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Evictions, Aspiration and Avoidance

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Evictions, Aspirations and Avoidance

Brian Ray¹

I INTRODUCTION

In December 2011 four of the Constitutional Court's five socio-economic rights cases turned on evictions.² The Court decided three eviction-related cases in the 2012 term and two more in 2013.³ For a Court that averages fewer than 30 decisions per term 10 decisions in less than two and a half years is an extraordinary level of attention devoted to a single area of constitutional law.⁴

Does this sustained attention to eviction cases harbinger a significant development in the Court's approach to the right to housing in FC s 26 and to socio-economic rights more generally? The cases provide some evidence of this possibility. One rough but important metric is the result and most of these decisions justifiably can be characterised as pro-poor.⁵ In several cases,

¹ Joseph C. Hostetler-Baker & Hostetler Professor & Associate Professor of Law, Cleveland-Marshall College of Law. I conducted research for this article as a Fulbright Scholar at the CL Marais Center at the University of Stellenbosch and the Community Law Centre at the University of the Western Cape. I am grateful for the excellent facilities and stimulating environments they provided and to Jackie Dugard, Ebenezer Durojaye, David Landau, Sandra Liebenberg, Gladys Mirugi-Mukundi, Frank Michelman, André van der Walt, Stuart Wilson, Stu Woolman, participants in the 2013 Constitutional Court Review conference and two anonymous referees for helpful discussions and comments on the issues the article addresses. I am also grateful for Jason Brickhill's editorial assistance, Amy Burchfield for research support and Katherine Greene for cite-checking and formatting the final draft.

² *Pheko and Others v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34, 2012 (2) SA 598 (CC), 2012 (4) BCLR 388 (CC) ('Pheko'); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33, 2012 (2) SA 104 (CC), 2012 (2) BCLR 150 (CC) ('Blue Moonlight'); *Occupiers of Skuurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd and Others* [2011] ZACC 36, 2012 (4) BCLR 382 (CC) ('PPC Quarries'); and *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others* [2011] ZACC 35, 2012 (2) SA 337 (CC), 2012 (4) BCLR 372 (CC) ('Golden Thread').

³ In 2012: *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2, 2012 (3) SA 531 (CC), 2012 (5) BCLR 449 (CC) ('Maphango'); *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9, 2012 (9) BCLR 951 (CC) ('Blue Moonlight II'); and *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* [2012] ZACC 26, 2013 (1) SA 323 (CC), 2013 (1) BCLR 68 (CC) ('Schubart Park'). In 2013: *Motswagae and Others v Rustenburg Local Municipality and Another* [2013] ZACC 1, 2013 (2) SA 613 (CC), 2013 (3) BCLR 271 (CC) ('Motswagae'); and *Hattingh and Others v Jutta* [2013] ZACC 5, 2013 (3) SA 275 (CC), 2013 (5) BCLR 509 (CC) ('Hattingh').

⁴ From 2003–2012 the Court issued an average of slightly more than 28 decisions each term.

⁵ I use the term 'pro-poor' to mean that the concrete outcome favoured the relatively economically disadvantaged party in the litigation. Others have used the term in related, but slightly different ways. See, eg, J Dugard and T Roux 'The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor 1995–2004' in R Gargarella, P Domingo, & T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (2006) 107–125 ('Institutional Voice'). As these analyses illustrate, the concept is more complex than my treatment here where I use it simply to point out that the Court has found ways to reach results that arguably to some extent achieve the objectives of the socio-economic rights by finding ways to protect the interests of poor people either individually or as a class while still largely avoiding substantive development of them.

the Court exercised a stronger institutional role that echoes its promising early interventions in *Government of the Republic of South Africa v Grootboom*, *Treatment Action Campaign v Minister of Health (No 2)* and *Khosa and Others v Minister of Social Development and Others*.⁶ The Court also established important principles that could have far-reaching effects in future eviction cases and might apply outside that context. For these reasons, the newer cases mark a shift away from the deferential role the Court adopted previously in *Mazibuko v City of Johannesburg*.⁷ In several other respects, however, these cases reflect the more conservative features of the Court's general approach to adjudicating socio-economic rights and the persistence of the separation-of-powers and institutional-competence concerns that cabin the exercise of its powers.

This article explores the tension between these two aspects of this string of decisions. On the one hand the evidence of a stronger judicial role represents a long-standing and genuine commitment to find ways to make the socio-economic rights provisions do the very difficult work of addressing the deep inequalities that the new democratic order deliberately left in place. The pro-poor outcomes and several remarkable doctrinal advances in these decisions show a court working in creative ways to fashion a jurisprudence that aspires to fulfill that promise.

In spite of the clear advances these cases make, the separation-of-powers and institutional-competence concerns that have frequently operated to limit the Court's role in its socio-economic rights decisions continue to feature prominently. These concerns generally have pushed the Court to avoid interpreting these provisions in ways that set clear and wide-reaching precedents that might have potentially significant redistributive effects.

⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC) ('Grootboom'); *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC) ('TAC'); and *Khosa and Others v Minister of Social Development and Others, Mablaule and Another v Minister of Social Development* [2004] ZACC 11, 2004 (6) SA 505 (CC) ('Khosa'), respectively. Stuart Wilson and Jackie Dugard have labelled these cases the 'first wave' of socio-economic rights decisions in which the Court adopted a stronger approach than in its more recent cases beginning in 2008 with *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1, 2008 (3) SA 208 (CC) ('Olivia Road'). S Wilson & J Dugard 'Constitutional Jurisprudence: The First and Second Waves' in M Langford, B Cousins, J Dugard & T Madlingozi (eds) *Symbols or Substance: The Role and Impact of Socio-Economic Rights Strategies in South Africa* (2013) ('First and Second Waves'). Sandra Liebenberg has drawn a similar contrast between these earlier decisions and the Court's more recent cases. S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) ('Socio-Economic Rights').

⁷ *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28, 2010 (4) SA 1 (CC) ('Mazibuko'). Many commentators have argued that *Mazibuko* represents the nadir of the Court's socio-economic rights decisions. See, eg, Liebenberg *Socio-Economic Rights* (note 6 above) at 480 ('The deferential and normatively thin concept of reasonableness review applied in the *Mazibuko* case weakens the capacity of socio-economic rights jurisprudence to contribute meaningfully to transformative social change.'). S Wilson & J Dugard 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' in S Liebenberg & G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 222, 236 ('Taking Poverty') (Argues the Court failed 'to define and evaluate the interests at stake in Mazibuko' and thus 'undercut its ability to hold the City to any meaningful standard of reasonableness').

This countervailing impulse is evident in the Court's continued reliance on what I am describing as a set of 'avoidance' techniques.⁸ These techniques encompass 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 a highly abstract or factually specific level; and limiting direct interventions to cases featuring clearly unconstitutional conduct.

As the pro-poor results in these cases demonstrate, these techniques are not necessarily anti-poor in effect. Indeed sometimes the possibility of avoiding concrete constitutional interpretation makes the Court more willing to push further towards progressive results.⁹ But, as a general matter, these techniques collectively tend to limit the scope of substantive constitutional development over time and circumscribe the Court's own role in that development.

I am far from the first to observe a pattern of constitutional avoidance in the Court's socio-economic rights decisions. Geo Quinot and Sandra Liebenberg succinctly summarise the core of this criticism: the Court's reasonableness review standard and its connection to an administrative-law model 'is relatively process orientated and pays little regard to developing the substance of the normative content and obligations' of socio-economic rights.¹⁰ Stuart Wilson and Jackie Dugard similarly argue that the Court needs 'to exercise the power the Constitution assigns it explicitly to determine the interests socio-economic rights themselves exist to protect and advance'.¹¹

Danie Brand attributes the Court's tendency to avoid substantive interpretations to a pervasive 'strategy of deference' to the political branches.¹² Brand argues that this strategy reflects a set of institutional concerns largely derived from debates over the constitutionalisation of socio-economic rights – democratic legitimacy,

⁸ See, eg, D Bilchitz 'Is the Constitutional Court Wasting Away the Rights of the Poor? *Nkokotyana v Ekurhuleni Metropolitan Municipality*' (2010) 127 *South African Law Journal* 591, 597; I Currie 'Judicious Avoidance' (1999) 15 *South African Journal on Human Rights* 138, 146 ('Judicious Avoidance'); Dugard & Roux, *Institutional Voice* (note 5 above) at 110.

⁹ *Mazibuko* arguably shows that sometimes squeezing the Constitution too hard – where the state has not been entirely supine – leads the Court to retreat into deference.

¹⁰ G Quinot & S Liebenberg 'Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa' ('Narrowing') in S Liebenberg & G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 197, 197 ('Poverty').

¹¹ Wilson & Dugard *Taking Poverty* (note 7 above) at 227. Wilson and Dugard have argued in a similar vein that what they call the second-wave cases are characterised by a consistent refusal to develop the substance of the reasonableness test and reliance on the same techniques I include in the category of avoidance. See Wilson & Dugard *First and Second Waves* (note 6 above) at 11 (arguing 'the Court often chose to reach its desired outcome by enforcing procedural rights through directing the implementation of pre-existing policy and through directing the state to keep promises it was alleged to have made to the claimants in a particular case. Where it can, the Court has also relied on applicable legislation and policy to give content to rights.')

¹² D Brand 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or "What are Socio-Economic Rights For?"' in H Botha, AJ van der Walt, & JC van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33, 37–43 ('Proceduralisation'); D Brand 'Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa' in Quinot and Liebenberg (ed) *Taking Poverty* (note 7 above) 172, 176 ('Deference').

institutional competence and separation of powers.¹³ Theunis Roux has described this tendency in related terms as motivated by an often unstated concern for preserving institutional security.¹⁴

These analyses point out the risk that uncritical avoidance will reduce the socio-economic rights to an ‘embroider[ed] version of procedural fairness’ that marginalises the Court’s role and undermines their status as justiciable rights.¹⁵ Some critics have called for the Court to adopt a much more direct enforcement role, including, for example, integrating the minimum-core concept to establish a substantive baseline to assess government programmes.¹⁶ More recent proposals have focused on working within the Court’s existing approach – accepting to some extent its limits while still pushing towards greater substantive engagement.¹⁷

The signs of avoidance in these more recent cases show that it is unlikely the Court will begin to develop the reasonableness test in strong substantive ways. But the pro-poor results and doctrinal advances in this set of cases also point towards approaches that allow the Court to mitigate the institutional and practical concerns that pervade its socio-economic rights decisions and still exercise greater institutional authority for interpreting and enforcing these rights.

There are benefits to an approach that seeks to channel the aspirational impulse through avoidance techniques. First, it is pragmatic. It tries to maximise the Court’s existing framework. In this respect it draws lessons from the more recent critiques I just mentioned. Pragmatism implies compromise, and I accept in part Roux’s framework where pragmatism, while necessary and even at times laudable because it secures the Court’s place as a functioning part of South Africa’s

¹³ Brand *Deference* (note 12 above) at 174 (Explains that the strategy reflects ‘a set of institutional concerns – concerns about the institutional capacity, legitimacy, integrity and security of courts and about classical separation of powers requirements (otherwise referred to as “comity” or “constitutional competence” ...’).

¹⁴ T Roux ‘Principle and Pragmatism on the Constitutional Court of South Africa’ (2008) 7 *International Journal of Constitutional Law* 106, 128 (‘Principle’); Brand *Deference* (note 12 above) at 175.

¹⁵ Wilson & Dugard *Taking Poverty* (note 7 above) at 227. See also M Pieterse ‘On Dialogue, Translation and Voice: Reply to Sandra Liebenberg’ in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 331, 345 (‘Dialogue’) (Maintains that the Court’s approach is virtually indistinguishable from pre-constitutional administrative law and the ‘unfortunate result is that the judicial contribution to the debate over transformation is no different than it would have been in a constitutional setting where socio-economic rights had either not been entrenched at all or had functioned only as directive principles of state policy.’)

¹⁶ D Bilchitz ‘Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance’ (2002) 119 *South African Law Journal* 484, 487–88. *Mazibuko* definitively rejected the minimum-core approach and cemented the Court’s more general refusal to develop the positive dimensions of socio-economic rights without considering the internal limit that most contain. See *Mazibuko* (note 7 above) at paras 53–57.

¹⁷ See, eg, Quinot & Liebenberg *Narrowing* (note 10 above) at 199 (‘In this chapter we argue that an approach to reasonableness review that builds on the development of reasonableness as a standard in both administrative justice and socio-economic rights jurisprudence offers us a strong and coherent model of judicial review.’); Brand *Deference* (note 12 above) at 188–90 (Argues for a ‘judicial prudence’ that engages a range of stakeholders and maintains a more active judicial role). Cf Wilson & Dugard *Taking Poverty* (note 7 above) at 239–40. Wilson and Dugard also propose adjustments to reasonableness review, but they are deeply skeptical of the Court’s own tendency (and presumably arguments in the literature) to rely on ‘supposedly “democratic” processes beyond the Court’s purview’.

governing framework, always compromises principle.¹⁸ The critical examination of the signs of avoidance in two of these cases that follows, highlights that compromise.

But pragmatism also means getting the job done. And these cases do that in ways that demonstrate that avoidance does not necessarily require the Court to adopt the deeply deferential role described in *Mazibuko* or result in a failure to advance substantive development of the socio-economic rights.

Avoidance techniques, however, assume that the democratic branches share the Constitution's reform agenda. Wilson and Dugard are justifiably skeptical of arguments highlighting the 'supposedly "democratic"' payoff in political enforcement.¹⁹ They point out – as have others – that the power to *challenge* the results of the political process against an independent standard is the distinct feature of constitutional rights.²⁰ Avoidance undermines that distinctiveness because on the one hand it defers to a large extent to political choices and, on the other, it emphasises remedies that enhance participation as the principal means of challenging those choices.

By the same token, the transformed view of separation of powers that political enforcement represents opens up different configurations of judicial and legislative power. If transformation means accepting the possibility for courts to delve deeply into areas like setting policy priorities and budgets traditionally considered out of their reach, it must also accept the possibility of legislative and executive constitutional interpretation. Breaking down the divide between law and politics allows movement across both sides of that border.²¹

This same slippage between legal and political functions acknowledges that socio-economic rights can operate as an agenda for political action and social change as well as (and perhaps to a greater degree than) a judicially enforceable limit on the exercise of state (or even private) power. Developing this aspect requires courts to adopt an interpretive role that allows for policy to change in response to better empirical data, altered budgets and political developments. It also opens the door for courts to enforce socio-economic rights by intervening more directly in policy processes themselves. The emphasis that avoidance techniques place on procedural control and mechanisms for putting the concerns of poor people on political and policy agendas play on this.

If courts maintain a genuinely independent role when employing avoidance techniques, individual cases can, in the right circumstances, stimulate a

¹⁸ See Roux *Principle* (note 14 above) at 116.

¹⁹ Wilson & Dugard *Taking Poverty* (note 7 above) at 223 & 239.

²⁰ Ibid at 223; Liebenberg *Socio-Economic Rights* (note 6 above) at 16–22, 482–83.

²¹ See Liebenberg *Socio-Economic Rights* (note 6 above) at 484 (Describes 'a reconceptualised separation of powers doctrine based on a model of dialogic interaction between the three branches of government, affected communities and organisations.'). Cf S Woolman 'Humility, Michelman's Method and the Constitutional Court: Rereading the *First Certification Judgment* and Reaffirming a Distinction between Law and Politics' (2013) 24 *Stellenbosch Law Review* 281. (Court recognises that its primary role in a new multiracial, multiparty constitutional democracy is state-building: (a) ensuring accountability through free and fair elections; (b) pressing public entities and state actors to discharge their regulatory, legislative and constitutional duties; and (c) establishing the rule of law in its most basic form – governors and governed are subject to the same rules of the game.)

broader political commitment to these rights. As André van der Walt explains, because Parliament perpetrated apartheid through legislation, there is a ‘special democratic and liberating significance’ to a legislature independently taking on board constitutional principles and seeking to enforce them directly through legislation.²² Where the Court uses – and sometimes broadly interprets – legislation, it recognises that significance and also that the success of the constitutional experiment depends on developing and expanding the political commitment that political enforcement represents. This also is true where the Court leaves room for political responses and even more directly when it crafts procedural remedies like engagement that seek to enhance what it calls ‘participatory democracy’.

This approach trades immediate, concrete relief and clear constitutional principles through expansive constitutional interpretation and direct court intervention for the prospect of more effective and more robust enforcement over time through increased legislative and executive activity and commitment to these rights. Experience has shown that this tradeoff is a gamble.²³ There are no guarantees that a more direct approach will work better.²⁴ Equally important, the Court seems committed to taking that bet and so the challenge is to find ways to hedge it by identifying ways the Court can maintain an independent role even when it relies on avoidance techniques.

Identifying ways that courts can act independently even while acknowledging legislative and executive leadership in identifying the substance of the socio-economic rights, recognises the distinction Pamela Karlan draws between a court’s own institutional authority and constitutional provisions that establish legislative power.²⁵ As Karlan explains, a court can view its own authority broadly and at the same time interpret constitutional provisions in a manner that grants broad legislative powers.²⁶ The position a court takes on each spectrum is independent of the other, but the combination of the two determines the extent to which the court views the relationship between the constitution and politics as either cooperative or antagonistic.

A court that adopts a narrow view of its own authority and broadly interprets legislative (and executive) power moves towards a position of outright deference – and reflects a view that the constitution operates primarily at the far margins of politics to police only the most obvious and egregious violations. This tracks the position of uncritical avoidance that these techniques risk. Conversely, a court that asserts extensive institutional authority and narrowly construes legislative power cuts off constitutional values from politics. The constitution either prohibits a particular political action or has nothing to say about it.

²² AJ van der Walt *Property and Constitution* (2012) 103.

²³ Wilson and Dugard argue that *Grootboom* has had a substantial, systematic impact (although they highlight that decision as uniquely substantive). See Wilson & Dugard *Taking Poverty* (note 7 above) at 225–227. As I discuss below, however, *Blue Moonlight* shows that the City of Johannesburg certainly failed to internalise the pro-active approach that the Court called for it to develop in *Olivia Road*.

²⁴ See D Landau ‘The Reality of Social Rights Enforcement’ (2012) 53 *Harvard International Law Journal* 190, 201.

²⁵ PS Karlan ‘Democracy and Disdain’ (2012) 126 *Harvard Law Review* 1, 12.

²⁶ *Ibid.*

Karlan advocates a more complex alternative: strong judicial authority paired with expansive legislative powers. Rather than deferring to the political process except at the margins, courts play an independent role in identifying constitutional principles and values. But recognising that the legislature has similarly broad powers, requires courts to acknowledge legislative enforcement of those principles and values. The challenge is to find concrete ways that courts can work with legislation and executive policy without deferring completely to them.²⁷

The avoidance techniques I describe here easily lend themselves to a combination of weak institutional authority and expansive legislative (and executive) power that would marginalise the judicial role. The Court's refusal to develop the substance of socio-economic rights without considering the resource-limitation provisions, its strong preference for analysing socio-economic rights within the context of existing legislation or policy and its acceptance of a deeply limited institutional competence to deal with the complex issues that socio-economic rights present, all weaken the Court's own authority while expanding legislative and executive power to determine what these rights require. (In many instances, the coordinate branches simply ignore them.)

The Court has at times asserted much greater institutional authority while still acknowledging broad legislative and executive power. Both *Grootboom* and *TAC* exhibit this combination for different reasons. In *Grootboom*, the Court examined government policy in light of an independent constitutional standard. In *TAC*, the Court asserted independent authority to examine the government's reasons for limiting a programme of its own creation.²⁸ Likewise, *Port Elizabeth Municipality* shows a Court confidently explaining why eviction legislation satisfies the constitutional standard set by FC s 26(3).²⁹ As I explain below, while each of these cases featured avoidance techniques, the Court, in asserting greater independent authority, actively partnered with the political branches to interpret the Constitution rather than merely deferring to them.

In *Olivia Road* and *Joe Slovo* the Court has exerted a different kind of institutional authority, while largely ceding interpretive control, by creating procedures to manage the process of political enforcement.³⁰ Engagement establishes an on-going form of judicial control through a set of consultation requirements that the courts have the power to enforce irrespective of the merits of challenged policies.³¹ *Joe Slovo's* detailed engagement order combined with continued oversight

²⁷ Karlan (note 25 above) at 55–57, 69.

²⁸ See *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('*Grootboom*') at paras 20–46 (discussing constitutional provisions and justiciability), at paras 47–79 (evaluating the state housing programme); *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* (CCT8/02), [2002] ZACC 15, 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) ('*TAC*') at paras 22–25 (discussing justiciability), at paras 96–106 (explaining the power of the court to provide relief).

²⁹ *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) ('*Port Elizabeth*'). The Court has exhibited this same confidence in several other eviction-related cases, including *Jafftha v Schoeman* [2004] ZACC 25, 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC). I focus on *Port Elizabeth* because it established the model the Court follows in later cases.

³⁰ *Olivia Road* (note 6 above); *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others* ('*Joe Slovo*') (CCT 22/08) [2011] ZACC 8, 2011 (7) BCLR 723 (CC).

³¹ *Olivia Road* (note 6 above) at paras 32–35.

of the engagement process exerted more direct control – but control that was confined to that specific case.³²

This more complex conception of the relationship between courts and the political branches overlaps in important ways with what Van der Walt has called a ‘subsidiarity approach’.³³ Subsidiarity incorporates a set of principles that avoid direct application of the Constitution or the common law in favour of resolving cases, where possible, on legislative grounds.³⁴ Briefly stated, the subsidiarity principles require applying legislation enacted to give effect to a constitutional right over pursuing a claim either directly under the Constitution itself or under the common law.³⁵ In Karlan’s terms, they institutionalise respect for broad legislative power under the Constitution.

Subsidiarity shares the avoidance techniques’ emphasis on democratic constitutional development.³⁶ Applied properly, subsidiarity is ‘a politics-confirming and -enhancing device that ensures interplay between constitutional principles and democratic laws, reformist initiatives and vested rights, change and stability’.³⁷ Subsidiarity also recognises the practical benefits of taking the long view that legislation and policy, not adjudication, are the real drivers of legal transformation.³⁸

But like avoidance, subsidiarity has risks. Uncritically deployed, it either can devolve into a ‘refusal to critically reflect on and decide the difficult constitutional issues inherent in every legal dispute in post-apartheid South Africa’.³⁹ The cure for that is a ‘constitutionally driven’ interpretative approach that ‘go[es] behind the legislative text and considers whether it properly gives effect to the underlying constitutional principle or the so-called value content of the basic rights’.⁴⁰ In other words, an approach that actively cooperates with the legislature and executive in assessing what the Constitution requires.

³² I discuss these examples below.

³³ AJ van der Walt ‘Normative Pluralism and Anarchy: Reflections on the 2007 Term’ (2010) 1 *Constitutional Court Review* 77, 98 (‘*Normative Pluralism*’).

³⁴ Van der Walt *Normative Pluralism* (note 33 above) at 108. Van der Walt describes what he calls an ‘embroidered’ theory of subsidiarity that draws out the implications of the principle as applied in the cases he discusses. Under this embroidered version:

direct application of the Constitution and the application and development of the common law should only come up in the absence of legislation. Some legislation will give effect to rights in the Bill of Rights more directly and some will affect existing law more explicitly and extensively, but in line with *SANDU* and *Bato Star* all legislation either fails constitutional scrutiny or triggers a subsidiarity principle according to which the right must primarily be protected via the legislation and not via direct application of the constitutional provision or the common law.

³⁵ Van der Walt *Property* (note 22 above). Van der Walt adds two provisos to these principles: first, a litigant can rely directly on the Constitution to challenge applicable legislation; and secondly, a litigant can rely directly on the common law where the legislation either was not intended to or in fact does not cover that aspect of the common law.

³⁶ *Ibid* at 91–92.

³⁷ Van der Walt *Normative Pluralism* (note 33 above) at 100.

³⁸ Van der Walt *Property* (note 22 above) at 8–9.

³⁹ *Ibid* at 99.

⁴⁰ *Ibid* at 102.

The analysis that follows first describes the avoidance techniques and the ways they tend to diminish the Court's interpretive authority over socio-economic rights provisions. I then argue that separating broad legislative power to enforce the socio-economic rights from the Court's own institutional authority opens up possibilities for the Court to maintain a stronger institutional role even when it relies on the avoidance techniques. First, by paying more explicit attention to the Constitution when interpreting and enforcing legislative and policy measures, the Court can maintain greater interpretive authority that partners with rather than simply deferring to the political branches. Secondly, by asserting more extensive control when relying on procedural enforcement mechanisms the Court can exercise a form of procedural authority over political and policy-making processes to reach constitutional outcomes without elaborating broad constitutional principles.

Part II describes the avoidance techniques and the ways they have reduced the Court's interpretive authority in its socio-economic rights decisions. I argue that, viewed under Karlan's framework, these techniques leave room for courts to exercise independent interpretive and procedural authority. Part III develops Van der Walt's idea of constitutionally driven subsidiarity – what I call 'thick' subsidiarity – to identify how the Court can maintain greater interpretive authority and explain how *Port Elizabeth* is a model for this interpretive approach. Parts IV and V closely examine two recent eviction decisions – *Maphango* and *Blue Moonlight* – as examples of the Court's reliance on several avoidance techniques to reach pro-poor outcomes. Both cases show how the avoidance techniques constrain the Court's interpretive role, but *Blue Moonlight* tracks *Port Elizabeth*'s example of a constitutionally thicker enforcement of statutes and policy. In *Maphango* the Court went out of its way to avoid engaging with the substantive issues by relying on a legislative procedural mechanism.

Part VI returns to *Port Elizabeth* and *Maphango*. I argue that – at the same time that it features thick subsidiarity – *Port Elizabeth* also describes a judicial approach that raises avoidance to the level of constitutional strategy by emphasising the need for courts to adopt a 'managerial' role and resolve socio-economic rights cases in fact-specific, contingent ways. This pre-figured the meaningful engagement requirement in *Olivia Road* and the institutional authority courts can exercise through procedural techniques. *Maphango*'s expansion of the Rental Housing Tribunal process follows that same model. Both *Olivia Road* and *Maphango* illustrate that relying on procedural control severely restricts the Court's interpretive authority. But both cases also show how the Court can exercise a different form of institutional authority that can shape and prod political enforcement. Unlike thick subsidiarity, which emphasises a legislative-judicial partnership, these procedural techniques create opportunities for courts to directly challenge government actions or policies and push for constitutionally compliant outcomes rather than to establish broad constitutional principles.⁴¹

⁴¹ *Maphango* itself represents the Court interpreting a procedure created by legislation to allow private actors to challenge private action on Constitution-related grounds.

I then examine two companion judgments issued the same day as *Blue Moonlight* that apply *Blue Moonlight*'s core constitutional holdings without expanding them in significant ways. I argue that these cases first show the potential for courts following *Blue Moonlight* to use the flexible framework of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) to exert procedural control over specific eviction processes to reach constitutionally compliant outcomes. Read this way, the substantive principles *Blue Moonlight* established are primarily tools for strengthening the case-specific managerial role *Port Elizabeth* describes. These two cases also demonstrate the potential for individual resolutions under PIE to incrementally develop stronger substantive principles over time.⁴² The Court's analyses in each case missed that opportunity by failing to identify the relative weights and effect of the facts under PIE's test.

II AVOIDANCE TECHNIQUES

I use the term 'avoidance' intentionally and provocatively to emphasise the ways in which the Court, even when it reaches a pro-poor outcome, frequently works in ways that avoid expansive substantive development of the socio-economic rights.⁴³ Standing alone each one of these techniques could be defended on several grounds – and to varying degrees were defensible in the cases where I identify them.⁴⁴ I do not intend (or, at least I do not always intend) to criticise the Court's use of them in any specific case.

Regardless, these techniques tend to push the Court away from playing an independent role in interpreting and enforcing socio-economic rights. And when the Court relies on more than one of these techniques in an individual case, it generally avoids constitutional substance to a greater degree. More troubling,

⁴² I do not address several other significant eviction-related cases, in particular *Jaftha v Schoeman and Others* (CCT74/03) [2004] ZACC 25, 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC).

⁴³ My approach might be taken to be in some tension with what Frank Michelman, relying on Donald Davidson's work, describes as 'the principle of interpretive charity'. F Michelman 'On the Uses of Interpretive "Charity": Some Notes on Application, Avoidance, Equality, and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa' (2008) 1 *Constitutional Court Review* 1, 4. Michelman originally cast his piece as a critique of Stu Woolman's 'flight from substance' reading of the Constitutional Court. See S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) *South African Law Journal* 762. But the two ultimately hold only marginally different positions. See further, S Woolman 'Between Charity and Clarity: Kibitzing with Frank Michelman on How Best to Read the Constitutional Court' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy* (2012) 391; F Michelman 'Old Kibitzes Never Die: A Rejoinder to Stu Woolman' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy* (2012) 417.

⁴⁴ Iain Currie has articulated a range of theoretical and practical justifications for the Constitutional Court's reliance on a more general set of what he calls 'judicious avoidance' techniques. See I Currie *Judicious Avoidance* (note 8 above) at 138. Many of those same justifications could apply to the techniques I describe here. See, eg, M Kende *Constitutional Rights in Two Worlds: South Africa and the United States* (2009) 271–75 (Defends the Constitutional Court's 'pragmatic' approach to enforcing the socio-economic rights provisions). Stu Woolman has critiqued the Court's avoidance jurisprudence. See S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 21–40, 42–78. See also S Woolman 'Application' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 31.

where the Court deploys these techniques over time it has a tendency to move towards a position of weak institutional authority that severely constrains its capacity to act as an independent partner in developing and implementing socio-economic rights provisions.

A Techniques

1 *Political Enforcement*

The Court has generally preferred to follow the lead of the legislature and executive in identifying the concrete requirements the socio-economic rights impose. FC s 26 and FC s 27 – the two core socio-economic rights that have occupied most of the Court’s attention to date – contain identical limiting provisions requiring the state to ‘take reasonable legislative and other measures... to achieve the progressive realisation of each of these rights’.⁴⁵ The Court’s consistent approach when considering the positive obligations of these rights is to begin with this provision rather than interpret the right in a manner that gives the right independent substance.⁴⁶ This interpretive approach – a form of avoidance – formalises the more general preference for relying on political branch measures.

In its strongest form this results in outright deference to legislation or policy. The Court’s analysis of the legislation and policies at issue in *Mazibuko* is the best recent example of this.⁴⁷ There O’Regan J articulated a general approach to positive socio-economic rights claims that ties their substance directly to state-enforcement measures and gives courts a deliberately reactive and secondary role in developing their substance.⁴⁸

More moderate manifestations of this preference involve the Court cooperating with the legislature or executive either by relying on legislation that enforces the Constitution or by enforcing (sometimes more robustly than the government) existing policies or programmes. The *TAC* Court observed that it was simply enforcing the government’s own policies.⁴⁹ *Khosa* directly altered extant social security law by recognising permanent residents’ entitlement to benefits. In both

⁴⁵ Constitution of the Republic of South Africa, 1996. The Court also has generally interpreted the unqualified socio-economic rights provisions as implicitly limited. See, eg, Liebenberg *Socio-Economic Rights* (note 7 above) at 139–40 (On *Soobramoney*) and 236–37 (Children’s rights in *Grootboom*). Liebenberg notes that the Court has addressed FC s 26(1) directly in cases dealing with what it characterises as the ‘negative’ obligations it imposes. See Liebenberg *Socio-Economic Rights* (note 6 above) at 218.

⁴⁶ See *Mazibuko* (note 7 above) at paras 48–49 (Explains that the Court concluded in *Grootboom* and *TAC* that the ‘scope of the positive obligation’ is ‘carefully delineated by’ the limitation provision.)

⁴⁷ See Brand *Deference* (note 12 above) at 177; Liebenberg *Socio-Economic Rights* (note 6 above) at 469.

⁴⁸ *Mazibuko* (note 7 above) at para 61 (‘Ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails...’). O’Regan J ties this approach first to the relative institutional incapacity of courts in dealing with the complexities of social conditions and budgets and secondly to the ‘democratic accountability’ loss that doing so would entail.

⁴⁹ *TAC* (note 28 above) at paras 117–120.

cases, the Court simply expanded existing programmes.⁵⁰ *TAC* expanded the Nevirapine protocol not solely on what FC s 27 requires, but primarily because the government's reasons for limiting the MTCT programme to pilot sites was unreasonable in terms of the government's own conclusions: that the drug was both safe and efficacious. The Court adopted a similar strategy in *Blue Moonlight*. The Court rejected the City of Johannesburg's decision to limit its emergency housing programme as irrational on the programme's own terms.⁵¹ *Khosa* demanded a more substantive elaboration of the social security right. The Court, consistent with established precedent and the text itself, interpreted 'everyone' to mean more than 'citizen'.⁵² However, the *Khosa* Court's departure point was still the legislation itself. The matter ultimately turned on the irrationality of excluding permanent residents from the benefits scheme.⁵³

At the opposite end of the spectrum, this deference limits the extent of the Court's constitutional interpretation of a right and leaves ample room for the legislature or the executive to place its own gloss on the provision and create its own remedies for the defect. *Grootboom*'s limited declaration that the state's housing policy was unconstitutional without prescribing criteria for compliance is one of the best examples.⁵⁴ The carefully crafted order in *TAC* that gave the government discretion to adopt a different protocol is a more limited version.⁵⁵ In each case, the Court either completely avoided giving the constitutional provision discernable content or established a highly abstract and non-remedial set of requirements for their discharge.

2 Procedural Creativity

The Court also sometimes avoids substantive development of socio-economic rights through creative application of its own procedures or by relying on

⁵⁰ See Pieterse *Dialogue* (note 15 above) at 344 ('It is the content of legislative and other measures aimed at achieving the progressive realisation of socio-economic rights that is assessed through an analysis of reasonableness, not the content of the rights themselves.' (emphasis omitted)). Pieterse analyses both *TAC* and *Grootboom* as examples. I agree that *TAC* falls squarely in this category because, as Pieterse shows, the arguments in that case were specifically about whether the programme's own limitations were reasonable in light of the decision to go forward with the pilot sites. But, like Wilson and Dugard, I see *Grootboom* as creating a substantive, if limited, constitutional standard. See Wilson & Dugard *Taking Poverty* (note 7 above) at 227.

⁵¹ *TAC* (note 28 above) at paras 39 & 80–81; *Blue Moonlight* (note 2 above) at paras 87–89. See also *Mazibuko* (note 7 above) at para 64 ('In a sense, then, all the Court did [in *TAC*] was to render the existing government policy available to all.') See also Quinot & Liebenberg, 'Narrowing' (note 10 above) at 215 (Court in *TAC* did very little to explicitly 'articulate the normative content' of s 27(1)).

⁵² *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development and Others* [2004] ZACC 11, 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) ('*Khosa*') at para 47.

⁵³ *Khosa* (note 52 above) at paras 53, 85.

⁵⁴ *Grootboom* (note 28 above) at paras 67, 93–99. In *Mazibuko*, O'Regan J explains that the *Grootboom* declaration was crafted specifically to minimise court intrusion into the government's role in developing policy. *Mazibuko* (note 7 above) at para 63.

⁵⁵ *TAC* (note 28 above) at para 135. See also *Mazibuko* (note 7 above) at para 64 (Compares the flexibility in the *TAC* order to the declaration in *Grootboom*).

remedies that expand procedural protections for poor people.⁵⁶ *Olivia Road* is the paradigm for this kind of procedural creativity and reflects both dimensions. The engagement order in that case – issued by an apex court with discretionary jurisdiction after oral argument – was a brand-new procedure that turned the Court into a forum for informal dispute resolution.

The *Olivia Road* Court's decision to make engagement a constitutional requirement in the final judgment and related refusal to address the issues the parties raised is another, more substantive version of that same creativity in two respects. First, as the *Maphango* majority noted, it departed from normal procedure to grant a 'novel' remedy that none of the parties sought.⁵⁷ Secondly, it ducked the substantive constitutional issues by refusing to further develop *Grootboom* and FC s 26 in light of the City of Johannesburg's housing policy.⁵⁸

The Court's back-door incorporation of engagement as a limiting mechanism in the eviction order in *Joe Slovo* is another example.⁵⁹ While formally rejecting the residents' claim that the government failed to meaningfully engage with them as required by *Olivia Road*, the detailed and carefully structured engagement order that accompanied the judgment effectively expanded the scope of the requirement.⁶⁰ *Maphango's* stay of proceedings, as I explain below, also extends *Olivia Road* in striking ways.⁶¹

3 Abstract or Fact-Specific Constitutional Deliberation

Another important aspect of avoidance is the Court's tendency to operate at two extremes of constitutional deliberation. On one extreme the Court frequently deals with socio-economic rights at what Keith Whittington calls the 'policy-making level' of constitutional deliberation by reaching a result on fact-specific grounds frequently by relying on multi-factor balancing tests.⁶² Operating at this

⁵⁶ A more mundane example is the Court's flexible approach to the admission of evidence on appeal in socio-economic rights cases. See, eg, *Mazibuko* (note 7 above) at paras 39–41; *Port Elizabeth* (note 29 above) at para 36. See also Wilson & Dugard *First & Second Waves* (note 6 above) at 22–23 (Cites this same phenomenon).

⁵⁷ *Maphango* (note 3 above) at fn 121. I discuss this below in Part IV.

⁵⁸ Liebenberg provides a detailed analysis of the substantive issues the Court refused to reach. See S Liebenberg 'Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of "Meaningful Engagement"' (2012) 12 *African Human Rights Law Journal* 1, 18 ('*Engaging*').

⁵⁹ *Joe Slovo* (note 30 above) at para 7.

⁶⁰ See B Ray 'Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy' (2010) 9 *Washington University Global Studies Law Review* 399, 408–12 (Analyses the innovations in the *Joe Slovo* engagement order). See Woolman (note 44 above) 460–467, 494–495 (Offers a similar analysis of the two *Joe Slovo* judgments.)

⁶¹ See below at Part IV.

⁶² KE Whittington *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999) ('*Construction*') 4. Whittington argues that when political actors either expressly or implicitly act or develop policy in light of more general constitutional principles they engage in a form of constitutional elaboration – or 'construction' that develops those principles in ways that do not extend beyond a specific situation. Lawrence Solum draws a similar distinction between what he terms 'political construction' defined as 'giving legal effect to the [constitutional] text without the aid of judicial constructions' and 'judicial construction' which is the 'translat[ion] [of] the linguistic meaning of a legal text into doctrine...'. L Solum 'The Interpretation-Construction Distinction' (2010) 27

level ‘may fulfill the promise of a constitution in governmental practice, yet it does not extend the meaning of the constitution itself’.⁶³

When the Court operates at the policy end of this spectrum it sometimes creates ‘soft-substantive’ interpretations by providing concrete relief to the individual plaintiffs without tying that relief to any broader constitutional requirement. The result itself establishes some guidelines for what the right at issue could require on those specific facts, but the Court deliberately stops short of establishing any definitive interpretation. *Port Elizabeth Municipality’s* description of a court going ‘beyond its normal functions ... to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process’ and its emphasis on the need to reconcile competing constitutional principles ‘by a close analysis of the actual specifics of each case’ is a formula for deliberation at the policy level.⁶⁴

The meaningful engagement requirement is a procedural version of this because it requires case-by-case assessment that leaves little room for the terms of any negotiated agreement having precedential effect. In *Olivia Road* the Court’s refusal to reach the more difficult question of whether the substance of the City’s revised housing policy passed constitutional muster, left *Grootboom* at an abstract level and created a mechanism – engagement – for resolving cases on a procedural basis that severely limits engagement with substantive constitutional principles.⁶⁵

Joe Slovo’s engagement order illustrates the ways that this technique can create soft substance. As a formal matter, the Court approved both the eviction plan and the government’s engagement efforts.⁶⁶ But the order’s requirement that the government engage on a detailed list of specifics with each evictee created a kind of de facto precedent for future evictions in two ways. First, it set up the argument that evictees have a constitutional right to consultation on the eviction process itself (as opposed to the policy decision that resulted in eviction). Secondly, it fleshed out that requirement with a specific list of the issues that consultation should address. The procedural posture of the result disconnects these requirements from any direct constitutional mooring, leaving open the constitutional status

Constitutional Commentary 95, 103–104. In my view, the Constitutional Court engages in essentially political construction when it decides socio-economic rights cases on fact-specific grounds without identifying the principles underlying its decision.

⁶³ *Whittington Construction* (note 62 above) at 4.

⁶⁴ *Port Elizabeth* (note 29 above) at para 35.

⁶⁵ 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 *Constitutional Court Review* 371, 389–390 (Argues that *Olivia Road* ‘is noteworthy for its avoidance of a number of disputed issues’ – including the City’s housing plan.)

⁶⁶ *Joe Slovo* (note 30 above) at paras 116–17 (Yacoob, J). Some disagreement exists among the concurring judgments on the question of whether the government’s engagement efforts were sufficient. See, eg, *Joe Slovo* (note 30 above) at para 378 (Sachs J). See also Liebenberg *Engaging* (note 58 above) at 23–24; Woolman *Selfless Constitution* (note 44 above) at 422–501.

of the order. It nonetheless created a framework for negotiation by parties and a potential model that lower courts can draw on in future cases.⁶⁷

On the other end of the spectrum the Court often provides relatively abstract pronouncements on the substantive requirements of socio-economic rights. The declaration in *Grootboom* is one example. The Court ordered the state to change its housing policy to address emergency needs without specifying what measures were necessary. *Port Elizabeth's* constitutional framework for interpreting PIE is another.⁶⁸ These abstract pronouncements develop the law directly unlike the soft-substantive standards that emerge at the policy-making end, but they have a similar effect by failing to specify with any degree of detail what the constitutional standard requires.⁶⁹

Operating at these extremes and avoiding the middle ground allows the Court to intervene in concrete ways while maintaining substantial flexibility. The emphasis on legislative and executive branch procedures that avoidance also features fills the gap in the middle. In this way, the Court is able to signal to the political branches, lower courts and individual citizens possible constitutional content while leaving the door wide open for change and also for independent constitutional development by the other branches and through civil society activism.

The problem with the Court consistently operating at these extremes – and the reason they represent avoidance – is that, even taken together, those results fail to establish a consistent or coherent constitutional framework over time. As Stuart Wilson observed following the SCA's judgment in *Blue Moonlight*: 'Both the Constitutional Court and the Supreme Court of Appeal have shown little difficulty in frustrating the enforcement of the old property law regime. Yet they have not yet set out with sufficient regularity and precision what processes and principles should replace it, at least where evictions which lead to homelessness are concerned.'⁷⁰ Put differently, where the Court reaches pro-poor results without

⁶⁷ As I discuss in Part VI below, in *Blue Moonlight II* the occupiers sought to rely on the *Joe Slovo* order as precedent for the Constitutional Court retaining jurisdiction in *Blue Moonlight*. See also *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* [2012] ZASCA 116, 2012 (6) SA 294 (SCA), 2012 (11) BCLR 1206 (SCA) (Orders meaningful engagement.)

⁶⁸ *Port Elizabeth Municipality* (note 29 above) at para 14–23.

⁶⁹ Currie makes a similar observation regarding O'Regan J's analysis of human dignity in *S v Makwanyane and Another* [1995] ZACC 3, 1995 (3) SA 591 (CC), 1995 (6) BCLR 665 (CC) 327–337. Currie *Judicious Avoidance* (note 8 above) at fn 55 (Although O'Regan J's recognition of human dignity as the 'touchstone of a new political order' is an example of reasoning from first-principles it 'lays down very little in the way of broad rules' and thus qualifies as shallow and narrow). But see S Woolman 'Dignity' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 36 (analysing the rich and expansive dignity jurisprudence developed by the Constitutional Court over the subsequent 10 years.)

⁷⁰ S Wilson 'Breaking the Tie: Evictions from Private Land, Homelessness and A New Normality' (2009) 126 *South African Law Journal* 270, 282.

specifying – or identifying only highly abstract – constitutional bases for those results, it substantially limits the substantive development.⁷¹

4 *Policing Constitutional Margins*

Finally, the Court's tendency to operate at the outer boundaries of constitutional provisions is another aspect of avoidance. By this I mean the Court's tendency to intervene only in the face of clearly unconstitutional conduct and a corresponding reluctance to scrutinise (or develop a framework for scrutinising) less obvious violations.⁷² This tendency works in tandem with the other avoidance techniques because it makes the Court much less likely to question, either abstractly or in the face of particular applications, legislation and executive policy if there is evidence of a genuine attempt to take seriously the obligations socio-economic rights impose.⁷³

Mazibuko and *Joe Slovo* illustrate this reluctance. Both cases involved large-scale policies adopted expressly to fulfill the socio-economic rights at issue and relatively little evidence of any bad faith by the government. *Mazibuko* dealt with legislation and implementing policy designed to address a genuine problem with equitable allocation of a scarce resource. The policy reflected a sincere – if arguably flawed – effort by the state to fulfill the right to water; changing that policy potentially would have had extensive practical effects.⁷⁴ In *Joe Slovo* the evictions were part of a new national housing plan to provide greater access to housing, and, in contrast to *Olivia Road* and *Grootboom*, the state accepted the responsibility to provide temporary accommodation for the people it sought to evict.⁷⁵

Olivia Road, *TAC* and, in a slightly different way, *Khosa* each featured either relatively small-scale programmes (in *TAC* at least with respect to cost) or clear indications that the government failed to seriously acknowledge the socio-economic rights obligations or both. The city's inner-city rehabilitation programme in *Olivia Road* was a general economic development programme not specifically designed to fulfill FC s 26, and its policy of relying on summary eviction procedures

⁷¹ Roux identifies this same phenomenon in the socio-economic rights cases and attributes it to an institutional-preservation strategy that leaves the Court flexibility to change course in subsequent cases where the political configuration changes. See T Roux *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013) 264 ('In the case of social rights, this meant that the Court needed to develop a review standard that would allow it, on the one hand, to signal its deference to the political branches and, on the other, to intervene where the micro-politics of the particular case allowed for this.')

⁷² Another way of characterising the Court's tendency is, as Brand notes, its inclination to take 'easy cases'. Brand *Proceduralisation* (note 12 above) at 53. Brand argues that *Grootboom* and *TAC* both were easy cases because 'the policies were clearly not rationally coherent' and invalidating them did not require the Court to extend beyond its 'rationality comfort zone'.

⁷³ See, eg, *Nkokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* (CCT 31/09) [2009] ZACC 33, 2010 (4) BCLR 312 (CC) (Relying on subsidiarity to avoid addressing constitutional claims). I am grateful to Sandra Liebenberg for this example.

⁷⁴ *Mazibuko* (note 7 above) at paras 78–89 (Describes the City's water policy) and 91–97 (Identifies the ways the City reviewed and revised its policy over time).

⁷⁵ *Joe Slovo* (note 30 above) at paras 28–31 (Describes the N2 Gateway Project and the City's negotiations with the residents regarding relocation).

with no serious attempt to provide even emergency housing to the evictees flew directly in the face of *Grootboom*.⁷⁶ In *TAC*, the cost of expanding the programme was substantially mitigated by the drugmaker's agreement to provide Nevirapine for free, and the government's reasons for limiting the programme were widely recognised as pretexts to mask their connection to the Mbeki administration's deeply flawed view of the science underlying HIV/AIDS.⁷⁷

Khosa fits less easily into this model. The social-security legislation in *Khosa* was much broader and, as the dissent highlighted, expanding it to cover permanent residents had potentially significant cost implications.⁷⁸ The Court also altered the legislation directly rather than giving Parliament the opportunity to reassert control. The significant equality dimension of the case explains this in part. But *Khosa* fits the model because the government's actions showed signs that it was not taking its obligations under s 27 sufficiently seriously both as a matter of substance and procedure. The government's inability to provide budget justifications without seeking an extraordinary delay at the Constitutional Court, and its admission that the numbers it eventually produced were speculative, underscored the potentially discriminatory nature of the exclusion.⁷⁹ On procedure, the government's failure to competently defend the legislation at any point until the case reached the Constitutional Court demonstrated either the inability or an unwillingness to recognise the legal obligations FC s 27 imposes.

B Avoidance and Institutional Authority

When viewed through Karlan's framework, the avoidance techniques generally push the Court towards a combination of relatively weak institutional authority and expansive legislative and executive power over socio-economic rights. But separating these two effects helps identify ways for a court to maintain greater institutional authority. All of these techniques imply a strong view of legislative and executive power. Political enforcement is a direct recognition of that. Relying on procedural enforcement – especially when the Court alters its own procedure to do so – reinforces the broad scope of that power by keeping the Court away from substance. Deliberating either abstractly or at the policy level leaves ample room for political-branch interpretation as does policing the margins of the socio-economic rights provisions.

In terms of institutional authority, however, only the tendency to police constitutional margins necessarily places the Court at the weak end of the spectrum. The Court could use each of the other techniques in ways that exercise

⁷⁶ *Olivia Road* (note 6 above) at para 19 (Evictions were the result of the City's 'Regeneration Strategy') and para 44 ('It is common cause that the City in making the decision to evict the people concerned took no account whatsoever of the fact that the people concerned would be rendered homeless.').

⁷⁷ See M Heywood 'Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies, and Outcomes of the *Treatment Action Campaign* Case against the Minister of Health' (2003) 19 *South African Journal on Human Rights* 278, 285–86, 296–99.

⁷⁸ *Khosa* (note 52 above) at para 127 (Ncgobo J).

⁷⁹ *Ibid* at paras 20–25 (Explains the postponement) and paras 60–62 (Describes the lack of 'clear evidence' of the financial effects.).

relatively stronger institutional authority. This potential is illustrated by the pro-poor outcomes the Court reached in several cases.

Political enforcement can incorporate stronger interpretive authority that avoids complete deference if it includes independent constitutional interpretation of the kind Van der Walt advocates and that I am calling ‘thick’ subsidiarity. Karlan cites *Nevada Department of Human Resources v Hibbs*, where the US Supreme Court upheld provisions in the Family and Medical Leave Act requiring employers to permit employees to take up to 12 weeks unpaid leave to care for a family member as an example of this combination.⁸⁰ The FMLA was passed under section 5 of the Fourteenth Amendment, which grants Congress power to pass legislation to remedy past unconstitutional discrimination – in *Hibbs* sex discrimination. The breadth of the FMLA’s requirements combined with the fact that they applied equally to both men and women clearly went beyond what the constitution required. The majority nonetheless upheld the Act, but not as a matter of deference to Congress’ own interpretation of what the constitution required. Instead the Court relied on its own sex-discrimination precedents and held that those decisions established greater authority for Congress to set prophylactic requirements to avoid the potential for unconstitutional conduct.⁸¹

Hibbs shows a court exercising a particularly strong form of interpretive authority to uphold legislative power. For Karlan, the Warren Court exemplifies a more nuanced balance between the two, reflecting a view ‘that democracy requires a level of egalitarian inclusion, ... that courts should welcome the political branches’ involvement in addressing constitutional values, and that authority to enforce constitutional values should be distributed broadly.’⁸² *Port Elizabeth* and *Blue Moonlight* illustrate ways a court can maintain an independent interpretive role that tracks Karlan’s description of the Warren Court’s approach. As I explain in more detail below, the Constitutional Court in each case primarily relied on Constitution-enforcing legislation to reach a pro-poor outcome but still independently assessed the constitutional sufficiency of the legislation and identified specific constitutional principles that the legislation satisfied.

The procedural creativity the Court employs to avoid substance can involve a different form of institutional authority. Rather than asserting control over constitutional interpretation, the Court has used procedural remedies and innovations in its own procedures to shape, prod or control in limited ways political and policy-making processes to give poor people and those who represent them a greater role. Engagement orders like those in *Joe Slovo* and *Olivia Road* created direct power in particular cases. But these procedural remedies can also provide opportunities for a court to influence broader policy as in *Olivia Road*, which essentially restructured the City of Johannesburg’s inner-city bad-building

⁸⁰ Karlan (note 25 above) at 69 (citing *Nevada Department of Human Resources v Hibbs* 538 US 721 (2003)).

⁸¹ *Ibid* at 69.

⁸² *Ibid* at 13.

eviction policy.⁸³ More broadly, the requirements of meaningful engagement that the Court described in *Olivia Road* and the power it established for courts to review the adequacy of engagement independent from the substance of policy or action have the potential to insert courts more deeply into the legislative and policy-development process.

This form of institutional authority does not establish substantive constitutional principles. Instead it creates some measure of judicial influence over political constitutional enforcement. Rather than retaining authority to assess whether the substance of a particular policy meets a judicially determined constitutional standard, a court asserts some control over the procedures through which legislation or policy is developed. This more directly promotes the democratic benefits that both Van der Walt and Karlan argue attach to sharing interpretive authority with the legislature.

By asserting greater institutional authority in either way – independently interpreting the substance of the socio-economic rights provisions or influencing the policy-development process – the Court moves away from the constitutional margins and back into a true partnership with the political branches.

III AVOIDANCE AND SUBSIDIARITY

The Court's general preference for enforcing socio-economic rights where possible through existing legislation or policy I have labelled 'avoidance' because it allows the Court to rely on the political branches to supply the substantive content of these rights. The subsidiarity approach developed by André van der Walt is built around a principle that systematises one part of this preference – courts are required to enforce applicable Constitution-enforcing legislation instead of direct Constitution- or common-law-based claims.⁸⁴ At first blush, these appear to be polar opposites. The idea of 'avoidance' is critical of the preference as shirking the Court's duty independently to interpret the Constitution. Subsidiarity views it as a principled, disciplined marching order for consistently sorting through overlapping (and potentially competing) legal sources to consolidate the Constitution's control.

I do not see it that way. My point in identifying political enforcement as one of the avoidance techniques is to acknowledge the strong potential it has to devolve into outright deference that fits in with a general pattern in the Court's approach to socio-economic rights. Van der Walt recognises this possibility and argues

⁸³ In *Blue Moonlight*, the City of Johannesburg described its process for relocating occupants of 'bad' buildings through property acquisition and 'engagement with both owners and occupiers' as a '*response to the judgment in Olivia Road*'. Heads of Argument for Applicant, City of Johannesburg at para 41; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33, 2012 (2) SA 104 (CC), 2012 (2) BCLR 150 (CC) (emphasis added).

⁸⁴ Van der Walt *Property* (note 22 above) at 35–36. It is important to note that my comparison of avoidance and subsidiarity addresses the overlap I see between this specific principle and what I have called avoidance. The subsidiarity principles do not require enforcing executive policy over the Constitution, and I do not here include subsidiarity's requirement that courts prefer legislation to common law as an aspect of constitutional avoidance. I also do not address the nuanced framework Van der Walt develops for identifying when legislation should trump a constitutional claim and as a result greatly simplify the approach.

that courts can avoid deference through constitutionally driven interpretation of legislative measures as well as by accepting the possibility of direct constitutional challenges to legislation. Van der Walt's model for this approach is *Port Elizabeth*, an early eviction case involving interpretation of the PIE Act. In this section, I describe subsidiarity and then examine how the *Port Elizabeth* model can form the basis for a thick version of subsidiarity that incorporates a more independent role for courts even when they rely on legislation or executive policy.

Van der Walt is, to a large degree, concerned about the possibility of a power struggle that features courts as conservative defenders of the common law using traditional judicial techniques to cut back reform-oriented legislation.⁸⁵ This concern is rooted in the conservative legal culture that most agree has persisted in the post-apartheid era. Requiring courts to seek out legislation enforcing the Constitution and to avoid resorting to the common law or direct constitutional enforcement is neatly tailored to address that risk.⁸⁶ It prevents courts from reflexively relying on existing common law. It also breaks up the judicial monopoly on constitutional interpretation and creates substantial room for legislative control by giving Parliament at least the first word on what the Constitution requires.

Assessments of the Court's socio-economic rights decisions feature the same concern that the Court is operating under the conservative influence of an apartheid-era approach to judging that is at odds with the new constitutional legal order. But the perceived problem in these cases is the Court's *deference to legislation and policy* and corresponding refusal to develop independent interpretations that can both guide future legislation and give footholds for litigants seeking to test the adequacy of those measures. In other words, the perceived power struggle is flipped with courts as the institutional ally of transformation and Parliament (or the executive) the likely opponent. Cast in these roles, a rule that displaces direct constitutional enforcement and gives Parliament the lead in constitutional interpretation is counterintuitive.⁸⁷

⁸⁵ Ibid at 6–7 and 98 ('The South African context particularly requires something in the nature of subsidiarity principles to avoid the arbitrary, unreflective and counter-constitutional tendency to privilege the common law over constitutional or constitution-inspired transformation efforts.').

⁸⁶ Van der Walt also focuses on situations where the choice is between enforcing (or developing) the common law and interpreting a statute that either expressly affects or could be interpreted to affect common-law property rights. In each case the legislation effectively alters common law property rights in ways required by the Constitution and enforcing it avoids the need to address the conflict between the two and the corresponding risk that courts might reflexively protect the common law. See Van der Walt, *Property* (note 22 above) at 40–57.

⁸⁷ There is another dimension that features prominently in the socio-economic rights cases – executive enforcement, often in the provincial or municipal sphere. Subsidiarity requires – as in *Blue Moonlight* – that courts address challenges to executive action through applicable legislation rather than directly on constitutional grounds. As O'Regan J explained in *Mazibuko*, however, this might leave room for direct constitutional challenge to enforce a provincial or municipal government's independent duty to take reasonable steps to fulfill the socio-economic rights. *Mazibuko* (note 7 above) at paras 73–74 (Asks whether, if legislation sets a 'national minimum, do other steps taken by other levels of government escape scrutiny as long as they comply with the national minimum, despite the fact that other spheres of government share the obligation to take reasonable steps?'). *Blue Moonlight* reinforces that possibility without directly endorsing it.

Van der Walt's argument that South Africa's unique history gives a 'special democratic and liberating significance' to legislative enforcement puts legislative enforcement on a different footing that goes beyond these assumptions. When Parliament assumes an independent obligation to proactively enforce the Constitution, that in itself – irrespective of the relative transformative effect of the specific legislation at issue – is transformative. Legislative enforcement turns the Constitution from a check on democratic action limiting majoritarian politics only at the margins into an affirmative political agenda. That same shift, though, requires reconfiguring the judicial role from a focus on policing legislation for constitutional violations to partnering with Parliament on advancing the constitutional agenda. Put in Karlan's framework, it calls for recognising expansive legislative power and for seeking collaborative approaches to rights enforcement.

But partnership can take many forms and a silent partnership is just another name for deference. Distinguishing between judicial institutional authority and legislative (or executive) power to enforce certain constitutional provisions can help to conceptualise ways for a court to maintain an independent interpretive and enforcement role.

Wilson and Dugard warn that arguments like these that rely on the supposed democratic-enhancing effects of political enforcement are particularly perilous in South Africa where the ANC continues to exercise de facto control of the political process. They point out that the dramatic rise in service-delivery protests begs the question 'whether the executive and the legislature are routinely ensuring a truly democratic form of socio-economic development'.⁸⁸ One partial answer to this is that the Court has frequently supplemented reliance on political enforcement with a consistent emphasis on techniques that aim to build what the Court has called 'participatory democracy' by creating opportunities for poor people to intervene in the policy-making (and sometimes legislative) process.

But Wilson's and Dugard's objection goes beyond the evidence that, at least so far, those efforts have not succeeded in making the political process more responsive to the needs and voices of poor people. They argue that 'the Court's job must be more than to foster further participation ... [i]t must surely also be to decide whether vital interests and needs have been overlooked in the "democratic" process'.⁸⁹ To do this, they say, the Court must develop an independent, normative account of what the socio-economic rights require.⁹⁰

A Thick Subsidiarity

Van der Walt's description of constitutionally inflected interpretation of legislation reflects the same concern with ensuring that the Court plays an independent role in deciding and declaring what the Constitution means rather than simply attempting to ascertain legislative intent. But it recognises the possibility of the Court exerting independent interpretive authority in the process of enforcing

⁸⁸ Wilson & Dugard *Taking Poverty* (note 7 above) at 228–29.

⁸⁹ Ibid at 229.

⁹⁰ Ibid at 229–30.

legislation. I call this approach ‘thick subsidiarity’ to distinguish it from the uncritical application Van der Walt rejects but acknowledges is a possibility.

Thick subsidiarity requires courts to adopt a very different conception of their relationship with the legislature and executive than the one *Mazibuko* describes. While *Mazibuko* grounds its approach in earlier cases like *TAC* and *Grootboom*, O’Regan J’s characterisation of those cases overemphasises the degree of deference the Court employed and fails to acknowledge the independent role the Court played in them. *Mazibuko* implies that the Court can create space for legislative and executive enforcement only to the extent that it backs away from an active interpretive and enforcement role. Delinking the Court’s own authority from legislative power in the way Karlan describes both better explains the approach that the Court actually employed in its earlier cases and helps conceptualise how it can maintain that approach in future cases.

It also prevents the obfuscation that often results when the Court tries to say that it is deferring to the legislature or executive when it is clearly exercising some measure of independent authority. Viewing these two things as independent would allow the Court instead to identify the ways that it acknowledges, maintains and sometimes extends the broad scope of legislative power without diminishing its own authority.

Van der Walt emphasises that a court employing subsidiarity should not simply defer to legislation or adopt an approach that results in a ‘general avoidance of constitutional influence’.⁹¹ Interpreting legislative enforcement measures necessarily brings the Constitution into play and subsidiarity also permits challenging the legislation itself as unconstitutional.⁹²

A constitutional attack on legislation is the most obvious way to bring the Constitution into play under subsidiarity and for courts to develop independent constitutional requirements. The Court’s pattern of avoiding interventions that directly disrupt large-scale programmes show that it is unlikely the Court will uphold direct general attacks very often in socio-economic rights litigation. But *Grootboom* and *Khosa* show that it is willing to address substantial gaps under the right circumstances.

More promising is what Van der Walt describes as ‘constitutionally driven interpretation’.⁹³ Van der Walt says a court should critically assess whether legislation meets constitutional objectives.⁹⁴ This requires courts to distinguish between constitutional and statutory requirements in the process of enforcing a statute.

One corollary of this is a willingness to interpret legislation expansively to make it fit constitutional requirements. This extends the potential for cooperative constitutional development by giving courts a larger role and more opportunities for elaborating constitutional substance. But doing that through legislation still leaves room for the legislature to react with amendments and, possibly further court review.

⁹¹ Van der Walt *Property* (note 22 above) at 37.

⁹² *Ibid* at 37.

⁹³ *Ibid* at 94.

⁹⁴ *Ibid* at 99.

As I discuss below, the Court already seems to be doing something like this when it goes out of its way to bring legislative or executive enforcement measures into play rather than engage directly with the Constitution. The Court also seems more comfortable with direct intervention and/or more expansive results when they emanate from enforcing legislation or executive policy. Both *Maphango* and *Blue Moonlight* involved expansive interpretations of legislation enforcing the Constitution, although the interpretation in *Maphango* expanded a process rather than establishing direct substantive limits. *Blue Moonlight* shows further that relying on legislative mandates reduces the perceived legitimacy concerns of stronger intervention. Both *Blue Moonlight* and *Mazibuko* dealt to a large extent with the adequacy of a government programme. In *Mazibuko* the Court framed the issue as a direct challenge to the constitutional adequacy of the programme,⁹⁵ but in *Blue Moonlight* the Court framed it as whether the City was fulfilling its legislative obligations under housing legislation.⁹⁶

This could also include a court interpreting general terms in legislation to create judicial discretion to enforce constitutional requirements. In *Port Elizabeth Municipality*, Sachs J emphasised that the language of PIE creates precisely this kind of discretion. Yacoob J's expansive interpretation of PIE's general requirements to effectively read out PIE's distinction between short- and long-term occupation, arguably follows that same pattern.⁹⁷

Challenges to provincial and municipal policies also present opportunities for courts to enforce legislation in constitutionally driven ways. For example, a court could reject a policy that does not go far enough to advance constitutional objectives even if it reflects an otherwise reasonable interpretation of the statute. This is a variation of what Van der Walt calls for. Because it is in the context of a challenge to executive action, this kind of challenge creates a clearer opportunity to distinguish between the Constitution and the legislation. It also reduces the anti-democratic nature of the review because it allows the Court to partner with Parliament to enforce the Constitution. *Blue Moonlight's* rejection of the City of Johannesburg's interpretation of housing legislation is a possible example of this.⁹⁸

B Port Elizabeth Municipality as Thick Subsidiarity

Port Elizabeth Municipality, which Van der Walt highlights as a model for constitutionally driven interpretation, features several of these techniques.⁹⁹ Although the Court applied PIE in the absence of a constitutional challenge, it still exerted independent interpretive authority by describing the constitutional framework for the legislation, identifying the ways that the legislation implements that framework and also adopting expansive interpretations of several provisions specifically because the legislation was intended to enforce the Constitution.

⁹⁵ See *Mazibuko* (note 7 above) at paras 6, 36–38.

⁹⁶ See *Blue Moonlight* (note 2 above) at paras 24–29.

⁹⁷ See below Part III.

⁹⁸ See below Part V.

⁹⁹ Van der Walt *Property* (note 22 above) at 4–5.

The case involved a challenge to Port Elizabeth Municipality's application to evict a small number of people unlawfully occupying vacant, private land. After detailing the ways in which facially neutral legislation worked in tandem with existing Roman-Dutch law to legitimate 'in an apparently neutral and impartial way to the consequences of manifestly racist and partial laws and policies' Sachs explained that FC s 26(3) and a new statutory framework were designed to address this legacy.¹⁰⁰

Sachs then turned to PIE, stating that it 'was adopted with the manifest objective of overcoming the above abuses and ensuring that evictions in future took place in a manner consistent with the values of the new constitutional dispensation' and therefore that '[i]ts provisions have to be interpreted against this background'.¹⁰¹ This led to an extensive discussion that specifically identified the ways that PIE is designed to transform eviction law to achieve the constitutional requirements.

PIE 'inverted' the apartheid legal framework in several ways. First, it decriminalised squatting and subjected the eviction process 'to a number of requirements, some necessary to comply with certain demands of the Bill of Rights'.¹⁰² Secondly, it reversed the relationship between private and public law. Rather than relying on the common law to normalise the political objectives of apartheid, PIE 'temper[s]' common-law remedies with 'strong procedural and substantive protections' to acknowledge the constitutional imperative to provide homes for victims of apartheid and to treat them with dignity and respect in the interim.¹⁰³

'Rescuing the courts from their invidious role as instruments directed by statute to effect callous removals, the new law guided them as to how they should fulfil their new complex and constitutionally ordained function: when evictions were being sought, the courts were to ensure that justice and equity prevailed in relation to all concerned.'¹⁰⁴

In a subsection titled 'the broad constitutional matrix for the interpretation of PIE' Sachs then explicitly elevated the statutory analysis to a constitutional level:

PIE cannot simply be looked at as a legislative mechanism designed to restore common law property rights by freeing them of racist and authoritarian provisions, though that is one of its aspects. Nor is it just a means of promoting judicial philanthropy in favour of the poor, though compassion is built into its very structure. PIE has to be understood, and its governing concepts of justice and equity have to be applied, within a defined and carefully calibrated constitutional matrix.¹⁰⁵

In analysing that constitutional matrix, Sachs established or reinforced several specific constitutional principles. He started by emphasising the careful balance struck by FC s 25 between protecting private rights and recognising legitimate public obligations.¹⁰⁶

¹⁰⁰ *Port Elizabeth* (note 29 above) at para 10.

¹⁰¹ *Ibid* at para 11.

¹⁰² *Ibid* at para 12.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid* at para 13.

¹⁰⁵ *Ibid* at para 14.

¹⁰⁶ *Ibid* at para 19.

He then identified several aspects of the relationship between FC s 25 and FC s 26. First, FC s 25 recognises the need to provide some measure of tenure security to people living in informal settlements. Secondly, he described ‘three salient features of the way the Constitution approaches the interrelationship between land hunger, homelessness and respect for property rights’.¹⁰⁷ The land rights of dispossessed people are not unqualified or self-enforcing and in the main ‘they presuppose the adoption of legislative and other measures’ for fulfillment.¹⁰⁸ In this respect, FC s 26(3) is primarily defensive. FC s 26(3) ‘expressly acknowledge[s] that eviction of people living in informal settlements may take place, even if it results in loss of a home’.¹⁰⁹

Finally, FC s 26(3) emphasises ‘the need to seek concrete and case-specific solutions to the difficult problems that arise’.¹¹⁰ This reflects an intentional constitutional strategy. The mandate to take all relevant factors into account ‘is there precisely to underline how non-prescriptive the provision is intended to be’ and to leave the judicial task ‘as wide open as constitutional language could achieve ...’.¹¹¹

After setting up this constitutional background, Sachs J applied it in a 23-paragraph analysis of PIE’s specific requirements. This extended analysis features an independent – and at times expansive – interpretation that reflects the constitutional principles Sachs J set up at the beginning. While it stays at a largely abstract level, this exposition nonetheless gives some concrete guidance that reveals the Court’s independent view of how this framework could further the constitutional objective of balancing private property rights and the constitutional obligation to protect people from homelessness.¹¹²

Sachs J also carved out space for greater judicial control by interpreting s 6’s requirements as ‘peremptory but not exhaustive’.¹¹³ This gives the Court ‘a very wide mandate’ to bring to bear other constitutionally relevant considerations in individual cases.¹¹⁴

The *Port Elizabeth* model preserves opportunities for the Court to assert much greater interpretive authority over the Constitution than *Maxibuko* implies, without requiring it to take the lead in developing those principles. As I observed earlier, the avoidance techniques tend to position the Court either at a very abstract or factually specific policy-application level. *Port Elizabeth* provides examples of the Court operating at both ends of this spectrum while still adopting an active role.

At the policy-application end the Court implements constitutional objectives concretely but by tying that concreteness to specific facts rather than to more general constitutional principles, the Court does not directly elaborate constitutional principles. When Sachs J talks about exercising judicial statecraft to manage the eviction process in humane ways and also when he emphasises

¹⁰⁷ Ibid at para 20.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid at para 21.

¹¹⁰ Ibid at para 22.

¹¹¹ Ibid.

¹¹² Ibid at paras 24–47.

¹¹³ Ibid at para 30.

¹¹⁴ Ibid.

the need for fact-specific balancing of multiple constitutional principles, this is precisely what he is describing. A court can change the outcome in individual cases to promote constitutional values without either specifying precisely what those values are or why they require a particular outcome. I return to this aspect of the decision in Part VI and argue that it sets up a kind of substantively inflected procedural control similar to meaningful engagement and the Tribunal process in *Maphango*.

At the abstract end, the Court only lightly specifies general constitutional principles and leaves open a large range of options for legislative or executive action to further specify those through legislation or policy. Sachs J's extended discussion of the constitutional framework for PIE features this kind of highly abstract analysis that identifies general contours of constitutional principles and – as in the analysis of PIE's implementation of the framework – suggests relevant considerations that fit those contours. Engaging in this kind of analysis restores to the Court an active interpretive role that defers to legislative and executive choices only where those choices fit the broad constitutional sensibilities the Court itself identified. As Sachs J illustrated in his PIE analysis, those sensibilities also can be shaped by the legislation itself but, in contrast to the strong deference implied in *Maxibuko*, the Court still actively interprets and questions the balance the legislature strikes.

In both instances there is room for iterative, cooperative development between the court and the legislature or executive that advances the constitutional objective of reducing inequality. Both also are mechanisms for courts to assert independent authority. At the abstract end, a court exercises independent interpretive authority of the kind Karlan describes. At the policy-application end the court shifts into a political mode and exercises authority over the outcomes – and even the development – of legislative or executive policy. Sachs J's insistence that a court can block evictions even where they are the result of an otherwise constitutionally sound policy is one concrete example of this. The judicial management process Sachs J describes broadens that authority in ways that presaged *Olivia Road's* description of meaningful engagement, which itself creates a procedural form of judicial authority almost completely detached from the substance of socio-economic rights.

There are risks to an approach like this that calls for a court to directly acknowledge broad legislative authority and to systematically avoid direct constitutional interpretation. Van der Walt acknowledges that a rigid, formalistic application of subsidiarity could devolve into a 'refusal to critically reflect on and decide the difficult constitutional issues inherent in every legal dispute in post-apartheid South Africa'.¹¹⁵

This risk points out subsidiarity's connection to the other avoidance techniques I identified earlier. Each of these techniques expands political-branch authority over the socio-economic rights. If the Court views its own authority as inversely related to the authority of the political branches – a view I have suggested it seems to adopt in *Maxibuko* – then relying on these techniques will push towards the

¹¹⁵ Van der Walt *Property* (note 22 above) at 99.

kind of deference Brand identifies. But if the Court begins to recognise more explicitly the possibility for delinking both and the ways that it has asserted independent authority in its earlier cases, then it can establish a more robust role.

The question is whether relying on techniques like subsidiarity will systematically push courts towards the strong deference that marginalises their own role. Van der Walt argues that the risk of ‘formalist, stability-oriented adjudication’ is inherent in South African legal culture generally and subsidiarity raises no greater risk than other adjudicative approaches.¹¹⁶ And subsidiarity has the benefit of addressing another dimension of that same risk: that courts steeped in apartheid-era-inflected common-law principles will ignore reform-oriented legislation in favour of direct, untransformed application of the common law.¹¹⁷

I worry somewhat more than Van der Walt that subsidiarity and the other avoidance techniques will have systematically conservative effects. This is because they offer a handy, off-the-shelf, justification for uncritical avoidance. Deploying it in this way is very easy – a court can simply cite the principle and move on. Van der Walt roundly rejects this kind of shallow application of subsidiarity, but deploying it in the constitutionally attentive manner that he advocates requires quite a bit more care and effort.¹¹⁸ But, in keeping with my pragmatist approach, I also think that the Court is likely to continue to apply subsidiarity and related principles in socio-economic rights cases.

Theorising the kind of constitutionally driven approach that Van der Walt describes and that I have tried to expand on here is the best way to mitigate that risk. This approach recognises that judicial institutional authority and legislative power are not necessarily inversely related. Starting with Constitution-enforcing legislation, acknowledges the breadth of legislative power to develop policies to fulfill these rights but incorporating concrete ways that courts can assert independent authority while still working through legislation prevents deference.

The exposition of *Maphango* and *Blue Moonlight* that follows first identifies the risks that subsidiarity viewed as an avoidance technique poses. After analysing the Court’s reasoning in some detail, I highlight these signs of avoidance. I then turn back to subsidiarity and argue that, unlike *Maphango*, *Blue Moonlight* is an example of the kind of thick subsidiarity that *Port Elizabeth* illustrates because the Court both independently developed some of the constitutional issues and also infused its interpretation of the relevant Constitution-enforcing statutes with constitutional principles.

In Part VI, I return to *Port Elizabeth* and identify the ways that it elevates avoidance to an express constitutional ‘strategy’. This undermines to some degree the extent of interpretive authority that a court employing this strategy is able to assert. At the same time, the role Sachs J describes opens up possibilities for exerting a different kind of institutional authority through judicial control over individual cases to directly enforce the Constitution. The extent of avoidance in *Maphango* shows how this form of institutional control directly distances courts

¹¹⁶ Ibid at 100.

¹¹⁷ Ibid. See also Van der Walt *Normative Pluralism* (note 33 above) at 99–111.

¹¹⁸ See K Klare ‘Legal Subsidiarity and Constitutional rights: A Reply to AJ van der Walt’ (2008) 1 *Constitutional Court Review* 129.

from the traditional task of elaborating constitutional principles but also allows them to reach constitutional-value-enforcing outcomes.

IV MAPHANGO AND AVOIDANCE

Before 1994 the only clogs inhibiting a lessor's common-law power of termination were those expressly legislated. But the Constitution has fundamentally changed the setting within which the rights of both lessors and lessees stand to be evaluated. Constitutionalism has wrought significant changes to private-law relationships.¹¹⁹

This sounds like the predicate to an extensive analysis of the complex relationship between FC s 26 and the common law of leases. The parties' papers teed up those issues. Several tenants with long-standing leases containing rent-control provisions challenged their landlord's attempt to terminate the leases solely to raise the rent. The leases contained a provision limiting rental increases to a set percentage unless the landlord sought permission from the Rental Housing Tribunal – an entity created by the Rental Housing Act to resolve landlord-tenant disputes. The leases also included a termination clause that either party could invoke with notice. The landlord argued that the termination provision – supported by long-standing common law – permitted it to terminate the existing leases and offer to each tenant a new lease with the same terms but at a higher rental rate.¹²⁰

The tenants, supported by an amicus curiae, argued that permitting the landlord to circumvent the rent restrictions by terminating the leases violated the tenants' right to security of tenure and access to affordable housing under FC s 26(1). The Court could recognise this by interpreting 'unfair practice' in the Act to prohibit termination of these leases solely to increase rent.¹²¹ Alternatively, the Court could develop the common law of contract to provide a constitutionally derived implied term in the lease limiting a landlord's termination rights in leases with protective clauses where termination would result in 'disproportionate hardship' to the tenant.¹²²

In a majority judgment written by Cameron J, the Court sidestepped each of these arguments by relying on the Act. The Supreme Court of Appeal held that the termination could not qualify as a 'practice' under the Act because terminations were single events.¹²³ The majority rejected the SCA's interpretation, but rather than interpreting 'unfair practice' itself, the Court issued a procedurally complex order that postponed the appeal to allow either party two weeks to file a complaint with the Housing Tribunal.¹²⁴ If that happened, the Court retained jurisdiction to

¹¹⁹ *Maphango* (note 3 above) at para 31.

¹²⁰ *Ibid* at para 3.

¹²¹ *Ibid* at paras 43–47. The Inner City Resources Centre laid out this argument in its submissions as amicus curiae. Heads of Argument for Inner City Resources Centre as Amicus Curiae paras 6.1–6.5, *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2, 2012 (3) SA 531 (CC), 2012 (5) BCLR 449 (CC).

¹²² See Heads of Argument for Inner City (note 121 above) at paras 1.7–1.8.5.

¹²³ *Maphango* (note 3 above) at para 23.

¹²⁴ *Ibid* at para 57 (Rejected SCA's interpretation) & para 70 (court order).

issue further orders based on the outcome of the Tribunal process. If it did not, the appeal would be dismissed leaving the SCA judgment intact.¹²⁵

The majority revived the Tribunal process even though early in the case the applicants had voluntarily abandoned their Tribunal complaint to focus on the litigation and in the face of a deeply critical partial concurrence that raised several procedural irregularities and substantive flaws with the order.¹²⁶ In addition, as Frank Michelman notes, bringing the Act into play required working through several ‘seemingly non-trivial’ questions about the Act’s applicability.¹²⁷

Zondo J, in a partial concurrence, took the majority to task for what he viewed as this highly irregular procedural innovation that flouted rule-of-law principles and was deeply unfair to the landowner.¹²⁸ Zondo J spent several lengthy paragraphs explaining that the applicants had functionally abandoned the Tribunal process and arguing that reviving that process involved a reckless departure from the Court’s pleading rules and normal procedure.¹²⁹

Regardless of whether these criticisms are correct (and most seem at least arguable), Zondo J’s judgment underscores three things: (1) the lengths that the majority went to bring the Tribunal process back into play; (2) the degree to which the majority avoided addressing the substance of any of the issues or arguments raised by the parties, including their arguments regarding the Act itself; and (3) the procedural irregularities required to avoid those substantive arguments.

Why, then, did the majority go to such lengths to bring the Act into play? Several features of the majority’s explanation for relying on the Act exhibit the avoidance techniques I described earlier. After mapping those out, I will turn to two alternative explanations – Van der Walt’s subsidiarity principles and Michelman’s closely related hypothesis that the result might reflect a justifiable form of inter-branch comity. Drawing on Michelman’s own misgivings over whether comity considerations were sufficiently strong in *Maphango* to justify the turn to the statute, I will argue that, in spite of the room it leaves for a pro-poor result (and the informal signals the majority sends to the Tribunal pushing in that direction), *Maphango* illustrates a more direct effort to avoid constitutional substance.

A Avoidance Techniques

First, Cameron J cited ‘rule of law considerations’ to find that ‘it would be wrong for this Court to take a narrow view of the matter that ignores the importance and impact of the statute. That would imply that this Court could allow litigants to ignore legislation that applies to an agreement between them.’¹³⁰ A short concurrence by Froneman J joined by Yacoob J restated this same point more

¹²⁵ Ibid at para 70.

¹²⁶ Ibid at para 45 (Applicants withdrew Tribunal complaint to focus on the litigation).

¹²⁷ Ibid at para 48 (Observes that ‘[i]n my view, neither the landlord nor the tenant fully appreciated the force of the Act’s provisions in litigating their dispute’). F Michelman ‘Expropriation, Eviction and the Gravity of the Common Law’ (note 43 above).

¹²⁸ *Maphango* (note 3 above) at paras 134–138.

¹²⁹ Ibid at paras 139–146.

¹³⁰ Ibid at para 48.

directly: ‘It would be a denial of constitutional responsibility for any court to decide a matter without considering legislation where it was aware of applicable legislation.’¹³¹ This is a particularly strong version of the Court’s general preference for seeking out legislative enforcement mechanisms that it sometimes relies on to avoid addressing the substance of socio-economic rights directly.

Secondly, the judgment emphasises the Act’s status as ‘a post-constitutional enactment adopted expressly to give effect to the right of access to adequate housing’.¹³² This allows for (and indeed may require) a broad interpretation of ‘unfair practice’ that potentially extends to the termination here.¹³³ Paired with the generic, rule-of-law-driven principle that a court should apply any relevant legislation to a dispute, this seems to suggest a double-ratchet in favour of legislative enforcement techniques in the case of constitutionally driven legislation.

Thirdly, the Court detailed in adjective-studded language the Act’s ‘complex, nuanced and potentially powerful system for managing disputes between landlords and tenants’.¹³⁴ The Act ‘expressly takes account of market forces as well as the need to protect both tenants and landlords’ and ‘is in particular sensitive to the need to afford investors in rental housing a realistic return on their capital’.¹³⁵ But, ‘[a]t the same time, the Act does not ignore the need to protect tenants’.¹³⁶ Indeed, the majority emphasised, this case focused on the Act’s ‘most potent’ provisions in this respect, the power of the Housing Tribunal to prevent a landlord (or tenant) from taking otherwise lawful action if that action constitutes an ‘unfair practice’.¹³⁷ Most relevant here, the Court explained, ‘the Act demands that a ground of termination must always be specified in the lease, but even where it is specified, the Act requires that the ground of termination must not constitute an unfair practice’.¹³⁸

The majority went on to unpack not only the Act’s definition but also to highlight the provincial regulations promulgated under the Act. It found ‘significant’ the Act’s specific ‘formulation’.¹³⁹ By incorporating ‘interests’ as well as rights, the definition ‘includes all factors bearing upon the well-being of tenants and landlords’.¹⁴⁰ The provincial regulations further prohibit landlords from engaging in ‘oppressive or unreasonable conduct’.¹⁴¹ Together these give the Tribunal the power to take into account not ‘only the common-law legal rights of a tenant or landlord, but ... also their statutory interests’.¹⁴²

The availability of a constitutionally driven, legislatively crafted balancing test for protecting tenants, the Court found, made it unnecessary to reach their

¹³¹ Ibid at para 152.

¹³² Ibid at para 57 and also at para 34 (Describes the Act as a ‘prime instance’ of legislative enforcement of FC s 26).

¹³³ *Maphango* (note 3 above) at para 57.

¹³⁴ *Maphango* (note 3 above) at para 49.

¹³⁵ Ibid.

¹³⁶ *Maphango* (note 3 above) at para 50.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ *Maphango* (note 3 above) at para 52.

¹⁴⁰ Ibid.

¹⁴¹ *Maphango* (note 3 above) at para 54.

¹⁴² *Maphango* (note 3 above) at para 53.

substantive constitutional and common-law arguments.¹⁴³ What is more, in spite of the majority's extensive exploration of the Act and its implementing regulations described above, it refused to decide the tenants' claim that the termination here constituted an unfair practice under the Act.

By rejecting the SCA's limited interpretation of unfair practice and finding that the constitutional connection required a broader reading, the majority's analysis started down the road the ICRC and the residents mapped out in their statutory arguments. Indeed, much of the detailed analysis in the majority judgment closely tracks their interpretations and sometimes even the language in their heads of argument. But rather than definitively interpreting unfair practice, the Court stopped short and instead 'kick-started' the Tribunal process by, in essence, remanding the case back to that body to determine, in light of the powerful balancing mechanism the legislature created, whether the terminations here were unfair.¹⁴⁴

This mirrors a similar shift in the Court's analysis in *Blue Moonlight* from constitutional to statutory analysis that I discuss below. In both cases, the Court avoided substantive development of the constitutional provisions the parties raised by finding a constitutionally infused legislative vehicle that incorporates a context-dependent balancing test.¹⁴⁵ Here the shift allowed the Court to avoid interpreting even the statute and instead to devolve, at least initially, the actual balancing to another body, created by legislation.

In *Maphango* the majority's decision to rely on the Act allowed the Court to avoid direct constitutional (and also common-law) development. As Zondo J's partial concurrence illustrates, the majority had to work pretty hard to take the statutory path and despite doing so, still refused to resolve the parties' arguments over the correct interpretation of the Act. The majority acknowledged in a footnote that reopening the Tribunal procedure required it to craft a remedy that none of the parties sought. Tellingly, it cited *Olivia Road* as precedent for creating such a 'novel remedy'.¹⁴⁶

Both cases show the self-reinforcing effects of multiple avoidance techniques. In both, the Court went out of its way to avoid the parties' substantive arguments by finding a Constitution-enforcing procedure that promises the possibility of resolving the dispute in a context-sensitive way. Here that procedure was one Parliament created as part of its obligation to legislatively enforce FC s 26 and so came with direct democratic credentials. In *Olivia Road*, the procedure was

¹⁴³ *Maphango* (note 3 above) at para 55 ('Since in my view this dispute is best approached through the generous and powerful mechanisms the Act offers both sides to the dispute, I express no view on whether the landlord was entitled at common law to cancel the leases, nor on whether, if it was so entitled, the common law should be constitutionally developed to inhibit that power:').

¹⁴⁴ See Michelman *Expropriation* (note 43 above) at 260 (Contrasts this result with the alternative of 'kick-start[ing]' a common-law revision process). Procedurally this order was not a direct remand, but functionally it served the same purpose by giving leave to the parties to file a complaint posing that question.

¹⁴⁵ Roux has argued that the Court has a general preference for translating potentially concrete constitutional principles into context-dependent tests as a mechanism for minimising possible future conflicts with the political branches. See Roux *Principle* (note 14 above) at 133–134.

¹⁴⁶ *Maphango* (note 3 above) at fn 121.

court-crafted but still designed to promote democratic processes through citizen participation in policymaking. In both cases, the Court emphasised the democratic aspects of these procedures rather than assessing their substantive dimensions.

One key difference is that engagement is a procedurally focused remedy and so consistent reliance on it poses a greater risk of continued avoidance over time. The Tribunal process uses a set of substantive criteria that courts could use to develop constitutional principles. But the Tribunals and the Tribunal process – while far more structured than engagement – share similar procedural characteristics and an emphasis on practical resolution of specific disputes over legal development.¹⁴⁷

B Subsidiarity

Van der Walt cites *Maphango* as a useful example of how subsidiarity can work to promote constitutional values. He sees in Cameron J's emphasis on the Constitution-enforcing role of the Act and his insistence that rule-of-law concerns require applying relevant legislation even where the parties fail to rely on it, something that sounds much like the second subsidiarity principle that Constitution-enforcing legislation displaces direct reliance on the common law.¹⁴⁸

Van der Walt recognises that invoking the Act meant sidestepping the parties' invitation to develop the common law of contract in light of FC s 26. But he argues that the majority correctly refused to abstractly define that interaction. Whether and how FC s 26 will limit a particular landlord's common-law rights, in his view, 'has to be established in every individual case, in its context, taking into consideration a large number of variables that may swing individual cases in one or the other direction'.¹⁴⁹ The Act does this and unless the balance it strikes is itself constitutionally suspect, the 'rule of law and democracy considerations' underlying subsidiarity require courts to channel their analysis through that process.¹⁵⁰

For Van der Walt, the majority's reliance on the Act 'represents a significant effort to promote the spirit, purport and objects of the Bill of Rights' in three respects.¹⁵¹ First, the majority recognised the general principle that FC s 26 affects private relationships, especially where the state takes measures to fulfill the right of access to adequate housing.¹⁵² Secondly, the majority held that the Act could limit the common-law right to terminate a lease where doing so constitutes an unfair practice.¹⁵³ Thirdly, and most significantly in Van der Walt's assessment, the majority accepted the argument that the tenants' right to security of tenure

¹⁴⁷ The Gauteng Tribunal's website describes the Tribunal as 'a quasi-judicial body, which serves a regulatory function.' The Tribunal performs three functions under the Act: it (1) 'resolves complaints through conciliatory processes such as mediation and arbitration'; (2) 'offers advice on issues related to residential leases and rentals'; and (3) 'provides consumer education which is important for informing people about their rights and duties as parties in the rental sector'. <<http://www.dlgh.gpg.gov.za/Pages/HousingRentalTribunal.aspx>>

¹⁴⁸ Van der Walt, *Property* (note 22 above) at 59.

¹⁴⁹ *Ibid* at 60.

¹⁵⁰ *Ibid*.

¹⁵¹ *Ibid* at 58–59.

¹⁵² *Ibid* at 57–58.

¹⁵³ *Ibid* at 58.

‘involves protection against the termination of their tenancies not just post-termination protection against eviction’.¹⁵⁴

This was a significant development in the Court’s approach to housing rights. Up to this point, the Court had dealt with the eviction process itself and applied FC s 26(3) to mitigate the effects of that process. *Maphango* for the first time recognised a legal mechanism that could prevent eviction altogether in some circumstances. By identifying the extent of avoidance here, I do not mean to minimise that aspect of the case. Part VI returns to this and considers how this is an example of the Court interpreting legislation to create a mechanism for procedural control that exerts a form of institutional authority not directly tied to constitutional interpretation.

C Inter-branch Comity

Frank Michelman offers a somewhat different analysis of *Maphango*. Michelman also hears echoes of subsidiarity in the majority’s insistence that the Court cannot ignore relevant legislation even if the parties themselves fail to raise it. But he notes that, as developed formally by the Court, subsidiarity is limited to preferring legislation over direct constitutional claims. He says that *Maphango* raises a very different question: whether ‘sound reasons appear for routinely favouring an arguably available statutory ground over an arguably available developed-common-law ground of relief, *in the class of cases in which (a) the Court believes that the Constitution would require the Court’s receptivity to the developed-common-law claim in the hypothetical absence of the statutory claim and (b) an apparently legally plausible, applicable development of the common law is known to exist.*’¹⁵⁵

In Michelman’s view the majority’s decision to follow the statutory route over developing the common law raises the prospect that what he calls the ‘gravity’ of common law – a latent, conservative pull towards preserving the status quo – might have influenced the majority.¹⁵⁶ He notes that the parties’ arguments clearly set up the common-law route, and the majority had to go to some lengths to avoid that route over the Act.¹⁵⁷

After exploring the signs of it in the majority judgment, Michelman ultimately declines to conclude that *Maphango* definitively reflects common-law gravity at work. Instead he finds plausible the alternative explanation that the Court might have ignored the common-law path relying on a form of inter-branch comity that privileges relying on – and developing through construction and interpretation – legislative measures that arguably are designed to respect, promote and fulfill constitutional rights.¹⁵⁸ In this, Michelman sees a potentially pro-transformative principle: courts might consistently prefer to interpret available legislative

¹⁵⁴ Ibid.

¹⁵⁵ Michelman *Expropriation* (note 43 above) at 258.

¹⁵⁶ Ibid at 255.

¹⁵⁷ Ibid at 260.

¹⁵⁸ Ibid at 260 (‘There is, however, a further apparent and compelling motivation for the SANDU rule in many of its applications, having to do with judicial recognition, acknowledgment, and encouragement of Parliament as a co-partner in shouldering the responsibility to respect, protect, promote and fulfill the rights in the Bill of Rights.’).

mechanisms over developing the common law because doing so will support, encourage and, in cases like *Maphango* where the interpretation that brings the statute into service is ‘plainly beyond the mundane’, even extend the parliamentary contribution to developing the Bill of Rights.¹⁵⁹ A preference like this could be justified because it recognises the shared role of the court and Parliament for constitutional development and also takes into account institutional-security concerns of the kind Roux has identified.¹⁶⁰

The inter-branch comity principle that Michelman accepts as a defensible explanation for the majority’s reliance on the Act in *Maphango* is related to subsidiarity in that it sees independent value in courts working to enforce the Constitution through legislative mechanisms. In this respect, Michelman seems to accept Van der Walt’s view that, as a general matter, the democratic payoff from preferring Constitution-enforcing legislation over direct development of the Constitution or the common law should play some role in the way a court orders its analysis.

But Michelman cautions that the inter-branch-comity justifications for preferring a legislative route were not the only considerations in *Maphango*. Others arguably militated against avoiding the common-law route. First, the comparative transformative potential of each route did not clearly favour relying on the Tribunal. While ‘kick-starting’ the tribunals through a now constitutionally infused unfair-practice assessment could have longer-lasting transformative effects for tenants by possibly opening the door to constitutionally derived challenges to other aspects of the tenant-landlord relationship, changing the common law to limit contractual rights might have produced even broader transformative effects by setting a precedent applicable not only to other leases but across other classes of contracts.¹⁶¹ Secondly, taking the statutory route missed the opportunity ‘to kick-start the common law judiciary into a stepped-up mode of constitutionally inflected review of the common law’ – an opportunity that, if missed too often, risks leaving the common law undeveloped.¹⁶²

Michelman raises the ‘spectre’ of a third concern tied to the Court’s celebration of the ‘complex, nuanced and potentially powerful system’ for managing landlord tenant disputes that is ‘acutely sensitive to the need to balance the social cost of managing and expanding rental housing stock without imposing it solely on landlords’.¹⁶³ This attraction to balancing measures crafted by legislation might, Michelman worries, ‘too often tempt courts away from the hard tasks of questioning the compatibility of legislative balances with constitutional

¹⁵⁹ Ibid at 259–260.

¹⁶⁰ Roux *Principle* (note 14 above) at 109–112.

¹⁶¹ Michelman *Expropriation* (note 43 above) at 260.

¹⁶² Ibid at 260. Michelman compares this point with Van der Walt’s argument for a ‘residuarity’ principle that requires litigants to rely on common law over direct constitutional claims in the absence of relevant legislation. Ibid citing Van der Walt *Normative Pluralism* (note 33 above) at 116). The need for a unified system of law under the Constitution, Van der Walt argues, justifies this marching order. Van der Walt *Normative Pluralism* (note 33 above) at 116. Reaching directly for constitutional remedies over developing the common law in light of the Constitution creates unnecessary duplication and leaves the common law out of ‘the new constitutional dispensation’.

¹⁶³ *Maphango* (note 3 above) at para 49.

requirements and of re-examination of the common law's historically embedded balances to ensure they are in keeping with the Constitution's pro-transformative aims and values'.¹⁶⁴

D Avoidance

The signs of avoidance in *Maphango* illustrate that risk. While I agree that the majority judgment shows a genuine concern for the constitutional principles at stake and that kick-starting the Tribunal process created a significant tool for practical protection of tenants' rights, it falls well short of a significant effort at explaining what those principles require.¹⁶⁵ Instead the Act's flexible framework provided an escape hatch for the Court simply to avoid constitutional and common-law issues at play while signaling its preference for a pro-poor outcome without saying much at all – even indirectly through statutory interpretation – about what those constitutional values are or how they should apply to these facts.

The majority's holding that termination could constitute an unfair practice opens the door to a possible limitation on a landlord's common-law rights here and in other complaints that come before a Housing Tribunal. But now, as Cameron J emphasised at length, we are talking about a limitation grounded in a set of statutory, not constitutional, considerations.¹⁶⁶ As an explicitly Constitution-enforcing statute, those considerations might – but might not – be constitutionally required.

To be fair, that will typically be the case in a constitutional framework that accepts legislative constitutional enforcement. Constitution-enforcing legislation is unlikely to expressly distinguish between its 'merely' statutory and constitutional dimensions. Nonetheless adopting a rule that systematically prefers legislative enforcement runs a greater risk of more limited constitutional development over time at least as compared to direct constitutional enforcement.¹⁶⁷ It also puts a premium on courts taking advantage of the substantially reduced opportunities that are likely to arise for identifying specific constitutional norms.

¹⁶⁴ Michelman *Expropriation* (note 43 above) at 261. Michelman cites Klare's response to Van der Walt for the first half of this worry (note 118 above).

¹⁶⁵ I recognise that there is a difference between promoting constitutional values and explicating constitutional principles. The one emphasises achieving constitutional objectives and the other concretely identifying what the Constitution requires. The problem with avoidance techniques is specifically the failure to clearly explicate constitutional principles.

¹⁶⁶ See *Maphango* (note 3 above) at paras 52–53 (emphasising the difference between 'interests' in contradistinction to 'rights').

¹⁶⁷ Van der Walt recognises this and argues that there are clear benefits to preferring a case-by-case resolution of how these principles apply. Van der Walt *Property* (note 22 above) at 60. As I explain later, I agree that there are benefits to this approach, but I think it is important to acknowledge that realising those benefits comes with the cost of increased uncertainty over constitutional meaning. Developing the common law would not necessarily provide any more clarity than systematically relying on legislation. In both cases courts can rely on extra-constitutional considerations to decide a case. For either approach, whether and to what extent the court develops constitutional principles will depend on how the decision is drafted. Thick subsidiarity builds on precisely this point by preferring an interpretive approach that explicitly incorporates analysis of the constitutional principles a statute enforces.

Legislation, like the Act, that creates a multi-factor balancing test, compounds the lack of constitutional clarity. Resolving the tenants' claims under its test might 'display the desired characteristics and avoid the unwanted effects identified in the Constitution' but not necessarily.¹⁶⁸ The majority celebrated the even-handed way the test takes into account both market concerns and the need to protect tenants.¹⁶⁹ But that same evenhandedness could swing the result in a particular case in either direction. Whether the specific balance a Tribunal strikes on a given set of facts furthers constitutional values or not is an open question – a question that is impossible to answer because we do not know how FC s 26 intersects with the common-law right to terminate, nor does the majority in *Maphango* provide any guidance.¹⁷⁰

Maphango differs from the situation where an appellate court remands a case to a lower tribunal to apply a new standard on the facts for two reasons. First, the procedural maneuvers the Court used to reopen the Tribunal process suggest that it was doing more than simply giving the Tribunal a first crack at striking this balance. Secondly, the Tribunal process itself is unlikely to provide much clarity on that interaction because it is designed specifically to resolve landlord-tenant disputes, not to settle legal questions or to produce reasoned judgments identifying the constitutional dimensions of each dispute.

Concern for inter-branch comity and democratic enforcement might, as a general matter, justify relying on the Act to resolve these disputes. As I have highlighted already, consistently applied, a rule like that will inevitably attenuate the scope of direct constitutional development at least in the short term. But that attenuation could be reduced if courts interpret Constitution-enforcing statutes with consistent and explicit attention to not only general constitutional values but also specific constitutional provisions. By identifying the aspects of the statute that reflect constitutional norms and how to apply those norms in specific factual situations (including how to weigh them against other statutory factors), courts can play an independent role in elaborating the constitutional dimensions of the Act. Van der Walt's description of the dialogue that subsidiarity can develop captures this. The majority's refusal to decide whether the terminations in *Maphango* were unfair practices (or even to provide some general guidance by evaluating the statutory factors in light of the Constitution) missed that opportunity.

To some extent these problems could relate to timing. This is the first case where the Court addressed the Act's Constitution-enforcing function and it did so in the absence of a ruling by the Tribunal. It is reasonable under those circumstances for the majority to leave open some of these questions. And it is possible that the Constitutional Court and lower courts could over time develop both the constitutional dimensions of the statutory framework and the constitutional boundaries of it. This could happen, for example, in appeals from individual cases that reject on explicitly constitutional grounds the particular

¹⁶⁸ Van der Walt *Property* (note 22 above) at 59.

¹⁶⁹ *Maphango* (note 3 above) at para 49.

¹⁷⁰ In fairness, I think Van der Walt is arguing that the basic fact that the Act creates a statutory mechanism to challenge what under common law was an absolute right to terminate on the basis that it's unfair in itself advances the constitutional project. I do not disagree with that point.

balance the Tribunal strikes and in direct challenges to the constitutionality of particular factors in the Act or to interpretations of those factors. Subsidiarity allows for that kind of constitutional development and that is the process, I think, Van der Walt sees subsidiarity as capable of promoting.

But there is no guarantee that that kind of incremental constitutional development will happen. Instead of kick-starting a constitutionally infused Tribunal process that will gradually clarify the scope of the Constitution and its effects on the common law, we might end up with a much narrower process that leaves decisions on individual cases predominantly in the hands of the rental tribunals, features few appeals and appeals that limit themselves to straightforward questions of statutory interpretation without any reflection on – much less questioning of – whether and how either the statute itself or the balancing in individual cases meets constitutional muster.¹⁷¹ That is the difference between subsidiarity as Van der Walt describes it and avoidance.

Consider how that risk played out here. The applicants unsurprisingly took up the Court's invitation to file a complaint with the Rental Tribunal. The Tribunal had the authority to determine whether terminating these leases to avoid the rent-increase restrictions in them was an 'unfair practice' in terms of the Act. But the first step was for the Tribunal to attempt to mediate the dispute. Here, mediation succeeded, and so the story ends with no opportunity to further develop the Act's substance or its relationship to the Constitution.¹⁷²

Even if that informal resolution had failed and the case returned to the Constitutional Court for review of a decision on the merits, it is relatively easy to imagine a scenario that would have left the constitutional dimensions of the case undeveloped. Following *Maphango*, FC s 26(1) could operate as a background principle enlarging the potential scope of 'unfair practice' and, at least if the Tribunal pays attention to the majority, pushing towards some restriction on the landlord's termination rights with respect to these leases. But (as the majority describes at length) the factors that the Tribunal applies are legislatively defined and the entire process is a legislatively crafted mechanism to implement FC s 26 in a market-sensitive way. Equally important, the balancing that results under the Act involves factors that extend beyond FC s 26 and so, even if the Court reviewed the Tribunal's interpretation, it could still avoid saying anything directly about how FC s 26 affects the Act and instead merely tweak the legislative balance on the specific facts of this case.

The lengths the majority went to bring the Tribunal process back into play here heighten this concern and show the self-reinforcing effect of avoidance techniques (and possibly their interplay with Michelman's worry about common-law gravity). It is one thing to adopt a rule that requires applying relevant legislation to a dispute even where the parties missed it. As Froneman J's concurrence notes, the SCA did that and found that because the terminations could not qualify as

¹⁷¹ The Act provides for 'review' rather than 'appeal' of Rental Tribunal decisions in the High Court. This arguably narrows the scope of review and may further diminish the prospects for this kind of constitutional development. See http://www.iolproperty.co.za/roller/news/entry/appeal_vs_review_in_housing.

¹⁷² March 2014 email correspondence with Stuart Wilson.

an ‘unfair practice’ under the Act, that could not be a basis for holding that they were contrary to public policy under *Barkhuizen*. The majority could have done the same thing here and in the process explained the ways in which unfair practice reflected constitutional norms and values and why those required the outcome on these facts.

But the majority not only wanted to bring the substantive provisions of the statute into play, it wanted to rely on the statutory procedure as well in spite of the fact that the applicants had voluntarily abandoned that procedure.¹⁷³ As Michelman observes, this involved a potentially pro-poor application of the statute that could result in substantial protections for tenants in the long term. But those gains are channelled through legislation that sets up a procedure designed to avoid legal principle. This is why it looks a lot like *Olivia Road*. In both cases the Court found a way to enforce FC s 26 through a procedure that promotes informal dispute resolution over formal legal resolution.

Surely subsidiarity here would have permitted the Court to find that eviction in these circumstances was an unfair practice in terms of the Act and in doing so say something substantive about the underlying constitutional principles? That’s the model the Court used in *Port Elizabeth*, and the amicus argument provided a roadmap for doing just that. Even if the Court started with the Act, it could have applied the balancing factors *on these facts* as substantive proxies for FC s 25 and FC s 26 and said something about their connection to those constitutional principles.¹⁷⁴ Instead the Court left it to the Tribunal with no guidance on the substance.

V BLUE MOONLIGHT

Seventeen years into our democracy, a dignified existence for all in South Africa has not yet been achieved. The quest for a roof over one’s head often lies at the heart of our constitutional, legal, political and economic discourse on how to bring about social justice within a stable constitutional democracy.¹⁷⁵

¹⁷³ Michelman explains that the Act provided both a substantive route – ie interpreting ‘unfair practice’ to prohibit the terminations here – and the procedural route the Court took of delaying judicial action on the eviction case until both parties had ‘an unhindered opportunity to place the matter before the provincial Rental Housing Tribunal for its disposition (thus allowing the Tribunal to make the primary determinations both of the “unfair practice” question and of any remedial consequence)’. Michelman *Expropriation* (note 43 above).

¹⁷⁴ Michelman notes that ‘[e]nforcing the statutory while by-passing the common-law claim then plainly carries with it a judicial judgment that the as-applied statutory protection for the constitutional rights and values in play is constitutionally sufficient in this case, while quite possibly (depending on how the Court writes the judgment) deciding nothing more about what the Constitution does or does not require.’ Michelman *Expropriation* (note 43 above) at 258. He argues that the Court could have done the same thing by developing the common law on these facts without ‘cutting a wider swathe of legislatively irreversible constitutional law ...’. I see the statutory route representing even greater constitutional avoidance than the common-law route for two reasons: First, the statute is designed in the first instance to protect tenants’ and landlords’ rights through informal compromise; and secondly, developing the common law would have involved striking a fact-specific balance between the tenants’ and the landlords’ rights (or at least stating a rule for how to strike that balance), something the Court avoided by interpreting ‘unfair practice’ only to reopen the Tribunal process.

¹⁷⁵ *Blue Moonlight* (note 2 above) at para 2.

Van der Westhuizen J opened his judgment for a unanimous Court with the acknowledgment that South Africa has not yet fulfilled the constitutional promise of a dignified existence or even reached a point where every citizen at least has a roof over his or her head. The facts of the case presented a small subset of that much larger problem. A group of 81 adults and five children, the ‘Occupiers’ in the judgment, faced eviction by a private landowner which sought to redevelop the property where they lived.¹⁷⁶

The scenario is a familiar one for the Court. Beginning with – and directly traceable to – the landmark *Grootboom* decision where the Court held that the state in all spheres lacked an adequate plan for dealing with what it called ‘emergency’ housing needs, the Court has decided several eviction cases, each presenting a slightly different factual configuration. *Blue Moonlight* presented a novel combination of issues: (1) the extent to which FC s 26 obligates a private landowner to permit people to occupy land where evicting them would result in homelessness; (2) the interactions between FC s 26 and FC s 25’s protection of private property; (3) the rights of both the Occupiers and the landowner against the municipality where the prospect of homelessness resulted from arguable inadequacies in planning and budgeting; and (4) the obligations of municipal governments generally in relation especially to provincial but also to national government in providing emergency housing to citizens evicted from private land.¹⁷⁷

In framing the questions in the case, however, Van der Westhuizen J found that FC s 26 – or at least its positive dimension requiring progressive realisation of access to adequate housing – was not directly on the table.¹⁷⁸ Instead, in his view, the facts primarily required interpreting ‘the principal instruments enacted to give effect to the constitutional obligations of the various organs of state in relation to housing’ – specifically the Housing Act, the National Housing Code and the City of Johannesburg’s Housing Policy.¹⁷⁹ In other words, the Court would focus on the mechanisms the government had already adopted to enforce its constitutional obligations rather than the constitutional provisions themselves.

Is this subsidiarity at work? The Court never cites subsidiarity directly and the parties certainly did not frame the case that way. The Occupiers argued that the City was obligated under FC s 26 (and *Grootboom*) to house, at least on a temporary basis, the people living on Saratoga Avenue if the landowner succeeded in evicting

¹⁷⁶ Ibid at para 6. This paragraph is notable for the detailed description of the Occupiers’ situation, in particular the acknowledgement that ‘[t]he location of the building is crucial to the Occupiers’ income’.

¹⁷⁷ Ibid at paras 3–5. The Court had dealt with several of these issues individually or in different combinations in other cases but not this particular combination.

¹⁷⁸ Ibid at para 5 (‘This case does not deal directly with a programme, or measures, to realize progressively the right of access to adequate housing.’)

¹⁷⁹ Ibid at paras 3 and 24 (quotation is from para 24).

them.¹⁸⁰ The landowner argued that it had the right, consistent with procedures prescribed by law, to evict these people grounded squarely in s 25. It argued further that this right was unqualified by the Occupiers' potentially conflicting rights under FC s 26 citing both the Supreme Court of Appeal's and the Court's own decisions. And the City thickened the constitutional brew by positing, in its terms, the 'novel constitutional question' of 'what ... the three spheres of government's respective duties in the context of a commercially motivated eviction by a private landowner' are under ss 152 and 153.¹⁸¹ Why, then, would the Court say that interpretation of the statutory questions was 'at the heart of the matter'?¹⁸²

A The Case

It was far from obvious that direct constitutional questions were not at the core of the case. Unlike *Maphango*, however, here the Court addressed those questions to some extent and interpreted the statutes at play in constitutionally attentive ways. It nonetheless relied on several avoidance techniques including a strong emphasis on statutory enforcement mechanisms that incorporate a context-dependent balancing mechanism and a fairly general interpretation of those mechanisms as well as the background constitutional principles that inform them in ways that limited its interpretive role. More troubling, in a follow-up proceeding where the Occupiers asked the Court to clarify and enforce its original order, the Court showed some signs of a reluctance to extend the important principles it established, which at least raises the question whether it will extend them in later cases or follow the pattern of the *Grootboom-Olivia Road* sequence and revert to more direct avoidance.

¹⁸⁰ See *Blue Moonlight* First Respondent's Heads of Argument para 1 ('At the heart of this application is the constitutional obligation of the applicant ('the City') to provide accommodation to otherwise homeless persons who are in unlawful occupation of private property.') See also Heads of Argument for Second Respondent, The Occupiers of Saratoga Avenue at para 5, *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9, 2012 (9) BCLR 951 (CC) (Cites *Grootboom* and argues that 'in order to be reasonable, a housing programme must make provision for temporary emergency accommodation for persons in desperate need'). In particular the occupiers sought as part of the order a declaration that the City's housing policy was unconstitutional (para 155.4.4). Heads of Argument for Applicant City of Johannesburg at para 1, *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9, 2012 (9) BCLR 951 (CC):

The novel constitutional question for determination is what are the three spheres of government's respective duties in the context of a commercially motivated eviction by a private landowner. Do occupiers of privately-owned buildings who are sought to be evicted by the owner – and not for reasons of their safety, but for that of commercial expediency – have an immediately exigible claim directly against local government for alternative housing in the context where the provincial government could not and did not make funds available therefor?

¹⁸¹ Heads of Argument for Applicant City of Johannesburg (note 179 above) at para 1, *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9, 2012 (9) BCLR 951 (CC). Indeed the City of Johannesburg, in a footnote, emphasised that '[n]either [*Grootboom*] nor [*Port Elizabeth*] or any other judgment by this Court considered this question.' (fn 1) And later in its written argument the City argued that *Grootboom* should be read as absolving municipalities from this responsibility (paras 67–71).

¹⁸² *Blue Moonlight* (note 2 above) at para 5.

1 *The 'Constitutional and Legal Framework'*

The Court opened its analysis, in a section titled 'Constitutional and Legal Framework', acknowledging that the case raised potentially 'compet[ing]' constitutional issues 'as well as constitutional allocation of powers' across government.¹⁸³ This structure mirrors *Port Elizabeth* directly. But in the next sentence the Court noted that '[p]olicy has been formulated and statutes enacted to create a scheme for the protection and realisation of these rights'.¹⁸⁴ The remainder of the section reflects that same emphasis on statutory analysis rather than the clear distinction that Sachs J drew in *Port Elizabeth* between the constitutional background and the provisions of PIE.

The Court acknowledged that Blue Moonlight relied on s 25, the Occupiers 'anchor their case in section 26', and cited Chapters 3 and 7 as setting out principles relevant to the City's role in providing housing.¹⁸⁵ But then it moved to the 'principal instruments enacted to give effect to the constitutional obligations of the various organs of state in relation to housing', the Housing Act and the National Housing Code.¹⁸⁶ The Housing Act, the Court explained, 'expressly gives effect to the Constitution' and obliges municipalities to take steps to ensure that local residents have access to housing.¹⁸⁷ This mandate intersects with the Local Government: Municipal Systems Act 32 of 2000, which specifies municipal powers and duties, thus giving effect to the constitutional distribution of powers in ss 152 and 153. Here again, the statute incorporates the substantive constitutional questions because it requires municipalities to work together with other spheres of government to progressively realise the rights in FC ss 25 and 26 as well as to give effect to the Constitution more generally through prioritising basic needs.¹⁸⁸ Returning to the Housing Code, we learn that Chapter 12 'was introduced after the decision of this Court in *Grootboom*' and the City's housing policy incorporates Chapter 12 by including a programme for emergency housing.¹⁸⁹ Finally, the Court put PIE on the table as the statutory framework for assessing evictions.¹⁹⁰

The Court devoted most of the rest of its analysis to PIE, framing '[t]he crucial question before this Court' as whether evicting the Occupiers satisfies PIE's equitable, considering-all-circumstances test.¹⁹¹ It turns out that this inquiry subsumed virtually every other question in the case. The Court made this clear by explaining that applying the PIE test required it to address five questions: the owner's rights, the City's obligations, the sufficiency of the City's resources to meet those obligations, the constitutionality of the City's emergency housing

¹⁸³ Ibid at para 16 ('The issues to be determined require a consideration of rights enshrined in our Constitution, which may compete in circumstances where homelessness is a likely result of eviction, as well as constitutional allocation of powers and functions to municipalities and the other spheres of government.')

¹⁸⁴ Ibid.

¹⁸⁵ Ibid at paras 17–23.

¹⁸⁶ Ibid at para 24.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid at paras 25–26.

¹⁸⁹ Ibid at paras 27–28.

¹⁹⁰ Ibid at para 29.

¹⁹¹ Ibid at para 30.

policy and ‘an appropriate order to facilitate justice and equity in the light of the conclusions on the earlier issues.’¹⁹² In other words, all of the issues, both constitutional and statutory, which the parties raised, were simply aspects of the PIE analysis.

In answering these questions the Court touched on the now-subsidary constitutional issues and also established some significant principles, including that private landowners have a limited obligation to allow occupiers to remain on land where evicting them would cause homelessness and that a municipality cannot rely on a lack of resources as a defence where that lack was the result of an incorrect interpretation of its statutory obligations to provide housing. By couching those conclusions as applications of PIE – and interpretations of other statutes filtered through the PIE inquiry – however, the Court shows some signs of the conservative pull of constitutional avoidance.

2 *Blue Moonlight’s Rights*

The Court made surprisingly short work of Blue Moonlight’s argument that it had an unqualified right to evict the Occupiers so long as it followed legal procedure, holding that ‘[a]n owner’s right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE’.¹⁹³ This comes on the heels of a discussion of the interaction between FC ss 25 and 26 and the careful balance the Constitution strikes between transformation through redistribution and protecting existing property distributions against arbitrary deprivation.¹⁹⁴ From this we learn that unlawful occupation is without question ‘a deprivation of property under section 25(1)’ but also that such deprivations may ‘pass constitutional muster’ if they flow from a law of general application and they are not arbitrary.¹⁹⁵

Although largely a concise summary of fairly well-trodden constitutional ground (which the Court acknowledged by citing both *Harksen* and *FNB*), this seems to promise the start of inquiry into the scope of s 25 and the criteria for constitutionally sufficient deprivations. Instead the Court short-circuited that discussion concluding ‘[t]herefore PIE allows for eviction of unlawful occupiers only when it is just and equitable’.¹⁹⁶ With this the Court left the Constitution and turned to PIE. Under PIE’s test, the Court explained, a private landowner, like Blue Moonlight, who purchases land with knowledge of long-standing occupation, should reasonably expect ‘the possibility of having to endure the occupation for some time’.¹⁹⁷ The Court did not ground this reasonable expectation in any specific legal source. It is possibly – but not clearly – a function of the Occupiers’ offsetting rights under FC s 26, and it is not a direct limitation on Blue Moonlight’s rights under s 25. The analysis stops with PIE and is tied specifically to the facts in this case.

¹⁹² Ibid at para 33.

¹⁹³ Ibid at para 40.

¹⁹⁴ Ibid at paras 34–38.

¹⁹⁵ Ibid at para 37.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid at para 40.

3 *The City's Obligations*

The Court spent somewhat more time analysing the City's argument that its obligations were limited to the implementation of the national and provincial housing schemes and that these require, at most, that the City seek emergency funding from the provincial government to provide emergency housing where a private party initiates an eviction. Here, again, the Court relied primarily on the statutory context – in particular Chapter 12 of the Housing Act – to find that '[t]he City has a duty to plan and budget proactively for situations like that of the Occupiers'.¹⁹⁸

As part of its constitutional argument, the City relied on language in *Grootboom* that it claimed imposed funding obligations on only the national government, restricting local government to implementation of those decisions. In rejecting this claim, the Court expanded its *Grootboom* judgment in an important way. First, the Court quoted *Grootboom* to find that the 'duty regarding housing in section 26 of the Constitution falls on all three spheres of government – local, provincial and national – which are obliged to co-operate'.¹⁹⁹ This is a key point of the judgment: all spheres of government must be proactive in fulfilling FC s 26. Municipalities cannot hide behind buck-passing arguments as the City tried to do here.²⁰⁰ The Court followed up by directly rejecting the City's interpretation of *Grootboom*.²⁰¹ This is a clarification and extension – if a modest one – of *Grootboom* necessary to deal with the City's interpretation that *Grootboom* absolved it of any responsibility.²⁰²

The Court also addressed FC ss 152 and 153 holding that municipalities bear some responsibility for service delivery beyond merely implementing national and provincial plans: 'A municipality must be attentive to housing problems in the community, plan, budget appropriately and co-ordinate and engage with other spheres of government to ensure that the needs of its community are met. Its duty is not simply to implement the state's housing programme at a local level. It must plan and carry some of the costs, as is shown below.'²⁰³

As we will see, the City's obligation to plan and budget for the housing needs of people like the Occupiers, while clearly connected to these constitutional provisions, is more specifically tied to the Housing Act. And it was the City's

¹⁹⁸ Ibid at para 67. The Court summarised its statutory analysis in para 66: 'These provisions indicate a legislative purpose that the City ought to plan proactively and to budget for emergency situations in its yearly application of funds.'

¹⁹⁹ Ibid at para 42.

²⁰⁰ This also is the basis for another important implication of the case: normally complex eviction cases will require joinder of all three spheres of government. Ibid at para 45.

²⁰¹ Ibid at para 57.

²⁰² The Court carefully formulated this principle in the negative as a rejection of the City's argument that it was *prohibited* from expending its own funds: 'There is no basis in *Grootboom* for the assertion that local government is not entitled to self-fund, especially in the realm of emergency situations in which it is best situated to react to, engage with and prospectively plan around the needs of local communities.' This leaves open the question O'Regan J posed in *Mazibuko* whether a municipality might have an independent positive obligation to go beyond the requirements of national legislation if it has sufficient resources. *Mazibuko* (note 7 above) at para 74.

²⁰³ *Blue Moonlight* (note 2 above) at para 46 and fn 49.

failure to correctly interpret the Act that had the most significant repercussions here.

4 *The City's Resources*

The most surprising aspects of the judgment come in the Court's discussion of the City's argument that it lacked sufficient resources to address the emergency needs of the Occupiers. Three things stand out here. First, the Court held that the City's resources argument was legally irrelevant because the City prepared its budget based on an incorrect understanding of Chapter 12 of the Housing Act: 'But the City's budget was the product of its incorrect understanding of Chapter 12... . *It is thus not strictly necessary to consider the attack on the factual findings of the Supreme Court of Appeal.*'²⁰⁴ In other words, the Housing Act imposes an unqualified obligation on the City to plan and budget for emergency housing for people like the Occupiers. The shift into the Housing Act described above thus eliminated the need to address FC s 26's resources limitation criterion.²⁰⁵ This made it possible for the Court to hold that a resources inquiry was technically unnecessary because the City simply misunderstood its legislatively mandated obligations under Chapter 12.

Finally, the Court faulted the City for failing to provide complete information on its entire budget.²⁰⁶ The Court connected this back to the point that the City could not rely on its own legal error but used language that seems to touch on FC s 26: 'This Court's determination of the *reasonableness of measures within available resources* cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of *constitutional or statutory obligations*. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.'²⁰⁷

5 *The City's Housing Policy*

The Court's definitive rejection of the City's housing policy directly on FC s 26 grounds is itself significant. The policy, at least on its face, was a reasonable, multi-faceted approach to different housing needs. It incorporated a response

²⁰⁴ Ibid at para 69 (emphasis added). It is notable here that the Court emphasised the procedural posture of the case as a challenge to the SCA's factual findings. This minimised the constitutional dimensions but it also constrained the Court's discretion in ways that ratcheted up the pressure on the government. Compare *Port Elizabeth* (note 29 above) at para 7 (rejecting the occupiers' characterisation of the case as essentially a challenge to the SCA's factual findings and proceeding to evaluate the claims in expressly constitutional terms).

²⁰⁵ This also meant that the exceptions to the normal rule barring new evidence on appeal the Court has said exist in socio-economic rights cases because of the progressive realisation language did not apply here. Compare *Mazibuko* (note 7 above) at para 40 (describing two 'qualifications' to the normal appellate rule 'both of which flow from the fact that this case concerns the state's obligations in respect of a social right').

²⁰⁶ *Blue Moonlight* (note 2 above) at para 74 ('The City provided information relating specifically to its housing budget, but did not provide information relating to its budget situation in general. We do not know exactly what the City's overall financial position is.').

²⁰⁷ Ibid (emphasis added).

to the *Olivia Road* judgment in the form of a constitutionally sensitive eviction and relocation procedure and included data to justify prioritising public-eviction relocation while still setting forth a procedure for emergencies that result from private evictions. In short it was the kind of policy that the Court in the past has held falls well within the broad scope of executive authority.²⁰⁸

The Court nonetheless held that the policy's differentiation between private and public evictions directly violated FC s 26. The Court applied reasonableness review but explained that it was sufficient in this case to review the City's policy for bare rationality without addressing whether reasonableness requires more.²⁰⁹

Why was a plan as complex as the City's so clearly unconstitutional that it failed even the lowest imaginable standard? The City's insistence that it had no obligation even to consider a policy covering private evictions made the rest of the housing policy irrelevant. The Court did the same thing that it had done in *Grootboom*, only here on a much smaller scale. It identified an unconstitutional policy gap: 'The City's housing policy is unconstitutional to the extent that it excludes the Occupiers and others similarly evicted from consideration for temporary accommodation. The exclusion is unreasonable.'²¹⁰ The holding thus does very little to expand the contours of FC s 26 other than confirming that an irrational distinction in a programme designed to implement FC s 26 obligations will fail, apparently irrespective of resources arguments.

B Blue Moonlight as Thick Subsidiarity

We have in hand then a judgment that prevents, at least temporarily, a private landowner from evicting unlawful occupiers. In reaching this result the Court confirmed and developed some important aspects of FC s 25 and FC s 26. It declared that the City's formal policy of ignoring potential evictees like the Occupiers violates FC s 26. It confirmed that, while unlawful occupation is a 'deprivation' under FC s 25, the state can constitutionally impose such a deprivation by postponing eviction if application of PIE's test makes immediate eviction unjust. Finally the Court modestly expanded *Grootboom* to clarify that FC s 26 imposes at least some direct obligations on municipalities to fund emergency housing programmes and that FC s 152 and FC s 153 likewise impose independent constitutional obligations on municipalities to go beyond mere implementation of national and provincial policies.

On top of this, the Court established several important constitutionally connected legal principles. Most significant among these is that a municipality's resource-limitation arguments are irrelevant where those limitations are the result of its own misinterpretation of statutory or constitutional obligations. In addition, the Court seems to have established a substantial evidentiary burden for municipalities that requires them to demonstrate that resources are unavailable anywhere in the entire budget.

²⁰⁸ Compare *Joe Slovo* (note 30 above) and *Mazibuko* (note 7 above).

²⁰⁹ *Blue Moonlight* (note 2 above) at para 87 ('Whether a policy which meets the requirements for rationality would necessarily be reasonable does not have to be decided here.').

²¹⁰ *Ibid* at para 95.

All of these features mark a return to the more independent approach of the Court's earlier cases. In particular, the Court's analysis followed the *Port Elizabeth* model by engaging in explicit constitutional interpretation at several points as well as by identifying the constitutional dimensions of the statutes it enforced. It also arguably applied that model in more aggressive ways by interpreting the Housing Act to impose more definitive obligations on the City than might have been possible through direct application of FC s 26. It was the Court's interpretation of the Housing Act that made the City's resources argument legally irrelevant.

To be sure, the Court largely followed the legislature's lead by relying principally on existing legislation and policy to provide the substantive framework for enforcing FC s 26 and identifying how it interacts with s 25. But it also exercised substantial independence by describing the broader constitutional principles that these measures implement, identifying specific constitutional dimensions of those measures and interpreting them in explicitly constitutional terms. The opportunity to reject the City's policy as violating the Housing Act allowed the Court to identify specific constitutional requirements that the legislature had already enforced and expanded.

What grounds, then, could even the most ardent proponent of socio-economic rights find for criticising this result?

C A Pessimist's Reading

A pessimistic reading of *Blue Moonlight* might start with the fact that, on one level, this was an easy case. The City of Johannesburg took an extreme position that evinced a complete absence of sensitivity to general constitutional values. In essence, the City told the Court that it had no responsibility whatsoever to play an independent role in responding to the needs of people like the Occupiers.

The Supreme Court of Appeal's discussion of the City's long-standing 'entrenched' refusal to plan for private evictions is telling.²¹¹ And the fact that the Constitutional Court rejected the City's position under rationality review demonstrates how extreme that position was. From this perspective, *Blue Moonlight* is another example of the Court policing the outer boundaries of constitutionally permissible conduct. The boundary at issue here was one already clarified by *Grootboom* and so policing it resulted in additional clarification that has significant practical implications. Any person threatened with homelessness from eviction can now ask a court to scrutinise the relevant municipality's budgeting process. This in itself creates important potential leverage. If that scrutiny reveals that the municipality deliberately excluded a particular group, it constitutes a *prima facie* violation of the Housing Act.

But what does that tell us about the substantive content of FC s 26 that can guide either policy development or litigants in future cases? *Blue Moonlight's*

²¹¹ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZASCA 47, 2011 (4) SA 337 (SCA), [2011] 3 All SA 471 (SCA) at para 51 ('The City has for a long time been faced with emergency housing situations of all kinds. It appears to have adopted an entrenched position that excludes persons such as the occupiers from assistance. It is abundantly clear that but for this approach it could have adopted a long-term strategy, which ought to have included financial planning, to deal with such exigencies.').

reasoning does not provide any guidance on the harder issues that will inevitably arise where a municipality budgets ‘rationally’. It simply holds that municipalities are obligated by statute not to completely exclude private evictees from consideration in the budget process. If in the next case, a city’s argument goes beyond a bare disclaimer of responsibility and instead argues that exclusion was the result of competing policy priorities, *Blue Moonlight* does not say much about the constitutional standard for assessing those priorities.

The Court also clarified that a private landowner in *Blue Moonlight*’s position who purchases land with known long-standing occupiers may have to expect a reasonable delay in evicting those occupiers if doing so would render them homeless. This too establishes an extremely important tool for protecting poor people. But here again, beyond the principle itself, the judgment provides little guidance on the factors a court should consider in deciding under what circumstances and for how long a private landowner can reasonably be required to delay eviction.

Here we see the obscuring effects of deciding the case exclusively through a context-specific test like PIE’s without developing the background constitutional principles at play. The Court emphasised that the landowner purchased with knowledge of the occupation and its own housing needs were not at issue.²¹² The fact that the Court identified these as relevant considerations creates the kind of soft-substantive guidance I discussed earlier. But because they are not specifically connected to FC s 26 and because they are only part of PIE’s multifactor balance subsequent cases even with those same facts could come out differently. What happens in a case where a city appropriately planned for its obligations to house evictees from private land and the money has run out? What about a landowner with more recent occupiers?

My point is not that the Court should have (or could have) addressed all of these eventualities. My concern is that the signs of avoidance even in this extraordinary decision contribute to the Court’s continued refusal to develop a detailed and consistent framework for evictions much less one that begins to flesh out the broader constitutional principles that undergird any such approach. I am also worried that the Court may be unwilling to take the next case that raises these more difficult issues and to build a sustained sequence of cases that extends the important principles established here in ways that prevent a retreat to deference in these harder situations. The sequence from *Grootboom* to *Olivia Road* is a good example of avoidance playing out in this way over time.

D *Blue Moonlight II*

Blue Moonlight II provides some limited support for this concern.²¹³ With the deadline for relocation fast approaching and no real communication from the City, the Occupiers filed an urgent application with the Constitutional Court

²¹² *Blue Moonlight (SCA)* (note 211 above) at para 39.

²¹³ *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9, 2012 (9) BCLR 951 (CC).

requesting that it enforce or modify its original order.²¹⁴ Among other things, the modifications they sought included a delay of the eviction date and a clarification that the original order required the City to meaningfully engage the Occupiers over the details of the relocation.²¹⁵

The Court rejected the application on formal procedural grounds.²¹⁶ First, the Court relied on the procedural posture of the original order, characterising it as ‘the usual “set aside and replace” kind of order made in an appeal’ that ‘effectively became an order of the High Court’.²¹⁷ This allowed the Court to reject the Occupiers’ request for a direct modification of the initial order on the basis that the Occupiers ought to have approached the High Court.

To get there, however, the Court had to distinguish *Zondi*, where it retained jurisdiction over a suspended declaration of invalidity, and *Joe Slovo*, where it issued a detailed engagement order qualifying its holding that the government could proceed with eviction.²¹⁸ As I mentioned earlier, the engagement order in *Joe Slovo* potentially established some soft substantive guidelines in future eviction cases. At a minimum it created a basis to argue that all evictees have the general right to negotiate over the details of their alternative accommodation and possibly to insist on consultation over all of the specific items the Court identified in the *Joe Slovo* order.²¹⁹ The Court stopped short of rejecting that argument outright, but refused to grant such an order and questioned whether such consultation is required as a general matter.²²⁰

Joe Slovo and *Zondi* clearly were exceptions. The court hierarchy is designed for precisely this distribution of labour, and the Court routinely remands cases back to the High Court to implement its decisions.²²¹ But comparing this sequence with *Joe Slovo* shows that both fit the avoidance patterns I have described above. In *Joe Slovo*, the Court exerted extensive control over the case in the implementation phase through the detailed engagement order and by retaining jurisdiction to enforce that order, which it exercised in its follow-up order. The occupiers relied on this process in their arguments in *Blue Moonlight II*. The predicate for exercising

²¹⁴ Ibid at para 1.

²¹⁵ Ibid at paras 5–6.

²¹⁶ Ibid at paras 1–2.

²¹⁷ Ibid at para 8.

²¹⁸ Ibid at paras 10–12.

²¹⁹ Ibid at paras 16–18.

²²⁰ Ibid at para 16 (‘Any eviction process must take place with due regard to the dignity of the persons who are being evicted. But whether that obvious requirement entails a more substantive requirement of ‘meaningful engagement’, which would entitle all evictees to contest the quality of temporary accommodation being provided to them, need not be decided here. This is because the Occupiers, on the papers before us, will be provided with accommodation and they will not be rendered homeless by the eviction.’ (cites omitted))

²²¹ This general practice distinguishes *Blue Moonlight II* from *Maphango*, where the majority ignored its own procedural rules to reopen the Tribunal process. The effect is similar sending the case back to a judicial body that easily could decide the issue on non-constitutional grounds. This is part of what makes both cases look like they may involve some avoidance. The appearance of avoidance is much stronger in *Maphango* because the Tribunal is specifically designed to settle disputes through mediation and High Court review of its decisions is procedurally limited. In *Blue Moonlight* the remand was consistent with normal procedure and involved the High Court, which has the power to consider constitutional questions.

that control, however, was a substantive decision in the government's favour that disconnected that control from constitutional principles.

Blue Moonlight reflects a mirror image. The Court firmly rejected the government's policy and established statutory interpretations and constitutional principles that temporarily stopped the evictions while still leaving open important questions about the extent of the City's obligation to re-house the Occupiers as well as the length of time the landowner could constitutionally be required to wait to evict them. Answering those questions and explaining how the constitutional principles at play bear on them – even indirectly as reflected through applicable legislation – will require the Court to make more difficult choices than the City's irrational policy raised in this case. The Court's somewhat limited engagement with those principles in the original judgment and refusal to expand on them with a follow-up order raise the possibility that it might not be willing to go that far. It is too soon to tell, and certainly too soon to complain given the remarkable results. But it is not too soon to raise the question and consider how to build on the Court's approach in *Blue Moonlight*.

VI AVOIDANCE AND PROCEDURAL AUTHORITY

In spite of the features that make *Port Elizabeth* a thick version of subsidiarity – close and specific attention to the constitutional framework, independent judicial articulation and application of that framework and an interpretive approach that explains the relationship between specific legislative provisions and constitutional principles – the case rolls those features into an overall judicial approach that self-consciously seeks to avoid establishing concrete constitutional principles. The open-ended language that Sachs J identifies as the constitutional 'strategy' that FC s 26(3) prescribes is a description of constitutional interpretation at the policy-making level.

Notably, the more definitive constitutional principles that *Port Elizabeth* establishes are primarily more specific examples of this flexible strategy: FC s 26(3) is not self-enforcing and permits evictions even where homelessness will result and FC s 25 and FC s 26 strike a careful balance requiring fact-specific resolution on a case-by-case basis.²²² Sachs J includes substantial qualifiers throughout the judgment that hint at more concrete limits – for example noting that PIE's reference to the availability of alternative accommodation means a court should be 'reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available' even if only interim accommodation.²²³ But the overall approach is designed to leave options open in each case.

Sachs J also emphasises that courts are required to go behind claims of general statistical progress and consider the actual circumstances of people challenging

²²² *Port Elizabeth* (note 29 above) at paras 19–23.

²²³ *Ibid* at para 28. The Court has treated the alternative-accommodation requirement as a de facto requirement in later cases, but it continues to formally maintain that courts are required to apply the PIE factors to determine whether alternative accommodation is required in each case. See Part VIII.A below.

their eviction. Here, however, the emphasis is not on establishing a broad-based FC s 26 principle for challenging government policy but instead on ‘reasonable application of judicial and administrative statecraft’ to avoid human distress.²²⁴ His example is a court intervening to address the situations of individuals facing eviction under an otherwise clearly constitutional policy that houses the maximum number of people in the most efficient way but nonetheless permits short-term homelessness. That intervention would not involve addressing the policy itself, only managing the details and timing of the actual eviction to protect the human dignity of the people involved.²²⁵

The pro-poor aspects of the decision, thus, primarily come from Sachs J’s rich description of a creative and flexible judicial role that is keenly sensitive to the situation of real people facing homelessness and that actively works to mitigate that situation in individual cases. Sachs J describes powerful tools judges can use in this role, including the possibility of blocking the government from evicting a person and ordering the government to devise a humane solution. It is also significant that this emphasis on the specific situations of individuals facing homelessness incorporates a form of direct relief missing from *Grootboom*’s insistence that judicial intervention must address government action on a programmatic level.²²⁶

That same emphasis on individual situations, however, also avoids easily identifiable constitutional principles that can influence future cases. *Grootboom* issued a general programmatic remedy, but set a significant precedent that has shaped legislation, policy and a substantial jurisprudence around evictions.²²⁷ *Port Elizabeth* sets up an approach designed to do the opposite. As Sachs J emphasises, PIE’s criteria ‘are not purely of the technical kind that flow ordinarily from the provisions of land law.’²²⁸ As a result PIE treats the rights it enforces ‘as interactive, complementary and mutually reinforcing’ and reconciling those rights requires ‘a close analysis of the actual specifics of each case.’²²⁹ Sachs J’s description celebrates the freedom from constraining principle this role creates and the practical advantages that freedom brings.

Olivia Road’s creation of the meaningful engagement requirement embodies that approach. Enforcing the meaningful engagement requirement creates a largely procedural role for courts divorced from the substantive discussion that makes *Port Elizabeth* a model of thick subsidiarity. Meaningful engagement asks about

²²⁴ Ibid at para 29.

²²⁵ Ibid. Sachs J states that the existence of a policy designed to house the maximum number of people in the most efficient way would ‘go a long way towards establishing a context that would ensure that a proposed eviction would be just and equitable. It falls short, however, from being determinative of whether and under what conditions an actual eviction order should be made in a particular case.’ (emphasis added).

²²⁶ See *Grootboom* paras 30–40. See also Landau *Social Rights Enforcement* (note 24 above) at 196–197; Roux *Principle* (note 14 above) at 136; Wilson *Breaking the Tie* (note 70 above) at 274–75.

²²⁷ Liebenberg and others have pointed out that the applicants in *Grootboom* settled prior to the Constitutional Court’s judgment thus permitting the Court to deal with only the systemic issues. S Liebenberg *Socio-Economic Rights* (note 6 above) at 399–409.

²²⁸ *Port Elizabeth* (note 29 above) at para 35.

²²⁹ Ibid.

only the process that produced a particular policy or action, not the outcome.²³⁰ This is what makes *Olivia Road* a paradigmatic example of avoidance.²³¹ The thick subsidiarity *Port Elizabeth* and *Blue Moonlight* feature is one partial hedge against that risk but thick subsidiarity depends on the interstitial interpretive opportunities that open up when courts apply and enforce legislation or executive policies – opportunities that engagement deliberately avoids.

Maphango applied the Rental Housing Act to create the same kind of procedural control as meaningful engagement over the private landlord-tenant relationship. The key substantive move the Court made was interpreting ‘unfair practice’ to encompass attempted evictions. This put the Tribunal *process* to work in potentially pro-poor ways without definitively establishing anything substantive about the Act or the constitutional principles the Act enforces. It is no coincidence that the Tribunal process, like engagement, is structured to resolve disputes informally through party consensus. The result was nearly complete constitutional avoidance that contrasts starkly with the specific elaboration of the constitutional context in both *Blue Moonlight* and *Port Elizabeth*.

But that same shift to procedure introduced the possibility of judicial control over individual situations that can strike a balance among the competing constitutional values without extending that balance – or at least not immediately extending it – beyond the facts of a particular landlord-tenant dispute.

These procedural devices provide a different set of possibilities for maintaining judicial authority. Rather than re-establishing a measure of interpretive control they put courts in a position to manage specific processes and guide those processes towards constitutionally compliant resolutions. The Tribunal process restores judicial authority by giving courts the power to balance FC s 26 and FC s 25 by resolving individual landlord-tenant cases. The flexibility of the Act’s multi-factor test combined with its emphasis on informal resolution encourages Tribunals to find case-specific solutions without requiring elaboration of either those factors or the constitutional principles they implement. Meaningful engagement creates a similar process. It gives courts the power first to reject unconstitutional outcomes on procedural grounds and then to influence the subsequent party-directed process for resolving the dispute. Both processes create opportunities for courts to develop the kind of soft-substantive guidance that incorporates a form of interpretive authority – in the Tribunal process through explicit elaboration of the legislative criteria and under meaningful engagement by setting the agenda and also substantive terms for the parties’ consultation or policy-level interventions like the 70 per cent set-aside in *Joe Slovo*. But either process can successfully resolve disputes without any explicit identification of constitutional principles.

²³⁰ *Olivia Road* (note 6 above) at para 18 (‘It may in some circumstances be reasonable to make permanent housing available and, in others, to provide no housing at all. The possibilities between these extremes are almost endless.’)

²³¹ The Court illustrated this in its decision finding it unnecessary to reach any of the substantive constitutional questions the parties had briefed and argued, including the constitutionality of the City’s new housing plan, the ‘reach and applicability of sections 26(1), 26(2) and 26(3),’ and ‘the question whether PIE applies in the present case’ or ‘the relationship between section 26 and PIE’. *Olivia Road* (note 6 above) at paras 32–38.

A *Blue Moonlight*'s Progeny: PIE as Muscular Procedure

Earlier I considered the ways that channeling the constitutional and statutory issues through PIE's multi-factor analysis circumscribed the scope of the Court's significant holding that PIE could justify limiting a private party's s 25 property rights.²³² *Blue Moonlight* establishes that the Constitution permits the state to require a property owner under the specific facts of that case to wait some period of time before evicting illegal occupiers, but it does not tell us much more about how to apply PIE where the facts change. This is a combination of the Court establishing a highly general constitutional principle – PIE's multifactor test under some circumstances constitutionally limits private property rights – and applying it at a policy-making level that does not clearly extend beyond the specific facts in a single case.

I now want to consider how that same combination creates the kind of procedural control I have just identified with *Olivia Road* and *Maphango* but also the possibility for incremental substantive constitutional development. PIE's multi-factor test gives courts a range of options for intervening in potential evictions to manage them in ways that protect constitutional values and achieve constitutional objectives without establishing any strong constitutional principles. Similar to the Rental Housing Act, PIE's substantive but still flexible framework also could, over time, reincorporate modest judicial interpretive authority alongside this procedural control.

The Constitutional Court issued two companion decisions to *Blue Moonlight* on the same day.²³³ Both cases involved evictions of people who were unlawfully occupying private land in the City of Tshwane. Yacoob J drafted closely connected unanimous judgments in each, applying *Blue Moonlight*'s broad principle that PIE's analysis can limit private property rights. In *PPC Quarries*, Yacoob J ordered the City to conduct an audit of the occupiers to determine the number of people who would be rendered homeless and to provide alternative accommodation to those people one month before their eviction.²³⁴ In *Golden Thread*, he remanded the case to the High Court for reconsideration and ordered the City to submit a report providing specific information that he held PIE's test required, including the availability of alternative accommodation.²³⁵ The result in each case was a delay in the occupiers' eviction and an order that connected the timing of the evictions to the City's ability to provide alternative accommodation.

1 Procedural Control

Both decisions reflect the sensitive, careful judicial management of the individual consequences of eviction processes that Sachs J described in *Port Elizabeth* that establishes concrete procedural authority without expanding specific constitutional principles or using existing principles to change broad policies. The applicants filed combined heads of argument in both cases seeking several broad principles.

²³² See above Part V.

²³³ *Golden Thread* (note 2 above); *PPC Quarries* (note 2 above).

²³⁴ *PPC Quarries* (note 2 above) at para 16.

²³⁵ *Golden Thread* (note 2 above) at para 4.

The results in both cases effectively apply those principles, but Yacoob J's analysis specifically avoids establishing those principles and instead the major substantive development is an expansive interpretation of PIE that expands the procedural authority of courts to join municipalities in all PIE-related evictions.

In *PPC Quarries* the Constitutional Court issued a direct order that relied on the general principles in *Blue Moonlight* but without expanding those principles in any easily identifiable way. The High Court ordered eviction but required the City to audit the occupiers and provide them access to land one day before the eviction.²³⁶ The Constitutional Court set aside that order holding that, in light of *Blue Moonlight*, the High Court misapplied the PIE analysis. The Court's own PIE analysis spans three short paragraphs. The first paragraph is a block quote from *Blue Moonlight* stating that PIE may temporarily restrict private property rights.²³⁷ In the second Yacoob J identified two facts as relevant: there was no evidence PPC Quarries planned to 'use the property gainfully in the foreseeable future' and there was no reason at that point to assume that the City would not 'take steps reasonably quickly to provide alternative accommodation' for the occupiers.²³⁸ In the third, Yacoob J concluded that these facts made it 'neither just nor equitable' under PIE to evict the occupiers who would become homeless before the City provides accommodation.²³⁹ The final order required the City to first survey the occupiers to determine who will become homeless and provide accommodation to those people one month before the eviction date the order sets.²⁴⁰ The only significant difference between this and the High Court's original order is an extension from one day to one month of the time between when the City has to provide accommodation and the eviction.

Golden Thread features that same kind of case-specific procedural control but here the Court delegated that control back to the High Court with a detailed framework for exercising it. The occupiers argued that the Court should overturn the High Court's eviction order and establish the same set of substantive principles as in *PPC Quarries*. Yacoob J, again, ignored those arguments saying the only contention that was 'necessary to investigate' was the High Court's failure to require the City to provide information about alternative accommodation and to investigate the possibility of mediation under PIE.²⁴¹

Reaching that conclusion required an important, not obvious, interpretation of PIE. PIE distinguishes between short-term (defined as less than six months) and long-term occupation and requires courts to investigate the availability of alternative accommodation only for long-term occupation.²⁴² The High Court

²³⁶ *Golden Thread* (note 2 above) at para 4.

²³⁷ *Ibid* at para 11.

²³⁸ *Ibid* at para 12.

²³⁹ *Ibid* at para 13.

²⁴⁰ *Ibid* at para 16.

²⁴¹ *Ibid* at paras 12–13.

²⁴² Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 s 4(6)–(7). PIE requires a court to determine in every case whether ordering an eviction is 'just and equitable ... considering all the relevant circumstances' but where a person has occupied property for longer than six months, s 4(7) specifies that these circumstances include 'whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner ...'.

noted evidence that the City might be able to provide alternative land for the occupiers and expressed frustration at the City's refusal to participate in the proceedings.²⁴³ It nonetheless concluded that it was powerless to order the City to do more because PIE did not require it to consider the availability of alternative accommodation.²⁴⁴

Yacoob J interpreted PIE's general mandate that courts consider all relevant circumstances broadly to include the availability of alternative accommodation in all cases – functionally eliminating the distinction between short- and long-term occupation.²⁴⁵ This solved the problem in *Golden Thread* by clearly permitting a court to join municipalities in all evictions where PIE applies and to require that they provide information on their ability to provide alternative accommodation. This set up the final order that remanded the case to the High Court for reconsideration and ordered the City to submit a report identifying: the number of families who would be rendered homeless if evicted; the steps the City has taken or plans to take to provide land or accommodation for the occupiers; when the City could provide alternative land or accommodation; the likely effects on the occupiers and surrounding residents if the eviction proceeded without alternative accommodation; and steps the City could take to alleviate the effects of continued occupation on the landowner until it provided alternative accommodation.²⁴⁶

This follows the same pattern as *Maphango*. The Court broadly interpreted Constitution-enforcing legislation to expand the scope of a multi-factor balancing test. In each case the Court carefully avoided broad constitutional principles that could narrow the range of outcomes under the test and did not even dictate how to strike that balance on the facts of each case. Instead the statutory expansion resulted in greater procedural control over individual cases.

The results in both *PPC Quarries* and *Golden Thread* look much like what Sachs J called for in *Port Elizabeth Municipality*: a court managing a specific eviction process to mitigate its effects rather than to establish broad constitutional principles or to change an underlying policy to comply with those principles. *PPC Quarries* applies *Blue Moonlight*'s core principle that courts can apply PIE to temporarily restrict private property owners' right to evict (and *Golden Thread* clearly expects the High Court will do the same).²⁴⁷ But the effects of that application are largely limited to the occupiers in each case.

Like in *Blue Moonlight* the Court in these cases repeatedly cited the municipality's poor conduct and expressed deep concern over the failure to treat the occupiers humanely. Each judgment introduced the case with an identical, sharply worded

²⁴³ *Golden Thread Ltd v People Who Intend Invading Portion R25 of Farm Mooiplaats 355JR Tshwane, Gauteng and 2 Others* [2010] ZAGPPHC 262 at paras 11–12 ('*Golden Thread High Court*').

²⁴⁴ *Ibid* at para 12.

²⁴⁵ *Ibid* at paras 15–16.

²⁴⁶ *Golden Thread* (note 2 above) at para 21.

²⁴⁷ Yacoob J observes in *Golden Thread* that '[i]t is possible that the High Court was motivated to some extent by its view that *Golden Thread* had no obligation towards the applicants ...' and then notes in para 17 that '*Blue Moonlight* held that ownership in South Africa is not as unrestricted' followed by a block quote. The limited substantive effect of even this is muted both because Yacoob J carefully couches it in hypothetical terms and because he limited his analysis to the Court's failure to order the City to provide information.

paragraph ‘necessary’ to address ‘a matter that is cause for considerable concern’: the inappropriate characterisation of the occupiers as ‘the people who invaded’ or ‘intend invading’ certain properties.²⁴⁸ This description ‘detracts from the humanity of the occupiers, is emotive and judgmental and comes close to criminalising the occupiers’.²⁴⁹

Yacoob J’s frustration with the City is evident at various points in both judgments. For example, in *PPC Quarries* he noted that the City never directly challenged the High Court’s judgment ‘except in the inept, indirect and half-hearted way already alluded to’.²⁵⁰ *Golden Thread* includes an unusual (and not strictly relevant) aside that ‘[i]t must be pointed out now that the High Court rightly expressed misgivings about the conduct of the City during the proceedings’, followed by a block quote from the High Court’s judgment:

I have already noted during the hearing that the [City] is conspicuous in its absence. It’s a very sad state of affairs, especially as the [City] is the one body which is constitutionally bound to address the problem which exists. They have not only failed dismally in that respect and have done so for many years, but they have not even attended this hearing to assist the court to come to a decision. The [City] merely briefed counsel on a watching brief.²⁵¹

PPC Quarries also contains some signs that the result may be as much a deal struck through informal judicial management of the situation as it is a precedent applying PIE in light of *Blue Moonlight*. While formally analysed – if thinly – in terms of PIE, the specific order tracks informal concessions the Court extracted from the occupiers and the landowner during oral argument. In summarising the arguments, Yacoob J noted that ‘[b]y the end of oral argument’ the occupiers backed away from their claim for a complete set-aside of the High Court’s order and ‘indicated their contentment’ with an order that permitted eviction but conditioned it on the City first providing alternative land.²⁵² Likewise, while *PPC Quarries* maintained that there was no legal basis for it to suffer continued occupation, in response to a question in oral argument the company said that, if the Court ordered eviction, it was willing to allow the occupiers to continue to live on the land for four months after the order.²⁵³ Yacoob J’s PIE analysis does not rely on these concessions, but the order essentially adopts them.

As a result, while these cases reinforce the core principles in *Blue Moonlight*, the Court uses those principles primarily to strengthen the flexible management role *Port Elizabeth Municipality* highlights rather than to further elaborate those principles. Indeed, both cases show that the main effect of *Blue Moonlight* may be expanding the scope of that management role to privately initiated evictions. All three cases confirm that municipalities are necessary parties in privately

²⁴⁸ *Golden Thread* (note 2 above) at para 4; *PPC Quarries* (note 2 above) at para 3.

²⁴⁹ *Ibid* at para 4; *PPC Quarries* (note 2 above) at para 3.

²⁵⁰ *PPC Quarries* (note 2 above) at para 12.

²⁵¹ *Golden Thread* (note 2 above) at para 6 (quoting *Golden Thread High Court* at para 5).

²⁵² *PPC Quarries* (note 2 above) at para 7.

²⁵³ *Ibid* at para 8.

initiated evictions.²⁵⁴ These two cases provide a template for the range of information a court can require a municipality to provide once it is joined, including the status of the potential evictees as well as its past efforts, future plans and overall capacity to provide alternative accommodation for any evictees rendered homeless. They also strongly suggest – but stop short of definitively establishing – that a court should order municipalities to provide alternative accommodation when it orders evictions from private land and sequence the orders to prevent homelessness.

The upshot is a set of principles that gives courts considerably expanded power to manage evictions. Courts now can convene all the relevant parties in a private eviction. They can obtain extensive information about a municipality's overall housing policies, its total budget, and the planning processes involved. Where appropriate, a court can use that information to craft an order that requires the municipality to provide alternative accommodation and ties the timing of the eviction to provision of that accommodation.²⁵⁵

2 *Interpretive Authority through PIE*

Both decisions reinforce two of the central constitutional principles *Blue Moonlight* established: municipalities have an obligation to provide and fund emergency housing even for people rendered homeless from privately instituted evictions and PIE may constitutionally limit private landowner's s 25 rights to evict even unlawful occupiers where those occupiers may be rendered homeless. As I argued above, because the Court recruited PIE's multi-factor test for determining both when the right to evict is restricted and the extent of that restriction it only lightly specified that principle. Individual resolutions like these operate largely at the policy-making level by applying that principle to a specific factual configuration without elaborating it much further.

But over time these individual resolutions could begin to develop broader principles either derived implicitly from constellations of overlapping factual situations with consistent resolutions or more explicitly where courts analyse cases comparatively and articulate how the similarities and differences across cases affect the final balance. This process would maintain substantial flexibility for courts across cases and – to the extent the analyses focus primarily on PIE as they did in these two cases – would also leave ample room for the legislature to exercise additional control through amending PIE. This would create the

²⁵⁴ Muller and Liebenberg argue that prior to *Blue Moonlight* a series of Constitutional Court and SCA cases effectively recognised that PIE requires joinder of municipalities to eviction proceedings. See G Muller and S Liebenberg 'Developing the Law of Joinder in the Context of Evictions of People from Their Homes' (2013) 29 *South African Journal of Human Rights* 554.

²⁵⁵ Wilson has argued that all of these principles are part of the 'new normality' in eviction law and that they indicate the possibility for a stronger substantive approach to FC s 26. See S Wilson *Breaking the Tie* (note 70 above). I agree that all of these show the Court asserting greater authority to enforce these rights, but, with the possible exception of the limitation on the property owner's eviction rights, I see each of these as specific aspects of the procedural authority I just laid out rather than a substantively stronger approach.

possibility for gradual, largely court-directed, constitutional elaboration over time.

Do *PPC Quarries* and *Golden Thread* represent the beginnings of such a process (and, if so, do they provide a response to the pessimist's read of *Blue Moonlight*)? In some respects, they certainly do. If we put all three decisions together and compare their facts, we can begin to put some meat on *Blue Moonlight*'s bones. When it comes to municipal obligations, *Blue Moonlight* stops with the principle that a city's complete failure to consider homelessness from private evictions during its planning process renders the resulting policy unconstitutional. In combination, *PPC Quarries* and *Golden Thread* lay the groundwork for arguing that municipalities are obligated not just to consider these situations in their budget and planning processes but actually to provide alternative accommodation through their own resources in some situations possibly irrespective of whether the planning processes were themselves constitutional.

As I noted above, for s 25, taken together all three cases establish that where there is a reasonable prospect the municipality can provide alternative accommodation in some relatively short period of time, a private landowner sometimes can be required to wait to evict until that accommodation is available.

But the decisions provide some fodder for the pessimist as well. A really narrow reading of *PPC Quarries* would note that the decision hinged on the City's procedural failure to challenge the High Court's order. This creates considerable uncertainty whether a municipality that actively participated in the proceedings and raised reasonable grounds for its inability to provide alternative accommodation should incur the same obligation.

More broadly, the accretion of soft-substantive principles into a set of harder constitutional standards that work within PIE's framework I described depends on careful and specific attention to not only the constitutional dimensions but also the statutory factors themselves. Yacoob J's analyses lack that interpretive precision and depth. In *PPC Quarries* – where the Court's direct order could have provided the most authoritative guidance – Yacoob J tells us only that the combination of a property owner with no short-term plans for using the land and the absence of evidence that the City would fail to provide alternative accommodation reasonably quickly mattered in the PIE analysis. The summary treatment of even those factors and the failure to specifically analyse other, seemingly significant but countervailing factors such as the existing interdict and the relatively short time-frame of the occupation leaves us with very little guidance as to how to balance those same factors under different circumstances. More importantly, there is no comparative analysis across the three cases at all to explain why the City in this case was required to provide accommodation.

Golden Thread is somewhat better on this score. Yacoob J's detailed recounting of the facts the High Court considered (with occasional commentary) gives some indirect hints that these facts were legitimate considerations, and he repeated the conclusion of *PPC Quarries* that the landowner's lack of short-term plans to use

the land should have significance in the PIE analysis.²⁵⁶ But he explicitly refused to engage with the High Court's PIE analysis. Sweeping aside the applicants' 'various interesting submissions and criticis[ms]' of the judgment, Yacoob J said it was 'necessary to investigate' only the High Court's failure to order 'the City to provide particulars of the applicant's housing situation and whether the City could provide emergency housing'²⁵⁷ as well as the Court's failure to consider mediation under PIE.²⁵⁷ It was these failures that justified remand and reconsideration. There is nothing in the judgment to suggest the High Court should reweigh these factors. The only real question left for the High Court was whether to order the City to provide alternative accommodation in light of its report (and *PPC Quarries* strongly suggests the likely answer there). This seems to assure a pro-poor result, but again a result that does not provide a model for careful exposition of PIE or a sense of how to weigh the same facts in another case.

On the one hand, this lack of specific analysis seems to strengthen the force of the constitutional principles at play by treating as apparently irrelevant the nuances I said limit the precedential force of individual decisions under PIE. Yacoob J's functional elimination of PIE's distinction between long- and short-term occupation in *Golden Thread* adds to this blunderbuss strengthening effect.

It might be the case that lower courts looking to this pair of cases will conclude that private landowners in all cases are required to wait to evict until the relevant municipality is able to house the occupiers. That would establish a de facto strongly pro-poor principle. The applicants in *PPC Quarries* and *Golden Thread* argued for exactly that principle, and the results in each case are consistent with it.²⁵⁸ But Yacoob J specifically refused to take up that argument in *Golden Thread* and tied the order in *PPC Quarries* to the specific 'circumstances of this case'²⁵⁹ without saying much about which circumstances mattered or why.

For courts trying seriously to apply PIE's factors in case-specific ways, the lack of nuanced analysis of why the City incurred the obligation to provide accommodation (or is likely to in *Golden Thread*) provides little additional guidance. It also suggests that these results may be better viewed as instances of ad hoc court management to bring some measure of dignity and humanity into messy situations, results largely attributable to informal factors such as the City's extreme and persistent recalcitrance and the parties' concessions. In either case, the failure to develop a careful analysis missed the potential for establishing an interpretive approach that could begin to develop an incremental substantive jurisprudence based on *Blue Moonlight*.

²⁵⁶ See *Golden Thread* (note 2 above) at para 8 (Yacoob J wrote that the High Court had 'remarked ... that it was unfortunate' the occupiers 'had not said anything about the conditions that existed whence they came'.) The *Golden Thread* Court held further that 'It is of some significance in this context that Golden Thread has not put the land to any use, nor is there any evidence that it intends to subject the land to use in the foreseeable future.' Ibid at para 18.

²⁵⁷ *Golden Thread* (note 2 above) at paras 12–13.

²⁵⁸ Applicants' Heads of Argument at para 72 (*Golden Thread*) and at para 88 (*PPC Quarries*).

²⁵⁹ *PPC Quarries* (note 2 above) at para 10.

VII CONCLUSION: EVICTIONS AS ASPIRATION AND AVOIDANCE

In the Introduction I highlighted the Court's recent focus on eviction-related cases and argued that these cases illustrate both the Court's continued aspiration to apply the socio-economic rights in pro-poor ways and the persistence of separation-of-powers and institutional-competence concerns that push towards substantively limited analyses and procedural remedies that avoid strong constitutional principles. I have since argued that both dimensions of these cases show how the Court could begin to develop an institutionally stronger role while still working within the confines of the avoidance techniques. In closing, I want to raise a broader concern that the Court's focus on evictions might result in an only truncated version of that stronger role. A version that leaves little room for even the cooperative, incremental substantive development of socio-economic rights I have described.

As Sachs J explained in *Port Elizabeth Municipality*, eviction in many ways encapsulates the essence of apartheid. Eviction – or forced removal – was the tool that created the physical separation at the core of the apartheid legal structure. If there is any indisputable dimension to the 'transformation' that the 1996 Constitution is designed to effect, it is the dismantling of that physical separation. At a minimum, that must include limiting the circumstances under which a person can constitutionally be evicted and insisting that the eviction process itself is procedurally robust and humane.

Sachs J's description of a keenly sensitive court willing to step in to protect individual dignity in every eviction case accomplishes this without entangling courts in the much messier task of assessing the constitutional adequacy of housing legislation and policy. Calling on courts to manage the *effects* of eviction on each individual pushes the constitutional analysis deep into the policy-making level. But asserting the power to deny an eviction – and especially to deny it even where there is no apparent constitutional defect in the overall legislation or policy – carves out a significant form of judicial power. In this managerial mode, courts can protect individuals and directly promote constitutional values without questioning the underlying legislative or executive policies.

On the one hand this role responds to the problem of political enforcement because it gives courts some control over the ultimate effect of legislative and executive decisions over housing and related policies. At the same time it also allows courts to exert institutional authority divorced from interpretive control that might limit the scope of legislative and executive discretion to set, revise and budget for those policies.

Evictions lend themselves particularly – perhaps uniquely – well to the exercise of this kind of case-specific procedural authority. Even where temporary accommodation is available, an eviction means displacing persons and disrupting their lives in dignity-compromising ways. Merely by delaying the eviction process, a court addresses the most urgent aspects of the constitutional claims evictions raise. That same delay also creates leverage for the threatened evictee herself to press the government for more substantive relief. By making the delay temporary – as in the cases I discussed – a court can avoid analysing both the reasons for the decision to evict as well as the policies behind that decision. This power

to grant significant, immediate relief while placing only limited and temporary constraints on executive and legislative power likely explains to a large extent both the numbers of eviction cases that come to the Court as well as its recent string of pro-poor results.

But exercising the procedural authority to delay evictions without at least articulating the case-specific factors that require a delay in each case masks the real role that the Court plays and stymies the potential for that role to incorporate even modest substantive constitutional development. Yacoob J's judgments in the two companion cases to *Blue Moonlight* illustrate this problem. The cases expand the circumstances where courts can delay evictions without elaborating either the constitutional or statutory bases for that expansion. Both cases purport to apply *Blue Moonlight's* principle that PIE's multi-factor test can sometimes justify a court limiting private property rights by temporarily delaying an eviction. But *Blue Moonlight* only started the process of analysing those factors, and, rather than elaborating that analysis, these two cases largely ignore PIE. The result is a de facto general rule – or at least a presumption – applicable in every case that courts will not order evictions from private land – regardless of the circumstances and with no reference to the PIE factors – until the municipality can provide alternative accommodation.

At first glance a strong rule like this looks much like the development I called for earlier in arguing the pragmatic benefits of working within the Court's existing reluctance to develop strong substantive interpretations in socio-economic rights cases. The Court maintains a seemingly context-limited approach that operates within the separation-of-powers and institutional-competence boundaries it has set for itself but nonetheless begins to develop a strongly pro-poor jurisprudence that extends across cases. But this unacknowledged and unanalysed strong-form approach is, in some respects, the worst of both worlds. On the one hand it eliminates the democratic benefits of a judicial-legislative partnership by effectively displacing PIE with a de facto rule that fails to even acknowledge, much less attempt to balance, the constitutional issues at play. More significantly, a rule like this misses the opportunity for the Court to build on the active interpretive role it adopted in *Blue Moonlight* and that could form the basis of a genuinely substantive approach to enforcing FC s 26 and other socio-economic rights. While this creates an important tool for protecting poor people from evictions, it provides no foothold either as a matter of judicial process or constitutional substance for extending those protections beyond the eviction context because it is not grounded in any broader set of principles.

Blue Moonlight, *Maphango* and these other eviction cases clearly have pushed eviction law in pro-poor directions and established important new tools for advocates representing potential evictees. In this respect, there is no question that the Court is beginning to fulfill the aspiration of the socio-economic rights. But if the Court continues to focus not only on eviction cases but also the procedural aspect of managing the eviction process over the substantive policies causing evictions it risks running into a dead end that will lead to even greater avoidance.