
Geoff Budlender spoke at the launch in July.

It is a great privilege to be invited to participate in launching Sandra Liebenberg’s book. This book is a monumental piece of work. It combines an account of the struggle for the constitutional recognition of social and economic rights in South Africa, a jurisprudential analysis of the basis for this recognition, a comprehensive and detailed account of the way in which our courts have dealt with social and economic rights in this phase of the development of this area of our law, and a scholarly critique of the judgments and the literature which have now emerged.

We have now more or less completed the first phase of the development of this area of our law. I say this because it is only now that one can begin to say that our practitioners and our courts have fully accepted that these are rights, they are legal rights, and they have to be given effect. We are, however, only at the early stages of the second phase, which is establishing clearly the content of the rights, and we are on the threshold — perhaps just past the threshold — of the third phase, which is developing appropriate remedies for breaches.

Sandy titles the ‘remedies’ chapter of her book ‘Responsive remedies’. It seems to me that this is a very apt way of describing what is needed. I will say something more about that a bit later.

The significance of this work has been described by Karl Klare, of Northeastern University School of Law in Boston, Massachusetts, as follows: ‘This book establishes South African socio-economic rights jurisprudence as an academic discipline.’

In my opinion, that judgement is right. The publication of this book marks the emergence of a systematic jurisprudence of social and economic rights in South Africa. This book will, I think, become the primary text on which we rely, and the primary text to which we will refer, for some years to come. It will also be the primary text to which foreign courts and scholars will refer when they want to understand social and economic rights in South African law.

The book bears Sandy’s fingerprints. It is meticulous, comprehensive and thoughtful. It does not, unfortunately, reflect the extent to which she is herself responsible for the jurisprudence which has developed — through her writing, through her work as an expert adviser in the constitutional negotiations, and through her participation and advice in some of the most important cases she discusses. I can confirm, for example, that in the Grootboom case, she played a critical role in formulating the general approach which ultimately found favour in the Constitutional Court. And that was not a lone example.

Sandy has been a scholar-activist. This book is the product of just a few years of study and writing, but of a substantial career thinking about and working on these issues.

In the few minutes which are left to me, I want to refer to the part of this book which I hope will become the most influential. It is pages 434 to 438, which deal with ‘The transformative potential of structural remedies’.

We are all too painfully aware of the problem. On the one hand, we have, for example, a constitutional right to education. On the other hand, we have a school system, large parts of which are broken and non-functional. For the children in these schools, their situation mocks the Constitution. Those children are almost all doomed, from the first day when they enter school, to a schooling which will fail them, and which will prevent them achieving their potential as human beings.

It is a desperate situation, and one which the courts seem powerless to address in any meaningful way. The courts cannot simply order the schools to do better.

This book brings to our attention the pioneering writing which has been done in these areas by Charles Sabel and William Simon. Sandy describes it as follows:

This type of structural interdict is capable of facilitating the ‘experimentalist’ remedial approach described by Charles Sabel and William Simon in their classic study on new directions in public interest litigation in the United States. These innovative structural remedies represent a departure from the normal finality, and ‘command-and-control’ features of judicial remedies. Initially a court gives an order which defines the broad goals to be achieved to cure the constitutional violation. The order further requires the respondents, through a process of deliberative engagement and negotiation with the applicants, to devise a plan detailing the concrete measures and steps to be taken in order to meet those goals. The approval of the plan and its implementation are subject to ongoing judicial supervision. However, the court leaves as much latitude as possible for the formulation, implementation and monitoring of the plan to be resolved through deliberative negotiation between the claimants, relevant organs of State and, possibly, other stakeholders (Liebenberg, 2010: 435).

These orders also reinforce the foundational constitutional values of accountability, responsiveness and openness. Executive officials ‘must make explicit policies and subject themselves to mechanisms of measurement and monitoring that make their performance more readily accessible ...’ (Liebenberg, 2010: 436).

Sandy shows that the Constitutional Court has taken initial steps in this direction through its orders for ‘meaningful engagement’ in cases such as *Port Elizabeth Municipality* and *Olivia Road*. Those cases show how the courts can address the fundamental inequality between the parties, and create a mechanism through which those who hold formal power (often the local municipality) and those without formal power (the people threatened with eviction) can be brought to the table in a position of relative equality. If the parties are ordered to engage with each other to attempt to resolve the problem, and to report to the court on what has been done, the power relations shift quite dramatically.

This is most clearly illustrated by *Olivia Road*. There, the City of Johannesburg had taken the view that there
was no alternative to the immediate eviction of the occupiers of several unsafe and unhealthy buildings, and that it (the City) could provide no effective relief for the people who would be rendered homeless. In short, the City took the view that this was not its problem. Conversely, the occupiers took the view that they would not move at all unless they were to remain in the inner city. They said that they would rather remain in the unsafe buildings than be removed to the periphery of the city. A stalemate had been reached.

When the ‘engagement’ order was made, each party was uncertain whether it would achieve its goal. Each was therefore required to engage with the other seriously, and not in a purely formal manner – because it knew that the proposals it put forward in the engagement, and the results of the engagement, would be reported to the Court, which would then decide what remedy (if any) to order. The outcome was, at least for me, quite unexpected. Remarkably, a solution was arrived at which was not only satisfactory to all, but consistent with the Constitution: arrangements were made for urgent steps to be taken to minimise the health risk caused by the buildings, alternative accommodation was made available within the City on terms which were agreed, and the occupiers agreed to move.

If one tries to understand why this happened – and the parties had, after all, been litigating against each other for some time, without finding this solution – it seems that it happened because the order made by the Constitutional Court had destabilised the existing inequality: the powerful were obliged to take the powerless seriously, and the powerless were no longer simply the passive beneficiaries of government largesse: they were the holders of rights. That is, of course, in the very nature and purpose of rights: they affect power relations. It is precisely why social and economic rights are so important.

This literature and learning is still largely unknown to South African lawyers and courts. We are still locked into the paradigm of treating structural remedies as punitive, rather than as a practical method for addressing a constitutional breach. The justification for these orders does not have to rest on a finding that the government is untrustworthy, which is the premise from which many of the previous arguments and judgments have proceeded. The orders can open up democratic space, enabling people to participate in the formulation of policies and programmes that affect their lives. And this can be done by carving out an area where the court has a legitimate role which is consistent with the separation of powers.

I am hopeful that Sandy’s work in opening this up will lead us to innovative approaches which will enable us to ensure (for example) that our children are not mocked by the Constitution. In many areas of our national life, we need to adopt this approach to enable the courts to play their proper role: to declare when conduct is inconsistent with the Constitution, to enable the parties to take the necessary steps to bring about compliance with the Constitution, and to ensure that this is done.

All that remains for me is to congratulate Sandy on this book, and to thank her on behalf of all of us for the foundation she has laid for the next phase of this work, which lies ahead.

Sandy, we are all in your debt, and we join you in celebration.

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