinct components: on the one hand there is the purely negative component that places a duty on the state to respect the specific right by not interfering with its enjoyment. This is the non-transformative aspect of a right as it attempts to preserve the existing situation in a society without reference to the larger social and economic

59 Ibid para 44.
60 Ibid para 46.
61 Ibid para 42.

context or the transformative goals of the Constitution. Hence the right of access to housing includes a negative aspect that prohibits the state or other relevant actors from disturbing someone in their existing enjoyment of their access to housing. The right to equality, on the other hand, includes the right of individuals to be protected from discrimination, that is, to be protected from detrimental action by the state or other relevant actors that distinguishes between individuals on the basis of suspect grounds such as race, religion, gender, sex and sexual orientation. This facet of the right to equality represents the formal aspect, and if the right to equality extended no further than protection of this aspect, it would not have embodied the transformative vision of the Constitution.

Thus, the rights in the Bill of Rights also contain a positive aspect and it is in this positive aspect that one finds the transformative spirit of the Constitution. This means that the right of access to housing includes not only the duty on the state (and other relevant players) to respect the access to housing of those who presently enjoy it, but also a duty to work towards realising the vision of a future in which those who do not yet have access to housing will also gain and enjoy continued access to housing. In the same way the right to equality contains a positive aspect and places a duty on the state to take steps to begin to realise the vision of a society in which people are not merely treated equally in a formal manner, but one in which all individuals really live with equal concern and respect. This transformative vision of society is not one that will be easy to achieve (most probably it will not be possible to achieve — ever), but the Constitution binds the state and other relevant players to this vision, and thus creates a constitutional imperative to take steps that would begin to address the present inequalities in our society.

There will, of course, often be a tension between the negative and positive aspects of the various rights because the negative aspect of the right is primarily aimed at freezing the status quo while the positive aspect is aimed at achieving a society that would look dramatically different from the one we live in now. Thus, on the one hand the right to equality implies the right of individuals not to be treated differently from others purely because of their association with a specific suspect group. This aspect of the equality guarantee reflects the constitutional commitment to protect the individual's human dignity and his or her existing entitlements. But, as the Constitutional Court has held in several cases, the right to equality means more than merely a guarantee of equal treatment. Given the specific social and economic context, the structural social and economic inequalities will sometimes require positive action from the state and other relevant actors. Where they fail to take such positive steps and merely treat people equally in a formal way, the state and other relevant actors will not be fulfilling their transformative duties. The difficult question for any court is to decide the extent to which such positive action is required, and what the limits of such actions should be.

Taking its lead from the text of s 9, the Constitutional Court has focused on the concept of 'unfairness' in attempting to come to grips with this issue. Much like its focus on 'reasonableness' when dealing with the positive obligations imposed by the right of access to housing, the Court asks whether the state or other relevant actors has acted fairly, given the constitutional commitment to a society in which individuals will be capable of reaching their full potential. And much like the case with 'reasonableness', this enquiry is undertaken with reference to the impact of the impugned provision judged from within the social and economic context in which the Constitution operates. Although the Constitutional Court has purportedly devised an equality 'test', this test is not very helpful as it is difficult to predict with mere reference to this text how the court will decide an individual complaint of discrimination.[62] I thus contend that at the heart of the equality jurisprudence of the Constitutional Court is a quest for *contextual fairness*. The Court's equality test acknowledges that the right to equality reflects the transformative vision of the Constitution and is therefore aimed at facilitating the achievement of a specific goal—a society in which individuals may live in dignity, able to reach their full potential as human beings—but within the confines of sanctioning action that is always both fair and reasonable to those people affected by the act or omission. And to determine what is fair and reasonable the Court will focus on the impact of the act or omission on the affected group.

To put it differently, the equality jurisprudence centres on the following question. Given South Africa's history of deprivation and prejudice; given the deep structural social and economic inequalities that exist in our society; given the Constitution's respect for individuality, difference, and hence the human dignity of all; given the constitutional goal of achieving a totally transformed society; how should the state or other relevant actors act or refrain from acting to ensure that there will be no unfair impact on the affected group? We look at the actual impact of the action or inaction by the state or other relevant actors and ask whether this can be sanctioned given our long-term commitment to a complete transformation of society in a manner that is contextually fair.

This analysis of the Constitutional Court's equality jurisprudence provides a better understanding of what it is that actually happens when the Court has to decide on an equality claim. It acknowledges that at the heart of the Court's equality analysis lies a value judgement about what is fair in the circumstances. This explains, for example, the difference between the majority and minority judgments in *City Council of Pretoria v Walker*.[63] While both Langa DP for the majority and Sachs J's minority

62 See generally Albertyn & Goldblatt (note 6 above).

63 Note 37 above. For criticism of the judgment in the case see S Jagwanth 'What is the Difference? Group Categorisation in *Pretoria City Council v Walker*' (1999) 15 *SAJHR* 200.

judgment followed the steps of the so-called *Harksen* test,[64] they came to diametrically opposed conclusions regarding the constitutionality of the selective enforcement of debt collecting by the City Council of Pretoria. Behind the rhetoric of these judgments lies a fundamental difference in the way in which their authors viewed the limits of fair action aimed at achieving the goal of 'real' equality. For Langa DP, the confusing and haphazard way in which the officials of the City Council of Pretoria acted in order to further rather ill-defined and vague transformative goals impacted unfairly (or, may I suggest, unreasonably?) against the respondents.[65] After looking at the bigger context — which included the potential political vulnerability of the white community[66] — Langa DP made a value judgement that the way in which the Council had acted to further the goals of equality had been unfair. On the other hand, Sachs J argued that the actions of the Council had had no discernible impact on the respondent as he was in exactly the same position that he would have been in before the Council embarked on its transformative action.[67] Thus, Sachs J made a value judgement to the effect that the Council's action could hardly be considered to be unfair (or unreasonable?) and hence could not be viewed as infringing the equality guarantee.

VI Conclusion

Lawyers and legal academics who wish to pursue the transformative possibilities of the Bill of Rights may find much to assist them in the *Grootboom* case. The reminder that equality is also a social and economic issue — not a formalistic and abstract question of weighing up whether an individual's human dignity has been infringed — is an important one. It refocuses attention on the transformative nature of the equality jurisprudence of the Constitutional Court and opens up possibilities for using both s 9(3) and ss 26 and 27 of the Constitution to begin to hold the state accountable for failures to address the needs of the socially and economically most vulnerable sections of society.

64 See note 31 above.
65 *Pretoria City Council v Walker* (note 37 above) paras 76-81.
66 Ibid para 48.
67 Ibid para 113.