ABHANDLUNGEN / ARTICLES

Forging space for pro-poor change: The use of strategic litigation by the Socio-Economic Rights Institution of South Africa (SERI) to advance equality

By Jackie Dugard*

Abstract: The 'Marikana Massacre' of 16 August 2013, in which the police killed 34 protesting mineworkers, was a tragic reminder of South Africa's far from complete socio-economic and political transition. Contrasting with this (far from uniquely South African) depressing story of political and economic failure, is the remarkable role that the law (largely through the adjudication of strategic litigation) has played since 1994, and especially over the past decade, in both pushing back any authoritarian impulses of the government and pushing forward the frontiers of socio-economic justice. Recognising the law's potential to construct the space within which subordinate groups can organise, mobilise and act for social change, Stuart Wilson and I established the Socio-Economic Rights Institute of South Africa (SERI) at the end of 2009. From the outset, we viewed SERI's primary role as constituting a vehicle to support the struggles of poor and marginalised groupings to advance the boundaries of the political economy, one frontline at a time. Since then, through developing a particular model of strategic litigation as informed by research and advocacy and embedded in community mobilisation, SERI has worked to responsively progress the agenda of pro-poor change in South Africa. This article examines SERI's model of strategic litigation, highlighting SERI's distinctive methodology and theory of change. In doing so, the article offers some insights into how the law can be used tactically and strategically to forge spaces for pro-poor change.

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A. Introduction

On 16 August 2012, in shocking footage broadcast across the world by television channels, the South African police used live ammunition to open fire on mineworkers who were

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protesting against the deplorable living conditions and low wages at the Marikana platinum mine.[1] Thirty-four mineworkers were killed and 78 others were seriously injured. In the aftermath, the 'Marikana Massacre' came to epitomise the very tangible limits of South Africa's transition from apartheid rule. Underlying the Marikana struggle, as powerfully noted in the opening paragraph of Thomas Piketty's Capital in the Twenty-First Century,[2] is the enduring apartheid legacy of profound socio-economic inequality and socio-political exclusion in South Africa. In this persistent reality, unskilled and semi-skilled workers, along with increasing numbers of unemployed youths,[3] struggle to survive in dismal townships, informal settlements or rural areas, while wealthy owners of capital flourish in large houses in verdant suburbs, fully integrated into the global economy. Attempting to manage this untenable status quo, an increasingly defensive post-apartheid government has often resorted to maintaining order through authoritarian, apartheid-reminiscent, stifling of dissent, such as at Marikana.

That South Africa's transition from apartheid has been far from complete, and that the Jacob Zuma Presidency (2009–2018) oversaw both a reversal of critical socio-economic gains and a resort to authoritarianism and securitisation, has been well documented.[4] Prompted by the Marikana Massacre, as well as other violent suppressions of protest by the

1 See for example *South African History Online*, Marikana Massacre 16 August 2012, https://www.sahistory.org.za/article/marikana-massacre-16-august-2012 (last accessed on 6 October 2018). Apart from low wages, the Marikana mineworkers were protesting about their living conditions in informal settlement shacks.

2 *Thomas Piketty*, Capital in the Twenty-First Century, London 2014, p. 39.

3 In 2018, the rate of unemployment of youths reached over 50 percent. See for example *Luyolo Mkentane*, 52% of South Africa's youth has no job: https://www.iol.co.za/business-report/economy/52-of-south-africas-youth-has-no-job-14993687 (last accessed on 6 October 2018). With a Gini coefficient of between 0.660 and 0.696, South Africa is one of the most unequal countries in the world. See for example, *The Guardian*, Inequality Index: Where are the World's Most Unequal Countries?:
https://www.theguardian.com/inequality/datablog/2017/apr/26/inequality-index-where-are-the-worlds-most-unequal-countries (last accessed on 6 October 2018); and Haroon Bhorat, Is South Africa the most Unequal Society in the World?, https://mg.co.za/article/2015-09-30-is-south-africa-the-most-unequal-society-in-the-world (last accessed on 6 October 2018). The persistently racialised nature of this inequality is outlined in in the *South African Human Rights Commission* (*SAHRC*)'s 2017/2018 Equality Report: Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa, which notes at p. 17 that 'approximately 64 percent of the Black African population and 40 percent of the Coloured population group are poor, contrasted to a mere six percent of the Indian/Asian population group and just one percent of the White population group', https://www.sahrc.org.za/home/21/files/SAHRC%20Equality%20Report%202017_18.pdf.

4 For the socio-economic limits see *Sampie Terblanche*, Lost in Transformation: South Africa's Search for a New Future since 1986, Johannesburg 2012; *Hein Marais*, South Africa Pushed to the Limit: The Political Economy of Change, Cape Town 2011; and *Hein Marais*, South Africa Limits to Change: The Political Economy of Transformation, Cape Town 1998. For the political limits see *Jane Duncan*, The Rise of the Securocrats, Johannesburg 2014; *David Bruce*, The Road to Marikana: Abuses of Force During Public Order Policing Operations, The South African Civil Soci-

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police, in June 2013,[5] African National Congress (ANC) stalwart, Ronnie Kasrils wrote an opinion entitled 'How the ANC's Faustian pact sold out South Africa's poorest'.[6] In this opinion, Kasrils accused his own party, the ANC, of not doing enough to undo the socio-economic and particularly the authoritarian legacies of apartheid. At the same time as political space, initially opened in the democratic transition, has come under attack by an embattled government, economic space in the democratic era has reflected a Janus-character. At the one end of the continuum, the transition to democratic rule has provided the opportunity for capital to become increasingly financialised and globalised, and for owners of capital and those working in financial, legal and banking services (whether white or black) to become extremely wealthy. But, at the other end of the continuum, the economy has not been able to absorb the majority of black South Africans, who remain locked into low-paying jobs or completely marginalised from the formal economy.

Contrasting with this (far from uniquely South African) depressing story of political and economic fragility, is the significant role that the law (largely through the adjudication of strategic litigation) has played since 1994, and especially over the past decade, in both pushing back any authoritarian impulses of the government and pushing forward the frontiers of socio-economic justice.[7] The use of the law to affect social change has been underscored by legal mobilisation scholars such as Michael McCann.[8] Based on the observation by EP Thompson that the law structures social relationships and the opportunities for action,[9] Stuart Wilson comments that 'the power of the law as an agent of social change lies in its ability to create or destroy spaces in which socially subordinate groups – the poor,

ety Information Service (2 October 2012), http://sacsis.org.za/site/article/1455 (last accessed on 18 October 2018); *Richard Pithouse*, On State Violence, South African Civil Society Information Service (10 May 2011), http://sacsis.org.za/site/article/666.1 (last accessed on 18 October 2018); and *Jane Duncan*, The Return of State Repression, The South African Civil Society Information Service (31 May 2000), http://sacsis.org.za/site/article/489.1 (last accessed on 14 October 2018).

5 *Ronnie Kasrils*, Mr President, Arrest this Descent into Police State Depravity, https://mg.co.za/article/2013-03-06-mr-president-arrest-this-descent-into-police-state-depravity (last accessed on 6 October 2018).

6 *Ronnie Kasrils*, How the ANC's Faustian pact sold out South Africa's poorest, https://www.theguardian.com/commentisfree/2013/jun/24/anc-faustian-pact-mandela-fatal-error (last accessed on 6 October 2018).

7 This is not to suggest that such legal mobilisation is beyond academic critique. Indeed, scholars such as Tshepo Madlingozi have criticised the social justice paradigm in South Africa as being insufficiently sensitive to race/ African culture (*Tshepo Madlingozi*, Social Justice in a time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution, Stellenbosch Law Review, 28 (2018)). Similarly, Magobe Ramose has criticised the elevated role of courts in South Africa's constitutional democracy, as undermining majoritarian political will (*Magobe Ramose*, Justice and Restitution in African Political Thought, in: P.H. Coetzee and A.P.J. Roux (eds) The African Philosophy Reader, London 1998).

8 *Michael McCann*, Rights at Work: Pay Equity and the Politics of Legal Mobilization, Chicago 1994.

9 *E.P. Thompson*, Poverty of Theory and Other Essays, London 1978.

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racial minorities, women, sexual minorities and indigenous populations – can think and act to give effect to their plans and aspirations'.[10]

It is this understanding of the law's potential to construct the space within which subordinate groups can organise, mobilise and act for social change that prompted Stuart Wilson and me to establish SERI at the end of 2009. From the outset, we viewed SERI's primary role as constituting a vehicle to support the struggles of poor and marginalised groupings to push forward the boundaries of the political economy, one frontier at a time. Since then, through developing a particular model of strategic litigation as informed by research and advocacy and embedded in community mobilisation, SERI has worked to responsively advance the agenda of pro-poor change in South Africa across critical fault line issues directly affecting marginalised communities.

Without attempting a critique per se,[11] this article examines SERI's model of strategic litigation, highlighting SERI's distinctive methodology and theory of change. The article first outlines SERI's strategic litigation model before exploring how SERI has applied this model to defend and advance social justice across critical fault line issues directly affecting marginalised communities. In doing so, the article offers some insights into how the law can be used tactically and strategically to forge spaces for pro-poor change.

B. SERI'S model of strategic litigation

For South Africa's public interest lawyers, the decade from 1994 to 2004 was, broadly, a time of limited strategic litigation.[12] During this period, most of the legal efforts by litigating non-governmental organisations focused on reformulating apartheid legislation and developing new legislation in line with the constitutional order, as enshrined in the Interim Constitution of 1993[13] and the (Final) Constitution of 1996.[14] However, from around 2004, it became apparent that – like in many other democracies – rights could not be taken for granted and needed to be defended against elite interests, whether private or public. The

10 *Stuart Wilson*, Making Space for Social Change: Pro-Poor Property Rights Litigation in Post-Apartheid South Africa, in: Jason Brickhill (ed), Public Interest Litigation in South Africa, Cape Town 2018, p. 167.

11 This would be inappropriate given my proximity to SERI.

12 See *Malcolm Langford*, *Bill Derman*, *Tshepo Madlingozi*, *Khulekani Moyo*, *Jackie Dugard*, *Anne Hellum* and *Shirhami Shirinda*, South Africa: From Struggle to Idealism and Back Again, in: Bard Andreassen and Gordon Crawford (eds), Human Rights, Power and Civic Action: Comparative Analyses of Struggles for Rights in Developing Societies, Abingdon 2013. The notable exceptions to this relative paucity of strategic litigation were the series of cases to advance non-discrimination on the grounds of sexual orientation, along with the landmark socio-economic rights cases of *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) and *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC).

13 Interim Constitution of the Republic of South Africa, 1993 (Interim Constitution).

14 Constitution of the Republic of South Africa, 1996 (Constitution).

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need to defend rights and create space to challenge the status quo, whether in the civil, political, social or economic sphere, became increasingly evident following the election of Jacob Zuma as the President of South Africa on 9 May 2009.

At the time, Stuart Wilson and I were working as socio-legal researchers and paralegal litigators[15] at the Centre for Applied Legal Studies (CALS) at the School of Law, University of the Witwatersrand. Coming from social science backgrounds, and in the process of finishing law degrees, we identified the need for a new type of public interest litigation organisation to advance socio-economic rights and challenge inequality. Although much good work was being undertaken by the key public interest litigation organisations including CALS, the Legal Resources Centre (LRC) and Lawyers for Human Rights (LHR), we felt that a new approach was necessary that would explicitly service the ongoing battles of poor people for social justice. From CALS we had learnt the value of strategic litigation in moving forward legal and political frontiers, and that grounding litigation in research and advocacy functions was a powerful way to advance jurisprudence and publicly highlight critical fault line issues. We had also learnt from our ongoing research and advocacy efforts at CALS the importance of maintaining relationships with communities at the coalface of socio-economic exclusion. However, situated at a university, CALS was administratively cumbersome and struggled to respond quickly and dynamically to the lived realities of poor communities. From the LRC and LHR, we were aware of the importance of pursuing 'routine' cases in terms both of building larger litigation challenges and providing support and relief to the applicants. Taking forward this knowledge and experience, we sought to establish a socio-economic rights organisation that was unique in at least two key respects: its embeddedness in poor communities and its reliance on integrated research, advocacy and litigation.[16] With initial core funding from the Ford Foundation, Atlantic Philanthropies and the Open Society Foundation, SERI began operating in Johannesburg in January 2010.

Throughout, SERI has pursued a distinctively responsive and integrated model of strategic litigation. Informed by research and advocacy, as well as through relationships built with socio-economically excluded individuals and communities, social movements (notably Abahlali baseMjondolo, the South African shackdwellers' movement) and other non-governmental organisations, SERI works on three cross-cutting themes that emerged as being the most relevant fault lines for SERI's partners: expanding political space, securing a home and making a living. Working through sustained partnerships, 'SERI's conviction is that it

15 Stuart and I both came from a social sciences background, but we completed our law degrees while working at CALS.

16 Subsequently, another socio-economic rights organisation was established (out of the Aids Law Project, which had been a project incubated at CALS), Section27, that has pursued a similar approach to SERI: http://section27.org.za (last accessed on 3 November 2018). However, arguably, SERI remains more embedded in local communities (and particularly around Johannesburg) than Section27, which primarily services health- and education- related interest groups. This is not to suggest that one approach is better than the other – the complexities of South Africa call for a range of approaches to social injustice.

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is the people who are on the receiving end of poverty and inequality who are best placed to devise and implement strategies to challenge them'.[17] Thus, SERI views its role as acting 'to protect and expand the political spaces in which individuals and communities organise and press for social change'.[18] As a service organisation for poor people's mobilisation, SERI's work is thus overtly 'political' (with a small 'p'), and SERI's theory of change has as its ultimate goal the realisation of the potential of all people to participate meaningfully in South Africa's society and economy.

For SERI, strategic litigation across its thematic areas of focus is litigation that has been identified through research and engagements with partners, as relating to legal fault lines that have the potential to open space in the socio-economic and socio-political terrain for partners and subordinate groups more broadly to participate in and benefit from South Africa's political economy. Strategic in this sense entails two types of litigation: litigation that challenges and moves structural frontiers in the public interest; and litigation, which at a more direct and micro level, removes barriers and constructs space within which SERI's partners can better organise, mobilise and live their lives. This article focuses on the two thematic areas in which there has been the most strategic litigation (defined both in terms of addressing fault line structural issues and being responsive to the strategic needs of SERI's partner communities) – the right to protest and housing rights.

C. Political Space: The Right to Protest for Greater Equality

During apartheid, under a range of repressive legislation, dissent was discouraged, organisations were banned, protests were regularly broken up and activists were routinely arrested and detained.[19] Against this dark past, section 17 of the Constitution guarantees the right to peaceful and unarmed protest. Nonetheless, key pieces of apartheid security legislation remain in force and (as outlined in the Introduction), during the Jacob Zuma Presidency, the government regularly used the police to limit the right of poor communities to express their frustrations by arresting and detaining protesters and criminalising (and even killing) their leaders.

By the time of the Marikana Massacre – when most public interest litigation organisations had long-since abandoned any direct defence of protest rights (including related to arrest, detention, bail etc.), on the reasonable assumption that this kind of work was unnecessary in a democratic context – SERI had already begun to work on the right to protest.[20] This is because – despite having been established as an organisation focusing on socio-eco-

17 SERI website: http://www.seri-sa.org (last accessed on 3 November 2018).

18 Ibid.

19 For an overview of the apartheid legal order see *John Dugard*, Human Rights and the South African Legal Order, Princeton 1978.

20 For a list and description of SERI's protest-related cases, see: http://seri-sa.org/index.php/litigation/participation-protest-and-political-space (last accessed on 14 October 2018).

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nomic rights – the direct link between socio-economic rights and protest quickly became clear, as community protests over poor living conditions began to proliferate in poor communities across the country in 2010. Amounting to what Peter Alexander has called a 'rebellion of the poor', such protests were 'widespread and intense, reaching insurrectionary proportions in some cases':

> *On the surface, the protests have been about service delivery and against uncaring, self-serving, and corrupt leaders of municipalities ... Many issues that underpinned the ascendancy of Jacob Zuma also fuel the present action, including a sense of injustice arising from the realities of persistent inequality.*[21]

As highlighted by Richard Pithouse, the protests were best understood as being about 'the material benefits of full social inclusion … as well as the right to be taken seriously when thinking and speaking through community organisations'.[22] In the words of members of the social movement, Abahlali baseMjondolo:

> *But we have not only been sentenced to permanent physical exclusion from society and its cities, schools, electricity, refuse removal and sewerage systems. Our life sentence has also removed us from the discussions that take place in society.*[23]

The government response to the mushrooming of community protests was to increasingly resort to apartheid-era security legislation to arrest and detain community leaders and also for the police to use live ammunition to quell protests, resulting in the deaths of the mineworkers at Marikana, along with several community activists, including Andries Tatane on 13 April 2011.[24] In this context, SERI's work with poor communities has inevitably propelled it to take up strategic litigation to defend and advance political space. This has included four sustained areas of legal intervention: defence of arrested, detained and charged community activists in Thembelihle; defence of the families of deceased Marikana mineworkers; defence of student protests; and challenging the legal parameters of the right to protest.

21 *Peter Alexander*, Rebellion of the Poor: South Africa's Service Delivery Protests – A Preliminary Analysis, Review of African Political Economy 37 (2010), p. 25.

22 *Richard Pithouse*, The University of Abahlali baseMjondolo, Voices of Resistance from Occupied London 2 (2007), p. 17, also available at http://www.abahlali.org/node/2814 (last accessed on 7 October 2018).

23 *S'bu Zikode* and *Zodwa Nsibande*, Serving our Life Sentences in the Shacks, http://abahlali.org/node/7187/

(last accessed on 7 October 2018).

24 *Sipho Masondo*, 'Tatane Showered with Praise', The Times (South Africa), 20 April 2011 https://www.timeslive.co.za/news/south-africa/2011-04-20-tatane-showered-with-praise/ (last accessed on 7 October 2018).

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I. Defence of arrested, detained and charged community activists in Thembelihle[25]

SERI's first direct experience of community protest was in September 2011. Under the banner of the Thembelihle Crisis Committee (a SERI partner), community members from Thembelihle informal settlement (outside Johannesburg), embarked on a series of protests over inadequate access to housing and basic services, and also the government's unilateral plan to relocate them to a new settlement. The police arrested, detained and charged several of the community's leaders for public violence-related offences. Having worked closely with the Thembelihle Crisis Committee's attempts to oppose the government's relocation and eviction plans,[26] SERI realised that, to properly support the community's socio-economic rights-related struggles, it was necessary to first defend the community's right to protest. SERI therefore decided to represent several of the community members who had been arrested and charged.

In one case,[27] SERI represented 14 Thembelihle residents (including 3 minors) who were arrested on the first day of the protests. SERI's decision to intervene in this case was based on the realisation that 'the main purpose of the prosecution was to punish the residents for having embarked upon legitimate and lawful demonstrations'.[28] Following SERI's intervention, the case was struck off the roll – despite having had seven months (and nine postponements) to prepare its case, the state could not produce an adequate charge sheet with the details of the offences for which the residents were charged. The matter was re-enrolled and set down for trial. However, at this point it was again struck from the roll as the state had failed to serve most of the accused with summons to attend,[29] and has never again been reinstated. In a separate case, also arising from the September 2011 protests, Thembelihle community leader, Bhayi Bhayi Miya was arrested and charged with public violence, arson and intimidation for his participation in the protests. Having spent a month in prison awaiting trial, SERI secured Mr Miya's release by successfully appealing the deci-

25 See *SERI*, An Anatomy of Dissent and Repression: The Criminal Justice System and the 2011 Thembelihle Protest (16 September 2014), http://www.seri-sa.org/index.php/38--news/285-research-report-seri-launches-an-anatomy-of-dissent-and-repression-the-criminal-justice-system-and-the-2011-thembelihle-protest-16-september-2014 (last accessed on 18 October 2018).

26 See *Thapelo Tselapedi* and *Jackie Dugard*, Reclaiming Power: A Case Study of the Thembelihle Crisis Committee, Good Governance Learning Network, Active Citizenship Matters, 2013 http://www.ggln.org.za/media/k2/attachments/SoLG.2013-Planact.pdf (last accessed on 7 October 2018).

27 *State v Nkosi and 13 Others*, unreported Case No. 43/01308/2011, Protea Regional Magistrates Court (5 September 2011).

28 SERI website: http://seri-sa.org/index.php/litigation/participation-protest-and-political-space/19-litigation/case-entries/106-state-v-nkosi-and-13-others-thembelihle (last accessed on 7 October 2018).

29 SERI Press Release, Magistrate strikes Thembelihle case from its roll (11 April 2012): http://seri-sa.org/images/stories/thembelihle_press_release_final.pdf (last accessed on 14 October 2018).

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sion of the Magistrate to refuse Mr Miya's bail application, on the basis that there was a complete absence of evidence against him.[30]

During February 2015, following renewed protests about their living conditions, 33 Thembelihle residents were arrested.[31] In terms of section 35(1)(d) of the Constitution, accused persons must be brought before a court within 48 hours of being arrested, to be charged or released. However, this 48-hour rule does not apply to arrests over weekends (when the Magistrates Courts do not operate) and so, because they were arrested on a Thursday night, the 33 residents had spent the weekend in the police cells. The arrestees included 7 women and 5 children. Following SERI's legal intervention at the first hearing, 13 residents were released, but the state opposed bail for 20 residents on the basis that they needed a further seven days to verify their addresses, since they lived in an informal settlement. After hearing arguments from SERI's legal team, the magistrate granted bail to all remaining residents. Subsequently, the charges against the children were not pursued and the charges against seven of the adults were withdrawn. Charges were pursued against 20 of the residents, even though many of the charged persons deny that they were at the protest,[32] but were ultimately withdrawn following sustained legal challenge by SERI.

II. Defence of the families of deceased Marikana mineworkers

Shortly after the 16 August 2012 killing of 34 mineworkers at Marikana, SERI was approached by the then minority trade union that had been mobilising the striking mineworkers, the Association of Mineworkers and Construction Union (AMCU). AMCU wanted SERI to support the union, along with the families of the deceased mineworkers,[33] in an attempt to hold the police accountable for killing their members at Marikana. Viewing this as a strategic opportunity to defend mineworkers' right to protest, and also to develop the law on police liability for unlawful killings and ensure appropriate compensation to the mineworkers' families, SERI embarked on two long-term legal interventions.

First, SERI represented the families of the deceased mineworkers and AMCU at the Marikana Commission of Inquiry (Marikana Commission).[34] The Marikana Commission

30 *Bhayi Bhayi Miya v The State*, unreported Case No. A410/11, South Gauteng High Court (20 October 2011): http://seri-sa.org/images/stories/miya_real_court_order.pdf (last accessed on 7 October 2018).

31 *Franny Rabkin*, Law Matters: Rough and Ready Justice at the Magistrates Courts, Business Day (5 March 2015): https://www.businesslive.co.za/bd/opinion/columnists/2015-03-05-law-matters-rough-and-ready-justice-at-the-magistrates-courts/ (last accessed on 7 October 2018).

32 SERI press release, Thembelihle arrested granted bail after 5 days in jail (3 March 2015): http://www.seri-sa.org/images/Thembelihle_PressStatement_FINAL.pdf (last accessed on 7 October 2018).

33 SERI ultimately represented 36 families of deceased mineworkers, the families of the 34 mineworkers killed on 16 August, and also two mineworkers who were killed by the police on 13 August 2012, during the ongoing protests that culminated in the Marikana Massacre.

34 Available at http://www.justice.gov.za/comm-mrk/index.html (last accessed on 7 October 2018).

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was appointed to investigate the events of, and surrounding, the 16 August 2012 killings, and sat from 1 October 2012 until 14 November 2014. SERI's participation at the Marikana Commission involved a large legal and support team for the two-year period. In the course of its representation of AMCU and the families of the deceased mineworkers, on 16 July 2013, the families of the deceased and AMCU temporarily withdrew from the Commission's proceedings in solidarity with the arrested and injured mineworkers (who were represented by different counsel),[35] whose legal teams had been denied state funding for their participation at the Commission. In further support, SERI joined legal proceedings to secure government funding for these teams. On 14 October 2013, the North Gauteng High Court ordered Legal Aid South Africa to fund the legal representation of the arrested and injured mineworkers at the Marikana Commission, establishing a precedent for the government to fund parties at commissions of inquiry.[36]

Following over two years of hearings and deliberation with extensive involvement by SERI's legal team, on 31 March 2015, the final Report of the Marikana Commission of Inquiry was handed to then President Jacob Zuma,[37] who did not release the report for close to three months. When the Report was finally made public, on 25 June 2015, it made several recommendations including: for there to be an inquiry into the fitness of the National Police Commissioner, Riah Phiyega to hold office;[38] for the National Prosecuting Authority to investigate and possibly prosecute individual police officers involved in the killings; and for there to be a review of the policing of protest.[39] Many commentators, including colleagues from SERI, felt that the Commission process had been problematic,[40] and that the Report was a whitewash in that it did not apportion specific blame to any of the police offi-

35 Alongside the 34 mineworkers killed on 16 August 2013, 78 mineworkers were seriously injured by the police. In addition, 250 mineworkers who had taken part in the protest were arrested. While SERI's legal team received some legal funding from the government, initially the legal teams representing the injured and arrested mineworkers did not receive any government legal funding.

36 *Magidiwana and Others v President of the Republic of South Africa and Others*, unreported Case No. 37904/2013, North Gauteng High Court (14 October 2013). The case was subsequently appealed to the Constitutional Court but largely on procedural grounds as, following the High Court ruling, Legal Aid South Africa began to provide funding for the legal teams representing the injured and arrested mineworkers.

37 *Marikana Commission of Inquiry*, Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province (31 March 2015), http://seri-sa.org/images/Full_Report_of_the_Marikana_Commision_of_Inquiry.pdf (last accessed on 7 October 2018).

38 National Commissioner Phiyega was subsequently suspended and dismissed.

39 *Greg Nicolson*, Marikana Report: Key findings and recommendations, Daily Maverick (26 June 2015): https://www.dailymaverick.co.za/article/2015-06-26-marikana-report-key-findings-and-recommendations/ (last accessed on 7 October 2018).

40 See *Jackie Dugard*, Marikana Inquiry's mistakes call for a Rethink, Business Day (11 September 2013), https://www.businesslive.co.za/bd/opinion/2013-09-11-marikana-inquirys-mistakes-call-for-a-rethink/ (last accessed on 7 October 2018); *Stuart Wilson*, Commissioner, police ignoring AMCU evidence, Mail & Guardian (18 August 2013), http://seri-sa.org/images/Wilson_oped_18Aug1

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cers involved in the Marikana shootings.[41] The families of the deceased mineworkers were particularly disappointed by the vagueness of the findings and recommendations. Nonetheless, the Marikana Commission played a critical role in highlighting the spiralling militarisation and lack of control within the police service under the Zuma regime. In addition, it laid the basis for damages claims against the police on behalf of the families of the deceased mineworkers, which was SERI's second major, and substantively successful, intervention in the Marikana process.

In February 2013, the families of the 36 mineworkers killed by the police at Marikana on 13 and 16 August 2012 served the police with notice of their intention to sue the Minister of Police and the National Police Commissioner for damages in terms of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002. During 2015, the government agreed to settle the damages claims and, in August 2018, the families were paid the first tranche of compensation, for loss of financial support. At the time of writing, the government and SERI were in the process of settling the further amounts to be paid, for general and constitutional damages.

III. Defending the right of students to protest over failures by universities to deal with rape culture on campus

In October 2015, students at South African universities began a concerted campaign to advocate for affordable university tuition. Known as #FeesMustFall, the student movement quickly gained momentum among students who were struggling to pay university fees and resulted in the shutdown of many of the top universities for weeks on end between October 2015 and November 2016.[42] In the wake of these protests, most of the affected universities resorted to calling in private security and/or the police, which in many instances occupied the university campuses for weeks at a time, with substantial ramifications for the right to protest.

Having just emerged from the Marikana Commission experience, SERI was concerned about the potential for universities to compromise protest-related rights, and particularly the risk posed through inviting the police onto campus to regulate protest. SERI therefore published a legal guide to student protests.[43] In addition, in the wake of police intervention at

3.pdf (last accessed on 7 October 2018); and *Jackie Dugard* and *Kate Tissington*, Snail's pace hampers Marikana Commission, Sunday Times (30 June 2013): http://seri-sa.org/images/Marikana_SundayTimes_30Jun13.pdf (last accessed on 7 October 2018).

41 *Stuart Wilson*, Judge Farlam's Accidental Massacre, Daily Maverick (26 June 2015): https://www.dailymaverick.co.za/opinionista/2015-06-26-judge-farlams-accidental-massacre/#.VZKc-Pmqqkp (last accessed on 7 October 2018).

42 The student protests were extraordinarily successful. Apart from resulting in significantly increased public funding and reduced fees for university education, the protests also achieved the insourcing of university cleaning and security staff at many universities.

43 *SERI*, Student Protests: A Legal and Practical Guide (September 2017), http://seri-sa.org/images/Students_rights_guide_FINAL_Nov 2017.pdf (last accessed on 7 October 2018).

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the University of the Witwatersrand, SERI compiled a research report on the misuse of police force and the violation of associated rights during these student protests.[44] It also intervened to defend several students at various universities who were arrested for protesting and who, as a result of SERI's interventions, were released due to an absence of evidence against them.

More pointedly, in the course of defending students' right to peaceful protest, SERI intervened to represent three students and a group of concerned staff members who had been interdicted from participating in protest following their peaceful demonstrations against 'rape culture' at Rhodes University. SERI's decision to intervene in the Rhodes University case was motivated by wanting to support gender activists at a time when the issue of campus-based sexual violence was just starting to be recognised. A further motivation was to try to obtain a court ruling against the use by universities of vague and widely-framed interdicts, which had the effect of stifling the right to protest. In the Rhodes University case, the university obtained an interim interdict against 'Students of Rhodes University engaging in unlawful activities on the applicant's campus' and 'Those persons engaging in or associating themselves with unlawful activities on the applicant's campus'. Until this point, the lawfulness of using wide-ranging interdicts against an unascertainable group of persons had not been tested in court (in any context). This was consequently an important opportunity to challenge such interdicts and thereby secure more space for peaceful protest at universities (and more broadly). In the *Rhodes University* case,[45] the Eastern Cape High Court in Grahamstown ruled in the applicants' favour, dismissing the university's application for the wide-ranging interdict to be finalised, and establishing that interdicts should not be granted against unascertainable groups of people.[46]

IV. Challenging the legal parameters of the right to protest

To strategically push the boundaries of the right of assembly so as to allow more space for subordinate groups to organise, mobilise and protest, SERI has been involved in challenging two key pieces of (apartheid-era) legislation that continue to adversely impact the right to assembly, the Regulation of Gatherings Act 205 of 1993 (RGA) and the Intimidation Act 72 of 1982 (Intimidation Act).

44 *SERI*, A Double Harm: Police Misuse of Force and Barriers to Necessary Health Care Services: Responses to Student Protests at the University of the Witwatersrand, September to November 2016 (October 2017): http://www.seri-sa.org/images/SERI_Wits_double_harm_report_For_WEB.pdf (last accessed on 7 October 2018).

45 *Rhodes University v Student Representation Council of Rhodes University and Others* [2017] 1 All SA 617 (ECG).

46 Ibid. paras 127–145.

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1. Regulation of Gatherings Act

The main legislation governing protest (or gatherings in the legal terminology) is the RGA. The RGA was enacted just before South Africa's transition to democratic rule. Although it is more permissive than apartheid-era legislation governing protest, as a pre-Constitution law, it suffers from some constitutionally suspect provisions. One of these is section 12(1)(a), which provides that organisers of gatherings who fail to notify the authorities ahead of a gathering, as required by the RGA, are subject to criminal prosecution. This clause has had a substantially chilling impact on the right to protest and was challenged following the arrest and criminal conviction of the organisers of a gathering in Cape Town convened by the Social Justice Coalition against the inadequate sanitation conditions in poor communities in the area.[47]

In *Mlungwana*, the Western Cape High Court found section 12(1)(a) to be an unjustifiable limitation on the right to assembly and therefore unconstitutional.[48] Under section 167(5) of the Constitution, any order of constitutional invalidity made by any other court must be confirmed by the Constitutional Court (CC). With the *Mlungwana* case heading to the CC, SERI saw an opportunity to support the arguments against section 12(1)(a) of the RGA. SERI therefore intervened as the representative of the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, Ms Annalisa Ciampi, who was admitted as an amicus curiae, in order to raise international law arguments about the impugned legislation. The matter was heard in the CC on 21 August 2018. At the time of writing, judgment was pending. It is likely that the CC will confirm the High Court's order of invalidity, thereby significantly freeing up space to protest.

2. Intimidation Act

Two months after the Marikana Massacre, three residents of Makause informal settlement (near Johannesburg) were unlawfully arrested for participating in a protest against police brutality at their local police station. Among those arrested was General Moyo of the Makause Community Development Forum, one of SERI's partners. At the same time as arresting the three Makause residents, the police detained two other people (a man and a woman) and forced both to remove their T-shirts, which were emblazoned with the words: 'Women demand justice for Marikana' and 'Solidarity for the slain of Marikana', and 'An

47 The RGA requires notification for any coordinated protest of more than 15 people (which it terms a 'gathering'). Groupings of 15 or less people protesting (which the RGA terms 'picketing') do not need to notify the authorities. In the case of the protest by the Social Justice Coalition, there were initially less than 15 protestors, but during the protest additional protesters joined in, thereby pushing the picket into the legal realm of a gathering. The protesters were all arrested, charged and convicted of contravening section 12(1)(a) of the RGA in that they had failed to notify the authorities of the gathering.

48 *Mlungwana and Others v The State and Others* 2018 (1) SACR 538 (WCC).

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injury to one is an injury to all'.[49] The three arrested residents spent the night in the police cells and subsequently the charges against two of the accused residents were dropped. However, the police persisted against General Moyo, who was charged with 'intimidation' under the Intimidation Act. Together with CALS, SERI has defended General Moyo against these charges. To this end, in April 2014, an application was launched to declare section 1(1)(b) of the Intimidation Act unconstitutional and invalid for being too vague and constituting an unjustifiable limitation on freedom of expression (and, concomitantly, assembly).[50] The criminal trial against Mr Moyo has been postponed until this challenge is finally determined. On 17 January 2017, the North Gauteng High Court delivered judgment, finding that the limitation entailed by section 1(1)(b) of the Intimidation Act was justifiable under the limitations clause (section 36 of the Constitution).[51] SERI appealed the judgment to the Supreme Court of Appeal (SCA), supplementing its grounds of appeal to include a challenge to section 1(2) of the Intimidation Act, which creates a reverse onus on an accused person and violates her right to silence. On 20 June 2018, the SCA ruled (albeit with separate concurring judgments on the reasons for this) that section 1(2) of the Intimidation Act was unconstitutional, but that section 1(1)(b) of the Intimidation Act was constitutionally valid.[52] The applicants have appealed the judgment to the CC, where it will be heard on 18 February 2019. SERI is hopeful that the CC will find both sections of the Intimidation Act unconstitutional.

49 *Mandy de Waal*, Makause: The activist's fear of the police and the sunset, Daily Maverick (25 October 2012), https://www.dailymaverick.co.za/article/2012-10-25-makause-the-activists-fear-of-the-police-and-the-sunset/ (last accessed on 8 October 2018).

50 Section 1(1)(b) of the Intimidation Act provides that any person who acts or conducts himself in such a manner that it might 'reasonably be expected that the natural and probable consequences thereof' would be that the receiving person 'fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person' shall be guilty of an offence and liable on conviction to a fine and/or imprisonment for a period not exceeding ten years. SERI and CALS argue that, by criminalising any speech or conduct that creates a subjective fear in any person – whether or not this fear (or the possibility of creating fear) is reasonable, and regardless of whether the intention was to create fear – this provision constitutes an unjustifiable limitation on the right to freedom of expression contained in section 16 of the Constitution (it also has a knock on effect on section 17 rights of freedom of assembly in that it is regularly used to arrest protesters).

51 *Moyo and Another v Minister of Justice and Constitutional Development and Others* 2017 (1) SACR 659 (GP).

52 *Moyo v Minister of Justice and Constitutional Development and Others* 2018 (2) SACR 313 (SCA).

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D. Living Space: The Right to Adequate Housing

The project to expand housing rights within the scope of section 26 of the Constitution[53] has constituted the largest component of SERI's work, and particularly of its strategic litigation. There are two main reasons for this. First, access to adequate housing is the priority for most poor communities, especially for people living in shacks in informal settlements or townships, and also those living in derelict buildings in inner city areas.[54] Second, South Africa's housing paradigm is overwhelmingly private property-oriented and largely market-driven, with hardly any formal low-cost rental housing stock.[55] As a result, a large proportion of people living in South Africa are 'effectively locked out of urban rental land and housing markets'.[56]

As identified through engagements with SERI's partners and research,[57] SERI's housing rights work has sought to construct and progressively expand the space for pro-poor housing within South Africa's mainstream property ownership-dominated reality[58] across

53 Section 26(1) of the Constitution provides: 'everyone has the right to have access to adequate housing'. Section 26(2) provides: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'. Section 26(3) provides: '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.'.

54 Approximately 37 per cent of households in South Africa live in informal housing (*South African Institute of Race Relations*, South Africa Survey (2017) Johannesburg 2017, p. 709. A 2010 study of protests in poor communities that occurred between 2007 and 2010 found that access to housing was the single most cited concern of protesters (*Hirsh Jain*, Community Protests on South Africa: Trends, Analysis and Explanations, Local Government Working Paper Series No. 1, Community Law Centre, University of the Western Cape (2010), pp. 29–30).

55 Instead of providing affordable rental housing stock and/or social housing, the government has focused on providing publicly-funded low-density private houses (so-called 'RDP homes', named after the ANC's first macro-economic policy, the Reconstruction and Development Programme, under which the programme to advance ownership of homes through public subsidies was initiated). Despite having achieved significant rollout since 1994, the extremely costly and complex process of providing standalone private housing to beneficiaries has never been able to keep up with the escalating demand for housing especially in South Africa's major urban centres. See *SERI*, Minding the Gap: An analysis of the supply and demand for low-income rental accommodation in inner city Johannesburg (November 2013), http://www.seri-sa.org/images/Minding_the_Gap.pdf (last accessed on 13 October 2018); and *SERI*, 'Jumping the Queue', Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand Allocation in South Africa (April 2013), http://www.seri-sa.org/images/Jumping_the_Queue_MainReport_Jul13.pdf (last accessed on 13 October 2018).

56 *Wilson*, note 10, p. 172.

57 SERI's housing-related research is available at http://seri-sa.org/index.php/research/securing-a-home (last accessed on 13 October 2018).

58 *Jackie Dugard* and *Makale Ngwenya*, Property in a Time of Transition: An Examination of Perceptions, Navigations and Constructions of Property Relations among Unlawful Occupiers in Johannesburg's Inner City, Urban Studies (2018), http://journals.sagepub.com/doi/10.1177/0042098018765402 (last accessed on 18 October 2018).

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four critical fault lines that challenge the exercise of public and private power: eviction of unlawful occupiers and access to alternative accommodation; informal settlement upgrading; bank repossessions/sales-in-execution; and landlord-tenant disputes.[59]

I. Eviction of unlawful occupiers and access to alternative accommodation

The majority of the socio-economic rights cases to have come before South Africa's courts have concerned failures by the government to provide alternative accommodation to anyone rendered homeless by an eviction. That this is a government obligation, as arising from section 26 of the Constitution, was clarified by the CC in the landmark judgment of *Grootboom*.[60]

SERI has been involved in most of the key cases that have been brought since January 2010, attempting in each case to progressively push the boundaries of housing rights jurisprudence in a pro-poor direction, both in terms of compelling the government to act in line with its constitutional obligations towards subordinate groups and to gradually carve out more space in the dominant housing paradigm for poorer residents. There is not the space here to detail all these cases,[61] but the main cases that have built on each other to strategically shift housing rights frontiers are summarised here, in chronological order, along with the legal principles established:[62]

- *Blue Moonlight*:[63] the government has the same obligations to provide alternative accommodation / emergency shelter to people rendered homeless by an eviction, regardless of whether the eviction is brought by a private property owner or the government;
- *Schubart Park*:[64] the government cannot use an emergency evacuation to bypass its constitutional obligations and render residents of unsafe buildings homeless;

59 A list of all SERI's housing-related cases is available at http://seri-sa.org/index.php/litigation/securing-a-home (last accessed on 18 October 2018).

60 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

61 For a recent analysis of South Africa's housing jurisprudence, including SERI's fault line cases, see: Wilson, note 11.

62 A full list of SERI's eviction cases (spread across informal settlement and inner city evictions, and eviction of unlawful occupiers) is available at http://www.seri-sa.org/index.php/litigation/securing-a-home (last accessed on 13 October 2018).

63 *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* 2012 (2) SA 104 (CC).

64 *Schubart Park Residents Association and Others v City of Tshwane Metropolitan Municipality and Others* 2013 (1) SA 323 (CC).

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- *Hlophe*:[65] individual government officials could be held liable in their official capacity for failing to enforce an order of court to report to the court on plans to provide adequate housing in terms of section 26 of the Constitution;
- *Matlaila*:[66] in instances where elderly and poor people have been living on a property for decades with the previous owner's permission, it will not be just and equitable for the new owner to evict them;
- *Kiribilly*:[67] in cases where an owner alleges that an eviction of unlawful occupiers was consensual, the owner bears the onus of showing that there was real and informed consent, including alerting occupiers about their constitutional rights;
- *Dladla*:[68] in the context of government provision of emergency shelter to people who had been evicted, it is not permissible to provide undignified accommodation with rules that violates residents' rights; and
- *Fischer*:[69] in instances where it is unjust and inequitable to evict unlawful occupiers due to their large number (in this case there were over 60 000 unlawful occupiers on private land) it may be necessary for the government to expropriate the land to fulfil its housing rights obligations.

Among these cases, *Dladla*, which is a judgment from 2018, deserves a bit more analysis. Although it established an important legal principle, the majority CC judgment was disappointing for basing its finding (that it was not lawful for the government to provide emergency housing in a shelter with rules that included gender segregation and daytime lockout) on the constitutional rights to dignity, freedom and security of the person and privacy[70] rather than on section 26's right to adequate housing, as argued by the applicants.[71] By doing so, the majority judgment sidestepped SERI's hope that *Dladla* would be the case that would provide some clear content to section 26 of the Constitution. Until *Dladla*, the courts

65 *Hlophe and Others v City of Johannesburg and Others* 2013 (4) SA 212 (GSJ); see also *City of Johannesburg Metropolitan Municipality and Others v Hlophe and Others* [2015] 2 All SA 251 (SCA).

66 *All Building and Cleaning Services v Matlaila and Others* [2015] ZAGPJHC 2 (16 January 2015).

67 *Occupiers of Erven 87 and 88 Berea v De Wet and Another* 2017 (5) SA 346 (CC).

68 *Dladla and the Further Residents of Ekuthuleni Shelter v City of Johannesburg and MES* 2018 (2) SA 327 (CC).

69 *Fischer v Persons listed on Annexure X to the Notice of Motion and those persons whose identity are unknown to the Applicant and who are unlawfully occupying or attempting to occupy Erf 150 (remaining extent) Phillipi, Cape Division, Province of the Western Cape and Others*2018 (2) SA 228 (WCC). The City of Cape Town has appealed the *Fischer* judgment but at the time of writing the appeal had not yet been heard. For an analysis of the High Court judgment see *Jackie Dugard*, Revisiting *Modderklip*: Can Courts Compel the State to Expropriate Property where the Eviction of Unlawful Occupiers is not Just and Equitable?, *Potchefstroom Electronic Review* (*PER*) 21 (2018), DOI http://dx.doi.org/10.17159/1727-3781/2018/v 21i0a3477 (last accessed on 13 October 2018).

70 Sections 10, 12 and 14 respectively of the Constitution.

71 Two separate minority judgments argued for a section 26-focused approach.

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had managed to avoid ruling on the adequacy of the alternative accommodation provided by the government in eviction cases. SERI and its partners believed *Dladla* was the strategic case that would require the judiciary to engage this fault line issue.[72] The failure of the CC majority to grapple with the content of housing rights in *Dladla* confirms the critique that 'instead of developing a clear sense of what the right to adequate housing entails, the court has opted to play a mediatory role in managing the worst impacts of the clash between the property rights of the powerful on the one hand, and the housing rights of the less powerful on the other'.[73] However, to the extent that *Dladla* did not achieve what was hoped for, new challenges and cases will inevitably present new opportunities for SERI to advance these legal frontiers.

II. Informal settlement upgrading

One of the components of SERI's work on challenging the eviction and relocation of poor communities far from established social and economic networks has been a focus on making the government pursue its stated policy of in situ upgrading of informal settlements. In one of the first cases of its kind, *Melani*,[74] SERI represented approximately 7 000 people from the Slovo Park informal settlement (near Nancefield in Johannesburg) who had been struggling for 20 years to get the City of Johannesburg to upgrade their settlement instead of evicting them. Ruling that the National Department of Human Settlement's Upgrading of Informal Settlements Programme (UISP)[75] is binding on the City of Johannesburg and that the City's decision to 'completely ignore' the policy in favour of its own plan to evict and relocate the Slovo Park residents was a violation of section 26 of the Constitution, the South Gauteng High Court set aside the City's relocation plan and directed the City to apply to the Province for a grant to upgrade Slovo Park in situ.[76]

72 *Dladla* arose out of the *Blue Moonlight* litigation – to comply with the *Blue Moonlight* order, some of the former occupiers of the *Blue Moonlight* building were offered accommodation by the City of Johannesburg in a shelter that imposed draconian rules on the residents, including gender segregation and daytime lockout. See *Jackie Dugard*, Beyond *Blue Moonlight*: The Implications of Judicial Avoidance in Relation to the Provision of Alternative Housing, Constitutional Court Review 5 (2014).

73 *Stuart Wilson*, *Jackie Dugard* and *Michael Clark*, Conflict Management in an Era of Urbanisation: 20 Years of Housing Rights in the South African Constitutional Court, South African Journal on Human Rights 31 (2015), p. 474. For a comprehensive analysis of the CC's failure to provide any content to housing rights, along with other socio-economic rights, see *Sandra Liebenberg*, Socio-Economic Rights: Adjudication under a Transformative Constitution, Cape Town 2010.

74 *Melani and Others v City of Johannesburg and Others* 2016 (5) SA 67 (GJ) (*Melani*).

75 *National Department of Human Settlements*, Upgrading of Informal Settlements Programme (UISP), Part 3:4, National Housing Code (2009),

http://www.seri-sa.org/images/5_Volume_4_Upgrading_Infromal_Settlement.pdf (last accessed on 14 October 2018).

76 *Melani*, paras. 42–50.

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Moreover, in the context of informal settlement residents having to wait for years and even decades for a decision to be taken regarding upgrading, SERI has litigated to ensure that informal settlement residents have interim access to basic services (particularly water and sanitation).[77] For example, in *Mtungwa*,[78] SERI litigated to compel the Municipality of Ekurhuleni to provide basic services to approximately 3 600 residents of three informal settlements in Langaville, Ekurhuleni. And in *Rand Leases*,[79] SERI secured an order for the City of Johannesburg to provide shelter and basic services to the residents of Marie Louise informal settlement (located between a refuse dumping site and a mine to the west of Johannesburg) pending their relocation by the City.

III. Bank repossessions/sales-in-execution

For any low-income household that has managed to secure home ownership through obtaining a bank mortgage, historically there has been a high risk that if they defaulted on their loan agreement payments, their home would be repossessed by the bank.[80] Indeed, until public interest organisations such as SERI began to challenge the practice by banks of pursuing sales-in-execution at public auctions without any reserve price and often for shockingly low arrears amounts,[81] South Africa's rate of bank repossession of mortgaged homes was amongst the highest in the world.[82] In many instances, low-income households that have had their home repossessed and sold-in-execution, are not able to secure another mortgage loan and may be left without access to adequate housing. Responding to this socio-economic problem, SERI has pursued strategic litigation (both directly and through amicus curiae interventions) to reduce the space in which banks can repossess mortgaged homes. In doing so, SERI has protected the rights of low-income homeowners against having their homes sold-in-execution.

The first major case that SERI litigated regarding sales-in-execution was *Gundwana*.[83] Here, SERI represented Ms Gundwana, who owned a bank-mortgaged house in Thembalethu township (in the Western Cape), from which she ran the only black-owned Bed and

77 Section 27(1)(b) of the Constitution guarantees everyone's right of access to sufficient water. While there is no explicit right to sanitation in the Constitution, there are legislated minimum standards for the provision of basic water and sanitation provision in the Water Services Act 108 of 1997.

78 *Mtungwa and Others v Ekurhuleni Metropolitan Municipality*, unreported Case No. 34426/11, South Gauteng High Court (6 December 2011).

79 *Rand Leases Properties Limited v The Occupiers of Vogelstruisfontein and Others*, unreported Case No. 2010/6182, South Gauteng High Court (15 April 2011).

80 These problematic practices have been pursued by all of South Africa's major banks.

81 For example, in *Absa Bank Limited v Ntsane and Another* 2007 (3) SA 554 (T), Absa Bank executed against the Ntsane family's home over an arrears amount of R18,46 (+/- Euro 1).

82 *Douglas Shaw*, The Constitutionality of Sales in Execution for Less Than Market Value where Alternatives are Available, unconcluded PhD thesis (that I am supervising).

83 *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC).

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Breakfast business in the area. The facts of *Gundwana* (and the other bank repossession cases) bear being summarised as they highlight the problematic practices of the banks. During 2003, Ms Gundwana fell behind on her monthly mortgage bond repayments. On 7 November 2003, at the insistence of Nedcor Bank, the Registrar of the High Court granted a default judgment against her along with a further order declaring the property specially executable for the sum owing. On the same day a writ of attachment was issued to give effect to the declaration of executability. Yet, the bank did not take any further action in relation to the execution for approximately four years, during which time Ms Gundwana continued making payments on the bond, 'albeit irregularly'.[84] In August 2007, on returning from visiting her sister, Ms Gundwana discovered that the bank was about to sell her house in-execution of the judgments it had originally obtained in November 2003. On contacting the bank, Ms Gundwana was told that she was in arrears for the amount of R5 268,66. She promised to pay the arrears as soon as possible and, having paid R 2000 on 13 August 2007, thought she had averted the sale-in-execution. However, on 15 August 2007, the property was sold in-execution under the original writ.

At its core, *Gundwana* challenged the constitutionality of the process that allowed banks to execute against residential property without proper judicial oversight.[85] SERI argued that, because sale-in-execution against residential property inevitably results in eviction, this process violated section 26(3)'s prohibition against an eviction order being granted without an order of court made after considering all the relevant circumstances. The CC agreed. In its judgment of 11 April 2011, the CC declared Rule 35(5) of the Uniform Rules of Court constitutionally invalid to the extent that it permitted a High Court Registrar to declare immovable property specially executable when ordering a default judgment against a mortgage bond-holder.

Having secured judicial oversight over bank repossessions of homes, in a series of cases, SERI moved to the next strategic frontier – the interpretation of the legislation enacted to protect consumers against the overzealous and unfair actions of creditors, specifically section 129 of the National Credit Act 34 of 2005 (NCA). The first of this series of cases, *Sebola*,[86] challenged banks' interpretation of the notice requirement in section 129(1)(a) of the NCA. Section 129(1)(a) provides that when a consumer is in default under a credit agreement, the credit provider may 'draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor etc, 'with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date'. Section 129(1)(b) provides that a creditor may not commence any legal proceedings to enforce the agreement before notify-

84 Ibid., para. 6.

85 At the time, the Rules of the High Court allowed a court Registrar (as opposed to a Judge) to authorise sales-in-execution in instances even when a default judgment had been previously obtained against the home-owner (meaning that the Registrar had not heard, and therefore had not considered, the home-owner's side of the story).

86 *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC).

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ing the consumer in terms of section 129(1)(a). In this case, it was accepted that Mr and Mrs Sebola, whose home was attached and sold in-execution, did not receive the section 129(1)(a) notice that Standard Bank sent them alerting them that they were in default of their mortgage bond agreement (nor did they receive the subsequent summons). The SCA, as well as several High Courts, had interpreted section 129(1)(a) as merely requiring banks to have sent the notice. On appeal, the CC ruled on 7 June 2012 that a notice under section 129(1)(a) of the National Credit Act must be properly delivered to the consumer, who is entitled to contest the enforcement of the credit agreement (and the sale-in-execution) in the event she did not receive the notice. Thus, the Sebolas and mortgagors in similar circumstances now have the ability to have any bank-initiated sale-in-execution set aside if they can show that they did not receive the required notice. Subsequently, to concretise this protection, the NCA was amended to require that section 129(1)(a) notices are delivered by registered mail or by hand to an adult person at an address designated by the consumer.

The next issue to be tackled, in *Nkata*,[87] was the interpretation of two further provisions of section 129 of the NCA: the provision in section 129(3)(a) of the NCA that a consumer may reinstate the credit agreement 'at any time before the credit provider has cancelled the agreement', by paying to the credit provider all amounts that are overdue (along with the permitted default charges and reasonable costs of enforcing the agreement); and the provision in section 129(4) that a consumer may not reinstate a credit agreement after the sale of any property pursuant to an attachment order or the execution of any other court order enforcing that agreement. Banks had been interpreting these provisions to mean that cancellation of the agreement occurred at the point at which the home was sold at the public auction (the point when the gavel is struck), and that consumers would have to pay all monies owed including the default charges in order to formally reinstate their credit agreements. SERI intervened as amicus curiae in *Nkata* to argue that the NCA should be interpreted in favour of the consumer, and that the correct interpretation of section 129(3)(a) and 129(4) is that consumers automatically (by operation of the law) reinstate the mortgage bond agreement when they pay the outstanding amounts (i.e. by bringing the account up to date), and that they may do so right up until any purchaser who purchases the house at an auction actually pays for the house.

The facts of *Nkata* again underscore the mala fides of banks in sales-in-execution proceedings. Ms Nkata defaulted on her mortgage bond payments to First Rand Bank (FRB). FRB obtained a court order against her declaring her house specially executable. On becoming aware of this, Ms Nkata immediately contacted FRB and entered into an agreement with it, in terms of which Ms Nkata agreed to pay all outstanding monies and to pay her monthly instalments in terms of the mortgage bond agreement, and FRB agreed not to sell her home in-execution. Ms Nkata paid the outstanding monies, but FRB nonetheless sold her home in-execution, prompting Ms Nkata to challenge the lawfulness of this practice. When the matter reached it, the CC ruled in Ms Nkata's favour, setting aside the public auc-

87 *Nkata v First Rand Limited and Others* 2016 (4) SA 257 (CC).

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tion and sale of her home on the grounds that she had lawfully reinstated the mortgage bond agreement with FRB. The majority judgment held that section 129 of the National Credit Act must be interpreted in favour of the values of fairness and equality,[88] meaning that a consumer can reinstate a credit agreement (including a mortgage bond agreement) right up until the purchase price is paid following a sale-in-execution and she may do so by simply paying the outstanding arrears due (she will ultimately also be liable for the default charges and the reasonable costs to the bank of enforcing the credit agreement, but these are only payable following having been taxed by the bank, and she certainly would not be liable for the full accelerated cost of the agreement).

Following this series of judgments, the Rules of the High Court were again amended to further strengthen the protections against un-procedural bank repossession of homes – the new Rule 46a (introduced in December 2017), provides that, where a creditor intends to execute against the residential immovable property of a judgment debtor, a court considering such an application must establish whether the property is the primary residence of the judgment debtor and consider alternative means by the judgment debtor of satisfying the judgment debt other than execution against the judgment debtor's primary residence.

Most recently, SERI has intervened as an amicus curiae in case involving further clarification of the operation of section 129(3) of the NCA. In *Mokebe*,[89] the South Gauteng High Court ruled that it is cleaner, fairer, and less costly and onerous for debtors for banks to wait to bring any application for a money judgment at the same time as they apply for a warrant to execute against a debtor's home.[90] The Court also held that, to safeguard the interests of debtors, it would be 'expedient and appropriate to generally order a reserve price in all matters depending on the facts of each case'.[91] Through these cases, the law has been progressively clarified and developed to ensure that banks exercise their right to repossess homes in a fair manner that does not violate the constitutional rights of mortgage bond consumers, particularly their section 26 rights to adequate housing.

IV. Landlord-tenant disputes

Finally, SERI has litigated three cases that have advanced the housing and basic services-related rights of low-income tenants. In *Maphango*,[92] SERI represented 18 poor residents of an inner city building that was purchased by a property developer at a public auction in the full knowledge that it was occupied by poor residents. The property developer, which wanted to renovate the building to provide rental housing for more affluent tenants, cancelled the existing tenants' leases and offered them new leases at vastly escalated rental amounts.

88 Ibid., para. 96.

89 *Absa Bank Limited v Mokebe* [2018] ZAGPJHC 485 (12 September 2018).

90 Ibid., paras. 14, 22, 25 and 26.

91 Ibid., para. 59.

92 *Maphango and Others v Aengus Lifestyle Properties* 2012 (3) SA 531 (CC).

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The CC held that doing so was potentially a prohibited unfair landlord practice and directed the matter to be referred to the Rental Housing Tribunal for determination.

In *Chiawelo*,[93] SERI established that government officials including electricity service providers cannot disconnect electricity supplies to tenants without first notifying them and providing a reasonable opportunity for them to make representations about why their electricity supply should not be disconnected. And in *Plettenberg Flats*,[94] the Rental Housing Tribunal found that it was unlawful for landlords to add a service charge to any electricity charges levied against tenants on their electricity accounts. These cases have all played a role in strengthening tenancy rights vis-à-vis ownership rights in a progressively pro-poor housing rights trajectory.

E. Conclusion

In its first nine years, SERI has experienced significant legal successes and has won most of its cases. In the realm of political space, SERI has successfully defended community activists against unlawful arrest and detention; it has ensured a modicum of justice for the families of the deceased Marikana families; and it has expanded the legal boundaries within which protest can occur. In the realm of living space, SERI has advanced the jurisprudence on just and equitable evictions; it has compelled the government to upgrade, and provide services to, informal settlements; and it has developed the law to restrict the power of private actors such as banks and landlords to act against low-income home-owners and tenants. In this way, SERI has made meaningful inroads into the political and economic status quo. SERI has also experienced legal disappointments, notably in relation to the Marikana Commission and the content of housing rights. Most devastatingly, during this period, structural inequality and socio-economic exclusion has increased rather than decreased.

Yet SERI's model of strategic litigation does not measure success or failure in terms of wins or losses in court. Rather, SERI's model is based on an understanding of the strategic role that the law can play in opening up spaces in which subordinate groups can organise and mobilise for social change. As pointed out by SERI's co-founder (and current Executive Director), Stuart Wilson:

> *Law does not, in itself, produce or constitute social change. Its role is more complex than that. It shapes the spaces in which ordinary people act … Changes in the law adjust the boundaries of human agency. They, therefore, albeit indirectly, lead to social change, whether or not anyone immediately changes his or her behaviour. It is enough that spaces of possible action are opened up or closed down. Over time, new spaces will be occupied and acted in, and old spaces will be abandoned, either as a*

93 *Residents of Chiawelo Flats, Soweto v Eskom Holdings Limited and City of Johannesburg*, unreported Case No. 2010/35177, South Gauteng High Court (10 September 2010).

94 *Tenants of Plettenberg Flats v Young Min Shan CC*, unreported Case No. RT1347/15, Gauteng Rental Housing Tribunal (15 March 2016).

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> *result of coercion, or voluntarily, as individuals and groups adjust their behaviour in light of what the law says about the boundaries of socially acceptable action.*[95]

Within this understanding of the potential of the law, SERI has sought to catalyse social change by supporting socio-economically marginalised communities and through pursuing strategic litigation across critical fault lines of struggle. Under SERI's theory of change, strategic litigation is a means rather than an end, and is aimed at 'the creation or destruction of spaces in which ordinary men and women can act for themselves'.[96] Thus, although socio-economic exclusion persists in South Africa and, arguably, the courts have not yet developed a substantive account of the 'positive obligations that socio-economic rights place on the state',[97] SERI recognises that struggle is constant, and that its role is to work collectively and progressively to ensure that the long 'arc of the moral universe' 'bends towards justice'.[98]

95 *Wilson*, note 10, p. 182.

96 Ibid., p. 184.

97 *Stuart Wilson* and *Jackie Dugard*, Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights, Stellenbosch Law Review 22 (2011), p. 664.

98 Paraphrasing Theodore Parker's words, during a speech on 25 March 1965, entitled 'How Long, Not Long', Martin Luther King Junior famously stated: 'The arc of the moral universe is long, but it bends towards justice'. https://en.wikipedia.org/wiki/How_Long,_Not_Long (last accessed on 3 November 2018).

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