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TOWARDS A FEMINIST APPROACH FOR HOUSING CASES

Dissertation submitted by

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In fulfilment of the requirements for the degree

MASTERS OF LAWS

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DECLARATION

I, _____, declare that this dissertation is my own unaided work. It is submitted in fulfilment of the requirements of the degree of Masters of Laws (LLM) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

_____

12/04/2019

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TOWARDS A FEMINIST APPROACH FOR HOUSING CASES

ABSTRACT

The dissertation is a qualitative study interrogating the extent to which gender has been integrated into South African housing cases. The dissertation has two sites of enquiry: housing judgments (the jurisprudence) and Public Interesting Litigation housing litigation (the lawyering). It first undertakes a contextual analysis of the multiple adverse impacts of a lack of housing on Black women living in poverty, and outlines the existing judicial responses to this intersectional disadvantage, before advancing a feminist conceptual framework to both critique the housing cases and to advance an alternative model to incorporate gender in housing cases. The dissertation proceeds, in Chapter 3, to use this feminist framework to analyse the housing cases of *Grootboom, Olivia Road, Blue Moonlight* and *Dladla*, identifying the gender gaps. From this analysis, the dissertation argues that judicial interpretations of reasonableness, progressive realization and available resources concepts from housing law and jurisprudence ought to incorporate a gendered focus. Turning to the second site of enquiry, in Chapter 4, the dissertation uses its feminist framework to interrogate housing-related Public Interest Litigation lawyering and to propose a feminist litigation strategy to incorporate gender. Finally, the dissertation concludes by drawing together the strands of the various chapters to suggest a way-forward on implementing a feminist approach in housing cases.

ABBREVIATIONS

AP	Atlantic Philanthropies
APR	Atlantic Philanthropies Report
CALS	Centre for Applied Legal Studies
CEDAW	Convention for Discrimination against Women
CESCR	Commission for Economic, Social and Cultural Rights
THE CITY	City of Johannesburg Metropolitan Municipality
CGE	Commission for Gender Equality
ICESCR	International Covenant for Economic, Social and Cultural Rights
TAC	Treatment Action Campaign
TEA	Temporary Emergency Accommodation
ESTA	Extension of Security of Tenure Act
OP-CEDAW	Optional Protocol Convention for Discrimination against Women
PIE	Prevention of Illegal Evictions From and Unlawful Occupation Act
PILS	Public Interest Litigation
PILS	Public Interest Litigation Sector
STATSSA	Statistics South Africa
UN	United Nations

TABLE OF CONTENTS

CHAPTER 1 - INTRODUCTION

I. RESEARCH PROBLEM AND RELEVANCE....1
II. RESEARCH METHODOLOGY....13
III. STRUCTURE OF THE DISSERTATION....14

CHAPTER 2 – CONCEPTUALISING A FEMINIST APPROACH FOR HOUSING CASES

I. INTRODUCTION....16
II. THE LIVED REALITIES OF WOMEN IN SOUTH AFRICA....16
III. JUDICIAL RESPONSES....23
IV. CONCEPTUAL FEMINIST FRAMEWORK....29
V. CONCLUSION....42

CHAPTER 3 – A FEMINIST CRITIQUE OF HOUSING CASES

I. INTRODUCTION....43
II. UNPACKING *GROOTBOOM, OLIVIA ROAD, BLUE MOONLIGHT* AND *DLADLA* ..43
a. Grootboom....44
b. Olivia Road....51
c. Blue Moonlight....56
d. Dladla....62
III. CONCLUSION....67

CHAPTER 4 – A FEMINIST CRITIQUE OF PUBLIC INTEREST LITIGATION

I. INTRODUCTION....68
II. A CRITICAL ACCOUNT OF PUBLIC INTEREST LITIGATION....68
III. OPTIMAL LITIGATION STRATEGIES....75
a. Gender - Sensitive Consultations and Drafting of Affidavits....75
b. Amicus Curiae Interventions....79
c. Arguments....81
d. Remedy....84
e. Advocacy and Training....86
IV. CONCLUSION....88

CHAPTER 5 – CONCLUSION.....90

BIBLIOGRAPHY.....94

Annexure A-Questionnaire.....105

CHAPTER 1 - INTRODUCTION

I. RESEARCH PROBLEM AND RELEVANCE

South African socio-economic rights jurisprudence is particularly renowned for its housing rights cases, which are internationally recognised as standard-setting examples of the justiciability of socio-economic rights.[1] Yet, as important as these cases have been, the housing rights jurisprudence engages only minimally, if at all, with the critical issue of gender. Therefore, this study undertakes a feminist analysis of South African jurisprudence and litigation strategies in housing cases and thereafter it proposes a feminist approach to housing cases.

Feminist scholars argue that the law as a whole is patriarchal.[2] Catharine Mackinnon argues that laws and policies which become the dominant laws of a land are more often than not, drafted by men and therefore, biased.[3] In many instances, the literal reading of a law does not reflect structural power imbalances based on gender and as a result, its implementation fails to consider the impact of rights violations on women.[4]

According to feminist theory, the patriarchal nature of the interpretation of laws and social settings is entrenched in six ways, namely, mode of production, paid work, the State, male violence, sexuality and cultural institutions.[5] Yet, as recognised by various waves of feminism, the law can also be used as a mechanism for change. However, as a general critique, law is interpreted and used to reinforce gender stereotypes. This is because lawyers and judges, who are tasked with interpreting narratives, at times, do not understand how best to interpret the women's narrative as they apply male lived experiences.[6] The dissertation supports the third wave of feminism, which highlights that the law in South Africa (as elsewhere) is male dominated, and it advances arguments and initiatives for an intersectional approach to law.

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[1] Jackie Dugard 'Beyond Blue Moonlight: The Implications of Judicial Avoidance in Relation to the Provision of Alternative Housing Jackie Dugard' 2014 *Constitutional Court Review* Vol 5 265.

[2] Catharine Mackinnon 'Towards a Feminist Theory of the State' 1989 Harvard University Press 238; these are views shared by radical feminists. Radical feminism focusses on difference in power between men and women. It suggests that men are privileged and women are subordinated. Dominance theorists propose institutional and structural change in law. See 'Feminist Legal Theory' Instructors Guide Second Edition *NYU Press* 4.

[3] Ibid.

[4] See Chapter 3 for the discussion of *Dladla and Another v City of Johannesburg and Others* 2018 (2) SA 327 (CC) (hereafter referred to as *"Dladla*") – the case is reflective of a gender blind implementation of a court order and City of Johannesburg policy in providing temporary emergency accommodation.

[5] Karin van Marle and Elsje Bonthuys 'Feminist Theories and Concepts' in Elsje Bonthuys and Catherine Albertyn, *'Gender, Law and Justice'* 2007 Juta & Co Ltd 15, 21.

[6] Ibid, 45 citing Lucinda M. Finlay 'Breaking Women's Silence in Law: the Dilemma of the Gendered Nature of Legal Reasoning' *Notre Dame Law Review* 1989 886, 894.

According to feminist legal theory, the effective use of feminist litigation strategies could begin to change public perception and laws in order to adequately cater for the needs of women. It could be used to ensure that court orders are implemented considering women's needs. Women's realities ought to be placed before a court, their realities ought to be critiqued, and used to highlight the effects of male dominance in this regard.[7] As such, a feminist litigation strategy creates a platform to engender the law. It prioritises the impact of rights violation of women and to ensure that gender equality is achieved. This dissertation interrogates how litigators and judges fail to interpret the realities of women in housing cases, particularly in eviction matters, and proposes a feminist approach and litigation strategy to bring gender into the frame.

As one of the lawyers who has been involved in challenging inner city evictions, the author has been struck by an apparent absence of gender in judgments. It is for this reason that the dissertation is focused on examining the extent to which gender is incorporated across two sites of inquiry: first, the jurisprudence and second, Public Interest Litigation ("PIL"). It is important to establish why gender is important for housing cases and how it gender ought to be incorporated for housing cases.

The relationship between the right to housing and the protection of the rights of women is relatively well documented. Kirsty McLean and Lilian Chenwi, in their article "A Woman's Home is her Castle?' – Poor Women and Housing Inadequacy in South Africa,"[8] explore how the right to adequate housing incorporates gender. The authors discuss the experiences of women living in inadequate housing conditions, and how better implementation of both international and domestic laws ought to protect them. McLean and Chenwi conclude that, to realise a woman's right to dignity and equality, it is necessary to develop a gendered perspective to the right to adequate housing.[9] They argue that there are multiple disadvantages impacting a woman's right to housing, which includes lack of security of tenure, domestic violence, child care and nationality.[10]

The transition from apartheid has directly and significantly impacted the housing landscape in in two of the biggest metropolitan cities in South Africa, Johannesburg and Cape Town. The dynamics of the inner city of Johannesburg changed post-apartheid which included,

[7] Catherine McKinoon op cit note 2, 242.
[8] Kirsty McLean & Lilian Chenwi 'A Woman's Home is her Castle?' – Poor Women and Housing Inadequacy in South Africa' in Beth Goldblatt & Kirsty Mclean *'Women's Social and Economic Rights: Developments in South Africa'* 2011 First Edition Juta & Co, 128.
[9] Ibid 155.
[10] Ibid 145.

migration of people from rural areas and the outskirts of city centres. Due to the urbanisation of Johannesburg, municipalities and urban planners became concerned with the eradication of bad buildings, removal of unlawful occupants and transport.[11] The gentrification of the inner city adversely affected the urban poor and stratifying people according to race and class. The transition in 1994, came with new forms of racial and class segregation.[12] Similarly in Cape Town, spatial planning of the inner city protected the White elite and removed Black people to the peripheral areas.[13] The removal of people from the inner city not only resulted in escalation of poverty but it prevented any access to natural resources.[14] Post-1994 Cape Town continues to embed racial spatial apartheid in the inner city. Predominant white areas are located near the scenic areas of Cape Town while the Coloured and Black population are situated south in dusty and sandy locations and in the Cape Flats.[15]

In the Johannesburg inner city, private companies and residents in the inner city fled to the outskirts of the city creating a divide between suburbs and the inner city.[16] The variation of community were based on the stigmatisation of the inner city as being criminal and dilapidated.[17] With the white flight, the further perpetuation of the downgrade of the inner city was caused by the redirection of money from the inner city into the suburban areas.[18] Further, the public/private partnerships reinforced the idea to remove people living in poverty from the inner city for business and leisure for tourists and the middle class to affluent society.[19]

This is evident in the realm of housing rights and the trajectory of housing jurisprudence in South Africa. With the relaxation of influx control and pass laws,[20] many Black people

[11] Martin J. Murray 'Taming the Disorderly City The Spatial Landscape of Johannesburg after Apartheid' 2008 Cornell University Press 7.
[12] Ulrich Jurgens, Martin Gnad and Jurgen Bahr "New forms of Class and Racial Segregation Ghettos or Ethnic Enclaves?" in Richard Tomlinson, Robert A. Beauregard, Lindsay Brenner, Xolela Mangcu 'Emerging Johannesburg Perspectives on the Postapartheid City' 2003 Routlege Printers, 56.
[13] Vanessa Watson 'Change and Continuity in Spatial Planning Metropolitan planning in Cape Town under political transition' 2002 Routlege Printers https://s3.amazonaws.com/academia.edu.documents/32301100/Change_and_Continuity_in_Spatial_Planning_2002.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1523712340&Signature=AGqL2INzt2BWyxQpOUtfFxcdejQ%3D&response-content-disposition=inline%3B%20filename%3DChange_and_continuity_in_spatial_plannin.pdf (accessed on 14 April 2018)
[14] Ibid 34.
[15] Ibid 103.
[16] Andre P. Czegledy "Villas of the Highveld A Cultural Perspective on Johannesburg and its "Northern Suburbs" in Richard Tomlinson, Robert A. Beauregard, Lindsay Brenner, Xolela Mangcu op cit note 12, 21, 27.
[17] Ibid.
[18] Ibid.
[19] Martin J. Murray op cit note 11.
[20] The pass laws were regulated by the Natives (Urban Areas) Act of 1923, which was replaced by the Natives (Urban Areas) Consolidation Act, and thereafter the Black (Natives) Laws Amendment Act of 1952. The 1952 Act required all Black persons over the age of 16 years old to carry a pass when entering an urban area. The pass laws were repealed in 1986.

migrated from the outskirts of Johannesburg (and from other parts of the country) with the deep held aspiration of seeking job opportunities within the economic hub of the country.[21] The above history and landscape of the inner city spatial planning is reinforced by narratives of occupiers in affidavits[22] which demonstrate that these buildings were usurped by imposters posing as the owner. Many people, who had migrated, paid rent to the 'new owner' and continued with their daily lives. A few years down the line, the original owner emerged requesting that the occupiers vacate the property. If they failed to do so, it led to either unlawful evictions or evictions through formal legal eviction proceedings. It was at this stage that legal organisations intervened to ensure that the rights of the occupiers were protected under law.[23] It bears mention that most of the housing jurisprudence emanated from the abuse of eviction processes and lack of planning in the Johannesburg inner city, which failed to take into consideration the impacts of dignity, privacy and freedom and security, especially for women.

Unfortunately, the gendered dimension in housing cases is often lost during the litigation strategy and in adjudication of the cases. In order for judges to apply their minds to the cases before them, the litigation strategy commencing from consultation and drafting phase to the argument must enhance a feminist approach. The overlap of litigation strategies which influences jurisprudence is covered in Chapter 3 of the dissertation. The chapter navigates the thinking-processes of lawyers and how they envisaged the best outcome for their clients. In the critique of the jurisprudence, the author uses the responses from litigators to illustrate the blind spots on adopting gender sensitive lawyering in the four cases, which results in the lack of gendered jurisprudence. It is against this foundation that the dissertation progresses into the second part of the enquiry. In Chapter 4, the dissertation critically examines the practice of PIL, the challenges and lack of a feminist approaches and how lawyers ought to approach these cases using a feminist lens.

The approaches of these cases commences at the point of consultation with the client. Women tend to be less vocal while male voices are dominant. With the male voice being dominant, lawyers tend to listen more intently to the realities from a conservative male perspective. The deplorable living conditions that households face affect both men and women living in poverty.[24] However, women are disproportionally affected in these circumstances.

[21] Richard Tomlinson, Robert A. Beauregard, Lindsay Brenner, Xolela Mangcu op cit note 12, xiii.
[22] An example of the narrative can be found in the case of *Van Heerden and Others v The Unlawful Occupiers Of Erf 65 Highlands Township (Formerly Erven 5, 6, 7 & 1/8 Highlands Township) and Others* (Case no. 2013/03477), First Respondents Answering Affidavit para 17-22.
[23] This is a scenario of cases that the author confronted in practice. These scenarios are also supported by Stuart Wilson 'Litigating Housing Rights in Johannesburg Inner City: 2004-2008' 2011 *SAJHR* 127, 131-133.
[24] See Chapter 2 under section II.

What does not get captured in the consultations are details of who has to get up early to collect and warm water, who ensures that children go to school with clean and ironed clothes, who ensures that the children do their homework and that they have a cooked meal each day. Many women enjoy and take pride in caring for their families, but the home must be secure and the necessary facilities should be put in place to ensure that necessary tasks are easily completed.[25] Regardless of their roles within the household, the struggles of women are exacerbated by the deplorable conditions of the buildings in which they live or are sent to live in. Inadequate water and sanitation services, along with a lack of security in the buildings increase women's risk of experiencing harm and violence. By not making a deliberate effort to integrate gender when approaching housing cases, lawyers fail to acknowledge the plight of women, consequently, the conditions of women are not highlighted and no specific relief is sought for women.[26] Depending on the case at hand, relief sought in litigation could focus on the nature of temporary emergency accommodation ("TEA"), that is, the necessity for accommodation that maintains privacy and security for women; for accommodation to be located in an area where public transport is easily accessible; for the provision of adequate facilities for cooking, adequate water supply and adequate sanitation facilities.

When lawyers and judges are confronted with cases of such a nature, the approach and strategy are not always consistent with transformative practices. The law has typically suited, and been modelled around, the White Man. The actual litigation strategy fails to incorporate gender from the point of consultation, to drafting and argument.[27] In circumstances when judges are confronted with affidavits that incorporate gender, they fail to analyse these papers to include a nuanced, gendered angle in their judgments.[28] The attitudes and conduct of lawyers and judges are illustrative of the stark realities that still plague societies and the realities of women.[29] However, arguably, the law, and the Constitution of the Republic of South Africa, 1996 ("the Constitution") specifically, has the potential to eradicate the gender imbalances in society. The constitutional framework promotes gender equality and has the potential to ensure gender equality. The trick is how these sections are used and interpreted in argument and in the court's analysis.

[25] Ibid.
[26] See Chapter 3, section II.
[27] See Chapter 2, section II for further elaboration on the lack of a feminist lens.
[28] See Chapter 3, section II.
[29] In the Supreme Court of Appeal in *Dladla's* case on 3 May 2016, a full bench of judges were apathetic and dispassionate to the applicants' counsel's argument that the lock out rule impacts women, and an example given was when a woman menstruates.

The Constitution is supreme law. The Bill of Rights in the Constitution provides that everyone living in the country is entitled to equal protection of their rights.[30] It protects individuals against the violation of a right or rights by the State, a person or a corporation.[31] The South African Constitutional Court has delivered judgments on a range of constitutional issues where arguments were made with careful consideration to address the infringement of rights against women. These cases included violence against women[32], the impact of cohabitation on a woman's right to inherit property,[33] customary marriages,[34] Muslim marriages[35] and the legalisation of sex work.[36] In certain instances, these arguments were not successful.[37] Based on the premise that the Constitution strives to achieve equality and justice for all, the paper will interrogate the right to housing as articulated in Section 26 of the Constitution which states that:

"(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

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[30] Section 7 of the Constitution

(1) *"This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.*

(2) *The state must respect, protect, promote and fulfil the rights in the Bill of Rights.*

(3) *(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill."*

[31] Section 8 of the Constitution

(1) *"The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.*

(2) *A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.*

(3) *When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court— (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).*

(4) *A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."*

[32] *S v Baloyi and Others* 2000 (2) SA 425 (CC).

[33] *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) (hereafter referred to as *"Volks"*).

[34] *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC); *Gumede (born Shange) v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC).

[35] *Daniels v Campbell and Others* 2004 (5) SA 331 (CC); *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC); *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753.

[36] *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (hereafter referred to as *"Jordan"*); *Volks* case supra note 33.

[37] *Jordon's* case ibid and *Volks'* case ibid.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

While the formative jurisprudence on the section 26 right considered the ambit of sections 26(1) and 26(2),[38] the predominant focus of housing cases which have dealt with evictions and their related processes over the past decade, has been Section 26(3) of the Constitution. To give effect to section 26(3) of the Constitution the Prevention of Illegal Eviction from and Unlawful Occupation Act 19 of 1998 ("PIE Act") was enacted. The PIE Act regulates the process for a lawful eviction. The PIE Act[39] is clear that the courts, when adjudicating eviction applications, need to consider women-headed households as a relevant circumstance. However, it is unclear from housing jurisprudence to what extent courts have applied section 4(7) of the PIE Act or incorporated gender in their judgments and to what extent litigants have advanced the gendered dimensions of housing realties in their arguments.

[38] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (hereafter referred to as "*Grootboom*").

[39] Section 4(6) states that

> *"If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women."*

Sections 4 (7) states that

> *"If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."*

Section 4(7) of the PIE Act protects women in situations of eviction, but ought to be read with sections 9,[40] 10,[41] 12(1)[42] and 14[43] of the Constitution. Section 9 extends the protection of women to obtain redress for the infringements of various rights in the Bill of Rights. All gendered rights cases have been interpreted through a section 9 analysis. In that case, the right to access to adequate housing ought to be argued section 26 of the Constitution read with section 9 of the Constitution.[44] The right to equality and dignity are intertwined, and therefore the right to housing analysis should extend to dignity.[45] A home is seminal to the right to privacy and freedom and security against elements and violence. It is for this reason that the right to adequate housing ought to take into account a woman's right to privacy and freedom and security.[46]

It is on this basis that the dissertation interrogates the courts' analysis of housing cases. The change of the political landscape in the country has resulted in an increase and variation of the types of housing issues faced in South Africa.[47] This has been echoed by a rich and growing housing jurisprudence, with housing being the most litigated socio-economic right, especially at the Constitutional Court level.[48] To understand the extent to which gender has

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[40] Section 9 states:

> *(1) "Everyone is equal before the law and has the right to equal protection and benefit of the law.*
> *(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
> *(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
> *(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*

Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[41] Section 10 states: "Everyone has inherent dignity and the right to have their dignity respected and protected."

[42]Section 12 (1) states "Everyone has the right to freedom and security of the person, which includes the right— (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way."

[43] Section 14 states: "Everyone has the right to privacy, which includes the right not to have— (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed."

[44] See Chapter 2 for the detailed discussion of the relationship between the right to adequate housing and the right to equality, dignity, privacy and freedom and security.

[45] Ibid.

[46] Ibid.

[47] Paula Metha & Sibongile Buthelezi "New housing/new crime? Changes in safety, governance and everyday incivilities for residents relocated from informal to formal housing at Hammond's Farm, eThekwini" *Geoforum* www.elsevier.com/locate/geoforum,https://www.wits.ac.za/media/wits-university/research/peripheries/documents/1-s2.0-S001671851730074X-main-2.pdf (accessed on 21 March 2018)

[48] Approximately twenty of the thirty-two socio-economic rights before the Constitutional Court cases dealt with housing. some of these cases included *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC)

played a role in legal arguments and judgments, as well as to explore the optimal strategies for integrating gender into housing-related litigation and jurisprudence, the dissertation examines four ground-breaking cases that developed housing and eviction law, namely, *Government of the Republic of South Africa and Others v Grootboom and Others Grootboom,*[49] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others,*[50] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [51] and *Dladla.*[52] The four cases selected for purposes of discussion in this dissertation challenged the different processes and state decisions of the eviction process. The analysis in the dissertation demonstrates where and how the courts have fallen short by not incorporating gender, and how the court ought to have interpreted the cases.

The jurisprudence around the right to access to adequate housing was first developed in *Grootboom*[53] in 2000, where the Constitutional Court discussed the elements of section 26; more particularly reasonableness and progressive realisation.[54] Since *Grootboom,*[55] the housing challenges facing South Africa have included a spate of inner city evictions in Johannesburg and evictions and unlawful demolishing of shacks in Cape Town.

Grootboom[56] stemmed from the eviction of a community residing in an informal settlement in Cape Town without the provision of alternative accommodation by the state.[57] *Grootboom*[58] was the first housing matter argued before the Constitutional Court, and reinforced the justiciability of socio-economic rights.[59] The court found that the State has a constitutional obligation to provide emergency assistance to people facing evictions. The judgment, although well received, did not discuss the adverse impacts of the housing conditions and policy on women. The respondents, as well as the amicus, advanced children's rights

President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (2004) 3 All SA 169 (SCA); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC); *Maphango v Aengus Lifestyle Properties* 2012 (3) SA 531 (CC)*; City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) 2012 (2) SA 104 (CC) (hereafter referred to as *"Blue Moonlight"*).

[49] *Government of the Republic of South Africa and Others v Grootboom and Others* supra note 38.

[50] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) (hereafter referred to as *"Olivia Road*").

[51] *Blue Moonlight's* case supra note 48.

[52] *Dladla and Another v City of Johannesburg and Others* supra note 4.

[53] *Government of the Republic of South Africa and Others v Grootboom and Others* supra note 38.

[54] *Grootboom's* case ibid para 31-34.

[55] *Grootboom's* case.

[56] *Grootboom's* case ibid.

[57] *Grootboom's* case ibid para 10-11.

[58] *Grootboom's* case 18.

[59] *Grootboom's* case ibid para 20.

arguments under section 28 of the Constitution[60] but no argument was advanced to protect women's access to housing rights.

Olivia Road[61] was an eviction by the State of a community living in a dilapidated building in the Johannesburg inner city. *Olivia Road*[62] expanded on the *Grootboom*[63] precedent in that the court explained the need for meaningful engagement.[64] The concept of meaningful engagement stems from section 4(7) of the PIE Act, which means that when a municipality provides TEA, it should engage with the affected families and households.[65] A court would then be in a position taking into consideration women headed households, children, and the elderly and disabled when deciding whether an eviction is just an equitable. However, this case, similarly, did not adequately deal with the issue of gender.

Blue Moonlight,[66] another case dealing with an impending eviction from a Johannesburg inner city building, developed jurisprudence on the constitutional obligation of local government to provide TEA to people facing eviction from a private owner. In *Blue Moonlight*,[67] although the court mentioned the consideration of women under section 4(7) of the PIE Act, it failed to highlight the challenges faced by women facing eviction. The court noted the considerations it ought to make in terms of section 4(7) of the PIE Act and in

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[60] Section 28 (1) states that *"Every child has the right—*

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that—

(i) are inappropriate for a person of that child's age; or

(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—

(i) kept separately from detained persons over the age of 18 years; and manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years."

[61] *City of Johannesburg v Occupiers of 51 Olivia Road* supra note 51.

[62] *Occupiers of Olivia Road* case ibid.

[63] *Government of the Republic of South Africa and Others v Grootboom and Others* supra note 38 that the State has a constitutional obligation to provide emergency housing to people facing eviction.

[64] *City of Johannesburg v Occupiers of 51 Olivia Road* supra note 50 para 53.

[65] *Occupiers of Olivia Road's* case ibid paras 18-22.

[66] *City of Johannesburg and Others v Blue Moonlight Properties (Pty) Ltd and Others* supra note 48.

[67] *Blue Moonlight Properties (Pty) Ltd* case ibid.

particular the consideration for women-headed households.[68] However, the court did not analyse the plight of women in the context of the eviction and the burden placed on women who face imminent eviction.

The aftermath of *Blue Moonlight*[69] resulted in a constitutional challenge of the conditions of TEA. The occupiers were provided with TEA at the Ekuthuleni Shelter, imposing certain living conditions on the residents. The residents at the Ekuthuleni Shelter instituted an application to challenge the conditions, in the case of *Dladla.*[70] *Dladla* is the first case where gendered nuanced arguments were advanced in a socio-economic rights case. CALS entered as amicus curiae solely to advance gendered arguments.[71] *Dladla* has dealt with the impacts of TEA on the rights of women. The High Court considered the impact on women by interrogating the right to dignity, privacy and freedom and security.[72] The Supreme Court of Appeal[73] and Constitutional Court failed to provide a gendered perspective in their reasoning of the judgment.

Generally regarded as progressive judgments,[74] with the possible exception of *Dladla,*[75] the four cases included here – viewed purely from the decisions themselves – do not incorporate gender. Beyond the judgments themselves, the question remains whether litigators in housing cases have advanced gendered arguments and whether the legal strategies adopted have highlighted the gendered impacts on women facing eviction from dilapidated buildings or informal settlements. If they have, were courts fully aware of and appreciative of the implications of the gendered arguments made before them and how ought judges to incorporate a feminist lens?

A case on point indicative of incorporating gender, despite a feminist approach not being advanced by litigants, was by Judge Tsoka in the case of *Mazibuko and Others v City of*

[68] *Blue Moonlight Properties (Pty) Ltd* case ibid paras 92.
[69] *Blue Moonlight Properties (Pty) Ltd* case ibid.
[70] *Dladla and Others v City of Johannesburg Metropolitan Municipality and Another* supra note 4.
[71] Further argument is advanced in chapter 3.
[72] *Dladla and Others v City of Johannesburg Metropolitan Municipality and Another* 2014 (6) SA 516 (GJ), paras 31-44.
[73] *City of Johannesburg v Dladla and Others* 2016 (6) SA 377 (SCA).
[74] Sandra Liebenberg "South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?" (2002) 6 *Law, Democracy and Development* 159; Sandra Liebenberg "The right to social assistance: The implications of Grootboom for policy reform in South Africa" (2001) 17 *South African Journal on Human Rights* 232; Sandra 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; Lilian Chenwi and Sandra Liebenberg "The constitutional protection of those facing eviction from "bad buildings" *ESR Review* Vol 9 no 1, 12.
[75] *Dladla and Others v City of Johannesburg Metropolitan Municipality and Another* supra note 4.

Johannesburg and Others.[76] Judge Tsoka found that the implementation of pre-paid water meters was discriminatory to women on the basis of their sex. He stated that

> "South Africa is a patriarchal society. Many household chores are performed by women. Many households in poor black areas are headed by women. Phiri Township is no exception. It is understandable therefore that the first applicant travelled approximately three kilometres to access water on behalf of her household. In this context is seems to me that the prepayment meters are discriminate against women unfairly on women because of their sex. Discrimination on the basis of sex is outlawed. It is unconstitutional and unlawful."[77]

In relation to housing rights, a feminist approach could take the form of deeper consideration of section 4(7) of the PIE Act. As such, a court's consideration of women-headed households could consider the individual circumstances of the affected women, for instance, the number of children that a woman provides care to, the nature of the burden that comes with caring for dependants with disabilities - with limited resources, the distance travelled for employment and the mode of transport used, the nature of the woman's employment – informal employment, the total household income and the basic services available or the lack of basic services in the affected building or settlement. These impacts should be considered concurrently with a woman's right to equality,[78] dignity,[79] privacy[80] and freedom and security,[81] which forms part of the feminist framework. Further, our courts should use international and regional instruments in support of gendered arguments.[82]

Despite the relevance of an engendering socio-economic issues and perhaps particularly housing, socio-economic rights jurisprudence has not included gender — centred argument, apart from the High Court judgment in *Mazibuko and Others v City of Johannesburg and Others*.[83] Socio-economic rights judgments and arguments advanced by lawyers failed to acknowledge the need and/or importance of a gendered focus,[84] although the lack of socio-economic rights impacts women more often than men. In the light of the above, the dissertation

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[76]*Mazibuko and Others v City of Johannesburg and Others* [2008] 4 All SA 471 (W) (hereafter referred to as *"Mazibuko"*).
[77] M*azibuko's* case ibid para 159.
[78] Section 9 of the Constitution.
[79] Section 10 of the Constitution.
[80] Section 14 of the Constitution.
[81] Section 12 of the Constitution.
[82] Section 233 of the Constitution states that *"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."*
[83] M*azibuko's* case supra note 76.
[84] Catherine Albertyn 'Gendered Transformation in South African Jurisprudence: Poor Women and the Constitutional Court' (2011) 22 *Stellenbosch Law Review* 591, 610.

has two sites of an enquiry; first, a feminist analysis of the housing jurisprudence identifying the gender gaps in the jurisprudence and proposes an alternative approach on how the courts ought to have interpreted the cases; and second, it critiques PIL strategies and proposes a feminist litigation strategy to remedy the problem. Therefore the enquiry responds to the question: what are the best litigation strategies to integrate a gendered perspective in housing cases?

II. RESEARCH METHODOLOGY

Drawing from theoretical frames and scholarship where relevant to inform the empirical analysis, the dissertation relies primarily on empirical research. The research pursues a combination of primary and secondary research.

The secondary research comprises a comprehensive analysis of relevant academic scholarship and literature, case law and legislation. The literature review includes journal articles, books and United Nations ("UN") reports that will inform the understanding of the dimensions engendering litigation strategies to the housing question, the role of *amicus curiae* in these matters and whether litigation strategies should include a gendered perspective. It also includes a detailed analysis of the four key cases and other cases that will support a feminist approach.

The secondary research is supplemented with qualitative in-depth semi-structured interviews with lawyers and gender experts. This research illustrates how legal strategies and jurisprudence have changed across the various cases, highlighting *inter alia* how changes in the political landscape have impacted jurisprudence and litigation strategies. It further probes whether the jurisprudence and legal strategies incorporates gender in matters relating to access to adequate housing and the impact of adopting a feminist approach.

Two sets of questions were drafted for the interviews. One set of questions targets the legal representatives of the occupiers in all four cases. The legal representatives interviewed were identified through the case reports and court papers pertaining to the four cases. The second set of questions targets gender experts. The gender experts interviewed, comprising feminist academics and practitioners, were identified through their scholarship and work. The interviews were conducted in person. The list of questions is attached and marked as "Annexure A", after the Bibliography. The questions to the litigators were framed to engage them on the litigation strategies used in the four cases (their own cases and the others). They further sought

to understand how, from a feminist perspective, the litigators view litigation and the extent to which they are inclined to rethink the traditional forms of litigation techniques and tools. The set of questions for the gender experts was used to tease out the parameters of a gendered perspective to litigation especially within a South African landscape. The interviews were recorded and transcribed. The recordings and transcripts have been saved on a password-protected laptop belonging to the author, and have been backed up and stored securely. The transcripts of the interviews can be made available upon request. The anonymity of the interviews will be preserved. The author obtained an ethics clearance certificate (reference number H16/08/33) from the Wits Human Research Ethics Committee (Non-Medical). Two of the interviews did not follow a structured question process and was conversational. Three interviewees have requested anonymity and have been coded as Respondent X, Respondent Y and Respondent Z.

III. STRUCTURE OF THE DISSERTATION

This dissertation is structured in five parts and the author proceeds as follows:

CHAPTER TWO – CONCEPTUALISING A FEMINIST APPROACH FOR HOUSING CASES

The chapter discusses the three-layered dimension of disadvantage in communities on the basis of gender, race and class. The discussion provides an analysis of the lived realities of women, and in particular the impact of the lack of housing on other rights violations. The chapter discusses the case law of the Constitutional Court, which has grappled with the lived realities of women but it is apparent that there is a gap of gender in the socio-economic rights jurisprudence. It is on this basis that the need for feminist litigation is justified. The chapter ends by developing a feminist framework that incorporates an integrated intersectional analysis of power and disadvantage gender-sensitive housing litigation. It is on the basis of the feminist framework that the housing cases and the alternative proposed interpretation to judges are canvassed in Chapter 3. Further, feminist critique of public interest litigation and the alternative feminist litigation strategy proposed in Chapter 4 is informed by the conceptual feminist framework.

CHAPTER THREE – A FEMINIST CRITIQUE OF HOUSING CASES

The chapter comprises a critical analysis of the four cases under discussion supported by theory, the relevant court judgments and interviews with litigators and gender experts to highlight the gender gaps and proposes an alternative model to judges. The discussion is analysed through the socio-economic rights elements of reasonableness, minimum core, progressive realisation, and available resources; as well as through judicial interpretations of section 4(6) and 4(7) of the PIE Act, meaningful engagement, conditions of TEA and remedies. The analysis finally summarises the gender gaps in the four cases and contemplates what the judgments ought to reflect if a feminist approach was applied.

CHAPTER FOUR – A FEMINIST CRITIQUE OF PUBLIC INTEREST LITIGATION

The chapter begins with critique of litigation strategies adopted in current public interest litigation in South Africa. The critique includes the lack of feminist litigations strategies when consulting and drafting affidavits, transformation of the legal profession and the limitations of funding in gendered cases. Having established the gender gaps in legal strategy, argumentation and judgment, this chapter develops an appropriate model for addressing gender disadvantage. The chapter synthesises scholarship, jurisprudence and the interviews with litigators and gender experts to create a feminist litigation model, taking into consideration the lived realities of South African women. The model is premised on the theoretical framework set out in Chapter 2.

CHAPTER FIVE – CONCLUSION

The chapter concludes by drawing the strands from chapter one to chapter four, justifying the need for feminist approaches for adjudication of housing cases and litigation strategies. Further, it concludes how the feminist litigation model in Chapter 4 could plug the gender gap to address the impact of the lack of adequate housing on women. Finally, the dissertation concludes with a discussion of the relationship between the theory and practice of gender and housing litigation, which is appropriate for a South African context.

CHAPTER 2 – CONCEPTUALISING A FEMINIST APPROACH FOR HOUSING CASES

I. INTRODUCTION

South Africa is a vastly unequal country in which the most vulnerable member of society will often be a woman who is black and living in poverty. Thus, gender, race and class[1] comprise three dimensions of disadvantage that inhibit a woman from realising not only her right to housing but her potential as a human being.[2] This chapter interrogates the social realities of women living in marginalised and poverty stricken communities, and examines how the lack of housing impacts a woman's rights to equality, dignity, privacy and freedom and security.[3] In the context of this dissertation's analysis of the absence of gender in socio-economic rights cases, the chapter proposes an interdependent rights based framework, international and regional instruments intertwined with critical race feminism and the capabilities approach as a feminist framework to analyse the housing cases and sets the basis for the best litigation strategy for housing cases.

II. THE LIVED REALITIES OF WOMEN IN SOUTH AFRICA

It is important at the outset to describe the South African society within which PIL is instituted. South Africa is still trying to eradicate the effects of colonialism from many aspects of South African society.[4] The legacy of colonialism and apartheid has resulted in a myriad of competing interests in South African society along lines of race and gender. As a result, this has adversely manifested in the arenas of non-delivery of essential services (e.g. healthcare, housing, water and sanitation), education, social security, unemployment, children's needs, and the need for development of infrastructure.[5]

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[1] Social Origin is a listed ground in Section 9(3) of the Constitution. See Ian Currie & Johan De Waal "The Bill of Rights Handbook" 6th Edition Juta & Co Ltd, 236, wherein it is stated that social origin refers to 'class, clan or family membership.' For purposes of this dissertation, class refers to poverty stricken communities.
[2] The capabilities approach is based on the basic necessities that one needs to live. See further note 9 below.
[3] See Chapter 1, footnotes 23 to 26 and the legal discussion in section IV below.
[4] Joel Modiri 'Laws Poverty' PER / PELJ 2015 (18) 2, 224; Johanna Kehler 'Women and Poverty: The South African Experience' *Journal of Women's Studies* November 2001 Vol 3 Issue 1 Article 3 41.
[5] Ibid.

The laws and practices of what apartheid sought to achieve persists for Black families, affecting many Black women who live in poverty. The legacy of apartheid disrupted family life. The imposition of the Group Areas Act 41 of 1950 and the migrant labour system separated men from their families. The unjust systems failed women in that women were unable to embrace and enjoy a nuclear family and perpetuated women as the sole nurturers compared to ensuring joint parental responsibilities. Most men worked under the migrant worker system that was legislated by the apartheid state. In order to deal with insubordination and oppression by the authorities, the men unleashed frustration and anger on the women, their wives, sisters and daughters.[6] The repercussions of apartheid continue to leave women in a state of vulnerability as many of them continue to face oppression and discrimination in both public and private spaces.

Black people were not permitted to own land, diminishing chances of security of tenure and escaping poverty. This has maintained the status quo that Black people would not thrive and be able to advance in society. In the aftermath of apartheid, Black people continue to suffer prejudice in the workplace, their homes and society at large.[7]

Apartheid's socio-economic legacy is still evident in South Africa's high levels of poverty and inequality. Poverty and inequality are different but yet linked. Poverty relates to the lack of resources and one's access to socio-economic rights. Inequality on the other hand relates to the vast disparities between the opulent and poverty stricken communities. South Africa is one of the most unequal countries in the world.[8] In recent statistics by Statistics South Africa ("StatsSA") poverty declined from 66,6 percent in 2006 to 53,2 percent in 2011, but increased to 55,5 percent in 2015. The number of people living in extreme poverty in South Africa increased by 2,8 million, from 11 million in 2011 to 13,8 million in 2015. According to StatsSA, South Africa is the most unequal country in the world. Its income per capita Gini coefficient (income inequality) has declined from 0,72 percent in 2006 to 0,68 percent in 2015. However, the Black population have the highest income inequality with a Gini coefficient of 0,65 in 2015, increasing from 0,64 in 2006. Income inequality amongst whites declined from 0,56 in 2006 to 0,51 in 2015.[9]

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[6] Kimberlė Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour' *Stanford Law Review* Vol 43 1258.

[7] Johanna Kehler op cit note 4, 44.

[8] Statistics South Africa 'Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities 42 http://www.statssa.gov.za/wp-content/themes/umkhanyakude/documents/South_Africa_Poverty_and_Inequality_Assessment_Report_2018.pdf (Accessed on 18 June 2018).

[9] Statistics South Africa 'Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015'.

Poverty has a racial and gender component.[10] Post-apartheid poverty persists at a larger scale. The reality of statistics are that majority of people living in poverty are women.[11] Razavi argues that "from a gender perspective, broader concepts of poverty are more useful than a focus purely on household income levels because they allow a better grasp of the multi-dimensional aspects of gender disadvantage, such as lack of power to control important decisions that affect one's life …"[12] The trajectory of life involves many necessities. Women living in disadvantaged communities face difficulties which exacerbate their poverty stricken lives. Women in rural areas have lower income and social security.[13] The limited access to basic services, and unequal rights in a family hinders women's chances of overcoming poverty.[14] This scenario is explained by Moghadam:

> "The feminisation of poverty would...appear to refute the idea that economic development and growth are generally accompanied by a trend towards the diminution of patriarchal gender relations and an advancement in the status of women through improvements in women's capabilities."[15]

The world economic downturn has resulted in a socio-economic crisis leaving many South Africans destitute, increasing the need for adequate housing in South Africa.[16] The consequences of the lack of adequate housing have affected Black people's access to adequate water, sanitation, electricity and health. These are basic needs to ensure that people have a quality life. The multifaceted aspect to housing has limited a woman's potential to full capability.[17] These further impede her rights to adequate housing on the basis that she is black and living in poverty.

Poverty does not constitute the lowest income, it comprises the lack of capabilities.[18] The capabilities approach involves "what a person is able to do and what to be."[19] Sen's theory

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[10] Joel Modiri, op cit note 4.
[11] Sylvia Chant 'The 'Feminisation of Poverty' and the 'Feminisation' of Anti-Poverty Programmes: Room for Revision?' *Journal of Development Studies* 2008 Vol 44 165, 167-168.
[12] Shahra Razavi (1999) 'Gendered poverty and well-being: introduction', Development and Change, 30(3) 417.
[13] Ibid citing from US Department '2007 Country Reports on Human Rights Practices: South Africa'.
[14] Ibid citing Johanna Kehler op cit note 4.
[15] Valentine Moghadam 'The feminisation of poverty: notes on a concept and trend. Women's Studies Occasional Paper, 1997 No. 2 (Normal: Illinois State University).
[16] David Bilchitz 'Socio-economic rights, economic crisis, and legal doctrine' 2014 *Oxford University Press and New York University School of Law* Vol 12 No. 3 710.
[17] See more on capabilities in footnote 101 and 109 below.
[18] Amartya Sen 'Human Rights and Capabilities' *Journal of Human Development* 2005 Vol 6 No. 2 151; See footnote 109 for Martha Nussbaum's list of capabilities; Sandra Fredman 'The Potential and Limits of an Equal Rights Paradigm in addressing Poverty' *Stellenbosch Law Review* 2011 3 566, 578.
[19] Amartya Sen 'Commodities and Capabilities' 1985; See also Amartya Sen 'Inequality re-examined' 1992 and Martha C Nussbaum 'Capabilities as Fundamental Entitlements: Sen and Social Justice' *feminist economics* 9(2-3) 2003

is favoured by both economists and legal academics especially in the context of asserting a person's socio-economic right within the South African context. Sen's theory is broad and open ended and does not consist of a closed list of capabilities. This approach was accepted by Nussbaum but critiqued for its broadness,[20] and therefore she introduced a list of ten capabilities.[21] The list that Nussbaum has provided includes many rights which are explicitly stated in the South African Constitution. Mokgoro J's assessment of social grants in the case of *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [22] speaks to capabilities because social grants bears the minimum of what people require to meet their basic needs. Mokgoro J stated that

> "The right of access to social security, including social assistance, for those unable to support themselves and their dependants is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational."[23]

The view held by Maxine Moleneux is that a house is the foundation which a woman should have in order for other aspects to assist in developing agency. Women are subject of oppression in the household and in the labour force which further hinders agency and perpetuates poverty. Molyneux argues that a woman's needs extends further than just a home.[24] Women often have to accept jobs in either the informal or formal sectors which are usually lower earning opportunities. In South Africa too, like other developing countries, there is no right to work, impacting job security for women.[25] To strategically redress the disproportionate impact on women, a woman should be provided with access to credit and professional training.[26] If women are given opportunities to find employment to address the economic and social challenges, it would be assist in providing a way out of poverty and assist women in developing themselves.[27]

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[20] Ibid.
[21] See footnote 148 for Martha Nussbaum's list of capabilities.
[22] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) (hereafter referred to as *"Khosa*").
[23] *Khosa's* case ibid para 52.
[24] Carole Cooper 'Women and the Right to Work' in Women's Social and Economic Rights in Beth Goldblatt & Kirsty McLean *'Women's Social and Economic Rights: Developments in South Africa'* 2011 First Edition Juta & Co, 245.
[25] Ibid – this includes women's interests, strategic gender interests and practical interests.
[26] Maxine Molyneux 'Mobilisation without Emancipation? Women's interests, the State and Revolution in Nicaragua'1985 11 *Feminist Studies* 227.
[27] Carole Cooper op cit note 24, 276.

The current spatial planning perpetuates apartheid and injustice between suburbs and the city, where you would find that issues facing women working in suburbs are different in comparison to a woman living in the inner city.[28] The role of motherhood varies; a suburban woman's experience in based on the White woman experience. A woman in the suburbs deals with work and motherhood starkly differently, in that she would have a nanny whereas a woman living in poverty has no such privileges.[29] An interviewee and gender expert, Seehaam Samaai noted that a woman in an informal settlement counts upon her neighbours and friends to care for her children. Spatial planning fails to consider the community element for women in the context of motherhood.[30] As confirmed in the study conducted by Alexandra Parker and Margot Rubin, women affirmed that as a result of their families living in distant cities or towns, they are unable to transport their children to a family member. Child care becomes a concern as many mothers have had negative experiences with nannies.[31]

Motherhood is not considered in the lived realities of women. What does being a mother for a woman living in a dilapidated building mean? What does her life entail? Motherhood could be defined by identity and ideology.[32] Mothers would differ depending on their cultural practices, religion, sexuality, and ethnicity. The experiences of a homosexual mother would differ to a Muslim mother who has different beliefs, ethics and limits and goals.[33] The ideology of many mothers is that their role is primary care-giving which perpetuates the gender stereotype.[34] In many communities women are not allowed to enter the workforce, or even if they are allowed to work, they are responsible for cooking, cleaning and taking care of children. According to the study, at least 43 percent of Black woman find that their role is to be a primary care-giver compared to 24 percent Coloured women, 25 percent Indian women and 15 percent White women.[35] As such, a woman's right to dignity is compromised when she is expected to be the 'perfect' wife, daughter or sister. The infringement of dignity is experienced as a result of her being poor and living in deplorable conditions.

Since motherhood is also defined in accordance with the needs of children, the dynamics of where women reside and their whereabouts would be affected by the schools that

[28] Alexandra Parker and Margot Rubin 'Motherhood in Johannesburg- Mapping the Experiences and Moral Geographies of Women and their Children in the City' GCRO Occasional Paper No. 11 November 2017 22-24.
[29] Ibid.
[30] Interview with Seehaam Samaai (Interview held on 6 April 2017).
[31] Alexandra Parker and Margot Rubin op cit note 28, 39.
[32] Ibid 14.
[33] Ibid 15.
[34] Ibid.
[35] Ibid 25.

their children attend.[36] The feeder school policies would impact where a woman lives and works, and what are convenient transport options. If a woman has access to private transport, her needs to get to work and return are more expedient than that of a woman who has to wait in queues for taxis or buses. Again, the differences for women living in the city and in the suburbs differ relative to time and money and access to transport and social amenities.[37] A typical day for a woman who has to ensure that her household chores are completed before she leaves for work is evident in the narrative

> "You know when they talk of a 9h00 to 17h00 [job] another would be 5h00 to 21h00 that is how I look at it [being a mother] because it is you probably up at 5h00 and your day finishes at 21h00, finish cleaning bottles or whatever so by 21h00 you say okay I am done so it is a five to nine job. (M1)
>
> We are fairly the same every day. If I am getting up early at like 02h00 I stop my studying at about 05h00 then I start getting done for work. It gives me a lot more time while they are still sleeping to just tidy up, especially if there are toys just laying around and then I bath and get ready for work. My husband would make the lunch for my son. I would get Noah dressed and we would be out of the house by 06h40."[38]

It is evident that motherhood is accompanied by other factors that need to be taken into account. Motherhood is central to the lives of many women. The private space for women is a contested space. Apart from the caring of her family, domestic violence is an added factor that inhibits a woman's ability to flourish. The lack of housing in South Africa prevents women from leaving the communal home or it would render her homeless. According to recent statistics,[39] 21 percent of women living with partners have experienced physical violence by a partner. The report further states that in the age group 18 to 24 years old, 10 percent of women experienced physical violence from a partner compared with 2 percent of women age 65 and older. Furthermore, women who are divorced or separated were more likely than other women to have experienced physical violence. Domestic violence not only affects the person but has wider consequences impacting children and living arrangements and results in economic instability.

[36] Ibid 42.
[37] Ibid.
[38] Ibid 27.
[39] South Africa Demographic and Health Report 2016, https://www.statssa.gov.za/publications/Report%2003-00-09/Report%2003-00-092016.pdf 54 (accessed on 21 March 2018).

Further, the repercussions of domestic violence have had adverse impacts on women, resulting in forced evictions and homelessness.[40] The impacts of domestic violence on women ought to be assessed through the intersection of race, class and gender.[41] The needs of women under further marginalised groups exacerbates the impact of domestic violence if they are not provided with facilities and assistance in the form of TEA that would be accommodating and secure. The options for TEA must take into account the different cultural and religious backgrounds of women, sexual orientation and whether they are foreign nationals.[42]

The obligation on the state towards its citizens is found in section 7(2) of the Constitution. Section 7(2) imposes a positive duty on the state to 'respect, protect promote and fulfil the rights in the Bill of Rights.' The protection against domestic violence is regulated in the Domestic Violence Act 116 of 1998, which obliges police officials to protect women against domestic violence.[43] Bonita Meyersfeld argues that the right to privacy enhances safety of the home. The state has an obligation to intervene in the privacy of the home. However, it must balance the intervention by not intervening in the lives of private individuals but ensure that women are provided with the necessary shelter when a complaint is lodged for domestic violence.[44] As noted by the former special rapporteur, due to the shortage of long term housing solutions, women tend to return to the household and continue to live in circumstance of domestic violence.[45] A few elements related to adverse impacts of the lack of housing affecting women include poverty, motherhood associated with child care and the effects of domestic violence. As a result of the realities faced by women, their right to adequate housing is impacted.

The ramifications of domestic violence and evictions leave women in a state of imminent homelessness. In cases of domestic violence, women are left to choose between homelessness and an abusive relationship.[46] Women are dependent on menfolk for housing and

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[40] Kirsty McLean & Lilian Chenwi 'A Woman's Home is her Castle?' – Poor Women and Housing Inadequacy in South Africa' in Beth Goldblatt and Kirsty McLean '*Women's Social and Economic Rights: Developments in South Africa'* 2011 First Edition Juta & Co, 128, 146-147.

[41] Natalie J. Sokoloff and Ida Dupont "Domestic Violence at the Intersection of Race, Class, and Gender: Challenges and contribution to Understanding Violence Against Marginalised Women in Diverse Communities" 2005 Sage Pub https://www.researchgate.net/publication/7701217_Domestic_Violence_at_the_Intersections_of_Race_Class_and_Gender (accessed on 21 April 2018)

[42] Ibid 51.

[43] Bonita Meyersfeld "Domestic Violence and International Law" 2010 Hart Publishing, 180.

[44] Ibid.

[45] Kirsty McLean & Lilian Chenwi op cit 40, 147, citing Miloon Kothari, 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living' UN Doc E/CN.4/2006/118 (2006) para 32.

[46] Ibid 147.

face further abuse. In cases of evictions, options of alternative accommodation are transit camps. The transit camps consist of small zinc structures which are closely situated to each other and leave women without any economic, social infrastructure and amenities.[47] The unsecured buildings and insubstantial shelters within buildings increase women's safety risks as they are vulnerable to acts of sexual violence. The law does not always recognise the special needs of women and their vulnerabilities. The incremental housing policy fails to consider the financial circumstances of women, who in most cases are low income earners and under skilled to their male counterparts and do not have the means to participate in terms of the incremental policy.[48] As a result of the law not considering women, the courts ought to come to the aid of women.

III. JUDICIAL RESPONSES

The judiciary has dealt with several emblematic cases over issues that have adversely impacted on women. It has done so in the main through the equality clause and the right to freedom and security. It is trite that courts analyse substantive equality under the *Harksen v Lane*[49] test. For purposes of this dissertation's analysis of the substantive equality jurisprudence, only selected

[47] Ibid 148-149.
[48] Ibid
[49] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 50:

(a) " Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
(b)(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
(b)(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution)"

cases have been used for discussion. These cases tackled difficult legal concepts and applied it to the lived realities of women. It further augmented jurisprudence which required advancement of gender equality but intertwined with race and class but in certain aspects this analysis is equivocal.

The substantive equality test has been used to determine gender discrimination in cases relating to sex work, employment, cohabitation, religion and customary law with the exception of socio-economic rights matters. The role of substantive equality goes beyond mere 'inclusion' and towards a transformative society.[50] Sachs J strongly explains the importance of substantive equality in *Minister of Finance and Others v Van Heerden*[51] when he stated that:

> "The substantive approach, on the other hand, requires that the test for constitutionality is not whether the measure concerned treats all affected by it in identical fashion. Rather it focuses on whether it serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution but have not already been achieved. It roots itself in a transformative constitutional philosophy which acknowledges that there are patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved. In this respect, the context in which the measure operates, the structures of advantage and disadvantage it deals with, the impact it has on those affected by it and its overall effect in helping to achieve a society based on equality, non-racialism and non-sexism, become the important signifiers."[52]

The notion of substantive equality strives to advance inclusion. Our courts have a role to play in developing the concept and to alter the patriarchal nature of systemic societal practices that devalue rights for women. In *Bhe v Magistrate of Khayalitsha*[53] the Constitutional Court held the view that primogeniture was an infringement of section 9(3).[54] Langa DCJ stated

> "The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order."[55]

[50] Catherine Albertyn 'Substantive equality and transformation in South Africa' *SAJHR* 2007 23 254.
[51] *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) (hereafter referred to as *"Van Heerden*").
[52] *Van Heerden's* case ibid para 142.
[53] *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) (hereafter referred to as *"Bhe*").
[54] *Bhe's* case ibid para 91.
[55] *Bhe's* case ibid.

The Courts' order was progressive in that it altered and tackled patriarchy to the extent relating to a woman's right to inherit. The Constitutional Court had developed the law for Black women living poverty.

The majority of cases that have appeared before the Constitutional Court dealing with discrimination against women, have related to gender-based violence, marriage, customary law and Islamic rites. In *S v Jordan*,[56] Ms Jordan challenged section 20(1)(aA) of the Sexual Offences Act 23 of 1957 on the basis that it discriminated against women, on the basis that the reading of the section penalises the recipient and not the customer.[57] The state argued that the section included both the words 'prostitute' and 'customer' and therefore it was not discriminatory.[58] Ms Jordan structured her case within the rights of equality, dignity, privacy, freedom and security and the right to free trade and economic activity. The cases was dismissed on the basis that Ms Jordan's rights were not infringed. The reality for Ms Jordan was that the vulnerability of sex work was not evident in her narrative. Sex work for Black women is a different experience than White women. The courts in this case adjudicated a case with facts that lacked vulnerabilities.[59]

A second example intersecting race and gender was the case of *Volks NO v Robinson.*[60] The case involved a constitutional challenge against the Maintenance of Surviving Spouses Act 27 of 1990 which interpreted 'spouse' to mean 'the surviving spouse in a marriage dissolved by death'. Mrs Volks instituted a claim against her deceased partner's first wife, Mrs Robinson. She sought relief from the Constitutional Court to have the word 'spouse' in the Maintenance of Surviving Spouses Act to include permanent life partners. She argued that the exclusion was an infringement of her right to equality in terms of section 9(3) and section 10 of the Constitution.[61] The majority of the Constitutional Court judges disagreed with Mrs Volks and therefore she was unsuccessful. The question is whether the identity of Mrs Volks impacted the outcome. The Constitutional Court did not have to deal with underprivileged women, or a case in which race and class intersected. Could this have been different had the court been faced with a Black woman, who lived in an underprivileged community? The struggles for Black woman are different and the facts of Ms. Robinson did not warrant an outcome for

[56] *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (hereafter referred to as *"Jordan*").
[57] Ibid paras 5-9.
[58] Ibid para 8.
[59] Views shared by Sibongile Ndashe (Interview held on 2 May 2017).
[60] *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) (hereafter referred to as *"Volks*").
[61] *Volks'* case ibid para 12.

prejudicial redress.[62] It is argued that despite the gender and race debate, a success for Ms Robinson could have assisted in reinforcing the right to choice for a woman who chooses to opt for marriage or not to be married. The law should have provided security and protection to a woman who chooses cohabitation rather than opting for the traditional life of marriage. These cases may have not dealt with race and class, but it was an opportunity to break gender stereotyping and to create gender awareness.

Justice Sachs succinctly describes the difficulties of women who are left without any provision from a partner. He stated that:

> "The reality against which the Act must be interpreted is that many recently bereaved, elderly, and poor women find themselves with no assets or savings other than their clothing and cooking utensils, little chance of employment and only the prospect of a state old-age pension to keep them from penury. Thus, while it is necessary to emphasise the importance of people taking responsibility for their lives, and to acknowledge the extraordinary self-reliance shown by many women in the face of extreme hardship, the law cannot ignore the fact that lack of resources has left many women with harsh options only. Their choice has been between destitution, prostitution and loneliness, on the one hand, and continuing cohabitation with a person who was unwilling or unable to marry them on the other. Any consideration of the fairness or otherwise of excluding from maintenance claims people who chose the latter path, must take account of this."[63]

The intersectionality of race and gender was further challenged in the case of *South African Police Service v Solidarity obo Barnard*.[64] The Constitutional Court using the test formulated in *Van Heerden,*[65] found that Ms Barnard was not discriminated against. Ms Barnard, a White woman, instituted a case in the Labour Court against the Commissioner of the National Police Force. Ms Barnard was rejected on two accounts for higher positions in the police force on the basis that she was white and the police force was not representative. The court found that the Constitution is a transformative document that aims to ensure that South Africa achieves a non-racist and non-sexist society. In the Constitutional Court, the minority judgments[66] placed emphasis on the fact that Ms. Barnard may have been white but she was a woman and her gender could favour her chances for appointment as women were historically disadvantaged.[67]

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[62] *Volks'* case ibid.
[63] *Volks' case* ibid para 225.
[64] *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) (hereafter referred to as *Barnard*").
[65] *Minister of Finance and Other v Van Heerden* supra note 51.
[66] The minority judgment were penned by Justices Cameron, Froneman, Majiedt and Van Der Westhuizen, who have come to the same conclusion as the main judgment but found that discrimination on the basis of gender should have been interrogated.
[67] *South African Police Service v Solidarity obo Barnard* supra note 64 para 114.

Our courts are central in enforcing restitutionary measures in order to balance the scales of inequality. From a gender perspective, the minority judgment would have profound effect in progressing the rights of women. The reality of current South Africa favours White women. Black men are still disadvantaged on the basis of race. The intersection of race and gender would always be central to an equality challenge.

The first example where substantive equality has been evident is redressing disadvantage that has satisfied structural change or has created a trajectory towards systemic redress has been central in the customary law and religious marriages, mainly in the context of Muslim Marriages. The cases of *Bhe*[68], *Gumede (born Shange) v President of the Republic of South Africa and Others* [69] and *Shilubana and Others v Nwamitwa*[70] challenged the power dynamics of inheritance, chieftaincy, land and resources. In *Daniels v Campbell and Others*[71] the court said that "the reality has been and still in large measure continues to be that in our patriarchal culture men find it easier than women to receive income and acquire property."[72]

These cases were not challenged based on grounds of child care and wanting to change the structure of the nuclear family but rather shifted attitudes of women's status.[73] Our courts began recognising Muslim marriages on an *ad hoc* basis which has afforded Muslim women with enforcing their rights and which provided them with protection in matters relating to intestate succession, testate succession and motor vehicle accident claims.[74] Marriages and its termination has impacted on a woman's right to housing.[75] In the case of *Arendse v Arendse,*[76] Mr Arendse married in terms of Islamic law and later divorced his wife. Upon termination of the marriage he sought an eviction against her and their children. She instituted an application to the Western Cape High Court to review the eviction order on the basis that it infringed her rights in terms of section 26. The court granted the order in her favour stating that the eviction was unlawful and failed to comply with the eviction processes in terms of the Prevention of Illegal Evictions From and Unlawful Occupation Act 19 of 1998 ("the PIE Act").

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[68] *Bhe and Others v Khayelitsha Magistrate and Others* supra note 51.
[69] *Gumede (born Shange) v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC) (hereafter referred to as "*Gumede*").
[70] *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) (hereafter referred to as *"Shilubana*")
[71] *Daniels v Campbell and Others* 2004 (5) SA 331 (CC) (hereafter referred to as *"Daniels*").
[72] *Daniel's* case ibid para 31.
[73] Catherine Albertyn 'Gendered Transformation in South African Jurisprudence: Poor Women and the Constitutional Court' (2011) 22 *Stellenbosch Law Review* 591, 598.
[74] *Hassam v Jacobs NO and Others* 2010 (4) SA 55 (CC); *Daniels v Campbell and Others* supra note 79; *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753.
[75] *Arendse v Arendse and Others* [2012] 4 All SA 305 (WCC) (hereafter referred to as *"Arendse*").
[76] *Arendse's* case ibid.

In the South African legal framework, the right to freedom and security was debated under the interim Constitution in *Ferreira v Levin.*[77] Ackerman J found that section 11 of the interim Constitution was the protection of individual liberty. He further argued that he would have defined the right to freedom negatively in a way that individual's rights would not have obstacles to possible choices and activities" in their way by the state.[78]

The majority in *Ferreira v Levin*[79] disagreed with Ackerman J and was held by the Chaskalson P that it could not only mean physical integrity. The debate gave rise to section 12 (a) to (e) of the final Constitution.[80] O'Regan analysed section 12 in the case of *S v Coetzee*[81] where she found that there are two components to the right to freedom and security, the first being the reasons for which the "state may deprive someone of freedom" and the second is the "manner in which someone has been deprived."[82] The right to security was challenged in the case of *Carmichele v Minister of Safety and Security*[83] where the court stressed the importance of the state's protection of women against domestic violence, including in the home. The applicant was attacked by Mr Coetzee in her home. He admitted to the assault but denied the rape. The applicant framed her relief in delict and asked the court that it find that the conduct of the Minister of Safety Security be held liable for negligence as the police aware of his record, allowed him to be a free man. The Constitutional Court ordered that there is a constitutional obligation to protect the applicant and referred the matter to High Court for further ventilation of the facts to determine liability for damages. The development of equality jurisprudence at the Constitutional Court has been favourable especially in the context of customary law and religion. The High Court case of *Arendse* is an example of how women's rights to housing have been impacted by religion and cultural practices. *Jordan, Volks* and *Barnard* could be seen as regressive as the judgments have not furthered gender equality but again, those cases addressed the plight of white women and lacked the racial considerations. The court has also tested the right to freedom and security in the context of violence against women as reflected in the case of *Carmichele.*

The lived realities of South African women have been dealt with by the courts to some extent and in certain respects. However, the socio-economic rights angle, and in particular the

[77] *Ferreira v Levin NO* 1996 (1) SA 984 (CC) 54 (hereafter referred to as *"Ferreira*").
[78] *Ferreira's* case ibid, quoted from I Currie and J De Waal 'Bill of Rights Handbook' 6th Edition Juta & Co Ltd, 270.
[79] *Ferreira's* case ibid.
[80] Section 12(1).
[81] *S v Coetzee* 1997 (3) SA 527 (CC) (hereafter referred to as *"Coetzee"*).
[82] *Coetzee's* case ibid para 159.
[83] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) (hereafter referred to as *"Carmichele"*).

interpretation of section 26 through a gendered focus has been limited. Moreover, many of the socio-economic rights cases[84] have addressed transformative constitutionalism but failed to do so incorporating gender and addressing the disadvantage of the impact of lack of service delivery and of stereotypes on women in particular.

IV. CONCEPTUAL FEMINIST FRAMEWORK

The current litigation theory and jurisprudence in South Africa has not adopted different approaches to incorporate the gender, race and class. The litigation strategy and jurisprudence should incorporate a feminist approach. The development of critical race feminism[85] has not appeared in jurisprudence. The focus of the jurisprudence should include 'historical, economic and social' diversities of the lived realities of women.[86] Jurisprudence for sexual crimes has stereotyped Black women, in that Black women are more sexualised and therefore cannot be raped. She writes

> "These sexualized images of race intersect with norms of women's sexuality, norms that are used to distinguish good women from bad, the madonnas from the whores. Thus Black women are essentially prepackaged as bad women within cultural narratives about good women who can be raped and bad women who cannot. The discrediting of Black women's claims is the consequence of a complex intersection of a gendered sexual system, one that constructs rules appropriate for good and bad women, and a race code that provides images defining the allegedly essential nature of Black women. If these sexual images form even part of the cultural imagery of Black women, then the very representation of a Black female body at least suggests certain narratives that may make Black women's rape either less believable or less important. These narratives may explain why rapes of Black women are less likely to result in convictions and long prison terms than rapes of white women. [87]

The problem exists in this scenario on two ways, first on race and second on gender.[88] The assumption and classification of Black women hinders any redress for Black women,

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[84] *Khosa v Minister of Social Development supra note 22*; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC)*; City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC); *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC).

[85] The theory calls for recognition on the basis of relational differences of race, wealth and sex, on which the recourse must be sought.

[86] Cynthia Grant Bowman 'Race and Gender in the Law Review' *Northwestern University Law Review* 66.

[87] Kimberlė Crenshaw op cit note 6, 1271.

[88] Ibid 1270.

reinforcing the fact that the racial element affects the manner in which cases are perceived and decided. Facts of a case ought to be interpreted through an empathetic perspective that takes into account critical race feminism. An interviewee and gender expert, Sibongile Ndashe's view supports Kimberlė Crenshaw's argument[89] that we have to understand disadvantage based on the complexities of race, gender and geography i.e. intersectionality. Commenting on intersectionality, Crenshaw states that "disadvantage based on more than one ground is therefore complex, creating different and multiple forms of inequality which cannot be explained or understood simply under gender."[90] The extrication of gender and race perpetuates women insubordination and racism.[91]

Conaghan argues that intersectionality is limiting and would only be enhanced through structures and process.[92] Undoubtedly, intersectionality on the grounds of race, gender and class entails complex dynamics. The complexities stem from the notion that societies are not homogenous and identity is multifaceted. For example, a Black woman living poverty would be impacted differently compared with a White woman living in the suburbs. Further divisions exist based on sexuality, education, income and economic status.[93] Consequently, the impact of rights infringements and their remedies for Black women living in poverty in South Africa require careful interrogation and attention. However, rather than retreating from such complexities, we need to embrace them. As stated by Adrien Katherine Wing, "to assist women of colour we need to delineate their multiple identities, examine how those identities intersect to privilege or lead them to face discrimination, and then design multidimensional programs that would enhance their life situations."[94] Thus, to obtain redress for Black women living poverty, it is essential to pursue an intersectional approach, including in litigation, as a realm of power and contestation.

Given the paucity of feminist approaches to socio-economic rights cases, what would a feminist litigation approach look like for housing cases in South Africa? Rights based argument

[89] Kimberlė Crenshaw op cit note 6, 1252; Interview with Sibongile Ndashe op cit note 59.
[90] Kimberlė Crenshaw ibid 1252.
[91] Catherine Albertyn & Beth Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' 1998 *SAJHR* 14 248, 253 also 'Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' *University of Chicago Legal Forum* 139.
[92] Joanne Conaghan "Intersectionality and the Feminist Project in Law" in "Intersectionality and Beyond Law, Power and the Politics of Location" edited by Emily Grabham, Davina Cooper, Jane Krishnadas and Didi Herman 2009 Routlege Cavendish 21, 40-42.
[93] Leslie McCall "The Complexity of Intersectionality" in "Intersectionality and Beyond Law, Power and the Politics of Location" edited by Emily Grabham, Davina Cooper, Jane Krishnadas and Didi Herman 2009 Routlege Cavendish 49, 60-61.
[94] Adriene Katherine Wing quoted in Joanne Conaghan op cit note 92, 31.

are deemed to be quantified from a western perspective. This is evident in the trajectory of waves of feminism. The first wave of feminism has applied the principle that a gender-neutral application of the law is realisable. The second wave of feminism holds the view that law is not the answer. First and second wave feminisms strive towards an essentialist remedy but Carol Smart argues that this is impossible to attain.[95] These waves of feminism sought to highlight the impact of patriarchy in every aspect of women's lives and universalised issues that affected White women.[96] The aim of highlighting the patriarchal legal discourse may assist in reinforcing the importance of law to achieve transformed jurisprudence. Many women in developing countries have criticised rights and feminism, as they are viewed as colonial and western and fail to resonate with their lived realities.[97] The disadvantage faced by women amplifies critical race feminism in the structure for litigation.

Legal feminism aims to "make sense of the many ways gender shapes the law, to reveal the many ways that law, as a consequence harms women, and to try to change law so that women are assisted."[98] Third wave feminism incorporates an intersectional nuance of gender, race and class.[99] It disproves the classification of women as a homogenous group.[100] Third wave feminists are cynical of but are of the view that the law is irrational and male dominated. Further, it brings to light the inaccuracies and failures of the law and our courts.[101] Feminist jurisprudence could be the method to remedy the existing shortfalls in litigation strategies. Women have mobilised through the use of social media, conscientising and raising awareness of issues that affect women,[102] giving rise to fourth wave feminism. For purposes of legal mobilisation, social media has been used an advocacy tool to highlight and galvanise support.

With support of third wave feminism, feminist litigation strategies is a mechanism used by lawyers to ensure that the women's voice is heard but further, to conscientise lawyers and judges of gender imbalances. Lawyers ought to make it a point to put their female client's narratives before the courts and use a feminist framework to enhance their client's case. The

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[95] Karin van Marle and Elsje Bonthuys 'Feminist Theories and Concepts' in Elsje Bonthuys and Catherine Albertyn, *'Gender, Law and Justice'* 2007 Juta & Co Ltd 15, 21.
[96] Lola Okalosie 'Open space beyond talking and owning intersectionality' *Feminist Review*, No. 108, Black British feminisms (2014) 90.
[97] Beth Goldblatt 'The Right to Social Security – Addressing Women's Poverty and Disadvantage' in Beth Goldblatt & Kirsty McLean 'Women's Social and Economic Rights: Developments in South Africa' 2011 First Edition Juta & Co 34, 38.
[98] Ibid 49.
[99] Lola Okalosie op cit note 96, citing Kimberlė Crenshaw op cit note 6, 1252.
[100] Yavuz Selim Alkan 'Feminist Legal Methods: Theoretical Assumptions, Advantages, and Potential Problems' *Ankara Law Review* Vol. 9 No. 2 (Winter 2012) 157, 163 wherein she states that women are not a homogenous community.
[101] Ibid 43.
[102] Lola Okalosie op cit note 96, 91.

majority of gender experts interviewed expressed views on the impacts of a feminist lens. These views included that it would change the landscape of evictions and it would make people aware of the consequences of evictions. Further, it would be a start to realise that people have personal and socio-economic circumstances which must be considered preventing judges from making hasty and reckless court orders without TEA.[103] Therefore, the inclusion of narratives in affidavits from people facing eviction especially the female client is imperative for a judge to decide a matter without oral evidence.[104]

Anna Pellatt describes the value of a feminist voice in litigation:

> "The problem, from a feminist standpoint, is that law's way of envisioning women's reality, of translating the substance and circumstances of women's lives, has tended to be dominated by the harsh exclusionary gender-based politics marking the social realm. Cultural myths and stereotypes about women and narrow, dualistic constructions of difference have dictated the way in which law has historically conceptualized and responded to women and women's subordination. In order to make law conscious of, and responsive to, gender oppression in all of its manifestations, it is necessary to challenge signifying rules and conventions that denigrate and erase the difference that women represent and, at the same time, to find ways of re-working the discourse in order to represent who women are and what they experience in palpably real and full terms."[105]

It is important to note that the feminist approaches should not be used to victimise women but rather to make judges and society at large aware of the gender disparities that plague South Africa. Further, it is argued[106] that feminist litigation could illicit a gendered focus of legal and social arrangements to a larger gender neutral way of thinking. Joanne Conaghan argues that feminist litigators find it challenging to ensure that the law identifies with the struggles of women.[107] They often use strategies to highlight ways that the law affects the lives of women and they strive to ensure that women's socio-economic status is improved, that women are respected and that their independence and integrity are enhanced.[108] These strategies require lawyers to prioritise women's participation in community consultations, and especially so

[103] Interview with Stuart Wilson (Interview held on 25 April 2017).
[104] Interview with Charlene May (Interview held on 4 April 2017).
[105] Anna S Pellatt, 'Equality Rights Litigation in Social transformation: A Consideration of the Women's Legal Education and Action Fund's Intervention in *Vriend v R'* 2000 12 *CJWL* 117,121.
[106] Joanne Conaghan 'Reassessing the Feminist Theoretical Project in law' 2000 27 *J of Law and Society* 351, 359.
[107] Ibid.
[108] Amanda Spies 'Considering the impact on amicus curiae participation on feminist litigation strategy', 2015 *SAJHR* 136, 140.

where women are less visible and/or evidently marginalised in community structures. It is at this point that a litigator would have to be creative in how she or he ensures that women's voices are heard. The participation of women in the consultation phase would assist in having their perspectives incorporated into the entire court process.

Katherine Bartlett identifies three methods of achieving a gendered opportunity[109] through litigation; first, asking the 'women question', second, 'feminist practical reasoning' and third, 'consciousness raising'. The 'women question' would involve the question on how the rights of women are affected, by looking beyond the surface of the law.[110] The questions that arise are the following: have women been left out of the consideration? How can this be remedied?[111] The 'women question' must raise an awareness of 'gender bias.[112] As lawyers we have advanced arguments without looking at the broader impacts of housing establishments. Samaai was illustrative in her interview, of what women experience in an informal settlement compared to an allocated home. As much as a woman would prefer improved circumstances, it would be an added advantage to preserve her living conditions in a community. The community lifestyle is familiar to her and suits her needs, whereas an allocation of a low- cost house in an establishment would be removing her access to basic needs.[113] The section 9(2) and 9(3)[114] analysis seeks to ensure that history is redressed and that we do not regress to a racist and sexist society. The equality test aims to achieve substantive equality. The dynamic that faces Black women is that feminism is based on the experiences of middle class White women and the racism is discussed from the perspective of Black men.[115] Crenshaw concludes that the prejudice felt by Black women is multi-layered and the Black woman falls last on the hierarchy of privilege.

Sandra Liebenberg's deliberation on whether formal or substantive equality is favourable to a woman facing an infringement of her socio-economic rights. She argues that

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[109] Katherine T Bartlett 'Feminist Legal Methods' 1990 103 *Harvard L*R 829, 831.
[110] Ibid 843
[111] Ibid 837
[112] Ibid 846
[113] Interview with Seehaam Samaai op cit note 30.
[114] Section 9 of the Constitution states:

> "…
> *(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
> (3) *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth…."*

[115] Kimberlė Crenshaw op cit note 6, 1298.

formal equality would require equal treatment of men, but fails to consider that women are affected differently to a men.[116] Sachs J in *Van Heerden* states that

> "Formal equality is based on a status-quo-oriented conservative approach which is particularly suited to countries where a great degree of actual equality or substantive equality has already been achieved. It looks at social situations in a neutral, colour-blind and gender-blind way and requires compelling justification for any legal classification that takes account of race or gender."[117]

Therefore, equality would require different treatment of men and women.[118]

The woman has no familiar neighbours or a crèche within the vicinity of her home. Samaai enforces the point that as litigators or the State, there is a failure to consider the broader picture when making decisions relating to housing. Thus, the information that addresses the impact of the housing situation and possible outcome is not dealt with in the consultation phase and further not analysed by a court.

The second method, 'feminist practical reasoning', is to identify loopholes in the law that are not usually considered and noticed through a gendered perspective.[119] Many litigators have found that a court might be irritated by the additional documents and information dealing with gender, but it is not clear that this would be the case.[120] Perhaps the Constitutional Court would welcome theoretical arguments on feminism.[121] Respondent Y who is a High Court judge, emphasised the importance of feminist legal theory. He expressed the view that more theory should be advanced to achieve gendered outcomes for women that are missing currently. He further stated that public interest organisations and advocates should step out of the traditional methods of lawyering and should be creative in litigation strategies.[122] Another participant shared the view that feminist underpinnings are necessary to understand society.[123]

According to Stuart Wilson, a litigator interviewed, succinctly stated that feminist legal theory should be used but the 'trick is how you convert theory into application.'[124] The theory has to be applied to the set of facts pertinent to the case before you. These sentiments were shared by other litigators too. The gender experts have found that litigators do not care enough

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[116] Ibid 418.
[117] *Minister of Finance and Other v Van Heerden* supra note 51 para 142.
[118] *Van Heerden's* case ibid.
[119] Katherine T. Bartlett op cit note 109, 858
[120] Interviews with Paul M. Kennedy (Interview held on 8 March 2017), Geoff Budlender (Interview held on 3 April 2017), Janice Bleazard (Interview held on 11 April 2017) and Ismail Jamie (Interview on 10 April 2017).
[121] Interview with Geoff Budlender ibid.
[122] Interview with Respondent Y (Interview held on 11 April 2017).
[123] Interview with Respondent Z (Interview on 13 April 2017).
[124] Interview with Stuart Wilson op cit note 103.

about gender and are not interested in reading academic papers. It is for this reason that gendered argument were not advanced in any housing case except for *Dladla*. Litigators, Emma Webber and Janice Bleazard agree that feminist theory is too political and academic and would not be convincing to a court.

The responses from lawyers and judge to the question about the importance of feminist legal theory were divided. For example, according to one respondent,[125] there is a place for feminist legal theory but judges do not read theory.[126] Or yes, it is important as it is linked to vulnerabilities and women.[127] Such insights support the notion that it has to be aligned with the struggles of Black women. It would therefore mean that the arguments would have to take into consideration gender, race and class.

Finally, 'consciousness-raising' is the opportunity to create a platform to have gendered arguments articulated in support of women's plight.[128] Consciousness raising aims to evolve society by conscientising people of the patriarchal systems that permeate all factions of society. Kay Mahonde, a gender expert, conceptualised the question, on whether feminist litigation would contribute to consciousness raising, that it would mean to understand 'consciousness raising' as an inward reflection of gender. She further stated that it amplifies women's voices once they hear about other stories. Consciousness raising is a form of mobilising women and to eradicate the feeling of isolation. A gender expert, Chriscy Blouws finds that the consciousness raising is an awareness of women's vulnerabilities, and allows women's issues to penetrate cases and in consultations with clients. Other gender experts argue that consciousness raising should be aimed at various stakeholders, including magistrates and judges, non-governmental organisations and the state.[129] As Bell Hooks claims, consciousness raising affects the broader community and finds that feminism is for everybody.[130] Both men and women should be consciously raising awareness about gendered aspects. In the realm of litigation, this awareness raising is done through affidavits.[131] The notion of public awareness is not prevalent as the public are not interested in every case. However, if a case is publicised and there is a media campaign, the public would become aware of the gendered nature and

[125] Interviews with Heidi Barnes (Interview held on 17 March 2017), Ismail Jamie op cit note 120 and Moray Hathorn (Interview held on 24 April 2017).
[126] Interviews with Nomzamo Zondo (Interview held on 17 March 2017) and Teboho Mosikili (Interview held on 16 March 2017.
[127] Interview with Richard Moultrie (Interview held on 28 March 2017).
[128] Katherine T. Bartlett op cit note 109, 863.
[129] Views shared by Pierre de Vos (Interview held on 10 April 2017), Elsje Bonthuys (Interview held on 21 April 2017).
[130] Bell Hooks 'Feminism is for Everybody' 2000 South End Press, 112-113.
[131] Katherine T. Bartlett op cit note 109, 864.

implications of the case at hand. The awareness would be restricted to students, lawyers and judges.[132]

It is from the information gathering that one would be able to strategise on the litigation, formulating the arguments and the relief from a court that challenges the literal readings of the law. As Albertyn[133] states, these gendered arguments and perspectives could be put forward through courts in different ways. It could be by reinforcing the values of what forms social and economic inequalities or through rights and remedies.[134] The laws in South Africa governing evictions, the PIE Act is gender neutral.[135] Policies too, have had an adverse impact on women headed households. As stated in General Comment 16, the Committee on Economic, Social and Cultural Rights emphasised the importance of a substantive notion of gender equality in the realisation of socio-economic rights, and noted that this cannot be achieved by gender-neutral laws and policies, but requires laws, policies and practices that take account the existing economic, social and cultural inequalities experienced by women.[136]

Yavuz Salim Alkan argues that feminist legal theory and critical legal studies challenges customary litigation theorists.[137] At the least, such an approach might begin to create the space for women to raise their concerns but at the same time not depict women as victims who need perpetual saving. The lawyers and gender experts interviewed as part of this research understand that homelessness is a reality which, bearing in mind the historical legacy of apartheid, affects predominantly Black people and Black communities who are poverty stricken regardless of their gender. On the other hand, gender experts that were interviewed for this research were of the view that housing is gendered.[138] In General Comment 7,[139] the Committee on Economic, Social and Cultural Rights focused on forced evictions as a violation of the right to adequate housing. It noted the particular vulnerability of women:

> "Women…are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation and their particular vulnerabilities to acts of violence and sexual abuse when they are rendered homeless."[140]

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[132] Interview with Respondent X (Interview held on 13 March 2017).
[133] Catherine Albertyn op cit 73, 597.
[134] Ibid.
[135] Kirsty McLean & Lilian Chenwi op cit note 40, 145.
[136] General Comment 16, paras 7 and 8. See also General Comment 4, para 6.
[137] Yavuz Salim Alkan op cit note 100, 157.
[138] Interviews with Bonita Meyersfeld (Interview held 31 March 2017) and Seehaam Samaai op cit note 30.
[139] UN Committee on Economic, Social and Cultural Rights, General Comment 7 (1997): The equal right to adequate housing (Art. 11.1 of the Covenant): forced evictions. Adopted at the Committee's Sixteenth Session, 20 May 1997. UN Document E/C/1998/22, annex IV.
[140] General Comment 7, para 10.

A home to a woman means something much more than being protected from elements, it is a shelter that provides security, warmth, privacy and allows a woman to enjoy her role not only as a mother and the burdens that she carries, but as a woman too. Article 14 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[141] recognised the housing needs of rural women in particular and associates their lack of access to adequate housing with discrimination against women.[142]

The Fredman test[143] includes four elements that substantive equality ought to address and to achieve; "to redress disadvantage, address stigma and stereotypes, prejudice and violence, to embrace difference and achieve structural change, and to enhance voice and participation."[144]

The cultural aspects of lifestyle must be respected to achieve the transformative goals. In order to balance both culture and gender equality, redistribution of social goods within groups and social and economic disparities must occur.[145] The lawyers arguing equality cases could infuse gender as canvassed in the international and regional instruments and General Comments. The Committee of Economic Social and Cultural Rights ("CESCR") states that the right to housing is an important basic human right, and is "of central importance for the enjoyment of all economic, social and cultural rights." The instrument includes the arguments of transformative constitutionalism in that it provides that the right to housing is linked to other rights such as, to non-discrimination, dignity, privacy, freedom of association, freedom of expression, social security, education, health, work, vote, and the right to an adequate standard of living.

Both CESCR General Comments 4 of the Right to Adequate Housing and the Covenant for Civil and Political Rights General Comment 16: Article 17 (Right to Privacy) for the Right

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[141] Adopted by General Assembly resolution 34/180 of 18 December 1979, and entered into force on 3 September 1981. South Africa ratified CEDAW in 1995.

[142] The United Nations' Commission on the Elimination of All Forms of Discrimination against Women has issued a number of General Recommendations that underscore States parties' obligations to ensure adequate living conditions and housing for women, and linked this right to the enjoyment of other fundamental rights, including equality and health. See for example, UN Commission on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 21 on Marriage and Family Relations' 13th session (1994), UN document A/49/38; UN Commission on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 24 on Women and Health,' 20th session (1999), UN document A/54/38/Rev.1, chap. I, para 28.

[143] Sandra Fredman 'Substantive Equality Revisited' *Oxford University, Research Paper Series* 2014 17; Fredman 3.

[144] Ibid 3.

[145] Catherine Albertyn 'The stubborn nature of patriarchy? Gender equality and culture diversity in South Africa' *Constitutional Court Review* 2009 2 165, 191.

to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation have noted the need to address gender discrimination in the enjoyment of the right to housing. In General Comment 4, the Committee recognised that the right to adequate housing

> "is of central importance for the enjoyment of all economic, social and cultural rights". It emphasised that "The right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity."[146]

Domestically, to address the inequalities and to interpret lived realties incorporating gender, the right to adequate housing ought to include further interrogation of other rights based infringements. These rights includes dignity, privacy and freedom and security. Yacoob J stated in Grootboom that "the proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom."[147] The rights of women to access adequate housing could draw from and be interpreted interdependently through CEDAW. CEDAW was developed to address gender equality in socio-economic rights. It demands systemic change for women and it emphasises that women have suffered and continue to suffer all forms of discrimination.[148] CEDAW places responsibilities on the state to ensure that rights of women are protected and addressed positively. It provides that states have positive duties to "protect, promote, and fulfil this right of non-discrimination for women and to ensure the development and advancement of women in order to improve their position to one of de jure as well as de facto equality with men." CEDAW recognises the housing needs of rural women in particular and associates their lack of access to adequate housing with discrimination against women.[149]

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[146] General Comment 4, para 6.
[147] *Government of the Republic of South Africa and Others v Grootboom and Others* supra note 84 para 83.
[148] Sandra Fredman 'Engendering Socio-Economic Rights' 2009 *SAJHR* 25 410, 434-435.
[149] Article 14 of CEDAW. The United Nations' Commission on the Elimination of All Forms of Discrimination against Women has issued a number of General Recommendations that underscore States parties' obligations to ensure adequate living conditions and housing for women, and linked this right to the enjoyment of other fundamental rights, including equality and health. See also, the UN Commission on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 21 on Marriage and Family Relations' 13th session (1994), UN document A/49/38; UN Commission on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 24 on Women and Health,' 20th session (1999), UN document A/54/38/Rev.1, chap. I, para 28.

The socio-economic disparities that classifies women as caregivers and housewives could be addressed with Fredman's second point of her test on addressing stigma and stereotypes.[150] The stereotypical nature of the classification is demeaning and impacts the rights to dignity. The right to dignity underlies the right to equality.[151] Based on the origins of Kantian theory dignity is what gives a person his or her intrinsic worth.[152] The value of dignity originates through Nussbaum's capabilities approach.[153] Liebenberg correctly argues that dignity, equality and freedom are intertwined.[154]

The Constitution asserts dignity to eradicate the practices of our past in which human dignity for Black South Africans was routinely denied. It asserts to inform the future, to invest in South Africa's democracy and respect the inherent worth of all human beings. Section 10 however, makes it simple that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of "human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour."[155] Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of possibly all other rights.

The lack of housing has impacted on a woman's right to dignity. The infringement of dignity is experienced as a result of her being poor and living in deplorable conditions. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2003 (commonly referred to as the Maputo Protocol), which came into force in 2005 and which South Africa has ratified,[156] specifically assures the rights of women to adequate housing.[157] The Maputo Protocol further guarantees every woman respect for her life and the

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[150] Sandra Fredman op cit note 143.
[151] Sandra Fredman 'Redistribution and Recognition: Reconciling Inequalities'2007 23 *SAJHR* 214.
[152] Arthur Chaskalson 'The Third Bram Fischer Lecture: Human Dignity As a Foundational Value of Our Constitutional Order' 2000 16 *SAJHR* 193, 198.
[153] Sandra Liebenberg 'The value of dignity in interpreting dignity' 2005 *SAJHR* 21 1.
[154] Ibid.
[155] *Dladla and Others v City of Johannesburg Metropolitan Municipality and Another* 2014 (6) SA 516 (GJ), para 35.
[156] African Union, 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,' *adopted* by the *2nd Ordinary Session of the Assembly of the Union* (Maputo, 11 July 2003), entered into force 25 Nov. 2005. South Africa ratified the Protocol on 17 December 2004.
See also the *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* at para 6, which provide that States parties submitting reports on what they have done to give effect to their socio-economic rights obligations under the African Charter must: "*Provide information on legislative and practical steps taken to ensure enjoyment of the rights on a non-discriminatory basis by members of vulnerable or marginalised groups as defined in the Principles and Guidelines. Reports should particularly indicate what steps have been taken to ensure gender equality*."
[157] Article 16 of the Maputo Protocol.

integrity and security of her person, and requires State parties to adopt and implement appropriate measures to ensure the protection of every women's right to her dignity and protection from all forms of violence.[158]

Further, the lack of adequate housing impacts a woman's right to live and enjoy family life, adequate shelter and to have a balanced peaceful life at home after a difficult day's work. A home is a place of solitude and privacy. To have the space to conduct your daily chores and family life in the privacy of your own home. A parallel can be drawn between the basic needs for women and within a rights framework and Nussbaum's list of capabilities.[159] Fredman aims to infuse capabilities with quality to promote dignity. To ensure that woman have the

[158] Articles 3 and 4 of the Maputo Protocol.

[159] Martha Nussbaum 'Capabilities as Fundamental Entitlements: Sen and Social Justice' *Feminist Economics* 2003 33, 41. The list of capabilities are:

"1. Life. Being able to live to the end of a human life of normal length; not ding prematurely, or before one's life is so reduced as to be not worth living.

2. Bodily Health. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.

3. Bodily Integrity. Being able to move freely from place to place; to be secure against violent assault including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

4. Senses, Imagination, and Thought. Being able to use the senses, to imagine, think, and reason – and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use the imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's own mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to so avoid non-beneficial pain.

5. Emotions. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experiencing longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to crucial in their development.)

6. Practical reason. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience and religious observance.)

7. Affiliation.

A. Being able to live with and toward others, to recognise and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)

B. Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of nondiscrimination on the basis of race, sex, sexual orientation, ethnicity caste, religion and national origin."

8. Other Species. Being able to live with concern for and in relation to animals, plants, and the world of nature.

9. Play. Being able to laugh, to play, to enjoy recreational activities.

10. Control Over One's Environment.

A. Political. Being able to participate effectively in political choice that govern one's life; having the right of political participation, protections of free speech and association.

B. Material. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to see employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason, and entering into meaningful relationships of mutual recognition with other workers."

capabilities it is to realise that women have a house that is situated in close vicinity to transport, has the necessary assistance with child care and security of tenure.[160]

Capabilities could be further realised if a woman is afforded rights to freedom, safety and security. Domestic violence is an infringement of section 12(1) (c). In cases of domestic violence, women tend to flee the home in fear. The lack of housing and imminent homelessness infringes her right to adequate housing. In 2005, the United Nations' Commission on Human Rights adopted a resolution on women's equal rights to adequate housing,[161] in which it recognised that "the lack of adequate housing can make women more vulnerable to various forms of violence." The Commission reaffirmed "women's right to an adequate standard of living, including adequate housing" and recommended governments to comply fully with their international and regional obligations and commitments concerning the equality of women to an adequate standard of living, including adequate housing.[162] It further affirmed that "discrimination in law and practice against women with respect to… housing constitutes a violation of women's human right to protection against discrimination and may affect the realisation of other human rights."[163] Therefore, the right to freedom and security in terms of section 12(1) (c) could be read with section 26(1). It could therefore be inferred that the state has an obligation to protect women from domestic violence by ensuring that there are places of safety.[164] There is no current litigation or jurisprudence which deals with the right to adequate housing and the right to freedom and security. However, the State ought to ensure that women are provided with TEA in cases of domestic violence. Article 18 of the Maputo Protocol states that "the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions." These regional legal frameworks enhance the important for strategies and analysis of cases to incorporate gendered arguments.

The South African perspective has to consider the racial, sex and class dynamics of the community, in which case it is Black women living poverty. An engendered perspective to housing rights is a combination of rights that enables a woman to be secured, protected and the foundation to realise her full potential and capabilities.

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[160] Kirsty McLean and Lilian Chenwi op cit 40, 151.
[161] UN Commission on Human Rights Resolution: 2005/25, "Women's equal ownership, access to and control over land and the equal rights to own property and to adequate housing", adopted at the Commission's 51st meeting on 15 April 2005; UN document E/CN.4/2005/L.10/Add.10.
[162] Ibid para 2.
[163] Ibid para 3.
[164] Based on Bonita Meyersfeld's view that the state has an obligation to intervene in domestic violence matters; See Bonita Meyersfeld op cit note 43.

V. CONCLUSION

The chapter sets out the lived realities of Black women living in poverty. The challenges that women face is multifaceted in that it infringes a woman's rights to equality on the basis of race, gender and class. Our courts have adjudicated on many rights infringements against women. Yet it is apparent that there is a lacuna in socio-economic rights matters, particularly housing cases that failed to address the gendered component.

Finally, the chapter sets out the need for a feminist litigation approaches for housing adjudication and in litigation strategies. Therefore, Chapter 3 supported by the feminist framework outlined here, critiques four cases relating to the right to access to adequate housing to establish the gender gaps and how judges have failed to interpret and analyse jurisprudence through a gendered perspective to the key elements and concepts of housing and eviction law. It further proposes an alternative interpretation to the key concepts.

However, the enquiry goes further than jurisprudence and interrogating litigation strategies. Chapter 4 is a feminist critique of public interest litigation strategies identifying the lack of a feminist lens and proposes a feminist litigation strategy.

CHAPTER 3 – A FEMINIST CRITIQUE OF HOUSING CASES

I. INTRODUCTION

It is evident from the previous chapter that litigation has thus far failed to address many of the elements of intersectional disadvantage for women, and particularly so in respect of housing cases, suggesting the need for a feminist approach.

Based on the feminist framework in chapter 2, this chapter engages in the first part of the enquiry, which is a critique specifically on four of the key housing rights cases — *Government of the Republic of South Africa and Others v Grootboom and Others,* [1] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others,*[2] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [3] and *Dladla and Another v City of Johannesburg and Others* [4] — examining whether the court engaged with the various concepts of socio-economic rights (reasonableness, minimum core, progressive realisation, and available resources) and from housing jurisprudence (section 4(6) and 4(7) of the PIE Act,[5] meaningful engagement and conditions of TEA) from a gendered perspective.

II. UNPACKING *GROOTBOOM, OLIVIA ROAD, BLUE MOONLIGHT* AND *DLADLA*

Sections 26(1) and 26(2) contain the obligation placed on the state to ensure that people have housing, and to take steps are taken to ensure that the state progressively realises within its available resources an individual's right to adequate housing. As a result of unlawful evictions by the state evidenced in *Grootboom, Olivia Road* and *Dladla* and by private entities such as Blue Moonlight (Pty) Ltd, housing jurisprudence has developed. Section 26(1) places a

[1] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (hereafter referred to as *"Grootboom*").
[2] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) (hereafter referred to as *"Olivia Road*").
[3] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) 2012 (2) BCLR 150 (CC) (hereafter referred to *"Blue Moonlight*").
[4] *Dladla and Others v City of Johannesburg Metropolitan Municipality and Another* 2014 (6) SA 516 (GJ); *City of Johannesburg v Dladla and Others* 2016 (6) SA 377 (SCA); *Dladla and Another v City of Johannesburg and Others* 2018 (2) SA 327 (CC) (hereafter referred to as *"Dladla*").
[5] See Chapter 1, footnote 30.

negative obligation on the state whereas section 26(2) places a positive obligation on the state. The courts have dealt with section 26(2) in three categories; minimum core, reasonableness and progressive realisation with available resources. Since these cases focus primarily on evictions, the following concepts have emanated from jurisprudence; the interpretation of section 4(7) of the PIE Act, meaningful engagement and obligations and the conditions of TEA. The responses from the various gender experts and litigators underscore the conclusion that a gendered focus has not been a focal point of consideration of litigation and our courts have not advanced gendered socio-economic rights adjudication. This section further proposes an alternative for judges on what an infused feminist approach ought to be. It exclusively discusses the Constitutional Courts' analysis of the four cases.

a. Grootboom

An eviction of 510 children and 390 adults from the informal settlement in Wallacedene, Cape Town resulted in the Constitutional Court's first housing case.[6] The community, instituted an urgent application in the Cape Town High Court for the provincial government to provide shelter until they received permanent accommodation. The High Court ordered that in terms of section 28 of the Constitution, the applicant children were entitled to TEA. The state appealed the decision to the Constitutional Court but was unsuccessful. Focusing on the reasonableness of the policy[7] and the concept of progressive realisation,[8] the Constitutional Court ordered that the state progressively and within its available resources devise a plan for TEA, reasonably and within its available resources assist those without shelter and that the state failed to comply with measures reasonably and within its available resources to assist those without shelter.

The Legal Resources Centre (LRC) intervened on behalf of the Human Rights Commission and the Community Law Centre. The amicus curiae's submissions included were based on the International Law principles relating to the realisation of socio-economic rights. The *amici* supported the respondents' arguments relating to the rights of children and the interpretation of section 26.[9] The Constitutional Court dismissed the children's rights argument but enforced the Court's stance on the justiciability of socio-economic rights.[10] It further

[6] *Government of the Republic of South Africa and Others v Grootboom and Others* supra note 1 para 4, footnote 2.
[7] *Grootboom's* case ibid para 42, 44, 64.
[8] *Grootboom's* case ibid para 45.
[9] *Grootboom's* case ibid para 71.
[10] *Grootboom's* case ibid para 20.

rejected that minimum core standard,[11] which requires an organ of state to fulfil its obligation provide minimum essential needs to a community. The court stated:

> "It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right."[12]

The relief provided by the courts requested that the state act reasonably within its available resources to provide shelter. The Court maintained its independence by not extending relief on how the state ought to have done so. Could a minimum core approach have assisted with eradicating the plight of the poor? Currently this is impossible to answer as there is no relevant jurisprudence whether domestically or internationally. Fredman criticises the court in *Grootboom* saying that it relied on the 'basic minima' of socio-economic rights and failed to consider the prejudice caused to women.[13] The legislation and policies have been interpreted narrowly without considering a gendered focus if challenged in court.[14]

The court coherently interpreted the State's policy using the reasonableness test and established a few criteria for reasonableness — policy should be comprehensive, "balanced and flexible, have sufficient regard for social historic and economic context of poverty and deprivation, take into account the availability of resources, take a phased approach, by including short, medium and long-term plans, allocate responsibilities to all spheres of government, respond with care and concern to the needs of the most desperate and free of bureaucratic inefficiency."[15] The court did not provide that policy should include the rights of women but provided an open and broad element of reasonableness to look at social and historical background. The social element for women

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[11] David Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance' 2002 *SALJ* 484, 485.

[12] *Government of the Republic of South Africa and Others v Grootboom and Others* supra note 1 para 32.

[13] Sandra Fredman 'Engendering Socio-Economic Rights' 2009 *SAJHR* 25 410, 423-424 and also cited by Kirsty McLean & Lilian Chenwi 'A Woman's Home is her Castle?' – Poor Women and Housing Inadequacy in South Africa' in Beth Goldblatt and Kirsty Mclean *'Women's Social and Economic Rights: Developments in South Africa'* 2011 First Edition Juta & Co 128, 134.

[14] *City of Johannesburg v Blue Moonlight Properties (Pty) Ltd and Others* supra note 3 and *Maphango v Aengus Lifestyle Properties* 2012 (3) SA 531 (CC) challenged the Emergency Housing Policy and the Rental Housing Act.

[15] *Government of the Republic of South Africa and Others v Grootboom and Others* supra note 1 paras 41-43.

would mean that the social origin for women has always been repressed. Women were not permitted to voice their concerns in public or in private; they are expected to be satisfied and respect the status quo.

Stuart Wilson, Jackie Dugard and Michael Clarke state that the courts have been and continue to be sensitive to South Africa's historical, social and economic context in housing jurisprudence.[16] They criticise the litigation approach that litigants have to advance arguments to gain sympathy rather than to present arguments based on principle.[17] The courts have not dealt with socio-economic right cases robustly. The reasonableness test is not sufficient to eradicate poverty and structural inequalities,[18] and it has not assisted with transformative constitutionalism from both poverty and gendered perspectives.

The arguments advanced by the parties did not include a feminist approach. The starting point here should have been that the lead applicant was a woman. Ms. Irene Grootboom could have provided the perfect narrative of a poor Black woman living in an informal settlement, her challenges which would include the lack of adequate water and sanitation supply, the safety risk and lack of dignity when she was evicted without any notice and consultation. The High Court had alluded to this, but focused on the rights of children rather than focussing that on the applicants were majority were women.

The courts inclusion of the gender disparity was captured simply in paragraph 23 of its judgment that

> "…All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential."[19]

All litigators who were interviewed were unanimous that children's rights were prioritised over that of women's rights because section 28 expressly entrenches children's rights. The rights

[16] Stuart Wilson, Jackie Dugard & Michael Clarke 'Conflict Management in an era of Urbanisation: 20 years of Housing Rights in the South African Constitutional Court' 2015 *SAJHR* 31 472, 502.
[17] Ibid.
[18] Jackie Dugard 'Courts and the Poor in South Africa: A critique of systemic judicial failures to advance transformative justice' 2008 24 *SAJHR* page 214, 236.
[19] *Government of the Republic of South Africa and Others v Grootboom and Others* supra note 1 para 23.

of women on the other hand, are to be interpreted through section 9. The right to equality is triggered to interpret section 26 infusing gendered.[20]

One of the litigators who was interviewed, Ismail Jamie SC, was clearly extremely passionate about children's rights was apparent and he suggested that child-headed households should have been included in section 4(7). He defended the children's rights approach adopted by the litigants by emphasising that children were the most vulnerable group in the community to be protected. He elaborated stating that issues relating to women, although prevalent could not be the focus of in the conceptualisation of cases. In doing so, matters involving rights infringements against women was not a consideration for litigators. The courts too have not mentioned the gendered impact on women. The court infused a rights based analysis but did not extend it to women.[21] The statement that 'if *Grootboom* were litigated today, a feminist approach would have been relevant'[22] is evident on the influence of lawyers. Geoff Budlender SC, who argued for the amicus curiae, concurred with Jamie's view that as amicus curiae, they had to create interpretation into socio-economic rights and gender could not have been raised. He together with litigators, Paul Kennedy, Heidi Barnes and Stuart Wilson maintain that the policy question was the focus of all housing litigation and therefore the litigants adopted correct approaches in those cases.[23] These views amplify the notion that litigators influence case strategy.

The arguments, although importantly raised the international instruments to establish the justiciability of the right to housing, could have used the CEDAW to complement the interpretation of the right to housing. The court was profound in establishing reasonableness and assisted in policy development. A gendered focus would have included the rights the rights to privacy, safety and security to within a reasonableness approach. The argument and the judgment could have included a further point to state that section 26 of the Constitution must be read in conjunction with the rights to equality, dignity, privacy and freedom and security to interrogate whether a policy is reasonable.[24] It could have been more explicit and stated that that since the state acted without considering the plight of women, their actions were unjust and therefore their policy unreasonable. The section 9 enquiry makes provision for social origin and within this enquiry that the rights of women should be embedded.[25] A robust analysis on

[20] Interview with Bonita Meyersfeld (Interview held on 31 March 2017).
[21] *Government of the Republic of South Africa and Others v Grootboom and Others* supra note 1 para 23.
[22] Interview with Ismail Jamie (Interview held on 11 April 2017).
[23] Views from Geoff Budlender (Interview held on 3 April 2017), Paul M. Kennedy (Interview held 8 March 2017), Heidi Barnes (Interview held 20 March 2017) and Stuart Wilson (Interview held on 25 April 2017).
[24] Views with Respondent X (Interview held on 13 March 2017).
[25] Interview with Nomzamo Zondo (Interview held on 17 March 2017).

social origin that encapsulates historical context on race and gender should have been elaborated on by the courts to conscientise the state on being deliberate on gender issues in its policy making processes. The gender experts have found that arguments should emphasise the vulnerabilities and the intersectionality of race, gender and class.[26]

The ICESCR stipulates that a State must progressively realise a right within its available resources. This obligation has been captured in section 26 of the Constitution. The notion of progressive realisation was developed in *Grootboom* on the basis that the state must ensure that its policies and implementation thereof are done in a manner that ensures people have a home. The court in *Grootboom* explained progressive realisation to mean that it

> "shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses…"[27]

The notion of progressive realisation too, could have included the plight of vulnerable groups and there is progressive plan to address housing crisis to alleviate the adverse impacts on women and their children. In effect, it would merely mean that arguments and papers needed to go further than just stating the personal circumstances. It could have been used to raise the inequalities in society as a whole. The case was determined least 6 years into a democracy, of which the time was ripe to use the case as an opportunity to level the scales on inequality who for decades under the apartheid era have lived in squalor, bore the burden of child-rearing and menial domestic labour. It was at this point in South Africa's democracy that socio-economic jurisprudence ought to have been cognisant of the issues facing women.

Section 26 (2) and section 27 (2) has internal limitations on the state in that it has proviso 'within the states available resources'. As a result the justiciability of socio-economic rights has been debated in the Certification hearings and has made court reluctant to adjudicate in these matters. The court stated

> "….Nevertheless, we are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched

[26] Interviews with Bonita Meyersfeld op cit note 20, Respondent X op cit note 24, Charlene May (Interview held on 4 April 2017) and Seehaam Samaai (Interview held on 4 April 2017).
[27] *Government of the Republic of South Africa and Others v Grootboom and Others* supra note 1 para 45.

> in the NT will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion…"[28]

Courts have shied away on the basis that it infringes the doctrine of separation of powers. This was explicit in the case of *Soobramoney v Minister of Health (Kwazulu-Natal)*[29] where the courts dismissed Mr Soobramoney's access to renal dialysis because of the lack of resources. The court did not delve in available resources in *Grootboom*[30] or *TAC*[31] but acknowledged the strained resources on the State in *TAC.*[32] The court rather considered the reasonableness of the various policies. The court was faced with the question of available resources in *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development*[33] where they acknowledged the increased costs that would be incurred but found that social grants will increase over the years but the amount to permanent residents is only a small proportion.[34]

The Committee for Economic Social and Cultural Rights ("CESCR") stipulates that the State must ensure that it has utilised its maximum available resources when addressing the socio-economic rights of women. If the State has failed to do so, then is has violated the rights of women.[35] General Comment 4 of the CESCR states that "adequate housing must be in a location which allows access to employment options, health care services, schools, child-care centres and other social facilities. This is true in both large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households."[36]

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[28] *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), para 78.
[29] *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC).
[30] *Government of the Republic of South Africa and Others v Grootboom and Others* supra note 1.
[31] *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) 2002 (5) SA 703 (hereafter referred to as *"TAC*").
[32] *TAC's* case ibid.
[33] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) para 44 (hereafter referred to as *"Khosa*").
[34] *Khosa's* case ibid para 62.
[35] ESCR-NET and IWRAW "Claiming Women's Economic, Social and Cultural Rights" 40 https://www.escr-net.org/sites/default/files/Guide%20on%20Women's%20ESCR%20-%20Final.pdf 20
See also the case of "Alyne da Silva Pimentel v. Brazil, decided by CEDAW in 2011, where CEDAW recognized that despite Brazil's efforts in areas of public health, its failure to prioritize reduction of maternal mortality and to devote the maximum available resources to guarantee that women can go safely through pregnancy and childbirth, created a violation".
[36] General Comment 4 para 8(f).

The court in *Grootboom* found that national budgets should make provision for emergency housing. The court stated:

> "Effective implementation requires at least adequate budgetary support by national government. This, in turn, requires recognition of the obligation to meet immediate needs in the nationwide housing programme. Recognition of such needs in the nationwide housing programme requires it to plan, budget and monitor the fulfilment of immediate needs and the management of crises. This must ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately. Such planning too will require proper co-operation between the different spheres of government."[37]

The socio-economic rights cases have scope to develop gendered budgeting to realise socio-economic rights. This is a remote possibility as litigators and judges have to pass the hurdle of recognising women and the impact of the lack of socio-economic rights. An expert indicated that portions of budgets must be allocated towards gender. The aim of gender-responsive budgeting is to narrow the economic equality gaps between men and women, in the interests of a more equal and effective society.[38] Budgets that are gender-sensitive should also take race and other vulnerabilities into account, thereby addressing socio-economic disparities and influencing a positive change for everyone.[39] Housing budgets should address these complexities. And courts should integrate such an approach into their adjudication of housing matters, focusing on budget allocations towards women-headed households. Thus, integrating a feminist approach to reasonableness and the availability of resources are important steps towards obtaining an egalitarian outcome for women.

Kameshni Pillay states that the court in *Grootboom* and *TAC* restrained itself from ordering a structural interdict as it had confidence that the State would comply. She is of the view that the courts ought to have ordered a structural interdict to avoid the 'hollow ring' leaving the occupiers without adequate shelter.[40] How would a supervisory interdict favour women? The court's oversight is important to avoid further infringements.

A court must ensure that its remedy will be effective. In *Fose v Minister of Safety and Security*[41] the Constitutional Court held:

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[37] *Government of the Republic of South Africa and Others v Grootboom and Others* supra note 1 para 68.
[38] Debbie Budlender, Diane Elson, Guy Hewitt and Tanni Mukhopadhyay "Gender Budgets Make Cents Understanding gender responsive budgets" 2002 Commonwealth Secretariat 52-53 https://www.internationalbudget.org/wp-content/uploads/2011/01/GBMC.pdf (accessed on 10 April 2019).
[39] Ibid 53.
[40] Kameshni Pillay "Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights"
[41] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (hereafter referred to as *"Fose*").

> "In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."[42]

Further, a court's adjudicative process must be in sync with the equality goals of the country. As Sachs stated; 'procedural and substantive aspects of justice and equity cannot always be separated.'[43] The logic behind court orders must sustain the transformative ethos of South Africa. Does this mean that litigators need to change the relief to suit women only or that the relief should incorporate relief for women specifically? A radical feminist would opt for the former whilst a liberal feminist would frame her relief to incorporate a gendered perspective.

b. Olivia Road

The buildings in the inner city occupied by people are in dilapidated and deplorable conditions. The conditions vary from building to building but in general, the majority of buildings have poor lighting produced by illegal electricity connections or no electricity at all. There is no water and sanitation facilities which exacerbates health risks and safety. In 2006, the City implemented the 'City's Regeneration Strategy'[44] which sought to eradicate all 'bad buildings' in the city. However, the campaign resulted in the eviction of people residing in the buildings without the use of the PIE Act process. As a result, the community residing in the San Jose building instituted an application to the High Court challenging the City's operation.

The matter involved the eviction of 400 people living in the Johannesburg inner city at 51 Olivia Road. The City of Johannesburg Metropolitan Municipality ("the City") justified the eviction of the occupiers by stating that the building was 'unsafe and unhealthy'[45] and in terms of section 12(6) of the National Building Regulations and Building Standards Act, it had an

[42] *Fose's* case ibid para 69.
[43] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 7 (hereafter referred to as *"Port Elizabeth Municipality"*).
[44] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* supra note 2 para 19.
[45] *Occupiers of Olivia Road's* case ibid para 1.

obligation to protect the well-being of people. The occupiers challenged the constitutionality of the Act. Their argument was that the City could not use the Act to evict on the basis that the Act conflicts with section 26 (3) of the Constitution in that people are protected from arbitrary evictions.[46] The Constitutional Court granted an interim order, that the parties should meaningfully engage on the conditions of the building and the possibility of obtaining alternative accommodation for the occupiers. The parties reached an agreement which was made an order of court.

The Constitutional Court held that a court should consider whether there has been meaningful engagement before granting an order for eviction. It further found that even though the City has an obligation to ensure that buildings are safe, it must consider the potential homelessness of people before it seeks an eviction order. The court declared section 12(6) of the National Building Regulations and Building Standards Act unconstitutional as it criminalised occupation of the building after a notice to vacate was served but without a court order. The Constitutional Court found that it is the City's constitutional obligation to meaningfully engage with occupiers. The Court provided guidance on meaningful engagement. "[The] larger the number of people ...to be affected by the eviction, the greater the need for structured, construct and careful engagement."[47]

It further stated that meaningful engagement is paramount for a court to consider when deciding whether it is just and equitable to evict. It stated:

> "[M]oreover, as I have already pointed out, it is the duty of a court to take into account whether, before an order of eviction that would lead to homelessness is granted at the instance of a municipality, there has been meaningful engagement or, at least, that the municipality has made reasonable efforts towards meaningful engagement. In any eviction proceedings at the instance of a municipality therefore, the provision of a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality within that process would ordinarily be essential. The absence of any engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an ejectment order."[48]

However, the judgment failed to acknowledge the impact of the unsafe and unhealthy building on women. Meaningful engagement is important for the State to identify the appropriate TEA

[46] *Occupiers of Olivia Road's* case ibid; Applicants' Written Submissions, Constitutional Court by Paul M. Kennedy SC and Heidi Barnes, 82-83 para 167-170.
[47] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* supra note 2 para 19.
[48] *Occupiers of Olivia Road's* case para 21.

for affected evictees. It is a process to establish the demographics of the occupiers affected. The information that is required includes the numbers of families, households, children and women. The needs of people would vary, in the event that you have disabled people and the elderly. Ancillary issues would include that the TEA must be situated in a place that has public transport easily accessible, clinics, schools and social amenities.

What does meaningful engagement mean for a Black woman facing eviction? Is the woman's right to safety and privacy taken into consideration? Do the courts look at the conditions of the building that people reside in and acknowledge the impacts of the lack of water, sanitation on the rights of women?

The arguments advanced at court did not highlight the specific needs of women that could have been alleviated by the provision of TEA. Emma Webber, a litigator interviewed, stated without having a clear view of the facts of *Olivia Road,* that it could have been a case where the courts grappled with safety of women. By doing so, there would have been a possibility that *Dladla* could have been avoided.[49] The principles for engagement[50] are broad and the court failed to nuance the principles to provide a gender sensitive approach to engagement. These principles are important to obtain a beneficial outcome but is not robust and nuanced enough to cater for the needs of women. The lack of gender sensitive approach would result in settlement for TEA that would not address the needs of women. Safety is central for a women in the provision of a home – a home for a woman goes beyond just a home.[51] As Sachs has stated, section 26(3) "evinces special constitutional regard for a person's place of abode." He further stated that 'a home is more than just mere shelter from the elements. It is a zone of personal intimacy and family security.'[52] This goes further as it provides a woman with the comfort and ease to care and provide for a family.

It is against this backdrop, that the question posed to the participants was whether a gender focus was adopted in *Olivia Road,* could *Dladla* have been avoided.

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[49] Interview with Emma Webber (Interview held on 29 March 2017).

[50] The principles have been formulated in *Olivia Road* and *Joe Slovo*. It includes parties must act reasonable and in good faith; honesty and equality of voice for all concerned, and understand and accommodate each other's concerns; the process should be transparent and confidential, complete and accurate account of the process should be provided; the engagement process must be tailored to particular circumstances, be structured and coherent, and be done collectively and individually; ad hoc engagement may be practical for smaller municipalities who face one or two eviction per year; needs pf specific occupiers may be different and due consideration must be afforded to those occupiers; the engagement process should be managed by careful and sensitive officials to ensure that the vulnerable, poor and illiterate are accounted for; structures that are sensitive and skilled in engagement must be put in place; civil society must be involved in engagement process; the engagement must not be top-down approach but rather with each other."

[51] Interview with Seehaam Samaai op cit note 26.

[52] *Port Elizabeth Municipality v Various Occupiers* supra note 43, para 17.

A respondent stated that gender could be argued in a vacuum and could have been argued in *Olivia Road* if there was evidence to support it.[53] The engagement process was raised mero moto by the court. The Constitutional Court granted an interim order on the basis that it would have been premature for the court to grant the eviction without meaningful engagement between the parties. It stated that:

> "This Court made the interim order because it was not appropriate to grant any eviction order against the occupiers, in the circumstances of this case, unless there had at least been some effort at meaningful engagement. It was common cause during argument that there had been none. The ejectment of a resident by a municipality in circumstances where the resident would possibly become homeless should ordinarily take place only after meaningful engagement. Whether there had been meaningful engagement between a city and the resident about to be rendered homeless is a circumstance to be considered by a court in terms of section 26(3)."[54]

The participant was further of the view that the interim order was the opportunity to have raised the gendered aspects of the TEA. Teboho Mosikili, the attorney for the occupiers, who was part of the engagement process, is of the view that an opportunity to incorporate gender was lost in this matter.[55] The Courts' failure to provide guidelines on the engagement process added to the missed opportunity to address the needs of women in the engagement process.

Mosikili's experiences were not agreed with by Wilson. Wilson was of the view that gender was not considered in the negotiation process. He further stated that they had to accept what was given as the court was not interested in hearing their client's case. The options available were one family per room and dormitory style accommodation for single men and women, which was the accepted proposal. After the case they were able to decide on what was best for women.[56] The process is an illustration that women are not prioritised in any proceeding. Lawyers did not understand at the outset that women ought to have been considered during the engagement process.

Moray Hathorn, who also acted for the occupiers of one the buildings that was part of the litigation, found that gender was never on the table and had it been, there could have been a different outcome. Many other litigators hold the view that a gendered outcome in *Olivia Road* could have changed the housing landscape. No further qualifications were provided. Paul

[53] Interviews with Paul M Kennedy op cit note 23 and Geoff Budlender op cit note 23.
[54] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* supra note 2 para 22.
[55] Interview with Teboho Mosikili (Interview on 16 March 2017).
[56] Interviews with Moray Hathorn (Interview held on 24 April 2017), Teboho Mosikili ibid and Stuart Wilson op cit note 23.

Kennedy SC, an advocate in the matter but was not part of the engagement process and did not respond to the question. Other litigants feel that as litigators we are too hard on ourselves because we cannot pre-empt future responses from the City.[57]

If the litigators were correct that *Olivia Road* looked for a solution for all regardless of gender, the amicus curiae could have alerted the courts to the needs of women. Both amici curiae, the Centre for Housing Rights and Evictions and the Community Law Centre, advanced arguments that the PIE Act should apply regardless of the safety and health concerns of the state of the building.[58] In the case of *Olivia Road*, the court mentions the safety and health risks on all occupiers. The engendered focus of the dilapidated buildings were not pronounced upon. The rights to adequate housing in *Olivia Road* should have been intersectional and an explicit gendered focus could have been incorporated to explain the impact of the conditions on women. The policy decisions and the Constitutional Court's approach for meaningful engagement was progressive and within the realm of dealing with housing solutions. Meaningful engagement was adopted in subsequent housing cases.[59] The Constitutional Court granted an order for meaningful engagement mero moto. The engagement process was the opportunity where litigator's could have been deliberate in tabling gendered impacts for TEA. Litigation is complicated – courts may find that occupiers are fastidious and could not demand specific TEA conditions from the State. The courts and the State fail to realise that the nature of TEA must comply protect the rights to privacy and dignity.

The cases before the court which have been discussed above may have impacted and progressively dealt with the housing policy. Sandra Liebenberg is of the view that even though our courts ordered meaningful engagement, government and other stakeholders still have much to do to ensure the process is followed through.[60] The courts failure was that it was unable to look at the impact on women.

The incorporation of women's involvement in developing policy and also the implementation of the court judgments would have had different solutions for the available TEA.[61] The mere acknowledgement of the struggles of women and what ought to happen when rendered homeless or facing imminent eviction would have alerted public officials and judges

[57] Views shared by Nomzamo Zondo op cit note 25, Janice Bleazard (Interview held on 11 April 2017) and Teboho Mosikili ibid.
[58] Amicus Curiae Constitutional Court Application Founding Affidavit.
[59] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* supra note 37, *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* 2010 (3) SA 454 (CC).
[60] Sandra Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: the possibilities and pitfalls of 'meaningful engagement' 2012 12 *African Human Right Law Journal* 1, 28.
[61] Interview with Moray Hathorn op cit note 56.

to be cognisant of the experiences of women in any subsequent cases. The views of litigators do not resonate with this sentiment. The litigators were of the view that that the arguments in *Grootboom, Olivia Road and Blue Moonlight* dealt with poverty and discrimination.[62] The arguments had to be narrow and had to address the specific violations and that a gendered argument could not be advanced.[63] Many felt that the questions pertaining to the cases on whether it could have been different, were speculative as one could not foresee the consequence of a judgment.[64] A litigator, Nomzamo Zondo explained that they had not foreseen the TEA offered for their clients in *Blue Moonlight*. They anticipated the standard of accommodation as provided for in *Olivia Road* which was comfortable buildings, such as MBV Phase 1 and Old Perm.

Had the litigators been more robust on the gendered negotiation tactics, the court could have included a nuanced meaningful engagement process. The pronouncement of the gendered angle on meaningful engagement could have included questions on whether the TEA entrenched the rights to family life, freedom and security, privacy, and dignity. The meaningful engagement process would have been important to avoid the subsequent discrimination and harm.

The court should ensure that the remedy must ensure that there is oversight. The continued belligerence of the State has proven on multiple occasions that it has failed its citizens. An engendered remedy should provide an alternative for women considering their safety, privacy and dignity. The court may not be able to order the exact location or type of accommodation due to the constraint of separation of powers but it could allow for the state to consider the impact of the accommodation on women.

c. Blue Moonlight

With the passage of time, the nature of evictions changed from the state as owner seeking eviction to that of mainly private owners who purchased buildings in the inner city and who sought vacant possession of the buildings. The role of the state in the evictions instituted by private owners developed jurisprudence to ensure that the States obligations remained. The

[62] Interviews with Paul M. Kennedy op cit note 23, Heidi Barnes op cit note 27, Geoff Budlender op cit note 23 and Stuart Wilson op cit note 23.
[63] Interviews with Paul M. Kennedy, Heidi Barnes, Geoff Budlender and Stuart Wilson ibid.
[64] Interviews with Paul M. Kennedy ibid, Heidi Barnes ibid, Geoff Budlender ibid, Ismail Jamie op cit note 22, Stuart Wilson ibid and Janice Bleazard op cit 57.

Constitutional Court in *Blue Moonlight* enforced the municipality's obligation to provide temporary emergency accommodation to people evicted by a private owner.[65] The *Blue Moonlight* matter concerned approximately 120 occupiers residing at 7 Saratoga Avenue in Bertrams. The occupiers argued that the City had a constitutional obligation to provide all people facing eviction with TEA. The High Court found that the City had an obligation to report to the court on the steps it had taken to engage with the occupiers and further to explain to the court possibilities to provide the occupiers with temporary emergency accommodation. The SCA found in favour of the occupiers. The City appealed the decision to the Constitutional Court.

The issues that the Court were confronted with dealt were threefold: what were the constitutional obligation on the Municipality, in an eviction matter instituted by a private owner; the constitutionality of Chapter 12 of the National Housing Code and, whether it was just and equitable to evict.

The Constitutional Court's analysis upheld the appeal and decided that the City has an obligation to provide TEA to people facing evictions. In its analysis the court had to decide whether the municipality had a constitutional obligation to provide TEA to evictees when a private owner sought the eviction. The Court started with section 26 of the Constitution and the Housing Act.[66] Section 9 of the Housing Act includes the functioning of government in the context of housing, the obligations of National, Provincial and local government,[67] the financial structures to source housing projects[68] and the termination of housing schemes.[69] The Housing Act, which seeks to protect housing development, makes provision for further policy in order to materialise the vision of the Act. Section 9 of the Housing Act is the foundation on which the National Housing Code of 2009 was drafted. It has failed in its accounts to consider the plight of women in housing situation and to address the lack of housing options and security of title of the marginalised.

The Housing Act is the only piece of legislation that regulates social housing and housing development. This has been noted and critiqued by former Special Rapporteur for

[65] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* supra note 3*; Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others* 2012 (2) SA 337 (CC); *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd and Others* 2012 (4) BCLR 382 (CC).
[66] 107 of 1997
[67] Part 3, 4 and 5 of the Housing Act.
[68] Part 6 of the Housing Act.
[69] Part 7 of the Housing Act.

Housing on the basis that South Africa has no legislation protecting vulnerable groups.[70] In particular, the Housing Act has not placed any provisions of incorporating a gender responsive budget within the financial management of housing schemes. He further recommended that special attention must be given to women experiencing domestic violence and the housing programmes must be revised to include low-income rental to security of tenure for tenants and finally to cater for special needs housing.[71] The Constitutional Court correctly used the only legislative framework it could for the purposes of the analysis without having to incorporate gender. The gaps identified by the former Special Rapporteur was not enhanced nor interpreted to infuse gender within the Housing Act. The litigation as supported by the views of Kennedy, Barnes and Wilson stated that the strategy adopted in *Blue Moonlight* had no place to incorporate gender. The strategy and outcome sought was narrow and the courts could not deal with too many issues.[72] The litigation and judgment has been progressive regardless of the narrow intervention on municipal obligations.

The Constitutional Court further declared the City's Emergency Housing Policy unconstitutional as it did not include eviction as a situation in which emergency housing was to be provided. The court may have found that the policy was unconstitutional, however, it is clear from the papers that the litigants failed to raise that policy considerations have to include gender. The Constitutional Court analysis of the constitutionality of the policy was a general statement that a policy ought to consider all persons facing eviction. It stated "The City's housing policy is unconstitutional to the extent that it excludes the Occupiers and others similarly evicted from consideration for temporary accommodation."[73]

Lilian Chenwi and Kirsty McLean state that housing policy ought to take into account gender components. In their discussion of policy engagement their assessment is that even though the state has made efforts to incorporate gender in policy it has challenges.[74] Further, they are of the view that despite the constellation of legislation and policy protecting a person's right to housing, there are gaps within them on the basis of gender.[75] Chenwi concludes in her

[70] Miloon Kothari, 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' A/HRC/7/16/Add.3 29 February 2008, para 89.
[71] Ibid para 105.
[72] Interviews with Paul M. Kennedy op cit note 23, Heidi Barnes op cit note 23 and Stuart Wilson op cit note 23.
[73] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* supra note 3, para 95.
[74] Kirsty McLean and Lilian Chenwi op cit note 13, 140.
[75] Ibid 140.

article, that South African jurisprudence and legislation is progressive but South Africa must look to African jurisprudence to augment its laws and jurisprudence for gender inclusivity.[76]

It is noted that the courts in *Blue Moonlight* had to decide whether it was just and equitable to evict. In its enquiry, the Constitutional Court acknowledged its obligation to consider women headed households and the listed vulnerable groups under section 4(7) of PIE. The section 4(7) enquiry is only a start to gender integration.[77] In its decision, when considering that the City ought to redraft policy, it did not probe into the implications of a policy that considered gender and whether such a policy should include gendered participation and gendered focus. It mentions in its analysis the importance of considering personal circumstances when deciding whether it is just and equitable to evict. The Constitutional Court stated that

> "[A]ffected individuals may include children, elderly people, people with disability or women-headed households, for whom the need for housing is particularly great or for whom homelessness would result in particularly disastrous consequences. Individuals may have a range of incomes – some may be able to afford subsidised housing while others may be completely destitute. In the present case, the Occupiers have a myriad of personal circumstances to be taken into account in considering their eligibility for housin[g]."[78]

The *Blue Moonlight* judgment has paved a way of looking at policy development for evictions. The Constitutional Court could have impressed on the surface of having policy drafted in consultation with women. This would have been novel and nuanced in that the court, without overstepping the doctrine of separation powers, insinuate the importance of having women part of policy making.[79] This is enforced by Leilani Farha "Women's housing inequality is exacerbated by their exclusion from policy development with respect to housing… by customary practices that are sometimes enforced by law, which prevent women from inheriting

[76] Lilian Chenwi 'The right to adequate housing in the African regional human rights system: Convergence or divergence between the African Commission and South African approaches' *Law, Democracy & Development* 2013 Vol 17 342, 347. See also The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which entered into force in 2005 and which South Africa has ratified, specifically guarantees the rights of women to adequate housing. The Protocol further guarantees every woman respect for her life and the integrity and security of her person, and requires State parties to adopt and implement appropriate measures to ensure the protection of every women's right to respect for her dignity and protection from all forms of violence. Article 18 further states that "the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions."

[77] Interview with Buhle Lekokotla (Interview held on 28 March 2017).

[78] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* supra note 3, para 92.

[79] Kirsty McLean & Lilian Chenwi op cit note 13, 128.

land and housing."[80] Policy is important to establish transformation, but ultimately there has to implementation of those policies.

The PIE Act was enacted to ensure that people are not left homeless and that they would retain a modicum of dignity. The PIE Act progressively protects vulnerable groups, by stating that a court may grant an order for eviction, if it is of the opinion that it is just and equitable to do so, after considering all relevant circumstances, which include women-headed household, children, the disabled and elderly. It is debatable whether the list constituting "relevant circumstances" provides sufficient safeguards to eradicate the stigma attached to women, whether it would improve a woman's life, and ensure that her section 26 rights would be realised. The other criticism of the incorporation of gender is why women are prioritised and not children, the disabled or the elderly as expressed in section 4(7)? What does the section mean for women and is the section interpreted integrating gender? According to Meyersfeld the reading of the section of the PIE Act and its interpretation are insufficient.[81] Wilson and Richard Moultrie stated that the PIE Act is limiting but does not warrant amendment.[82]

Many fail to realise that majority of women are responsible for child care. In the event that her child is disabled, the additional responsibility of care rests on the woman. If the woman is disabled or old, she faces a double battle but particularly, because she is a woman.[83] If a woman is old, she is responsible for the domestic chores, having to walk long distances and wait in queues for her social grant.[84] In certain instances the elderly women are caring for their grandchildren. A woman bears the responsibility to ensure that her children have shelter, warmth of a home that a child requires to be raised.

The question posed to participants was whether the section 4(7) enquiry that the court must consider houses-headed by women was sufficient for a gendered analysis. In the context of evictions, both in the inner city and rural areas legislation and courts' interpretations thereof lacks gender integration. Both the Extension of Security of Tenure Act 62 of 1997 ("ESTA") and the PIE Act have been problematic in addressing the needs of women. The difference between ESTA and the PIE Act was also raised by gender expert, Chriscy Blouws and litigator, Respondent Z addressed the inefficacy of ESTA. Unlike evictions in terms of the PIE Act, the

[80] Leilani Farha 'Is there a woman in the House? Re/conceiving the Human Right to Housing' 2002 14 *Canadian Law Journal* of Women and Law 118, 121-122.
[81] Interview with Bonita Meyersfeld op cit note 20.
[82] Interviews with Richard Moultrie (Interview on 28 March 2017) and Stuart Wilson op cit note 23.
[83] Beth Goldblatt 'The Right to Social Security – Addressing Women's Poverty and Disadvantage' in Beth Goldblatt and Kirsty McLean *'Women's Social and Economic Rights: Developments in South Africa'* 2011 First Edition Juta & Co 34, 50-51.
[84] Ibid.

lack of a gendered dimension of ESTA was raised by the amicus in *Klaase,*[85] but amicus curiae's application to adduce new evidence was rejected due to technical and procedural grounds. However, their involvement to bring to the fore the gendered dimension will at least make lawyers and the courts aware of the weak protection of women in ESTA matters.

The enquiry in terms of the PIE Act is a test to only cater for single mothers.[86] The fact that only women-headed households are considered means that women in all other circumstances are excluded. By limiting it to women-headed households, there is a presumption that women who are married are in a better position because they have men in their households. Why it is that women must be attached to a man and that she is not treated in her own capacity and as an individual for the purposes of a gender-sensitive housing enquiry?[87] A woman who is married will arguably suffer similar discrimination as that of a single mother or single woman. Her dignity is still infringed upon because of the lack of facilities in a building. A woman living with her partner will suffer the same domestic difficulties as a single mother.[88] The patriarchal nature of households still places the woman to be the sole and primary care-giver.

Mosikili explained that despite instances of men being the primary care-givers and sharing the difficulties of child-care, women generally have endured hardship. Men are advantaged because of their gender. Most of the respondents were of the view that section 4(7) is limiting. Webber and Wilson were of the view that lawyers place a lot of emphasis on people with disabilities and the elderly resulting in women-headed households falling by the way-side. The court having progressively ordering that a policy that does not include people facing eviction as an emergency to be unconstitutional. Could the court have elaborated on the section 4(7) analysis? The court having considered what is an emergency and having the personal circumstances placed before it, had an opportunity to interrogate the enquiry. What does an eviction mean for a Black woman living in poverty? The Constitutional Court could have grappled with the impact of various rights violations on women when providing its reasoning to the constitutionality of the policy.

In ensuring compliance, remedy that secures protection for women could have included that the state be able to report back to court on its available accommodation. The reporting process of available accommodation was ordered in the first phase of *Blue Moonlight* in the

[85] *Klaase and Another v Van der Merwe N.O. and Others* 2016 (6) SA 131 (CC).
[86] Interview with Moray Hathorn op cit note 56.
[87] Interviews with Stuart Wilson op cit note 23 and Emma Webber op cit note 49.
[88] Interviews with Emma Webber ibid, Stuart Wilson ibid and Charlene May op cit note 26.

High Court by Judge Masipa.[89] Subsequent to the High Court matter, the City has an obligation to file reports. This is an obscure reporting process which has the potential of further challenges. In order for there to be follow through on cases, judicial oversight is paramount.

d. Dladla

The political landscape which includes issues of transformation on the basis of race, gender and class has influenced their litigation strategies. It is evident from the interviews that some women are less favoured to adopt feminist litigation strategies but forced to do so because their attorneys or senior on the matter were adamant on advancing gendered formulated argument.[90] In other cases, it is the traditional lawyers who only wish to advance narrow arguments and what has been termed as the 'violation'. The younger lawyers who may not have adopted litigation strategies in the cases that they argued, have on reflection in certain instances said that it could have been utilised.

The strategy for the inclusion of gender arguments to be read with reasonableness was raised by the amicus curiae in the case of *Dladla*. CALS' submissions to all the courts included argument that rights infringement on women must be considered when a court decides on the constitutionality of the rules imposed on residents in TEA. The City resorted to providing the residents with TEA at the Ekuthuleni Shelter to residents who could not afford rental accommodation ranging between R600 and R1000 per month at the MBV Building[91] The rules included gender segregated rooms, daytime lock-outs[92] and it allowed the shelter to evict residents after 6 months if the resident had not complied with social worker requirements or were disruptive. The applicants argued that the City acted unreasonably by imposing these rules on the residents.

CALS arguments were centred on the impacts of the conditions on women. They further used international instruments to frame the legal protection of women when interpreting section 26 and in the reasonableness test. In their written submission, CALS stated the following: "Given their detrimental and discriminatory impact on women, the Ekuthuleni shelter rules are, we submit, unreasonable within the meaning of s 26(2) of the Constitution. The result is that

[89] *Blue Moonlight Properties 39 (Pty) Limited v Occupiers of Saratoga Avenue and Another* (2006/11442) [2008] ZAGPHC 275 (12 September 2008).
[90] Interview with Janice Bleazard op cit note 57.
[91] Applicants Written Submission, High Court by Paul M. Kennedy, Stuart Wilson and Mkhululi Stubbs 5 May 2014, para 23.
[92] *Dladla and Others v City of Johannesburg Metropolitan Municipality and Another* supra note 4 para 16.

the City has failed to comply with its obligation under s 26(2) of the Constitution in the implementation of its temporary accommodation programme at Ekuthuleni."[93] The courts had to grapple with the right to adequate housing and the intersectionality of housing with the right to dignity, privacy and safety. These rights holistically provide that a shelter provided as TEA amounted to a home. The court grappled with the question whether TEA, which constituted a shelter amounted to a home. If the shelter was the only form of accommodation offered by the City and people have no place other than the shelter, is that not a home?

The City failed to realise that every person needs to relax after a hard day of work and to enjoy the sanctity of peace and warmth of a home. The infliction of the rules on the residents was an infringement of the residents' rights to dignity and privacy. The right to family life had to be interpreted and respected to appreciate that the City was unreasonable in its policy making. The right to family life may not be explicit but our courts have dealt with the right drawing from international instruments. O'Regan J discussed the right to family life in *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others,*[94]

> "The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends. The importance of the family unit for society is recognised in the international human rights instruments referred to above when they state that the family is the "natural" and "fundamental" unit of our society. However, families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms."[95]

The right to family life is an aspect required to realise the right to adequate housing. There is no explicit right to family life, but the courts have interpreted family life to be an important

[93] CALS' written submissions, Constitutional Court by Emma Webber, para 26.
[94] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).
[95] Ibid para 31.

societal norm.[96] The Constitutional Court stated in *Dladla* that "The right to dignity includes the right to family life. This right in turn consists of the right to marry and the right to raise a family. The family separation rule creates a vast chasm – between parents and children, between partners and between siblings – where there should be only intimacy and love. As the High Court notes, the family separation rule erodes the basic associative privileges that inhere in and form the basis of the family. Therefore, in so many ways, the lockout and family separation rules limit the dignity of the applicants."[97] The litigants and gender experts raised issues pertaining to housing that were not directly posed. Hathorn stated that policies must take into account the dignity of women. Budlender concurs providing that the lack of housing affects a woman's dignity.

It was common amongst the gender experts that the intersectionality of health, sanitation, safety and privacy affected a woman's right to adequate housing. A pertinent topic of the intersectional nature of a woman's right to housing emanated from the interviews; Webber, Bleazard and Hathorn raised the importance of access to adequate sanitation, safety and privacy of women. The intersectional rights violations of the rules imposed on the applicants were highlighted by Mhlantla J. Mhlantla J, on behalf of the majority, found that the lockout rule infringed the right to privacy and further freedom and security. She stated the following in relation to the right to privacy:

> "It is even more obvious that the lockout and family separation rules impair the right to privacy set out in section 14 of the Constitution. The fact that the applicants are forced out onto the street during the day means ipso facto they do not have privacy for the duration thereof. The right is given effect only if the applicants have a place they can call their own to which they can retreat at any time. The lockout rule destroys their ability to avail themselves of such solitude. One would think that people who have been evicted from their homes in which they had some privacy would be provided a substitute with a measure of the same. They were not."[98]

This paragraph is evidence that the City's plan and policy on TEA had not protected the applicants' rights to privacy. The Court however, had not interpreted this aspect through a gendered focus, particularly how has the lack of privacy impacted a woman.

The court expanded on its analysis of the lockout rule, finding that it is an infringement of one's freedom and security. It stated:

> "Finally, the impugned rules limit the right to freedom and security of the person. It goes without saying that they restrict the movements of the applicants in critical respects. As the applicants have complained, they could not go about their business because the lockout rule

[96] Ibid.
[97] *Dladla and Another v City of Johannesburg and Others* supra note 4 para 49.
[98] *Dladla's* case ibid para 51.

> prevented them from accessing the Shelter during the day and barred them from entry after 20h00. Because parents could not visit their children and partners of different sexes could not stay with each other, the family separation rule materially affected the movements of the applicants within the Shelter as well. The lockout rule also endangered the applicants. In particular, the lockout rule exposed the applicants to the vagaries of street life both during the day and at night. Several of the applicants have been assaulted. According to the applicants' submissions, one applicant was even stabbed after he was denied entry at night. After a long work shift, or a painful medical procedure, the applicants would also have nowhere to rest and would be forced to suffer on the street after curfew. The City did not dispute these facts, which illustrate the impact of the impugned rules on the applicants."[99]

It is worth noting that the both men and women were subject to infringements of their rights. However, how does the infringement of the right to freedom and security impact a woman? Despite the CALS' evidence on the prevalence of sexual violence in Johannesburg,[100] and the limitations of these realities on women were not mentioned.

The SCA in *Dladla* failed to consider any of the rights-based analysis advanced by parties. The court delivered a disappointing judgment that failed to consider the living conditions of the residents. The use of international landscape and its relevance to gender and reasonableness was found to be 'trite' and no in depth analysis was given.[101] The residents appealed the matter to the Constitutional Court. In December 2017, the Constitutional Court ruled on the constitutionality of the rules. Although all judges concurred that the rules were unconstitutional, the judgments varied in their reasoning. The judgments did not deal with the impacts of the rules on women. The majority judgment found that the rules infringed one's right to dignity, privacy and freedom and security. Despite the first amicus curiae arguing that the City's obligation to provide adequate housing is constituted in section 26 (2), and that the imposition of the rules rendered the City's conduct unreasonable,[102] the majority judgment failed to interrogate the City's obligations in terms of section 26(2) of the Constitution and in particular the reasonableness argument.

The minority judgment written by Cameron J, and concurred to by Froneman J and Khampepe J agreed with the majority but with different analysis and reasoning. The minority found that the City's obligation to provide TEA was embedded in section 26 (2) and that the infringement of the right was unreasonable. It stated "…[T]he correct position is surely that,

[99] *Dladla's* case ibid para 52.
[100] *Dladla's* case Constitutional Court Record Volume 15, 1241.
[101] *City of Johannesburg v Dladla and Others* supra note 4 para 23.
[102] CALS' written submissions by Emma Webber, para 29.

when government provides temporary housing in fulfilment of a court order, section 26(2) and its reasonableness criterion govern the way in which it does so..."[103] However, they did not adopt the argument by CALS to engender the reasonableness element. Bleazard noted that the argument by CALS in the courts was critical to expect the City to protect women. CALS assisted the court to establish the reasonableness argument. However, it was an opportunity lost by all three courts to acknowledge and infuse gendered perspectives into a housing case. The judgment is a case in point that reaffirms that our courts are nonchalant to gender arguments despite amicus curiae interventions. The *Dladla* case could have been the turning point in the Constitutional Court's jurisprudence that would have merged gendered perspective. Unfortunately, South Africans must await another case that includes flagrant infringements to a woman for a court to address gender.

The *Dladla* case consists of blatant infringements to the right to dignity, privacy and safety. The impact of the conditions on the shelter has adversely impacted on the rights of women. The applicants (residents) argued the infringements under section 10, 12 and 14 of the Constitution. The judgment ought to have considered the amicus curiae (CALS) evidence emphasising a gendered focus using the interdependent rights based argument and international and regional instruments arguing that a reasonable outcome should incorporate a gendered interpretation. The counsel who acted on behalf of CALS[104] were satisfied and optimistic of the role of amici. They saw the benefits of the intervention, but more so in the High Court. The Constitutional Court has failed to incorporate gender. Bleazard who initially was not optimistic but as she acknowledged, she was 'prompted' by her attorneys and senior on the matter. She subsequently realised the value of the intervention.

CALS' intervention was welcomes by the applicants' legal team. Zondo indicated that the CALS' intervention emphasised the value of the expert reports that got lost in the volume of paper. CALS used the social worker report and the statistics that they adduced in the High Court to illustrate the adverse impacts of the living conditions.[105] Wilson, who argued on behalf of the residents, was appreciative of CALS' intervention and stating that it had two benefits; first, the intervention was supportive to the applicants. The case in itself was difficult in that it was risky to challenge the conditions of TEA. Second, the intervention enforced the arguments on impact, in particular the impact on a vulnerable group.[106] The outcome of the case has the

[103] *Dladla and Another v City of Johannesburg and Others* supra note 4, para 68.
[104] Interviews with Janice Bleazard op cit note 57 and Emma Webber op cit note 49.
[105] CALS written submissions at the Constitutional Court by Emma Webber paras 15-27.
[106] Interview with Stuart Wilson op cit note 23.

potential to have assured that women residents are given the basic adequate shelter to have provided a foundation to reach their full ability.

The structure of the arguments of the *amicus curiae* complement the applicants and together they were able to provide structured and robust arguments on the intersectional rights to adequate housing. The *Dladla* case was the beginning of how litigation ought to be focussed on gender and that the impact of right violations on women ought to be a consideration in litigation strategies, and augmented with amicus curiae support.

III. CONCLUSION

The four cases under analysis have been the leading jurisprudence in the development of housing jurisprudence. This chapter has unpacked the Constitutional Courts' analysis of cases in the realm of socio-economic right principles and the trajectory of eviction law and its concepts. The chapter also provided a proposal to judges on how judges ought to incorporate a feminist approach in its analysis.

The analysis proves that judges have not incorporated a feminist approach. In reaching this conclusion, an analysis of the litigation strategy in each case have been interrogated to ascertain how lawyers influence jurisprudence. As the litigators noted that gender was not focal in *Grootboom, Olivia and Blue Moonlight* and therefore was correct that gender could not have been argued. At least 9 of the litigators found that if gender could not have been used in the mainstream litigation then the role of the amicus curiae is valuable to raise these issues. The value of an amicus curiae on gender was seen in *Dladla*. Those litigators that were aware of the litigation process, were unanimous in their view that the CALS intervention enhanced the prejudice caused especially against women.

The critique of the four cases are based on the premise that lawyers and judges are not always empathetic to the plight of their clients/aggrieved party especially if the client/aggrieved party is a woman. The four cases are also indicative of the societal failures of not conscientising lawyers and judges of the gender imbalances and how litigation influences jurisprudence to bridge the gap and achieve gender transformation and redress.

It is on this basis that the following chapter addresses the gaps in public interest litigation and proposes optimal litigation strategies to advance a feminist approach in housing cases.

CHAPTER 4 – A FEMINIST CRITIQUE OF PUBLIC INTEREST LITIGATION

I. INTRODUCTION

The previous chapter critiques the four key housing rights cases in South Africa, highlighting the absence of feminist arguments and approaches in almost all instances and proposed an alternative interpretation for judges. Understanding that to be truly transformative, public interest litigators ought to be reflective about their litigation strategies, this dissertation has sought to understand how to advance a feminist approach especially in housing rights cases. In order to respond adequately to how to incorporate gender in litigation, this chapter uses its feminist framework to critique litigation strategies used by the public interest sector, identifying the gender gaps in litigation strategies. The chapter subsequently applies the contextual and conceptual frames, along with the critique of the existing jurisprudence, pursued in the previous chapters, and combines it with interviews with litigators, judge and gender experts to propose an optimal litigation strategy to advance a gender integration in housing cases for South African public interest litigators.

II. A CRITICAL ACCOUNT OF PUBLIC INTEREST LITIGATION

The current legal strategies that have been documented in South Africa on public interest matters are based on a seven point structure theorised by Gilbert Marcus and Steven Budlender[1] in the report 'A Strategic Evaluation of Public Interest Litigation in South Africa' commissioned by the Atlantic Philanthropies ("the APR"). This report was commissioned by one of the biggest donors of the Public Interest Litigation Sector ("PILS"), Atlantic Philanthropies ("AP"). The AP mandated two advocates to provide draft the report on strategic litigation. The report has reduced PIL to a seven point guide for a successful litigation strategy. These include proper organisation of clients,[2] overall long-term strategy,[3] co-ordination and

[1] Gilbert Marcus & Steven Budlender 'A Strategic Evaluation of Public Interest Litigation in South Africa' Atlantic Philanthropies 2008 http://www.atlanticphilanthropies.org/learning/strategic-evaluation-publicinterest-litigation-south-africa.
[2] Ibid 111.
[3] Ibid 116.

information-sharing,[4] timing,[5] research,[6] characterisation[7] and follow-up.[8] Marcus and Budlender argue that, for a successful case, there must be a long-standing client mobilisation process. It is their view that the Treatment Action Campaign ("TAC") was an example where such a movement played a significant part in the success of the case. Public interest litigation has to have a longer term strategy. They argue that the relief that is sought should be for the broader public and achieve a longer term solution. Litigation cannot be a first option. The issues must be ripe for litigation. Research is usually understated and downplayed by the sector. They argue that international arguments are not researched an applied in cases. Implementation of court orders do remain a problem area for most communities fighting against government stakeholders. The remedy that lawyers seek should ensure that there is follow through. Marcus and Budlender argue that structural and supervisory court interdicts are preferably used to achieve this purpose of realising a court order.[9]

A follow up report by Budlender, Marcus and Nick Ferreira ("the second APR report")[10] describes lessons learnt from the various public interest cases that have come before the Constitutional Court, and extended its analysis to include four legal strategies. This report was an expansion of the first report in that it also included education matters and the lessons learnt from all public interest cases until the date of publication. The authors crafted their synopsis of the litigation paradigm into four categories: public information; advice and assistance; social mobilisation; and litigation.[11]

The report assesses litigation strategies from conceptualisation to the point of litigation without considering the actual argument to include to achieve social change. As litigators, litigation is the last resort unless it is an urgent application, as seen in *Government of the Republic of South Africa and Others v Grootboom and Others.*[12] The case commenced with an urgent court application in response to unlawful evictions.

[4] Ibid 118.
[5] Ibid 119.
[6] Ibid 120.
[7] Ibid 121.
[8] Ibid 122.
[9] Ibid 146.
[10] Steven Budlender, Gilbert Marcus & Nick Ferreira 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' Atlantic Philanthropies 2014 http://www.atlanticphilanthropies.org/app/uploads/2015/12/Public-interest-litigation-SA-exec-summ.pdf.
[11] Ibid 95.
[12] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (hereafter referred to as "*Grootboom*").

Based on these seven points, the APR Report has critiqued cases such as *Mazibuko and Others v City of Johannesburg and Others*[13] on the grounds that it did not tick all boxes that they conceptualised to be the ideal in every public interest matter.[14] Jackie Dugard and Malcolm Langford critiquing the argument that *Mazibuko* did not meet the check list, find that *Joseph and Others v City of Johannesburg and Others*[15] was successful but did not tick all the boxes.[16] Interestingly, all these authors have failed to consider the gender angle, particularly as it relates to client and community mobilisation. The litigation strategies proposed and critiqued have failed to concentrate on three aspects dealing with gendered lawyering. First, consultations and drafting of affidavits; second, transformation of the public interest litigation sector, which takes into account legal team compositions; and third, gendered specific funding to further gender project.

Is it correct that community mobilisation is pivotal in a public interest case? How ought mobilisation to take into consideration gender dynamics within the community, who speaks more in consultations, and how does one find redress to assist the vulnerable groups within a community? Community consultations and mobilisation tends to be a momentous task if there is a fragmented community. Lawyers cannot disrupt and dictate how a community mobilises but ought to encourage and support the client community to ensure mobilisation. Interference removes agency and the community identity.

If communities are mobilised and litigation is ripe (as correctly stated in the APR report), the next step is statement taking and drafting of affidavits. How is the clients' narrative captured? And if the client is a woman, does it bring to the fore the lived realities so that the remedy can address the gender bias in a community.

Interestingly, the clients in many of the emblematic socio-economic rights cases have been women, including the lead applicants in the *Grootboom* and *Mazibuko* cases. Yet the legal approaches of the lawyers and the Constitutional Court judgments did not incorporate gender. These were lost opportunities (regardless of outcome) to engender socio-economic rights jurisprudence.[17]

Litigation strategy in housing cases, goes beyond consultations, drafting and legal argument. It leads to the question on whether legal teams and the lack of conscientisation of

[13] *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) (hereafter referred to as "*Mazibuko"*).
[14] Steven Budlender, Gilbert Marcus & Nick Ferreira op cit note 10, 63, 69.
[15] *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC).
[16] Jackie Dugard & Malcolm Langford 'Art or Science? Synthesising lessons from public interest litigation and the dangers of legal determinism' 2011 27 *SAJHR* 39.
[17] The High Court judgment incorporates a gendered perspective in the context of water. See chapter 1, 9.

lawyers impact the legal strategy. The gender gap in housing cases solicits the question: to what extent do lawyers influence strategy which impacts the approach with lawyering?

The lawyer who resonates with her client adds a different and worthwhile dimension to the case. As Elizabeth Schneider notes that a lawyer arguing through experience conceptualises feminist litigation. She states that:

> *"the best kind of legal theory-making and strategy comes out of personal experience . . . .The notion that there was something wrong came directly out of our own experience as women's rights activists, directly out of our own consciousness-raising experiences, out of our understanding of sex bias and the concept of reasonableness and its application to those situations."*[18]

A litigator, Buhle Lekokotla concurred with this view and believes that Black women have a different perspective to bring to their client communities.[19] As stated by Crenshaw, Black women have experienced their own prejudice due to the colour of their skin.[20] It is on this basis that Black women lawyers who experience the lived realities of the clients, that are able to filter the experience through the litigation process.

In contrast to the view that the lawyer must be a person who resonates with a client, an expert was firm that there is no optimal litigation strategy but rather that it depends on good lawyering.[21] As she stated, it requires a "lawyer who is well-equipped and who understands race, class and gender and is able to develop that with a strategy in mind - you cannot have a strategy without a remedy."[22] However, the lawyer should be a person who understands that the struggles of her client is for the reality of majority of women. Therefore, a feminist lawyer would not only fight for the interests of her client but would construct a case for the broader feminist project.[23] The hierarchical nature of the profession potentially hinders the feminist legal project.[24] The difference of opinion between attorney and advocate is indicative of the split bar system, which has its advantages and disadvantages. As an attorney, one is so immersed in the litigation that it is useful to have an objective view on the matter. The downside

[18] Elizabeth Schneider 'Lesbians, Gays and Feminists at the Bar: Translating Personal Experience into Effective Legal Argument' 10 *Women's Rights Law Reporter 1998 Vol 10* 107, 115-16.
[19] Interview with Buhle Lekokotla (Interview held on 28 March 2017).
[20] Kimberlé Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' *The University Of Chicago Legal Forum* 1989 Issue 1, Article 8 139, 149.
[21] Interview with Respondent X (Interview held on 13 March 2017).
[22] Ibid.
[23] Naomi R. Cahn 'Defining Feminist Litigation' *Harvard Women's Law Journal* 1991 Vol 14 1, 14.
[24] Stuart Wilson's view that the profession ought to tackle the hierarchies of the profession (Interview held on 25 April 2017).

to that is that advocates do not always understand the full implications of the client's lived realities to advance the argument that an attorney would wish to advance. In most cases, attorneys voiced that the gendered impact was raised in the litigation strategy, but advocates remove it from pleadings and fail to advance it during oral argument. This was raised by two attorneys who felt that counsel who led the litigation strategy deleted profound gender arguments that could have impacted on women's rights more broadly.[25]

The power imbalance in the attorney client relationship is prevalent. The lawyer should understand when and how to separate her experiences from influencing the case.[26] The skill lies in that person removing him/herself from the reality of the case and to be empathetic while proceeding objectively. According to Naomi Cahn, writing in the United States context, the main reason for the failure to litigate infusing gender has been that lawyers do not want to engage with feminist legal methods, are not skilled to do so or do not have an interest in doing so.[27]

For purposes of the conversations in the South African landscape, and of the PILS, legal teams should be representative of the demographics of the country. Lawyers are trained to draft affidavits and to present eloquent and articulate arguments in court, but it requires lawyers who are committed to seeking change for women socially and economically and politically.[28] A feminist lawyer is the person who is able to prepare arguments in the clients' interests because she is a woman and to be able to respond to her opponent.[29] The unseen success is the lawyer who is able to present argument that he/she can resonate with the facts of the case before them.

Furthermore, the profession as a whole has favoured White counsel to be proficient in socio-economic rights cases. These assumptions and practices ought to change and Black female counsel should be afforded the opportunities to lead feminist litigation.[30] Sibongile Ndashe's view is that not all female counsel are productive. A feminist lawyering requires committed lawyers to the feminist project and not ad hoc lawyering at one's whim.[31]

This is a niche area that would require lawyers who are passionate of this area of work and are willing to dedicate time and energy to the initiative. Gendered lawyering, to this day

[25] Interviews with Teboho Mosikili (Interview held on 16 March 2017) and Sibongile Ndashe (Interview held on 2 May 2017).
[26] Naomi R. Cahn op cit note 23, 17-18.
[27] Ibid, 1.
[28] Ibid 17-18.
[29] Ibid.
[30] Cynthia Grant Bowman and Elizabeth M. Schneider "Feminist Legal Theory, Feminist Law Making, and the Legal Profession" *Fordham Law Review* Vol 67, 249.
[31] Sibongile Ndashe presentation at the NADEL Gender Workshop on Feminist Litigation Strategies, Webber Wentzel, 19 August 2017.

has been *ad hoc* and a community of experts must unite to provide attention to feminist litigations strategies.

The four cases in question, discussed in Chapter 3 have been argued by predominantly White men and three White women. Out of the four cases there has been four Black attorneys, two Black male advocates and one Black female advocate. Does the race and gender of lawyers impact the arguments that are advanced? Or does it mean that the legal profession is so hierarchical that advocates advance arguments without any contact or relationship with the client?

The PILS has been pivotal in the development of transformative jurisprudence but internally, the sector is still striving for transformation. Public interest litigation requires a novel and nuanced response to Black women legal teams, to transcend the same thought process from beginning to finish. This in no way reflects that all Black women's experiences are the same, but merely enforces transformative aspects to litigating public interest matters. The political landscape which includes issues of transformation on the basis of race, gender and class has influenced their litigation strategies. It is evident from the interviews that some women are less favoured to adopt feminist litigation strategies but forced to do so because their attorneys or senior on the matter were adamant on advancing feminist argument.[32] In other cases, it is the traditional lawyers who only wish to advance narrow arguments and deal with finding a remedy for the violation suffered by the client. According to the gender experts and litigators interviewed, the justification for not using feminist legal methods in litigating socio-economic rights has been that judges are not interested in theory. Surprisingly however, a Judge interviewed for this dissertation, Respondent Y explained that he would be open to public interest litigators developing such strategies and arguments.[33] The younger lawyers who may not have adopted litigation strategies in the cases that they argued, have on reflection, said that in certain instances gendered arguments could have been utilised.[34]

The nature of the profession is that White male lawyers are treated with more respect than Black lawyers and women.[35] Judges would agree with White male lawyers and listen attentively to them. From a strategic point of view, this would be a reason that attorneys would favour briefing white men. It is not their skill but mere perpetuation of the apartheid legacy to

[32] Interview with Janice Bleazard (Interview held on 11 April 2017).
[33] Interview with Respondent Y (Interview held on 11 April 2017).
[34] Interview with Teboho Mosikili op cit note 25.
[35] Interviews with Buhle Lekokotla op cit note 18, Emma Webber (Interview held on 29 March 2017) and Janice Bleazard op cit note 32. These views have been their personal experiences.

treat White people as a 'messiah.'[36] This is an unfortunate reality but attorneys will go to drastic lengths to win a case for their clients. As Wilson states that 'competence is defined through racial and gender lines' as a person needs to adopt a 'specific persona in court.'[37] These are historical realities which should be addressed.

Black feminists argue rights infringements have always been argued to include the experiences of the White woman and Black men.[38] It is against this point, the litigation strategies and lawyers representing women should be resonant to the plight of those on whose behalf they are arguing. Although lawyers in the sector have attained middle class lifestyles and live in better circumstances than their clients, most lawyers have emerged from poverty. Most of these lawyers have been raised by single mothers and they understand the struggles that women experience.[39] Black lawyers who have overcome poverty, discrimination and hardship are likely to choose careers that are resonant with their lives. A litigator, Moray Hathorn differs on the point that only Black women would identify with their clients.[40] He feels that he is able to consult and argue matters on their behalf. He says that it may only become difficult in cases of sexual violence.[41] The reason given by Hathorn is indicative of the lack of feminist litigation thought and theory. It takes more than skill to advance a gender integrated focus in cases when representing disadvantaged communities and Black women. The failure of recognising the need for feminist lawyers illustrates a disconnect between the lawyer and the client, especially the woman client.

The final critique relates to the lack of funding for gender work. The costs of counsel and other litigation costs must be must be factored into the costing of feminist lawyering. When strategising on the cases, the PILS must effectively prepare funding proposals and budgets. Gender experts, Seehaam Samaai and Charlene May both suggested that it requires a concerted effort to strategise on gender related matters. The sector is reliant on external funding and therefore the suggested strategy and work required is not doable without concentrated resources and capacity. Samaai and May further stated that dedicated funding would be required to employ someone solely for strategic planning on gender matters. It is only by researching the

[36] Interview with Nomzamo Zondo (Interview held on 17 March 2017)
[37] Interview with Stuart Wilson op cit note 24.
[38] Kimberlė Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' *The University Of Chicago Legal Forum* 1989 Issue 1, Article 8 139, 142-143.
[39] Interview with Teboho Mosikili op cit note 25.
[40] Interview with Moray Hathorn (Interview held on 24 April 2017).
[41] Interview with Moray Hathorn ibid.

current landscape and getting various gender organisations around a table to strategise on how to confront problems in order to work towards the change envisaged.[42]

III. OPTIMAL LITIGATION STRATEGIES

During the interviews, all litigators and gender experts were asked, in general terms, what an optimal litigation strategy ought to be. Three of the litigants said that a 'narrow approach' is best, which meant that argument must be advanced to obtain the relief. For these respondents, any arguments incorporating gender would deviate from the core relief.[43] The analysis canvassed in the dissertation disagrees because that the relief is limiting to women by failing to eradicate the impacts of the infringements. It further fails to highlight the gender disparities and to ensure that the outcomes address the lived experiences for women. The remaining litigants and gender experts suggested at least one of the aspects of the feminist approach advocated here.

According to Cahn, when arguing incorporating gender, the lawyers must bear in mind the following – she ought to tell the story of her client use the legal principle to obtain the relief.[44] Based on the scholarship as well as interviews, several optimal litigation strategies for incorporating gender emerge; gender-sensitive consultations and drafting, the role of amicus curiae, arguments, relief and advocacy and training incorporating the feminist framework conceived in Chapter 2.

a. Gender - Sensitive Consultations and Drafting of Affidavits

Attorneys acting on behalf of communities usually have direct access to their client communities unlike attorneys acting on behalf of *amicus curiae.* The initiation of eviction processes begins with service in terms of section 4(2) of the PIE Act. The notice of eviction must be served by the Sheriff of the Court on all occupiers living in a building or house. The eviction papers must include who is being evicted, the date of the court hearing, which court the occupiers should be attending and the right to legal aid/pro bono representation, if

[42] Interviews with Seehaam Samaai (Interview held on 6 April 2017) and Charlene May (Interview held on 4 April 2017).
[43] Views with Paul M. Kennedy (Interview held on 7 March 2017), Heidi Barnes (Interview held on 20 March 2017) and Geoff Budlender (Interview held on 3 April 2017).
[44] Naomi R. Cahn op cit note 23, 19-20.

necessary. The common practice in evictions is that the owner or State (the applicants) does not interrogate who the actual occupiers are, their details, family situation, how many children, women, elderly or disabled. Applicants who seek to evict, cite the evictees using a general averment such as *"the occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg"* or *"the Occupiers of Saratoga Avenue."*[45]

This practice places an onerous task on the evictees to gather the information within short periods of times. In order to litigate and avoid the challenges with capturing information, lawyers request that clients form committees, which perform the role of governance structures. The committees are important as they are the driving force of litigation strategies. They assist with calling meetings with the communities and play an intermediary role between lawyers and the community.[46]

The personal circumstances that are placed before the court in all eviction court papers constitute the personal circumstances of all individuals in all households. This includes names of all members of the household, ages, identity numbers, the period that the family or individuals have been living in the current property, their incomes, sources of income, how is money being spent, the schools that the children attend, access to transport for work and school, is the family of household dependent on social grants, the conditions of the building, and the reality of homelessness.[47] The information must provide a detailed account of one's personal daily life which many clients feel ashamed to share. Some are willing to share these details as they are of the view that the courts would empathise with them and provide them with a solution that would be suitable and in the best interests of the family. May discussed these personal circumstances as an onerous task which the applicant evades especially if the applicant is the State. The approach is therefore standard and mediocre absolving the applicant from its responsibility to meaningfully engage.

This information is important in the first instance to reflect the number of women-headed households as this is the literal reading of section 4(7) of PIE. The story telling in eviction cases is merely compliance with the section 4(7) enquiry illustrating that that court must consider women-headed households, children and the elderly. May and Kay Mahonde are

[45] These were the citations in the cases of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) (hereafter referred to as *"Olivia Road*") and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) 2012 (2) BCLR 150 (CC) (hereafter referred to *"Blue Moonlight*").

[46] Centre for Applied Legal Studies 'Community Engagement Policy' 2014, 25.

[47] The checklist to oppose an eviction is available in the Resource Guide published by the Socio Economic Rights Institute 'Resisting Evictions in South Africa: A Legal and Practical Guide' 16 http://www.seri-sa.org/images/SERI_Dear_Mandela_Evictions_Guide_FINAL_FOR_WEB2.pdf (Accessed on 31 March 2018).

further of the view that the section 4(7) enquiry is 'a tick-box exercise' but the ultimate goal is to deal with issues on a broader scale.[48] May is of the view that a set of guidelines ought to be drafted for courts to be able to interpret the personal circumstances. She proffered a suggestion of having guidelines in place so that magistrates and judges can utilise them in interpreting personal circumstances. Samaai differed with the approach of guidelines for interpretation and drew an analogy with sexual violence. Samaai explained that in matters relating to GBV there are guidelines for various stakeholders, South African Police Service,[49] health practitioners,[50] the National Prosecuting Authority[51] and magistrates.[52] The guidelines did not create a framework that people could use to ensure that women are fully protected when reporting or follow up of their domestic violence cases. Guidelines are not always the solution to resolve the inadequacies of a system, but it could be a mechanism to instil regulation and conscientised thought processes when interpreting rights.

The information capturing and story-telling enhances the consciousness raising element on women's plight.[53] Mahonde and Bonita Meyersfeld believe that the point of the best litigations strategy starts at the point of consultation, in that it affords women a platform to express their story.[54] When a client responds to the lawyer's specific question it loses the human element. Further, narratives illustrates a picture for judges to understand the set of facts placed before them. More importantly, it is about how the facts are applied and interpreted and how they could be reflected in court judgments. Wilson stated that in the same way he had advised lawyers to speak about poverty in their affidavits, to illustrate the lived realities of disadvantage, versions of the gendered angle must be brought forward.[55] The disadvantage of the drafting process is that the story could be lost when lawyers draft. As Naomi Cahn notes

[48] Interviews with Charlene May op cit note 42 and Kay Mahonde (Interview held on 28 March 2017).
[49] The policy for SAPS includes the protocol of when one is dealing with a victim, questions that should be posed and conduct of that official. Such guidelines can be accessed at http://www.justice.gov.za/policy/guide_sexoff/sex-guide01.html (accessed on 12 May 2018).
[50] The policy which includes guidelines for health practitioners when examining a victim can be accessed at http://www.justice.gov.za/policy/guide_sexoff/sex-guide02.html (accessed on 12 May 2018).
[51] The policy guidelines for prosecutors can be accessed at http://www.justice.gov.za/policy/guide_sexoff/sex-guide04.html#1 (accessed on 12 May 2018).
[52] The policy guidelines for magistrates and parole boards can be accessed at http://www.justice.gov.za/policy/guide_sexoff/sex-guide05.html#1 (accessed on 12 May 2018).
[53] Naomi R. Cahn op cit note 23, 2. See also Katherine T Bartlett 'Feminist Legal Methods' 1990 103 *Harvard LR* 829 and Catherine Albertyn 'Gendered Transformation in South African Jurisprudence: Poor Women and the Constitutional Court' (2011) 22 *Stellenbosch Law Review* 591 in Chapter 2, section IV in Chapter 2, section IV.
[54] Interviews with Kay Mahonde op cit note 47 and Bonita Meyersfeld (Interview held on 31 March 2017).
[55] Interview with Stuart Wilson op cit note 24 wherein he referred to his article co-authored with Jackie Dugard, Stuart Wilson & Jackie Dugard 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' 2011 *Stellenbosch Law Review* 3 664, which states that lawyers must be coherent on the plight for their clients in affidavits. This was in the context of poverty but the same could apply to gender.

in her article[56] that lawyers have the role in the drafting process which influences the story telling. It is the lawyers who write the affidavits which is further modified by advocates to suit their stylistic preferences.[57] It is possible that the original voices of the women are not captured on affidavit and therefore the women's voice is lost.[58]

May however was of the view that the personal circumstances is a means of conveyance of the realities into court, but what does one do with that narrative? She was of the view that the courts, especially the lower courts, are ignorant on how to interpret these personal circumstances.[59] All litigators stated that they rely strongly on personal circumstances and ensure that is included in affidavits. At least nine of the twelve litigators and all gender experts concurred that it begins with a narrative. Three litigators find that the narratives should illustrate the inadequacy of the housing situation which embeds a gendered impact.[60] As Samaai noted, the women's story has 'deeper repercussions which could eliminate apartheid spatial planning.'[61] It would in reality mean that the gender focus on the impact of the lack of housing would address the power imbalances within the home and the systemic issues that continue to render women helpless.[62]

The inclusion of narratives is a step in the right direction, but what are those narratives to accomplish? This could raise the notion of consciousness raising[63] and to make judges and lawyers, the state and private owners aware of the lived realities of women, and of people living in poverty. Respondent X explains that the impact of the gendered focus should be targeted at the state and private developers. It is these stakeholders that have the power to provide housing to people that is mindful of women's rights to security, privacy and health.[64] However, the lack of political will hinders progression unless the state is deliberate and genuinely committed to addressing the needs of women.

[56] Naomi R. Cahn op cit note 23, 1.
[57] Ibid 3.
[58] Interview with Janice Bleazard op cit note 32.
[59] Interview with Charlene May op cit note 42.
[60] Interviews with Paul M. Kennedy op cit note 43, Teboho Mosikili op cit note 25 and Nomzamo Zondo op cit note 36.
[61] Interview with Seehaam Samaai op cit note 42.
[62] Interviews with Pierre De Vos (Interview held on 10 April 2017), Danwood Chirwa (Interview held on 10 April 2017)
[63] See Katherine T Bartlett op cit note 53 and Catherine Albertyn op cit note 53 in Chapter 2, section IV.
[64] Interview with Respondent X op cit note 21.

b. Amicus Curiae Interventions

Gender experts and a few litigators were of the view that amicus curiae intervention on gender should be a start. Amicus Curiae is a Latin phrase meaning 'friend of the court.'[65] Under the constitutional dispensation, the role of amicus curiae has become nuanced in that the amicus curiae assist the court an independent party.[66] The amicus curiae would develop argument independent of the parties involved in the matter.[67] The Constitutional Court Rule 10[68] provides guidelines on procedure to be followed as a potential amicus curiae.

Gendered arguments are pertinent to every social justice matter to eradicate the gender biases that exist. Budlender and Marcus identified the amicus curiae litigation strategy as

[65] Interpreted from the Latin word and adopted from Roman Dutch Law.
[66] Geoff Budlender 'Amicus Curiae' in Stuart Woolman *'Constitutional Law of South Africa'* Chapter 8.
[67] Amanda Spies 'Considering the impact on amicus curiae participation on feminist litigation strategy', 2015 *SAJHR* 136, 138.
[68] Rule 10 Amici curiae

(1) "Subject to these rules, any person interested in any matter before the Court may, with the written consent of all the parties in the matter before the Court, given not later than the time specified in subrule (5), be admitted therein as an amicus curiae upon such terms and conditions and with such rights and privileges as may be agreed upon in writing with all the parties before the Court or as may be directed by the Chief Justice in terms of subrule (3).
(2) The written consent referred to in subrule (1) shall, within five days of it having been obtained, be lodged with the Registrar and the amicus curiae shall, in addition to any other provision, comply with the times agreed upon for the lodging of written argument.
(3) The Chief Justice may amend the terms, conditions, rights and privileges agreed upon as referred to in subrule (1).
(4) If the written consent referred to in subrule (1) has not been secured, any person who has an interest in any matter before the Court may apply to the Chief Justice to be admitted therein as an amicus curiae, and the Chief Justice may grant such application upon such terms and conditions and with such rights and privileges as he or she may determine.
(5) If time limits are not otherwise prescribed in the directions given in that matter an application pursuant to the provisions of subrule (4) shall be made not later than five days after the lodging of the respondent's written submissions or after the time for lodging such submissions has expired.
(6) An application to be admitted as an amicus curiae shall-
    a. briefly describe the interest of the amicus curiae in the proceedings;
    b. briefly identify the position to be adopted by the amicus curiae in the proceedings; and
    c. set out the submissions to be advanced by the amicus curiae, their relevance to the proceedings and his or her reasons for believing that the submissions will be useful to the Court and different from those of the other parties.
(7) An amicus curiae shall have the right to lodge written argument, provided that such written argument does not repeat any matter set forth in the argument of the other parties and raises new contentions which may be useful to the Court.
(8) Subject to the provisions of rule 31, an amicus curiae shall be limited to the record on appeal or referral and the facts found proved in other proceedings and shall not add thereto and shall not present oral argument.
(9) An order granting leave to be admitted as an amicus curiae shall specify the date of lodging the written argument of the amicus curiae or any other relevant matter.
(10) An order of Court dealing with costs may make provision for the payment of costs incurred by or as a result of the intervention of an amicus curiae.
(11) The provisions of rule 1 (3) shall be applicable, with such modifications as may be necessary, to an amicus curiae."

beneficial to public interest litigation as a whole.[69] Amanda Spies' argument amplifies the importance of amici interventions arguing that the methods identified by Bartlett together with amicus intervention through a gendered perspective are litigation strategies that feminist litigants could use in order to achieve litigation incorporating gender.[70] The gender amicus curiae has mainly been visible in mainstream gender matters.

In respect to the cases subject of analysis in this study, there had been amicus curiae involvement in all four cases analysed in this dissertation. In these cases, the amici's submissions were of value in terms of assisting the Constitutional Court with framing the relief. However, none of the amici apart from CALS in *Dladla*[71] advanced gendered arguments. There should be concerted efforts by women's rights organisations to intervene and bombard courts with relevant information. It is in this way that the courts would become accustomed with the nuances of gender within the housing landscape.

The litigators apart from three litigators were of the view that an amicus is the best approach to begin gender arguments. At least three of the litigators have voiced a traditional conservative view that stated that one should not inundate a court with too many issues and although gendered arguments are useful, it risks getting lost in the argument.[72] Their discord on amicus intervention stems from the notion that the main litigants have the relationship with the community and their clients and are able to demonstrate to a court the actual plight of its client community. To enforce gender roles through mainstream litigation would be the ideal. An amicus curiae intervention that focusses on gender is seen as 'another argument' and not the main focus. The court upon deciding on remedy has to assess according to a check list and will scrutinise the important arguments.[73] Kennedy further was of the view that the amicus could not incorporate gender as a gendered focus would deviate from the objective of attaining relief on the municipality's constitutional obligations.

Contrasted with Kennedy's view, May argues that gender arguments are not being argued in mainstream litigation, 'amicus curiae should bombard courts'[74] with information highlighting the importance of gender. The amici have the opportunity to raise provisions from international and regional instruments in their arguments.[75] The instruments must be

[69] Steven Budlender, Gilbert Marcus SC and Nick Ferreira op cit note 10, 136.
[70] Amanda Spies op cit note 67, 142.
[71] *Dladla and Another v City of Johannesburg and Others* 2018 (2) SA 327 (CC) (hereafter referred to as *"Dladla*").
[72] Interviews with Paul M. Kennedy, Geoff Budlender and Heidi Barnes op cit note 41.
[73] Interview with Heidi Barnes ibid.
[74] Interview with Charlene May op cit note 42.
[75] See section *iii* on Arguments.

considered by our courts and this would make lawyers and the judiciary aware of the need to have regional instruments assimilated into our jurisprudence and law.

The advantage of amicus is that they are able to raise novel and nuanced arguments. They are afforded the right to bring in argument that could assist the court. The amicus submissions should incorporate arguments on gendered grounds. This will provide a new dimension to a case. It could start with narratives if the mainstream litigation does not have that included in their affidavits. The facts must be supported by feminist legal argument which constitutes the feminist literature to be assimilated to the facts. The amicus role is therefore a crucial opportunity to further the constitutional project of infusing feminist legal argument for consideration by the Court. The amicus curiae's role in this regard must not be overlooked.

c. Arguments

The main litigant or the amicus curiae could advance arguments drawing from international instruments and the interdependence of rights arguments, using sections 9, 10, 12 and 14 of the Constitution. The international and regional frameworks are blatant on the protection of women which, could strengthen the argument.

Section 233 of the Constitution states that "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." This section allows for the court to have interpreted section 4(7) of the PIE Act to understand housing through an engendered focus. The broadness of section 4(7) enables a court to interpret the section and by using international instruments.[76] Moultrie advised international law should be argued through section 233 rather than section 39 of the Constitution.

The use of international and regional instruments in establishing a gendered perspective is needed. The litigators were of the view that it is important, but one should be careful with how the instruments are used and applied. Moultrie holds the view that international law could be used but must be applied to the facts of the case and in interpreting the content of the legislation or law.

The international legal framework is trite[77] – yet have courts have not considered and/or incorporated these instruments in their judgments on this basis.[78] There has been mixed

[76] Interview with Seehaam Samaai op cit note 42.
[77] See Chapter 2, section IV.
[78] *City of Johannesburg v Dladla and Others* 2016 (6) SA 377 (SCA). See also Chapter 3 II *(d).*

views on the use of international instruments in litigation strategy. The twelve participants thought it would be helpful, but each one then qualified whether they thought it would useful or there was a caveat attached. Zondo and Webber were determined that international law can definitely be raised in cases. Zondo elaborated that international law can be used to shape our jurisprudence in socio-economics rights and gender as there is a gap. The court in *Grootboom* stated that "The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable."[79] The Court's approach to international law and its consideration thereof was referred to and analysed by Budlender, as he stated that Constitutional Court is most open to international law arguments, as these were the core arguments of the amicus curiae in *Grootboom* and partly by CALS in *Dladla.*[80]

Barnes and Mosikili found that international law could be useful,[81] and finally, Wilson projected the view that South Africa has a nationalist municipal system, which requires interpretation; international instruments are useful aids for interpretation of legislation and the Constitution. It is important to note that most found that international law is useful but there was no robust support.

The enthusiasm for international law emanated from the interviews with Samaai and May. Samaai raised it in the context of interpreting section 4(7) of the PIE Act and May find that it must be understood to what housing means to women, especially in the context of a woman's right to safety and security. Drawing from Samaai's responses, the international legal instruments would fortify the interdependence of rights arguments. Some interviewees raised the importance of reading the right to equality and dignity, safety and security with the right to access to adequate housing when discussing their optimal litigation strategies.

The infusion of the rights based analyses must be reflected in a woman's affidavit. The narratives that must be placed before the court has to take into consideration the realities and the legal principle. In that way argument that ought to be placed before the court to advance a gendered focus should take into consideration arguments based on equality, dignity and freedom and security.[82] Cahn rejects the 'competing rights' arguments. She is of the view that

[79] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (hereafter referred to as *"Grootboom*"), para 27.
[80] Interview with Geoff Budlender op cit note 43.
[81] Interviews with Heidi Barnes op cit note 43 and Teboho Mosikili op cit note 25.
[82] An example of arguments based on interdependence of rights was done by CALS in their application to intervene as amicus curiae in the matter of *Dladla v City of Johannesburg and Other*s supra note 71. Also see the Founding Affidavit in the matter of the *Concerned Residents of Flag Boshielo West and Others v The Sekhukhune*

arguments ought to balance clients' needs and respond to your opponent.[83] This was the view of all litigators but what they fail to realise, that when advancing the infringement of a housing right and its impact on women, one would have to be deliberate. It is not a clear right in section 26 but has to be infused through sections 9, 10, 12 and 14 of the Constitution.[84] Meyersfeld summed it up by expressing that it 'would result in a comprehensive right to housing which goes beyond saving a woman and her children from the elements but rather that it has the right to life embedded within section 26 and judges would have that responsibility to ensure that all affected rights are protected.'

Housing rights jurisprudence is yet to be developed incorporating gender. As Zondo explained that engendered jurisprudence 'would be enriching'. It is not about section 26 but the rights to equality too. Meyersfeld, Samaai and May have indicated that housing includes all affected rights, dignity, safety and security.[85] In advancing a full argument supported by law that influences the court to interpret the law and facts integrating gender, women's circumstances could improve.

The arguments advanced must coincide with the lived realities of women. As discussed in Chapter 2, the lived realities of women display that the infringement of the right to housing adversely impacts a woman because she is Black, a woman and lives in poverty.[86] The litigants and gender experts find that the arguments must align with the struggles of Black women. A According to a gender expert, Meyersfeld stated that most women living poverty are Black, and this is linked to the feminisation of poverty. She said that that we have a "racist and sexist structure…its' not about the violation based on race, sex or housing[87] – it is all – we only address the violation one at a time and not realise that it is a multitude of rights."[88]

Respondent X, a gender expert, added the dimension of women of foreign nationality who experience disadvantage on the basis of race, gender and location. May found that during the xenophobic outbreaks in South Africa, many women who were evicted were sexually assaulted. This amplifies the notion that women in South Africa are disadvantaged on the basis of race, gender and geographical location.[89]

District Municipality (Case no. 15437/2015), where in the applicants emphasised the impact of the lack of water on the lives of women.

[83] Naomi R. Cahn op cit note 23, 3-4.

[84] See Chapter 1, 8 footnotes 40-43.

[85] See Chapter 2 for the feminist framework under section IV.

[86] See Chapter 2, section II.

[87] This enforces Kimberlė Crenshwe's argument on intersectionality, see Chapter 2 section IV.

[88] Interview with Bonita Meyersfeld op cit note 54.

[89] See Chapter 2, section II which discusses the lived realities of women illustrating the triple disadvantage based on gender, race and class.

The supporting affidavits ought to include feminist legal theory into their cases. This is important to conscientise the judges but also to ensure that all repositories of power are conscientised to begin incorporating gender into their policies and avoid another *Dladla* scenario. In the context of housing, a gendered focus has to focus on the law makers as the conditions of housing and temporary accommodation suits the needs of women.

Judges are inundated with cases. Eviction cases have become standardised and there are no original perspectives to consider. Thus, judges have remained nonchalant to looking at gender. They do however, state that there are women and children on the property and therefore people cannot remain homeless. This does not absolve them from applying a gendered focus.

These arguments if successful in litigation, and the relief is gendered an implemented accordingly, has the potential to result in a woman's right to development. The rights based argument supported by international law would enhance a women's capabilities.[90]

d. Remedy

In eviction cases, the remedy sought is to prevent an eviction and to address the inability of poor people to access the private property market. As Samaai stated that a gender focus would address the spatial planning. This is effect means that the relief ought to consider the impact of apartheid spatial planning and provide remedies that would fulfil a woman's right to equality, dignity freedom and security and privacy.[91] As litigators, relief is the starting point of strategic considerations when dealing with a matter; what do our clients want? The main concern for lawyers is what constitutes engendered relief that encompasses a practical outcome. The starting point is that judges, lawyers and the public are desensitised to feminist views. If one judge, lawyer or political figure changes their view of women or addresses the stigma associated with the problems that women face, it is a victory. Litigators often operate on black and white letter lawyering and fail to consider the broader impact of the arguments made and especially if it is repeated in judgments.

In cases of systemic change and public interest, lawyers would opt for either declaratory orders, non-supervisory interdicts or supervisory interdicts. Many socio-economic rights cases that obtained outstanding outcomes have failed to be implemented. The supervisory interdicts are designed in one of the following ways: 1) state when a party needs to comply and when

[90] See Chapter 2, section II and IV on the discussion of the capabilities approach.
[91] Interview with Seehaam Samaai op cit note 42.

the court would re-hear the matter; 2) the order could force parties to engage and negotiate a settlement; 3) all parties to participate; 4) matter referred to expert for remedy; and 5) courts and the parties could with the aid of a third party develop a consensual remedy.[92]

Ultimately, the question before a court is whether it is just and equitable to evict. The court must consider the relevant circumstances before it. What is a just and equitable remedy? An order that looks at the relevant circumstances of people. If this is so, why is gender not addressed? What about relief for women? Should it be tangible relief or relief to create awareness highlighting the plight of women, such as in *Mazibuko and Others v City of Johannesburg and Others*[93] and *Nkala and Others v Harmony Gold Mining Company Limited and Others*[94] matters? Samaai elaborated that the optimal litigation strategy is to respond to the question "what it means for a woman's security, health… a woman as a holistic being." She describes the realisation of the right to adequate housing to be "just not a about the woman sleeping there but a place that she is able to be a woman." Samaai expanded on the right to housing to be a place that a woman would be able to access transport, social grants, child care from neighbours and crèches.[95]

The relief that should be sought it to provide TEA in areas that are supportive to women. Housing may be a need for all poor people but yet again the issue on race and poverty has taken preference over gender. The relief for women is secondary, if at all.

The relief for rights violations of women should not end at the domestic level. Women should be advised to approach regional and international committees to report their right violations. Both the Optional Protocol for the ICESCR and CEDAW are available mechanisms for women.

Once all domestic remedies have been exhausted and there has been no substantive outcome, the woman or women could approach the committee for the Optional Protocol CEDAW ("OP-CEDAW").[96] If the complaint is admissible by the OP-CEDAW committee various remedies are available. These remedies include restitution, compensation, rehabilitation, restitution or actions necessary to restore the victim(s) to the conditions she/they

[92] Michael Bishop 'Remedies' Constitutional law of South Africa Chapter 9 Juta Publications 176, 180.
[93] *Mazibuko and Others v City of Johannesburg and Others* supra note 13.
[94] *Nkala and Others v Harmony Gold Mining Company Limited and Others* (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 (5) SA 240 (GJ).
[95] Interview with Seehaam Samaai op cit note 42.
[96] [96] ESCR-NET and IWRAW "Claiming Women's Economic, Social and Cultural Rights" 40 https://www.escr-net.org/sites/default/files/Guide%20on%20Women's%20ESCR%20-%20Final.pdf (Accessed on 29 April 2018); It is not necessary to exhaust domestic remedies if: "1. No remedies for the violation are available; 2. Remedies available are "unreasonably prolonged" (unreasonably time-consuming). 3. Remedies available are unlikely to bring effective relief."

would have been had the violation not occurred, retrial, enforcement of domestic court judgments which establishes conditions enabling the victim(s) to exercise a right, interim guidelines, instructions and steps to end continuing violations or prevent repetition of the violation and law reform.[97]

Women should be made aware of the option to use the international to lodge its complaints. The complaints could be made by them in the individual capacity or by their lawyers, NGO'S or communities. The domestic courts are not the only avenues. As South Africans, we have not extended beyond our borders and litigated in the regional courts.[98]

e. Advocacy and Training

The conscientising of the plight of women should extend to the public and to the magistrates and judges to eradicate the perceptions that people and women living the inner city are indolent and careless mothers.

Advocacy and media initiatives complement the litigation. Dugard and Langford state that advocacy could take many forms. It is not necessarily prior to litigation but rather the follow through. Mobilisation could come after the litigation, when outcomes are shared and to rally for broader social change.[99] Advocacy reaches the broader population through various mediums. The outcome of court decisions must be work-shopped and published into booklets so that the public at large have access to it. The gendered impacts must be included in these booklets not to under state its value especially to the public. As much as conscientising should start at judicial and lawyer levels it has to manifest on the ground. Women must understand their rights and how the law protects them.

There has been an underutilisation of Chapter 9 institutions in monitoring court order compliance. The role of both the South African Human Rights Commission and Commission for Gender Equality ("CGE")[100] could have been used to monitor gender compliance. As seen in *Grootboom*, the Human Rights Commission failed to acquire the information of the compliance of the Constitutional Court order.[101] For purposes of the gender court orders, the

[97] Ibid 47.
[98] Interview with Kay Mahonde op cit note 48.
[99] Jackie Dugard and Malcolm Langford op cit note 15, 64.
[100] The CGE is a Chapter 9 institution governed by section 187 of the Constitution. Its mandate is to promote, protect, monitor and evaluate gender equality.
[101] David Bilchitz 'Towards a Reasonable Approach to Minimum Core: Laying the Foundation for future Socio-economic Rights Jurisprudence' *SAJHR* 2003 (19) 1, 25.

CGE could conduct effective monitoring of gender issues and to ensure that court orders are complied with.

The media, if utilised in the correct way, have a profound impact on reaching the elite and the disadvantaged. The novel trend is in the form of opinion editorials and open letters to relevant public officials to enhance issues that are current.[102]

Advocacy entails not only initiatives with the public at large but also engagement with the State. This form of advocacy takes the form of drafting submissions on South Africa's compliance with UN conventions with regards to women and housing. Domestically, lawyers and activists could play a role in the drafting of gender-sensitive legislation and laws. Responses to calls for comments on Bills to Parliament of policies from Departments of Human Settlements, Water and Sanitation, Health, Basic Education and Transport impacts women and their rights to adequate housing.

Judges are influenced by the media. However, with appropriate litigation versions placed before a Judge, Samaai strongly emphasised the need to train magistrates and judges.[103] The question to judges and magistrates is what a feminist analysis is and how gender could be used in housing cases?[104] A court is only able to consider the numbers of women-headed households through the inclusion of personal circumstances in affidavits. The courts have commented that the onus of pleading the personal circumstances be placed by the applicants before the court.[105] However, in practice, the onus is placed on the occupiers.[106] May expressed that courts and the state are unable to interpret and therefore understand the personal circumstances. She finds that the courts are inundated with the personal circumstances but are not willing to interrogate them further. It is evident from the interviews that the narratives of

[102] Examples of opinion-editorial on gender related issue, see Tiffany Ebrahim, Zeenat Sujee and Edward Malopi 'Constitutional Court says emergency shelter rules are unconstitutional' which can be accessed on the link https://www.businesslive.co.za/bd/opinion/2017-12-13-constitutional-court-says-emergency-shelter-rules-are-unconstitutional/ (Accessed on 31 March 2018).

[103] The lack of judges and magistrates training of gender issues and women's plight has been evident in *Mazibuko* and *Nokotyana and Others v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC), where the issues were gendered and yet were never dealt with in judgments. Or it could be that judges refrain from speaking on behalf of women, due to the conversations on the lack of transformation in the legal profession and more particularly in the Public interest Litigation Sector. It has been understood that people should not empathise and speak on behalf of another group, men on behalf of women, and women of behalf of men, Black people on behalf of White people and White people on behalf of Black people. The damaging effect of a judges comments was the 2016 incident of Judge Mabel Jansen who proffered racist remarks on stereotyping all Black men as rapists and further that she has not met a Black woman who has not been raped. This was 'misguided' or blasphemous remarks made by a High Court judge.

[104]This view was shared with Bonita Meyersfeld op cit note 54, Seehaam Samaai op cit note 42, Charlene May op cit note 42 and Kay Mahonde op cit note 48.

[105] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA), para 34.

[106] Interviews with Charlene May op cit 42 and Respondent Z (Interview held on 13 April 2017).

women and men are different.[107] Regardless of the blatant differences and personal circumstances put before a court, courts are not able to grapple with the personal circumstances. Our judges and the state are not equipped to be dealing with feminist approaches.

IV. CONCLUSION

Litigation strategies in the PILS have been conceptualised but it has proven to have loopholes and gaps. The critique of the APR seven-point guide and the further critique on the lack of gendered focus and litigation teams address the nuances of litigation strategies. The gap in the APR illustrates that gender sensitive consultations, the composition of legal teams and no gender specific funding impacts the litigation strategy.

In order to address gender imbalances, this chapter seeks to provide a guide to litigators on the relationship between attorney and client and cautions lawyers to refrain from top-down approaches of lawyering. The proposed litigation method is horizontal in nature providing agency to communities by narrating their story. The legal processes is for the lawyer to determine how to link the facts to the law. This ought to be done through arguing the right to adequate housing in conjunction with equality, the right to dignity which is justiciable,[108] privacy and freedom and security. Mainstream litigators must be conscious to the women in their client communities and pay attention when hearing their stories. They are skilled to use the law for the advantage of their female clients and should be gender sensitive in affidavits, pleadings and heads of argument. Whether a lawyer is acting for the community affected or for an amicus curiae, their arguments ought to include the use of international and regional instruments could be used to highlight the gendered focus. It must further elaborate on arguments that highlight the impact of the lack of housing on the rights to equality, dignity, privacy and freedom and security.

The model proposed attempts to begin changing mind-sets of our communities and the legal community. These communities are distinct but the judiciary has a role to play to change society. Most of our constitutional court cases are televised and shared on social media, which are mediums used to bring the court to the public. Judgments must be shared with communities

[107] Interviews with Emma Webber op cit note 35, Teboho Mosikili op cit note 25, Moray Hathorn op cit note 40, Stuart Wilson op cit note 24, Paul M. Kennedy and Heidi Barnes op cit note 43.
[108] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) see chapters 2 and 3.

and in the public domain to illustrate the impact and nuances of socio-economic right infringements on the lives of women. Finally, conscientisation through judgments can only be achieved if magistrates and judges are trained to apply the feminist approach in judgments.

CHAPTER 5 – CONCLUSION

This dissertation acknowledges the patriarchal nature of the law. It has examined and validated that the impact of rights violations against women in both litigation and jurisprudence has been sorely lacking in our constitutional democracy. It examined the lived realities of women living in South Africa. It concludes that there is a triple disadvantage on the basis of gender, race and class. The dissertation discusses the Courts' approaches in dealing with lived realities of women and it is evident that there is a gender gap in socio-economic rights cases.

It is against the backdrop of economic and gender disparities that inflict our society, impacts upon human rights and bears relevance to public interest litigation and developing jurisprudence. The issues that face South Africa are based on race, gender and class are vast. The challenge with formulating litigation strategies is preeminent to incorporate a platform for women to have their voices heard and more importantly to have their rights protected and enforced. The dissertation with the support of views from leading public interest litigators and gender experts affirm that gendered perspective is not only relevant but also critical to attaining social justice.

The dissertation demonstrates the disproportionate impact of the lack of housing on women in South Africa, and particularly Black women living in poverty. The dissertation has been grounded on the notion that women are not a homogenous community.[1] As stated by Jackie Dugard and Malcolm Langford, litigation strategy is not a science;[2] in the same way the model must be altered, adapted and utilised in the best way that suits a client community.

The feminist litigation framework favours third wave feminism incorporating critical race feminism arguments (which takes into account the intersection of race, sex and class). The framework includes the reading of the South African law with international and regional instruments which, strengthens the needs for a feminist lens to housing. Finally it explains the domestic legal framework, the PIE Act and housing policies which is gender neutral, could be utilised through the equality test intertwining it with dignity, privacy and freedom and security to enhance a woman's capability. Law is a mechanism in which the gender bias can be balanced. It has the potential to achieve the redress what feminists and women hope to achieve. The lived realities of women have been addressed by the Constitutional Court in various

[1] See Chapter 2 section IV. See also Yavuz Selim Alkan 'Feminist Legal Methods: Theoretical Assumptions, Advantages, and Potential Problems' *Ankara Law Review* Vol. 9 No. 2 (Winter 2012) 157, 163.

[2] Jackie Dugard & Malcolm Langford 'Art or Science? Synthesising lessons from public interest litigation and the dangers of legal determinism' 2011 27 *SAJHR* 39, 64.

situations where rights against women have been infringed but a gendered focus still lacks in the realm of socio-economic rights jurisprudence.

In response to addressing the gender gaps, the dissertation is based on a two site enquiry; first, jurisprudence and judges approaches canvassed in Chapter 3 and, second, lawyering and litigation strategies discussed in Chapter 4.

Through the use of both desktop research and the qualitative research, the dissertation concludes with its findings and reflections on the holistic research. The judgments in cases of *Government of the Republic of South Africa and Others v Grootboom and Others*,[3] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*,[4] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*[5] and *Dladla and Another v City of Johannesburg and Others*[6] could have included a gendered focus.[7] The analysis of the four cases have been critiqued for not incorporating feminist approaches. Once critiqued, it provided courts with how to have applied a feminist approach when interpreting the key concepts of reasonableness, minimum core, progressive realisation and eviction law concepts of meaningful engagement, TEA, section 4(7) of the PIE Act, conditions and remedy. The Constitutional Court missed an opportunity in ensuring that the rights of women were catered for developing any of these concepts. The frequent use of gendered analysis and argument would have ultimately reached a point that the remedy would take into account women's lived realities to ensure dignity through an improved quality of life. After having critiqued the jurisprudence, the dissertation had to explore the litigation strategies that were advanced by lawyers in PIL cases.

Litigation in socio-economic rights has not included a feminist lens. With the enactment of the Constitution over two decades ago, transformative constitutionalism has not developed feminist judgments in socio-economic rights. Regardless of housing being gendered,[8] litigators have failed to include gendered arguments. The starting point for litigators should be to obtain adequate instructions and stories. Although most of the personal circumstances are captured

[3] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).
[4] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).
[5] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC).
[6] *Dladla and Another v City of Johannesburg and Others* 2018 (2) SA 327 (CC).
[7] See Chapter 3, section II which deals with the case analysis.
[8] The interviewees have alluded to the concept; see Chapter 4 interviews with Bonita Meyersfeld (Interview held on 31 March 2017) and Seehaam Samaai (Interview held on 6 April 2017). Leilani Farha 'Is there a woman in the House? Re/conceiving the Human Right to Housing' 2002 14 *Canadian Law Journal* of Women and Law 118, 121 argues that "[t]he gendered nature of social and economic relations within and outside the household means that women experience discrimination and inequality in virtually every aspect of housing."

and scribed in an affidavit, it is drafted to suit lawyer's' stylistic preferences. Despite having creative arguments, the case is ultimately before a judge who adjudicates. A judge too emanates from different social and economic contexts and do not always understand the plight of women living in poverty. They are inundated with cases and do not read the personal circumstances placed before them. And if they do, how do they apply their minds to these personal circumstances. It is incumbent that judges and magistrates undergo training on social justice matters which includes gender, race and class. In this way, magistrates and judges would become aware of the communities who appear before them, to understand their historical backgrounds and how to interpret the facts to include a gendered sensitive approach. In doing so, it would require taking into consideration the lived realities of women and how the law could be utilised to improve living conditions that engrains the rights of dignity, privacy and freedom and security of women.

Litigators should advance arguments in the interests of their clients and balance the arguments with the broader achieve public interest goals to achieve gender equality. Developing precedent and jurisprudence is important to build a constitutional democracy, but simultaneously using the law to eradicate the plight of people with remedies that obtains the redress and transformation. It would be a success if mainstream litigators advanced argument incorporating gender. This has not been the case in all of the housing cases, even though women have been the main deponent to a case or have supported narratives. If there is a gap, amicus curiae are useful interventions to convey gendered arguments.

The right to housing must be argued using section 26 as basis and read with sections 9, 10, 12 and 14 of the Constitution.[9] In applying the equality test, the courts' judgment ought to incorporate the lived realities and historical disadvantage of women (as a result of her race, sex and class), in attaining substantial relief. The right to equality must include the right to dignity. Dignity is housing.[10] On a larger scale, the strategies seek to achieve woman's autonomy, privacy and freedom and security.

The dissertation has attempted to highlight the lack of feminist approaches in litigation and adjudication, and proposed an alternative feminist model based on third wave feminism. Further, the research attempted to create a foundation and appetite to deepen the feminist

[9] See Chapter 1, footnotes 40-43.

[10] *Government of the Republic of South Africa and Others v Grootboom and Others* supra note 2, para 83 states "Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity" and also, *Nokotyana and Others v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC), 25 which states "It is incontestable that access to housing and basic services is important and relates to human dignity."

litigation strategies practically and academically in the socio-economic rights space. Further research would be an opportunity to test the litigation model on others socio-economic rights cases beyond access to housing rights and evictions.

Further, this model is structured to commence change within all echelons of the legal profession. It is necessary to evolve the conceptualisation of cases in order to attain a transformed society. It is paramount that the research and model proposed is implemented and immersed into training modules for law students,[11] candidate attorneys, practicing lawyers, government officials, magistrates and judges.

[11] Cynthia Grant Bowman and Elizabeth M. Schneider "Feminist Legal Theory, Feminist Law making, and the Legal Profession" *Fordham Law Review* Vol 67, 249 - Law schools and Universities should begin to include in their curriculum.

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- Geoff Budlender SC (Interview held on 3 April 2017
- Heidi Barnes(Interview held on 20 March 2017)
- Ismail Jamie SC (Interview held on 11 April 2017)
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- Richard Moultrie (Interview held n 28 March 2017)
- Stuart Wilson (Interview held on 25 April 2017)
- Teboho Mosikili (Interview held on 16 March 2017)
- Respondent Z (Interview held on 13 April 2017)

Judge

- Respondent Y (Interview held on 11 April 2017)

Gender Experts

- Bonita Meyersfeld (Interview held on 30 March 2017)
- Chriscy Blouws (Interview held on 6 April 2017)
- Danwood Chirwa (Interview held on 10 April 2017)
- Elsje Bonthuys (Interview held on 21 April 2017)
- Kay Mahonde(Interview held on 28 March 2017)
- Pierre De Vos (Interview held on 10 April 2017)
- Seehaam Samaai(Interview held on 6 April 2017)
- Sibongile Ndashe (Interview held on 2 May 2017)
- Respondent X (Interview held on 13 March 2017)

Annexure A

Questionnaire

Thank you for agreeing to be interviewed. You were identified to take part in this research because of your pivotal role in housing cases. I would like to ask you some questions about the housing litigation strategies that could be used to advance a gendered lens.

Litigators

1. Please state for the record your position and expertise.

2. Have you considered or used a gendered lens in arguing/building housing cases that you have been involved in?
   - 2.1 If so,
     - 2.1.1 Why?
     - 2.1.2 What does a gendered lens mean to you?
     - 2.1.3 What would a gendered argument look like?
     - 2.1.4 Do you think these arguments align with struggles of black women?
     - 2.1.5 Why do you think it is beneficial to include a gendered lens?
   - 2.2 If not,
     - 2.2.1 Why not?
     - 2.2.2 If you reflect on your arguments, do you think it would be useful to add a gendered dimension?

3. Section 4(7) of PIE includes that a court must consider all personal circumstances, including women-headed households. Do you think that this is sufficient for a gendered analysis?

4. Did you find in your consultations with clients that a woman's experience facing an eviction is in any way different to a man's experience? Why do you think that the experiences of women were not enforced through argument and included in judgments?

5. The *Grootboom* judgment has focussed a great deal on a section 28 analysis, the rights of children. The court did not agree with the litigants and did not use a children's focus in their conclusion. Why did you emphasise children and not a gendered emphasis? Do you think that the court would have analysed their findings differently had the gender focus been used in argument?

6. When the court ordered 'meaningful engagement' in *Olivia Road*, did the finding in the engagement process have a special focus on gender? Do you think that the TEA offered would have been different if gender was a focal point during engagement?

7. Do you think that if a gendered focus was adopted in *Olivia Road*, *Dladla* would have been avoided?

8. The *Blue Moonlight* judgment mentioned women-headed households in the courts' analysis. Is the section 4(7) analysis in terms of PIE, any anyway sufficient since *Blue Moonlight* morphed into *Dladla*?

9. Assuming that you think that a gendered approach is necessary or beneficial in housing matters, what do you think is the best way to advance such an approach?

10. Do you provide the court with women client's statements which include their personal circumstances?

11. Do you think that feminist legal argument would be useful to support engendering of housing rights?

12. Do you think that international and/or regional law is important and useful to use to advance a gendered lens?

13. Do you think that amicus curiae are beneficial to assist the court with arguments through a gendered lens? Should amicus curiae intervene solely for this purpose?

14. In *Dladla*, do you think that the *amicus curiae* added value to the proceedings?

15. Since the people in housing cases are predominantly poor black communities, and understanding that feminism often means something different for black women, how comfortable would you (as a white man) feel making gendered arguments in legal papers and in court?

Gender Experts

1. Please state for the record your position and expertise.

2. Section 4(7) of PIE includes that a court must consider all personal circumstances, including women-headed households. Do you think that this is sufficient for a gendered analysis?

3. Do you think that courts inclusion of a gendered lens in housing cases would assist with public awareness on gender related issues?

4. Do you think a gendered approach in litigation strategies would raise woman consciousness?

5. What would a gendered approach in housing cases look like? Do you think these arguments align with the struggles of black women?

6. What would be the impact of gendered litigation strategies in housing cases?

7. How would a gendered approach assist with a woman's right to development?

8. If you had to enter as amicus curiae, what evidence would you place before the court to highlight the gendered impacts of women in housing cases?

9. What do you think would be the optimal litigation strategy to advance a gendered lens in housing cases?