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# **The Appropriateness of the Reasonableness Standard in Ensuring the Effective Realisation of Socio-Economic Rights in South Africa**

by

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## CHAPTER 1: INTRODUCTION

### 1.1 Introduction and Statement of the Research Problem

The principle of constitutionalism is a significant feature of the post-1994 South African dispensation.<sup>1</sup> The principle presupposes that the state derives its powers to govern its citizens from a pre-determined written constitution.<sup>2</sup> The constitution alone does not bring about constitutionalism. Rather, a legitimate government must exercise public power in accordance with the prescripts of the constitution.<sup>3</sup> Thus, the state's administrative actions must draw validity from the constitution.<sup>4</sup>

The Constitution of the Republic of South Africa, 1996 (hereafter 'Constitution') is the supreme law of South Africa.<sup>5</sup> Law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.<sup>6</sup> The supremacy of the Constitution entails that the rules and principles of the Constitution are binding on all branches of the state, and they have priority over any law made by parliament or other institutions.<sup>7</sup> Since the executive, legislature and the judiciary derive their powers and duties from the Constitution, their actions must be within the confines of the Constitution.<sup>8</sup>

Fombad explains that a constitution is only as good as the mechanism that it offers for ensuring that its provisions are properly implemented, and that any violations of it are promptly sanctioned.<sup>9</sup> He avers that constitutionalism requires an efficient and

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<sup>1</sup> I Currie & J de Waal *the Bill of Rights Handbook* (2005) 8. Constitutionalism is a notion of a democratic government limited by law. Constitutionalism is about faithfulness to the Constitution. See E Kibet & C Fombad 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa' (2017) 17 (2) *African Human Rights Law Journal* 342.

<sup>2</sup> Currie & De Waal (note 1 above) 9-10.

<sup>3</sup> M Bazezew 'Constitutionalism' (2009) 3 (2) *Mizan Law Review* 358.

<sup>4</sup> See *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC) (hereafter '*Fedsure Life Assurance*') para 57, where the Constitutional Court confirmed that the state is constrained by the Constitution, and it may exercise no power and perform no function beyond what is conferred upon by the Constitution.

<sup>5</sup> Constitution of the Republic of South Africa, 1996 (hereafter 'Constitution'), sec 2.

<sup>6</sup> Constitution, sec 2.

<sup>7</sup> See *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC) (hereafter '*Doctors for Life*') para 38.

<sup>8</sup> See *Fedsure Life Assurance* (note 4 above) para 49.

<sup>9</sup> CM Fombad 'The Constitution as a Source of Accountability: The Role of Constitutionalism' (2010) 24 (2) *Speculum Juris* 49.

effective mechanism to enforce the constitution.<sup>10</sup> Therefore, he asserts that the only way the supremacy of the SA Constitution can have meaning is when it is complied with, and enforced through the courts.<sup>11</sup>

In terms of section 7(1) of the Constitution, the Bill of Rights is the cornerstone of democracy and embodies the rights of citizens and non-citizens. The provision additionally states that the Bill of Rights espouses the values of human dignity, equality, and freedom. As per section 7(2) of the Constitution, the state is compelled to respect, protect, promote, and fulfil the rights in the Bill of Rights.

Socio-economic rights are expressly included in the Constitution under sections 26,<sup>12</sup> 27,<sup>13</sup> and 29.<sup>14</sup> The rights include access to adequate housing, sufficient food and water, health care services, education, and social security. Sections 26(2) and 27(2) create internal limitations on the socio-economic rights.<sup>15</sup> Access to the rights is subject to the availability of resources.<sup>16</sup> Thus, the state is not under a duty to immediately fulfil the rights.<sup>17</sup> Instead, the state is required to take reasonable measures to progressively realise the rights within its available resources.<sup>18</sup>

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<sup>10</sup> Fombad (note 9 above) 49.

<sup>11</sup> Fombad (note 9 above) 49.

<sup>12</sup> Section 26 provides:

- (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.

<sup>13</sup> Section 27 provides:

- (1) Everyone has the right to have access to:
  - (a) health care services, including reproductive health care;
  - (b) sufficient food and water; and
  - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

<sup>14</sup> Section 29(1) provides:

- Everyone has the right:
- (a) to a basic education, including adult basic education; and
  - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

<sup>15</sup> D Bilchitz 'Performance of Socio-Economic Rights in the South African Constitution' in T Roux & R Dixon (eds) *Constitutional Triumphs, Constitutional Disappointments* (2018) 51.

<sup>16</sup> *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) (hereafter 'Soobramoney') para 11.

<sup>17</sup> *Soobramoney* (note 16 above) para 11.

<sup>18</sup> *Grootboom v Government of the Republic of South Africa and Others* 2001 (1) SA 46 (CC) (hereafter 'Grootboom') paras 45-46.

In *Certification of the Constitution of the Republic of South Africa*,<sup>19</sup> it was argued that socio-economic rights are not justiciable and not suited for judicial enforcement, as they would encroach upon the principle of separation of powers.<sup>20</sup> The Constitutional Court dismissed the arguments, holding that socio-economic rights are fully justiciable.<sup>21</sup> Thus, socio-economic rights can be negatively protected from improper invasion.<sup>22</sup> A few years later, in the landmark socio-economic rights case, *Grootboom v Government of the Republic of South Africa and Others* (hereafter 'Grootboom'),<sup>23</sup> the Constitutional Court held that the issue of whether socio-economic rights are justiciable was put beyond doubt by the text of our Constitution.<sup>24</sup> The court consequently highlighted that it is constitutionally bound to enforce and protect socio-economic rights.<sup>25</sup>

The inclusion of justiciable socio-economic rights in the Constitution signifies a commitment to address poverty and inequality. The objective is to transform the South African society into one in which there will be human dignity, freedom, and equality,<sup>26</sup> and improve the quality of life of all citizens.<sup>27</sup> Thus, transformation lies at the heart of the new constitutional order.<sup>28</sup>

Klare refers to the use of a constitution to transform society as transformative constitutionalism.<sup>29</sup> In his view, transformative constitutionalism is a long-term project of constitutional enactment, interpretation, and enforcement,<sup>30</sup> aimed at

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<sup>19</sup> 1996 (4) SA 744 (CC) (hereafter 'Certification case').

<sup>20</sup> *Certification* (note 19 above) para 77.

<sup>21</sup> *Certification* (note 19 above) para 77.

<sup>22</sup> *Certification* (note 19 above) para 78.

<sup>23</sup> *Grootboom* (note 18 above) para 20.

<sup>24</sup> *Grootboom* (note 18 above) para 20.

<sup>25</sup> *Grootboom* (note 18 above) para 20.

<sup>26</sup> *Soobramoney* (note 16 above) para 8.

<sup>27</sup> *Soobramoney* (note 16 above) para 9.

<sup>28</sup> P Langa 'Transformative Constitutionalism' (2006) 17 (3) *Stellenbosch Law Review* 351-352. However, see the opinion piece by the Minister of Tourism, Lindiwe Sisulu, titled 'Whose law is it anyway?', in which she asserts:

In our beloved South Africa, a Constitution in 1994 and the rule of law took on a new lofty meaning after the deck had been heavily stacked against the victims of the "rule of law". It was a new dispensation of justice after centuries of a vicious oppression of the indigenes of the land by invaders. But what has this beautiful Constitution done for the victims except as a palliative? If we look around, we see a sea of African poverty. ... When we talk about transformation, is it just a buzz word?

L Sisulu 'Lindiwe Sisulu: Whose law is it anyway?' (2022, 8 January) *Mail & Guardian* <<https://mg.co.za/opinion/2022-01-08-lindiwe-sisulu-whose-law-is-it-anyway/>> (accessed 30-10-2022).

<sup>29</sup> K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 (1) *South African Journal on Human Rights* 150.

<sup>30</sup> Klare (note 29 above) 150.

bringing about large-scale social change.<sup>31</sup> Langa elaborates that transformative constitutionalism seeks to establish a society based on social justice.<sup>32</sup> This necessitates the levelling of socio-economic conditions,<sup>33</sup> and the improvement of the living conditions of the poor.<sup>34</sup> It also entails the provision of basic services to all,<sup>35</sup> together with the establishment of a truly equal society.<sup>36</sup>

Since transformative constitutionalism finds a clear textual basis in the Constitution,<sup>37</sup> the courts must interpret and enforce socio-economic rights in a manner that is consistent with the goals of transformative constitutionalism.<sup>38</sup> The context-sensitive legal reasoning can promote transformative constitutionalism.<sup>39</sup> The courts should be able to clarify what it anticipates the reformed law will achieve in relation to transformation and the impact it will have on the lived experiences of the persons affected by it.<sup>40</sup> This means that the courts should adopt a substantive approach to enforce socio-economic rights,<sup>41</sup> taking into account the constitutional value of equality.<sup>42</sup> In *King N.O. and Others*,<sup>43</sup> Victor AJ underscored the significance of the court's adopting a substantive transformative constitutionalism approach to abate the historical and sinister unequal distribution of wealth in South Africa.<sup>44</sup> The Acting Justice cautioned that if the courts do not embrace a more

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<sup>31</sup> Klare (note 29 above) 150.

<sup>32</sup> Langa (note 28 above) 352.

<sup>33</sup> Social justice acknowledges the injustices of the past and lays the bedrock for a democratic and open society in which every person is equally protected by law. It seeks to improve the quality of life of all citizens and free the potential of every person. See the Preamble to the Constitution. See also Albertyn & Goldblatt, who describe 'social justice' as the redistribution of power and resources along egalitarian lines and the eradication of systemic forms of domination and material disadvantages based on race, gender, class and other grounds of inequality. This aligns with the constitutional values of human dignity, equality, freedom, accountability, responsiveness and openness. C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 (2) *South African Journal on Human Rights* 248-249.

<sup>34</sup> Langa (note 28 above) 359.

<sup>35</sup> Langa (note 28 above) 352-353.

<sup>36</sup> Langa (note 28 above) 353.

<sup>37</sup> S Sibanda 'Not Purpose Made! Transformative Constitutionalism, Post-Independence Constitutionalism, and the Struggle to Eradicate Poverty' (2011) 22 (3) *Stellenbosch Law Review* 486.

<sup>38</sup> G Penfold 'Substantive Reasoning and the Concept of Administrative Action' (2019) 136 (1) *South African Law Journal* 171.

<sup>39</sup> Penfold (note 38 above) 171.

<sup>40</sup> Penfold (note 38 above) 171.

<sup>41</sup> See D Davis and K Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 (3) *South African Journal on Human Rights* 496.

<sup>42</sup> Penfold (note 38 above) 171.

<sup>43</sup> *King N.O. & Others v De Jager & Others* 2021 (4) SA 1 (CC) (hereafter '*King*').

<sup>44</sup> *King* (note 43 above) para 168.

progressive or unconventional approach to substantive transformation, they will imbed formal equality rather than substantive equality.<sup>45</sup>

The Constitutional Court introduced the reasonableness standard to adjudicate socio-economic rights claims in the *Grootboom* case.<sup>46</sup> The Court explained that the reasonableness standard requires the state to develop programs and measures capable of realising socio-economic rights.<sup>47</sup> While the precise contours and content of the measures adopted are primarily a matter for the legislature and the executive, the state must ensure that the measures adopted are reasonable.<sup>48</sup> Consequently, when a court adjudicates claims involving socio-economic rights, the question will be whether the legislative and other measures adopted by the state are reasonable.<sup>49</sup>

The effective realisation of socio-economic rights is monitored by the South African Human Rights Commission (SAHRC).<sup>50</sup> In terms of section 184(3) of the Constitution, the state must furnish the SAHRC with information pertaining to measures taken towards the realisation of socio-economic rights.<sup>51</sup> In this sense, the SAHRC serves as an appropriate constitutional mechanism to monitor, assess, and report on the implementation of socio-economic rights.<sup>52</sup>

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<sup>45</sup> *King* (note 43 above) para 197.

<sup>46</sup> *Grootboom* (note 18 above) para 41.

<sup>47</sup> *Grootboom* (note 18 above) para 41.

<sup>48</sup> *Grootboom* (note 18 above) para 41.

<sup>49</sup> *Grootboom* (note 18 above) para 41.

<sup>50</sup> See Heywood who states that there has been poor compliance with the SAHRC questionnaires and requests on the measures taken towards realisation of socio-economic rights, and this has frustrated the ability of the SAHRC to meaningfully fulfil its section 184 (3) obligations. It also undermines a key aspect of the Constitution in relation to socio-economic rights. M Heywood 'Economic Policy and the Socio-Economic Rights in the South African Constitution, 1996–2021: Why Don't They Talk to Each Other?' (2021) 11 *Constitutional Court Review* 352.

<sup>51</sup> Constitution, sec 184(3).

<sup>52</sup> See The Citizen 'SAHRC drags provincial education departments to court over pit toilets,' 21 December 2021 <[www.sahrc.org.za](http://www.sahrc.org.za)> (accessed 30/10/2022). The SAHRC indicated that it will be taking legal action against the Department of Education due to unsafe and unhygienic toilets in public schools. It is estimated that more than 3,000 public schools have pit latrines for learners to use. See *Pretoria News* 'Deadlines to end pit toilet at schools pushed back,' 5 March 2022 (accessed 24 November 2022). Although the SAHRC has not reported any progress on legal action against the Department of Education, it was reported that Basic Education Minister Angie Motshekga responded to parliamentary questions from EFF MP Lorato Florence Tito on the pit toilet issue and indicated that "the provincial departments had identified 3 898 schools. She said there were 2 814 schools, which were targeted and the upgrading of sanitation has been completed at 1 564 schools. The balance of the schools are scheduled for completion by the end of 2022/23".

It has been over 22 years since the *Grootboom* matter was adjudicated by the Constitutional Court and not much transformation has been achieved. Millions of South Africans continue to live under extreme poverty due to inadequate provision of social services.<sup>53</sup> This situation may be attributed, to some extent, to the way the Constitutional Court has interpreted and enforced socio economic rights.<sup>54</sup>

Ngang explains that the court is faced with a challenge of enforcing socio-economic rights while respecting the separation of powers.<sup>55</sup> This is precisely why the court adopted the reasonableness standard in *Grootboom* to adjudicate socio-economic rights, as opposed to scrutinising whether the measures adopted *realise* the rights.<sup>56</sup>

Van der Berg argues that when the courts adjudicate socio-economic rights claims, they should scrutinise whether the state allocated a reasonable budget for the progressive realisation of the rights.<sup>57</sup> The state priorities can be evaluated by assessing the adequacy and effectiveness of resource allocation to fulfil the rights.<sup>58</sup> In that way, the court will ensure that the state allocates resources reasonably within its available resources to progressively achieve socio-economic rights.<sup>59</sup> It is against the background of the criticism of the Constitutional Court's approach in adjudicating socio-economic rights cases that the present study is undertaken.

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<sup>53</sup> See Daily Maverick 'Reflections on the lack of progress on socio-economic rights 25 years after the enactment of the Constitution', 16 December 2021 <[www.dailymaverick.co.za](http://www.dailymaverick.co.za)> (accessed 30/10/2022). Mila Harding, Allison Corkery & Ohene Yaw Ampofo-Anti opined that government has failed to fulfil its socio-economic rights obligations. Despite the failure, government continues to cut spending on socio-economic rights, thereby undermining the resources required to fulfil the rights.

<sup>54</sup> O Fuo & A Du Plessis 'In the Face of Judicial Deference: Taking the "Minimum Core" of Socio-Economic Rights to the Local Government Sphere' (2015) 19 (1) *Law Democracy & Development* 2-3.

<sup>55</sup> C Ngang 'Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection: The Obligation to Take Other Measures' (2014) 14 (2) *African Human Rights Law Journal* 664.

<sup>56</sup> *Grootboom* (note 18 above) para 41

<sup>57</sup> Van der Berg 'Ensuring Proportionate State Resource Allocation in Socio Economic Rights Cases' (2017) 134 (3) *South African Law Journal* 576-577.

<sup>58</sup> Van der Berg (note 57 above) 576.

<sup>59</sup> Van der Berg (note 57 above) 577.

## **1.2 Research Aims**

The present study examines the Constitutional Court's socio-economic rights jurisprudence from 1998 to date to determine how the doctrine of separation of powers has impacted on the realisation of socio-economic rights. The study specifically assesses the appropriateness of the Court's engagement of the reasonableness standard in ensuring the effective realisation of socio-economic rights.

## **1.3 Research Questions**

The study addresses the following research questions:

- (i) What is the nature, scope, and status of socio-economic rights in the South African Constitution?
- (ii) How has the doctrine of separation of powers impacted on the realisation of socio-economic rights in South Africa?
- (iii) Is the application of the reasonableness standard to adjudication of socio-economic rights appropriate in ensuring their full realisation and the achievement of the goal of large-scale social and economic transformation?

## **1.4 Motivation and Hypothesis**

The present study is motivated by the desire to contribute knowledge towards improving the standard of the Constitutional Court's adjudication of socio-economic rights, to effectively achieve the goals of transformative constitutionalism.

The present study hypothesises that the reasonableness standard, which has been adopted by the Constitutional Court when adjudicating socio-economic rights disputes, is ineffective to achieve the goals of transformative constitutionalism. The study assesses selected judgments of the Constitutional Court on the right to access adequate housing, health care, and sufficient water to support the proposition that the reasonableness standard is too deferential to achieve the goals of transformative constitutionalism. It argues that a more robust standard is necessary to adjudicate socio-economic rights.

### **1.5 Scope of the Study (Limitations and Delimitations)**

The scope of the study is on the Constitutional Court's adjudication of socio-economic rights, in particular the right of access to adequate housing, sufficient water and food, health care services, and social assistance. The study does not review every judgment of the Constitutional Court on socio-economic rights. Rather, it focuses on selected judgments that have endorsed and developed the reasonableness standard in the context of socio-economic rights adjudication.

The study focuses on the interpretation of socio-economic rights in the South African constitutional context, which involves a consideration of international law, in accordance with section 39 of the Constitution. Thus, the study engages in a comparative international law analysis involving consideration of how socio-economic rights have been interpreted at the United Nations (UN) and African Union (AU) levels. Apart from the comparative international law analysis, the study does not engage in comparative analysis with any foreign jurisdictions.

### **1.6 Research Methodology**

The research methodology of the study is doctrinal research. Doctrinal research is based on secondary data authorities, and a comprehensive enquiry and analysis of existing legal authorities through legal reasoning.<sup>60</sup> The present study accordingly relies on existing sources of law, such as constitutional provisions, statutes, and case law, as well as secondary sources of law, such as books and journal articles. The primary and secondary sources are collected, analysed, and interpreted to understand the appropriateness of the reasonableness standard in ensuring the effective realisation of socio-economic rights in South Africa, and to propose the best approach to adjudicate socio-economic rights.

The present study is additionally based on conceptual analysis. Conceptual analysis involves the examination of legal concepts, with the aim of understanding how they relate to each other.<sup>61</sup> It involves examining concepts for clarity and

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<sup>60</sup> A Kharel 'Doctrinal Legal Research' (2018) 1 (2) *Social Science Research Network Electronic Journal* 3.

<sup>61</sup> J Furner 'Conceptual Analysis: A Method for Understanding Information as Evidence, and Evidence as Information' (2004) 4 (3-4) *Archival Science* 233.

coherence, critically scrutinising their logical relations, and identifying assumptions and implications.<sup>62</sup> In the present study, concepts are analysed using primary sources, such as case law, as well as with reference to secondary sources, such as scholarly journal articles, commentaries, and books.

The present study applies the theoretical framework of transformative constitutionalism, as a basis to determine the appropriateness of using the reasonableness standard to realise and enforce socio-economic rights more effectively. As stated in part 1.1 above, transformative constitutionalism entails a constitutional framework, which includes fully justiciable socio-economic rights.

## 1.7 Chapter Outline

This introductory chapter introduced the concepts of constitutionalism, the supremacy of the Constitution, the justiciability of socio-economic rights, and transformative constitutionalism. The chapter outlined the nature and the extent of the state's obligations relating to socio-economic rights and the constitutional duty of the courts to respect, protect, promote, and fulfil socio-economic rights. This chapter further explained the research aims and articulated the research questions. It also set out the motivation, hypothesis, and scope of the study, as well as the research methodology.

**Chapter two** details the nature, scope, and status of socio-economic rights based on international instruments and the South African Constitution.

**Chapter three** explores how the doctrine of separation of powers has impacted on the realisation of socio-economic rights in SA.

**Chapter four** evaluates whether the application of the reasonableness standard to the adjudication of socio-economic rights is appropriate in ensuring their full realisation and achieving the goal of large-scale social and economic transformation. The chapter also assesses possible alternative approaches to

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<sup>62</sup> Furner (note 63 above) 233.

ensuring the full realisation of socio-economic rights and ultimately achieving the goals of transformative constitutionalism.

**Chapter five** summarises the conclusions of the preceding substantive chapters and explains the key findings for each chapter. It explicitly answers the research questions.

## CHAPTER 2: THE NATURE, SCOPE, AND STATUS OF SOCIO-ECONOMIC RIGHTS IN THE SA CONSTITUTION

### 2.1 Introduction

Socio-economic rights are included in the Constitution to atone for the deep historical injustices and inequality in our society. The commitment to address high levels of inequality and extreme poverty is expressed in the Preamble to the Constitution.<sup>63</sup> In *Soobramoney*, Chaskalson P remarked that socio-economic rights were included in the Constitution to transform our society into one in which there will be human dignity, freedom and equality.<sup>64</sup> However, almost three decades following the adoption of the SA Constitution, many people continue to live in appalling conditions and extreme poverty due to high levels of unemployment, and insufficient social security.<sup>65</sup> Moreover, there is lack of access to clean water, adequate health services, adequate housing and food.<sup>66</sup> Against this background, the effective realisation of socio-economic rights remains critical in overcoming poverty and inequality.<sup>67</sup>

This chapter outlines the nature, scope, and status of socio-economic rights in South Africa. It discusses the court's engagement of the reasonableness standard in the assessment of the state's measures to fulfil socio-economic rights and its implications for the enforcement of the rights, as well as the achievement of the goals of transformative constitutionalism.

The chapter commences in part 2.2 below with a brief overview of the nature, scope, and status of socio-economic rights at the international law level. Thereafter, part 2.3 provides a brief overview of the status, nature, and scope of socio-economic rights in the SA Constitution and assesses whether socio-economic rights under the SA Constitution have a minimum core content.

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<sup>63</sup> *Soobramoney* (note 16 above) para 9.

<sup>64</sup> *Soobramoney* (note 16 above) para 8.

<sup>65</sup> *Soobramoney* (note 16 above) para 8.

<sup>66</sup> *Soobramoney* (note 16 above) para 8.

<sup>67</sup> *Grootboom* (note 18 above) para 23.

## 2.2 The Nature, Scope, and Status of Socio-Economic Rights in International Human Rights Law

At the United Nations (UN) level, socio-economic rights are recognised as human rights in the 1948 Universal Declaration of Human Rights (UDHR),<sup>68</sup> and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>69</sup> South Africa signed the ICESCR<sup>70</sup> in October 1994 and ratified it on 12 January 2015. Article 2 of the ICESCR enjoins States Parties to maximise available resources to achieve progressively the full realisation of socio-economic rights, including the adoption of legislative measures.<sup>71</sup>

In interpreting the nature of States Parties' obligations under the ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR) explains that a State Party is enjoined to comply with the minimum core socio-economic rights obligations.<sup>72</sup> An assessment whether a State Party has satisfied minimum core obligations takes into account resource constraints.<sup>73</sup> Thus, a State Party can attribute failure to comply with the minimum core obligations to lack of available resources.<sup>74</sup> However, a State Party must demonstrate that maximum available resources have been prioritised to satisfy the minimum core obligations.<sup>75</sup>

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<sup>68</sup> UDHR, art 22.

<sup>69</sup> The UN General Assembly adopted the ICESCR on 16 December 1966.

<sup>70</sup> See M Heywood who states that South Africa has ratified several international and regional human rights treaties that give rise to express duties to mobilise the 'maximum available resources' to realise socio-economic rights. Heywood (note 50 above) 362.

<sup>71</sup> Article 2(1) of the ICESCR provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

<sup>72</sup> CESCR *General Comment No. 3*, issued in 1990, explains minimum core in para 10 as follows:

... an obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. A State party in which any significant number of individuals are deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

<sup>73</sup> CESCR *General Comment No. 3*: (note 72 above) para 10.

<sup>74</sup> CESCR *General Comment No. 3* (note 72 above) para 10.

<sup>75</sup> Fuo & Du Plessis (note 54 above) 5.

At the African regional level, socio-economic rights are recognised under article 22 of the African Charter on Human and People's Rights, 1981 (ACHPR).<sup>76</sup> South Africa signed and ratified the ACHPR on 9 July 1996. The AU has embraced the notion of the minimum core obligation in the interpretation of States Parties obligations in the Pretoria Declaration.<sup>77</sup> As per the Declaration, a State Party has an obligation to ensure the realisation of the minimum essential levels of each of the socio-economic rights.<sup>78</sup> This obligation exists, regardless of the availability of resources.<sup>79</sup> In cases of resource constraints, a State Party has to prioritise the realisation of minimum socio-economic rights obligations for the poorest and the most vulnerable in society.<sup>80</sup>

### **2.3 Status, Nature, and Scope of Socio-Economic Rights in the SA Constitution**

The SA Constitution entrenches both civil and political rights, as well as social and economic rights in the Bill of Rights.<sup>81</sup> All the rights in the Bill of Rights are interrelated and mutually reinforcing.<sup>82</sup> The Constitution does not make any difference or hierarchy between civil, political, socio-economic, and cultural rights.<sup>83</sup> The rights do not appear in any order.<sup>84</sup>

Civil, political, economic, social, and cultural rights are also interdependent and should be treated holistically.<sup>85</sup> Certainly, to lead a meaningful life and to fully develop, a person needs to enjoy civil, political, and socio-economic rights.<sup>86</sup> Therefore, all rights are indivisible, interdependent and have equal status.<sup>87</sup>

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<sup>76</sup> See art 22 of the ACHPR which states that all peoples shall have the right to their economic, social, and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

<sup>77</sup> See article 2 of the Pretoria Declaration.

<sup>78</sup> See article 2 of the Pretoria Declaration.

<sup>79</sup> See article 2 of the Pretoria Declaration.

<sup>80</sup> Fuo & Du Plessis (note 54 above) 6.

<sup>81</sup> *Grootboom* (note 18 above) para 23.

<sup>82</sup> *Grootboom* (note 18 above) para 23.

<sup>83</sup> C Mubangizi 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' (2006) 2 (1) *African Journal of Legal Studies* 4.

<sup>84</sup> Mubangizi (note 83 above) 4.

<sup>85</sup> S Liebenberg 'Chapter 33: The Interpretation of Socio-Economic Rights' in S Woolman & M Bishop *Constitutional Law of South Africa* (2013) 1.

<sup>86</sup> S Khoza *Socio Economic Rights in South Africa: A Resource Handbook* (2007) 19.

<sup>87</sup> N Haysom 'Constitutionalism, Majoritarian Democracy and Socio-Economic Rights' (1992) 8 (4) *South African Journal on Human Rights* 451.

Like civil and political rights, socio-economic rights have horizontal,<sup>88</sup> and vertical application, in that they bind the state, as well as natural or juristic persons.<sup>89</sup> The judiciary is charged to effectively protect and enforce socio-economic rights.<sup>90</sup> The rights impose a combination of negative and positive duties. Section 7(2) of the Constitution compels the state to *respect* socio-economic rights by not directly or indirectly interfering with the enjoyment of the rights, and by ensuring that people are not deprived access to the rights.<sup>91</sup> Section 7(2) also compels the state to *protect* socio-economic rights by taking measures to prevent violation of rights by third parties, and making provision for effective remedies to protect the most vulnerable against private parties.<sup>92</sup> Section 7(2) further places a duty on the state to *promote* socio-economic rights by increasing awareness, and educating citizens about socio-economic rights.<sup>93</sup> Finally, section 7(2) obliges the state to *fulfil* socio-economic rights by taking positive measures to realise the rights progressively within available resources.<sup>94</sup>

Sections 26(1) and 27(1) of the Constitution encompass the actual socio-economic rights and substantive entitlements. With regard to its right-holders, socio-economic rights, as entrenched in the SA Constitution, are conferred on 'everyone', entitling them to 'have access to' adequate housing, health care services, including reproductive health care, sufficient food and water, and social security.<sup>95</sup> With regard to its primary duty-bearer, namely the state, the Constitution stipulates that the state is required to 'take reasonable legislative and other measures', within its available resources, to achieve the progressive realisation of each of these rights.<sup>96</sup> Given that socio-economic rights are subject to qualifications,<sup>97</sup> sections 26(1) and 27(1) must be read together with sections 26(2) and 27(2) to define the content and

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<sup>88</sup> See Heywood (note 50 above) 347, who states that the State has a positive duty to intervene in private conduct to prevent private actors from violating rights, including economic conduct, where it is necessary to facilitate the realisation of a right.

<sup>89</sup> Constitution, sec 8(1) & (2).

<sup>90</sup> Ngang (note 55 above) 663.

<sup>91</sup> Constitution, sec 7(1) & (2).

<sup>92</sup> Khoza (note 86 above) 36.

<sup>93</sup> Khoza (note 86 above) 36.

<sup>94</sup> Khoza (note 86 above) 37.

<sup>95</sup> Constitution, secs 26(1) & 27(1).

<sup>96</sup> Constitution, secs 26(2) and 27(2).

<sup>97</sup> 2002 (5) SA 721 (CC) (hereafter 'Treatment Action Campaign' para 23.

scope of the obligations imposed on the state.<sup>98</sup> As Liebenberg correctly observes, the concepts of 'legislative measures', 'progressive realisation' and 'within available resources' are derived from article 2 of ICESCR. In this sense, there is consistency between the formulations of socio-economic rights in South Africa and international human rights law.<sup>99</sup>

In *Grootboom*, the Constitutional Court explained that progressive realisation means that the rights cannot be realised immediately. Rather, the state is enjoined to take specific steps within available resources to realise socio-economic rights.<sup>100</sup> On the issue of whether socio-economic rights under the SA Constitution have a minimum core content, Yacoob J in *Grootboom* examined the minimum core obligations set out by the CESCR in General Comment No. 3. The Justice noted that the CESCR was of the view that every State Party is required to satisfy the minimum essential level of the socio-economic rights.<sup>101</sup> The Justice further observed that the CESCR required that every effort must be made to use available resources to satisfy the minimum core obligations.<sup>102</sup>

Referring to the SA constitutional context, Yacoob J stated that it is not feasible for the court to ascertain the minimum core obligation of the right of access to housing,<sup>103</sup> without having sufficient information on the wide-ranging needs and opportunities for the enjoyment of such a right.<sup>104</sup> The needs and opportunities vary in terms of income, unemployment, availability of land and poverty.<sup>105</sup> Notably, Yacoob J acknowledged that there may be cases where it may be conceivable and suitable to have regard to the content of a minimum core obligation to ascertain whether the actions taken by the state are reasonable.<sup>106</sup> However, this can only

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<sup>98</sup> *Treatment Action Campaign* (note 97 above) para 39.

<sup>99</sup> Liebenberg (note 85 above) 4.

<sup>100</sup> *Grootboom* (note 18 above) para 45.

<sup>101</sup> *Grootboom* (note 18 above) para 30.

<sup>102</sup> *Grootboom* (note 18 above) para 30.

<sup>103</sup> According to Young, *Grootboom* is notable in rejecting a stand-alone 'minimum core' approach, which would establish a minimum threshold right to access housing. However, the Constitutional Court held open the possibility that the minimum core, understood as a relevant standard, could guide its assessment of reasonableness. KG Young 'Proportionality, Reasonableness, and Economic and Social Rights' in VC Jackson & M Tushnet (eds) *Proportionality: New Frontiers, New Challenges*, Cambridge University Press (2017) 11.

<sup>104</sup> *Grootboom* (note 18 above) para 32.

<sup>105</sup> *Grootboom* (note 18 above) para 32.

<sup>106</sup> *Grootboom* (note 18 above) para 33.

be done when sufficient information is placed before a court to enable it to establish the minimum core obligation.<sup>107</sup>

In *Mazibuko and Others v City of Johannesburg and Others* (hereafter 'Mazibuko'),<sup>108</sup> O'Regan J put the Constitutional Court's position regarding minimum core obligations in respect of socio-economic rights beyond any doubt. Citing the *Grootboom* and *Treatment Action Campaign No 2* decisions, she indicated that section 27 of the Constitution does not impose minimum core obligations.

As stated in part 1.1 of chapter 1 above, the issue of whether socio-economic rights are justiciable was put beyond doubt by the text of the Constitution and the *Certification* decision. The justiciability of socio-economic rights enables any person to approach a competent court and allege that their constitutional right(s) have been infringed or threatened. Aggrieved persons must be afforded a real and fair opportunity to enforce justiciable socio-economic rights.<sup>109</sup> This is fortified by section 34 of the Constitution,<sup>110</sup> which stipulates that any aggrieved person may approach the courts to enforce a right that is alleged to have been violated.

Section 38 of the Constitution reinforces section 34 by providing that a person has a right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief. The provision effectively grants any person standing in court to enforce socio-economic rights.<sup>111</sup>

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<sup>107</sup> *Grootboom* (note 18 above) para 33.

<sup>108</sup> 2010 (4) SA 1 (CC) (hereafter 'Mazibuko') para 56.

<sup>109</sup> *De Beer N.O. v North-Central Local Council and South-Central Local Council and Others* 2002 (1) SA 429 (CC) paras 1 & 11.

<sup>110</sup> Section 34 states:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

<sup>111</sup> Section 38 provides:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

The Bill of Rights obliges the courts to effectively protect and enforce socio-economic rights. This grants the court considerable authority to advance the welfare of the most vulnerable.<sup>112</sup> In *Grootboom*, the Constitutional Court held that courts have an obligation to enforce socio-economic rights.<sup>113</sup> Thus, the question that a court must grapple with when faced with socio-economic rights claims is not whether socio-economic rights are justiciable, but how to enforce them in a given case.<sup>114</sup> Hence, if the state fails to take reasonable measures to progressively realise socio economic rights within its available resources, the courts must scrutinize their conduct and make appropriate orders.<sup>115</sup>

## 2.4 Conclusion

This chapter demonstrated that socio-economic rights are recognised internationally and domestically as interrelated, interdependent, and indivisible in relation to civil and political rights. All state organs are constitutionally mandated to respect, promote, protect, and fulfil socio-economic rights. In addition, socio-economic rights are justiciable in that they can be enforced in the courts.

The chapter further highlighted that socio-economic rights are subject to limitations of 'progressive realisation' and 'within available resources. While the Constitutional Court has held that the minimum core obligation, which applies in respect of the ICESCR, does not apply in South Africa due to the qualified nature of socio-economic rights, the court still has an obligation to develop the substantive content of the rights, and clarify the nature and extent of the state's obligations about respecting, protecting, promoting, and fulfilling socio-economic rights.

Through adjudicating socio-economic rights cases, the courts can ensure that the most vulnerable citizens get access to basic necessities and improve their quality of life,<sup>116</sup> thereby advancing the goals of the transformative constitutionalism

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<sup>112</sup> Ngang (note 55 above) 663.

<sup>113</sup> *Grootboom* (note 18 above) para 94.

<sup>114</sup> *Grootboom* (note 18 above) para 20.

<sup>115</sup> Ngang (note 55 above) 662.

<sup>116</sup> Ngang (note 55 above) 658.

project.<sup>117</sup> Given that a decision of a court binds all persons and organs of state to which it applies,<sup>118</sup> the courts play a key role through adjudication to ensure that everyone in SA has access to basic services.<sup>119</sup> Consequently, if the courts interpret socio-economic rights in an overly deferential manner, these rights will exist only in paper. Since the rights were included in the Constitution to advance socio-economic needs, the courts should interpret them in that way.<sup>120</sup>

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<sup>117</sup> Ngang (note 55 above) 662.

<sup>118</sup> Section 165 of the Constitution provides that:

(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

<sup>119</sup> Liebenberg (note 85 above) 159.

<sup>120</sup> Liebenberg (note 85 above) 160.

## CHAPTER 3: THE IMPACT OF JUDICIAL DEFERENCE ON THE REALISATION OF SOCIO-ECONOMIC RIGHTS

### 3.1 Introduction

The Interim Constitution Act 200 of 2003 had 34 Constitutional Principles set out in Schedule 4. Constitutional principle VI prescribed that the final Constitution shall have separation of powers between the legislature, executive and judiciary, with checks and balances to ensure accountability, responsiveness, and openness.<sup>121</sup> Therefore, separation of powers is one of the fundamental principles within the new constitutional text.<sup>122</sup>

This chapter considers the meaning of separation of powers, and examines how the SA Constitutional Court has applied the doctrine when adjudicating socio-economic rights disputes. The chapter commences with an explanation of the purpose and operation of the doctrine. It then considers specific cases where the doctrine was applied and the implications of the court's decision for the effective realisation of the socio-economic right concerned.

### 3.2 Purpose and Operation of the Separation of Powers Doctrine

The doctrine of separation of powers lies at the heart of the South African constitutional order.<sup>123</sup> Separation of powers is a way for state organs to exercise authority<sup>124</sup> The doctrine is based on the notion that powers and responsibilities of administering the affairs of the state are conferred upon three distinct state organs, namely the legislature, the executive, and the judiciary. Each state organ must act within its domain and not encroach on the domain of the other.<sup>125</sup> Thus, the separation of powers means the separation of functions and duties.

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<sup>121</sup> *Certification* case (note 19 above) para 44.

<sup>122</sup> *Certification* case (note 19 above) para 45.

<sup>123</sup> *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC) (hereafter '*Glenister*') para 16.

<sup>124</sup> K O'Regan 'Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution' (2005) 8 (1) *Potchefstroom Electronic Law Journal* 145-146.

<sup>125</sup> M Brennan 'To Adjudicate and Enforce Socio Economic Rights: South Africa Proves that Domestic Courts are Viable Option' (2009) 9 (1) *Law Review Journal* 72.

The separation of powers doctrine essentially distributes public power between distinct organs of state to ensure that public power is not concentrated in one state organ.<sup>126</sup> It is thus based on functional appreciation of the powers.<sup>127</sup> In essence, each state organ's character and competence is protected to exercise its powers and perform its functions.<sup>128</sup> For instance, the executive is expressly enjoined to implement national legislation; develop and implement national policy; co-ordinate the functions of state departments and administration; prepare and initiate legislation; and perform any other executive function provided for in the Constitution or in national legislation.<sup>129</sup> The legislature, on the other hand, is responsible for developing laws, holding the executive into account, and maintaining oversight over the executive.<sup>130</sup> In relation to socio-economic rights, the legislature and the executive are expressly required to provide for legislative measures and other measure to ensure the progressive realisation of the rights within available resources.<sup>131</sup>

Section 165(1) of the Constitution confers upon the courts powers to adjudicate disputes. Section 172(1)(a) of the Constitution enjoins a court to declare invalid any law or conduct that is inconsistent with the Constitution.<sup>132</sup> A court deciding a constitutional matter has a wide remedial power to make 'any order that is just and equitable',<sup>133</sup> including mandatory and structural interdicts, to enforce socio-economic rights claims.<sup>134</sup> The Constitution imposes positive and negative obligations on the state to fulfil socio-economic rights.<sup>135</sup> According to Olivier and

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<sup>126</sup> S Seedorf & S Sibanda 'Chapter 12: Separation of Powers' in S Woolman, J Klaaren & M Bishop *Constitutional Law of South Africa* (2013) 1.

<sup>127</sup> O'Regan (note 124 above) 145.

<sup>127</sup> Ngang (note 55 above)

<sup>128</sup> O'Regan (note 124 above) 145

<sup>129</sup> Constitution, sec 85(1) & (2).

<sup>130</sup> Constitution, sec 55(1) & (2).

<sup>131</sup> Ngang (note 55 above) 656.

<sup>132</sup> Section 172(1) of the Constitution provides:

When deciding a constitutional matter within its power, a court –

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including –
  - (i) an order limiting the retrospective effect of the declaration of invalidity; and
  - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

<sup>133</sup> *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC) (hereafter *State Information Technology Agency*) para 53.

<sup>134</sup> *Treatment Action Campaign* (note 97 above) para 113.

<sup>135</sup> Brennan (note 125 above) 73.

Van Rensburg, while the state is expected to realise socio-economic rights, the courts have a duty to enforce socio-economic rights and order state organs to act positively to fulfil socio economic rights.<sup>136</sup>

During the constitutional certification process, there were arguments that the inclusion of socio-economic rights in the Constitution would encroach on the separation of powers, because the courts would direct how budgets should be allocated.<sup>137</sup> The Constitutional Court disagreed with the proposition,<sup>138</sup> It reasoned that while the rights have budgetary implications, there is no violation of separation of powers.<sup>139</sup> It stated that courts often make orders that have direct budgetary implications when enforcing civil and political rights.<sup>140</sup> Ultimately, the Constitutional Court held that socio-economic rights are enforceable even if they have direct budgetary implications.<sup>141</sup>

### 3.3 Key Constitutional Court Decisions that Upheld the Separation of Powers Principle when Adjudicating Socio-Economic Rights Disputes

As stated previously, the courts have an obligation to enforce socio-economic rights.<sup>142</sup> The Constitutional Court has constantly been challenged on how to enforce socio-economic rights and at the same time respect the limits of separation of powers.<sup>143</sup>

Early in the development of socio-economic rights jurisprudence, the Constitutional Court adopted a deferential approach in ***Soobramoney v Department of Health, KwaZulu-Natal***, when it decided that due to limited resources, Mr. Soobramoney did not meet the criteria for admission to the renal dialysis program.<sup>144</sup> The court did not scrutinize resource allocation decisions and decided to defer to the

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<sup>136</sup> M Olivier and L van Rensburg 'Protection and Enforcement of the Right to Social security' (2000) 4 (1) *Law, Democracy & Development* 93.

<sup>137</sup> *Certification* case (note 19 above) para 77.

<sup>138</sup> *Certification* case (note 19 above) para 77.

<sup>139</sup> *Certification* case (note 19 above) para 77.

<sup>140</sup> *Certification* case (note 19 above) para 77.

<sup>141</sup> *Certification* case (note 19 above) para 77.

<sup>142</sup> *Grootboom* (note 18 above) para 94.

<sup>143</sup> Ngang (note 55 above) 664

<sup>144</sup> *Soobramoney* (note 16 above) para 31.

executive.<sup>145</sup> Sachs J held that the decisions about budgets, resource allocations and prioritisation fall within the domain of the executive,<sup>146</sup> and that there is no reason to interfere with the allocation undertaken by those who are better equipped to make such decisions.<sup>147</sup> O'Regan J elaborated that the courts are not institutionally suited to make allocative budgetary decisions and develop complicated social programmes.<sup>148</sup> According to Brand, this reasoning has influenced the deferential approach the court adopted to adjudicate socio-economic rights cases.<sup>149</sup>

In ***Government of the Republic of South Africa v Grootboom***, the Constitutional Court decided that the state's housing programme contravened section 26(2) of the Constitution because it failed to make provision for persons living in desperate need.<sup>150</sup> The court clarified that the ultimate question is whether the measures adopted by the state to realize socio-economic rights are reasonable,<sup>151</sup> in the sense that they are supported by coherent policies and programs that are well coordinated. The court elaborated that the policies and programs must be reasonable in their conception and implementation.<sup>152</sup> Further, the programs must make provision for short-, medium-, and long-term needs, and not exclude those who are in desperate need and live in intolerable conditions. In addition, the measures must be regularly reviewed to adapt with the progressive realisation of socio-economic rights requirement,<sup>153</sup> and supported by appropriate, well-directed policies and programmes.<sup>154</sup> Unfortunately, the court declined to develop the contents of emergency shelter. Rather, it deferred to the executive and the legislature to determine the precise contours and content of the measures adopted to achieve the right of access to adequate housing. The court held that it does not review whether the state could have adopted other better measures. Instead, it

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<sup>145</sup> *Soobramoney* (note 16 above) para 59.

<sup>146</sup> *Soobramoney* (note 16 above) para 29.

<sup>147</sup> *Soobramoney* (note 16 above) para 59.

<sup>148</sup> O'Regan (note 126 above) 143.

<sup>149</sup> D Brand 'The South African Constitutional Court and Livelihood Rights' in O Vilhena & F Viljoen (eds) *Transformative Constitutionalism: Comparing the Apex Court of Brazil, India, and South Africa* (2013) 421.

<sup>150</sup> *Grootboom* (note 18 above) para 69.

<sup>151</sup> *Grootboom* (note 18 above) para 41.

<sup>152</sup> *Grootboom* (note 18 above) para 42.

<sup>153</sup> *Grootboom* (note 18 above) para 43.

<sup>154</sup> *Grootboom* (note 18 above) para 42.

reviews whether the measures adopted by the state are reasonable and capable of achieving the right in question.<sup>155</sup>

In ***Minister of Health v Treatment Action Campaign (No 2)***, the Constitutional Court emphasised that the Constitution requires a restrained role of the courts.<sup>156</sup> As per the Constitution, the court's role is to evaluate the measures adopted by the state to realise a socio-economic right in terms of the standard of reasonableness.<sup>157</sup> The case concerned a constitutional challenge against the executive policy to make nevirapine available to limited pilot sites, thereby excluding public medical practitioners who are not based on pilot sites from prescribing the drug for use by pregnant women. The Treatment Action Campaign (TAC) argued that the policy prevented the implementation of a comprehensive program to avert mother-to-child transmission of Human Immunodeficiency Virus (HIV).<sup>158</sup>

On the facts, the Constitutional Court held that the policy was inflexible and unreasonable within the context of section 27(2) of the Constitution, in that it denied access to nevirapine to mothers and their new-born children at public hospitals and clinics outside the research and training sites.<sup>159</sup> The Constitutional Court held that while the evaluation of the reasonableness of the measures may have budgetary implications, it cannot direct that budgets should be rearranged.<sup>160</sup> In the court's view, it is not suited to deal with issues that have social and economic consequences.

In ***Mazibuko v City of Johannesburg***, the question before the Constitutional Court was whether a policy which restricted access to clean water to 25 litres per person per day was inconsistent with section 27 of the Constitution.<sup>161</sup> The High Court held that the policy was inconsistent with section 27 of the Constitution.<sup>162</sup> It ordered the City of Johannesburg to provide free basic water supply of 50 litres per person per

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<sup>155</sup> *Grootboom* (note 18 above) para 41.

<sup>156</sup> *Treatment Action Campaign* (note 97 above) para 38.

<sup>157</sup> *Treatment Action Campaign* (note 97 above) para 38.

<sup>158</sup> *Treatment Action Campaign* (note 97 above) para 44.

<sup>159</sup> *Treatment Action Campaign* (note 97 above) para 80.

<sup>160</sup> *Treatment Action Campaign* (note 97 above) para 38.

<sup>161</sup> *Mazibuko* (note 108 above) para 6.

<sup>162</sup> *Mazibuko* (note 108 above) para 6.

day.<sup>163</sup> The Supreme Court Appeal also held that the policy was inconsistent with the section 27 constitutional right.<sup>164</sup> However, it decided that the quantity of water required for dignified human existence in compliance with section 27 of the Constitution is 42 litres per person per day.<sup>165</sup>

On confirmation proceedings, the Constitution Court decided that the City of Johannesburg Water policy complies with the standard of reasonableness, and was not inconsistent with section 27 of the Constitution.<sup>166</sup> The court held that the argument that it should determine the quantity of water, which constitutes the content of section 27(1)(b) right and not merely its minimum content, must fail exactly for the same reasons that the minimum core argument failed in *Grootboom* and *Treatment Action Campaign No 2*.<sup>167</sup> The court explained that section 27(1) and (2) of the Constitution do not confer a right to claim 'sufficient water' from the state immediately, but allows the government to progressively realise the right within available resources.<sup>168</sup> In addition, setting a quantified content may be rigid and deter the analysis of context to determine the reasonableness of the executive program.<sup>169</sup>

The Constitutional Court reiterated that it is not suitable for it to ascertain specifically what the achievement of a particular socio-economic right entails. Instead, this falls within the domain of the executive and the legislature who are better placed to investigate social conditions in line with available budgets and set targets.<sup>170</sup> The court further emphasised that section 27(2) of the Constitution mandates the state to implement reasonable legislative and other measures. When these measures are adopted, the rights acquire content, and that content is subject to the constitutional standard of reasonableness.<sup>171</sup>

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<sup>163</sup> *Mazibuko* (note 108 above) para 18.

<sup>164</sup> *Mazibuko* (note 108 above) para 18.

<sup>165</sup> *Mazibuko* (note 108 above) para 29.

<sup>166</sup> *Mazibuko* (note 108 above) para 9.

<sup>167</sup> *Mazibuko* (note 108 above) para 56.

<sup>168</sup> *Mazibuko* (note 108 above) para 57.

<sup>169</sup> *Mazibuko* (note 108 above) para 60.

<sup>170</sup> *Mazibuko* (note 108 above) para 61.

<sup>171</sup> *Mazibuko* (note 108 above) para 66.

### 3.4 Impact of Separation of Powers on the Enforcement of Socio-Economic Rights

The courts have broad remedial powers to grant appropriate relief when a violation of a right has been established. These extensive remedial powers enable the courts to effectively enforce socio-economic rights.<sup>172</sup> The remedies a court can grant include declaratory orders, structural interdicts, a mandamus/mandatory relief, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced<sup>173</sup>. The courts may also create new remedies to secure the protection and enforcement of rights.<sup>174</sup> In *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others 2022 (8) BCLR 985 (CC)*, the Constitutional Court stated that if on particular facts and circumstances, constitutional damages are the only effective remedy to vindicate violation of socio-economic rights, they ought to be granted.<sup>175</sup>

According to Ngang, even though the Constitution grants the courts wide review powers, the court's approach to adjudication of socio-economic rights is deferential.<sup>176</sup> He asserts that the Constitutional Court has imposed a superfluous constraint on its legitimate powers.<sup>177</sup> In Brennan's view, the court should adopt more stringent remedies and retain control until there is compliance with the court order.<sup>178</sup> Brennan maintains that due to the considerations of separation of powers, the Constitutional Court prefers to issue declaratory orders.<sup>179</sup> Brand also contends that the Constitutional Court prefers declaratory orders, as demonstrated in *Grootboom*.<sup>180</sup> The court declared that state is required to implement within its available resources, programs that progressively realise the right of access to

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<sup>172</sup> Ngang (note 55 above) 663.

<sup>173</sup> In *Equal Education and Others v Minister of Basic Education and Others 2021 (1) SA 198 (GP)* para 82 & 89, the court stated that a declaratory order effectively means that if a court finds that a constitutional duty exists, noncompliance is declared unlawful. Therefore, it confirms the fact of the infringement. If a mandatory order is granted, the court compels a party to carry out a particular act and supervisory or structural interdict is an order under which the court controls compliance with its order and the state is compelled to report back.

<sup>174</sup> *Fose v Minister of Safety and Security 1997 (3) SA 786* (hereafter '*Fose*') para 19.

<sup>175</sup> *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others 2022 (8) BCLR 985 (CC)* para 83.

<sup>176</sup> Ngang (note 55 above) 665.

<sup>177</sup> Ngang (note 55 above) 665.

<sup>178</sup> Brennan (note 125 above) 80.

<sup>179</sup> Brennan (note 125 above) 80.

<sup>180</sup> Brand (note 149 above) 422.

adequate housing. The programs must include reasonable provisions for people living in intolerable conditions. The state measures failed to make provisions for living in intolerable conditions.<sup>181</sup>

Regrettably, reports emerged that after 5 years of a declaratory order, the executive had not complied with the court order.<sup>182</sup> This shows that declaratory orders are not effective to enforce court decisions.<sup>183</sup> However, in *Treatment Action Campaign*, the Constitutional Court granted directory relief by ordering government to take reasonable measures to extend the testing and counselling facilities to hospitals and clinics throughout the public health sector beyond the test sites to facilitate and expedite the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV<sup>184</sup>, but declined to retain jurisdiction over the implementation of the directory order.<sup>185</sup> The imposition of a structural interdict enables the Constitutional Court to retain jurisdiction over the enforcement of the orders.<sup>186</sup> The courts are concerned about separation of powers, as a result they are reluctant to grant structural interdicts. The courts accept that court orders will be adhered to.<sup>187</sup> In *Treatment Action Campaign*, the Constitutional Court stated that a structural interdict should not be granted unless this is necessary, the state has always respected and implemented court orders. Therefore, there is no reason to believe that it will not do so in the present case.<sup>188</sup>

### 3.5 Conclusion

The doctrine of separation of powers has impacted on the level of scrutiny applied by the Constitutional Court to adjudicate socio-economic rights. The strict application of separation of powers has led to the Constitutional Court adopting a disproportionately deferential approach to the adjudication of socio-economic rights.<sup>189</sup> As a result, the level of scrutiny is procedural in that it focuses on whether

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<sup>181</sup> *Grootboom* (note 18 above) para 99.

<sup>182</sup> Brennan (note 125 above) 80.

<sup>183</sup> Brennan (note 125 above) 79.

<sup>184</sup> *Treatment Action Campaign* (note 97 above) para 95.

<sup>185</sup> *Treatment Action Campaign* (note 97 above) para 129.

<sup>186</sup> Liebenberg (note 85 above) 62.

<sup>187</sup> *Mzalasi NO and Others v Ochogwu and Another* 2020 (3) SA 83 (SCA) par 13

<sup>188</sup> *Treatment Action Campaign* (note 97 above) para 129.

<sup>189</sup> K McLean *Constitutional Deference, Courts, and Socio-Economic Rights in South Africa* (2009) 3.

the measures and programs can realise socio-economic rights, with no substantive interpretation of the content of the rights.<sup>190</sup>

While separation of powers is one of the basic structures of the Constitution, the courts have a constitutional duty to enforce socio-economic rights and order state organs to act positively to fulfil socio economic rights.<sup>191</sup> The present chapter has shown that separation of powers does not prevent the courts from enforcing socio-economic rights, but it impacts on the level of scrutiny that the court employs to adjudicate the rights. As a result, the court has failed to interpret section 26 (1) and 27 (1) to define the precise content of the rights.<sup>192</sup>

Even though the Constitutional Court has decided that mandatory and structural interdicts do not infringe separation of powers,<sup>193</sup> the court has imposed constraints on its legitimate powers,<sup>194</sup> because it is reluctant to issue supervisory orders, choosing instead to grant declaratory orders, which are not effective to enforce court decisions.<sup>195</sup> The failure to issue supervisory orders has led to the court being overly deferential. This has impacted on the effective realisation of socio-economic rights.

Separation of powers requires the court to determine specific claims of goods and services flowing from the rights. In doing so, the courts are enforcing and protecting the rights.<sup>196</sup> While the doctrine of separation of powers is vital in a constitutional democracy,<sup>197</sup> the courts have a constitutional obligation to ensure that all rights are protected and enforced,<sup>198</sup> and to prevent the state from acting in ways that infringe them.<sup>199</sup>

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<sup>190</sup> G Quinot & S Liebenberg 'Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa' (2011) 22 (3) *Stellenbosch Law Review* 639.

<sup>191</sup> Olivier and van Rensburg (note 136 above) 93.

<sup>192</sup> D Davis 'Socio-Economic Rights: Do they Deliver the Goods?' (2008) 6 (3-4) *International Journal of Constitutional Law* 697.

<sup>193</sup> *Treatment Action Campaign* (note 97 above) paras 112-113.

<sup>194</sup> Ngang (note 55 above) 665.

<sup>195</sup> Brennan (note 125 above) 79.

<sup>196</sup> S Seedorf & S Sibanda 'Chapter 12: Separation of Powers' in S Woolman et al *Constitutional Law of South Africa* 66.

<sup>197</sup> Constitution, sec 1(c).

<sup>198</sup> Ngang (note 55 above) 661.

<sup>199</sup> Currie & De Waal (note 1 above) 572.

## CHAPTER 4: THE APPROPRIATENESS OF THE REASONABLENESS STANDARD IN THE ADJUDICATION OF SOCIO-ECONOMIC RIGHTS AND PROMOTING TRANSFORMATIVE CONSTITUTIONALISM

### 4.1 Introduction

The purpose of including socio-economic rights in the Bill of Rights is to ensure that the poor and marginalised gain access to basic services. Therefore, socio-economic rights must be interpreted in a way that advances the needs of the most vulnerable.<sup>200</sup> The Constitutional Courts plays a critical role in ensuring that the most vulnerable gain access to basic services through adjudication of socio-economic rights disputes.<sup>201</sup>

The Constitutional Court has long decided that socio-economic rights are justiciable and enforceable.<sup>202</sup> However, separation of powers has shaped the adjudication of socio-economic rights in South Africa. Despite the constitutional commitments to social justice and substantive equality, the Constitutional Court has adopted an overly deferential approach to adjudicate socio economic rights.<sup>203</sup> As shown in chapter 3 above, the deferential approach offers little protection of socio-economic rights, with the result that litigation may not bring about concrete benefits.<sup>204</sup>

This chapter considers the appropriateness of applying the reasonableness standard when adjudicating socio-economic rights. It considers the impact of the Constitutional Court's application of the reasonableness standard on the effective realisation and enforcement of socio-economic rights.

### 4.2 Appropriateness of Reasonableness Standard in the Adjudication of Socio-Economic Rights Disputes

In applying the standard of reasonableness when adjudicating socio-economic rights disputes, the courts are cognizant of the boundaries of judicial authority and

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<sup>200</sup> Liebenberg (note 85 above) 160.

<sup>201</sup> Liebenberg (note 85 above) 159.

<sup>202</sup> *Grootboom* (note 18 above) para 20.

<sup>203</sup> Davis (note 192 above) 692.

<sup>204</sup> Bilchitz (note 15 above) 75.

the constitutional mandate obligation to leave certain matters to the executive.<sup>205</sup> The standard of reasonableness requires the courts to protect the executive domain from intrusion by the judiciary through the doctrine of separation of powers.<sup>206</sup> In *Bato Star Fishing*, it was emphasised that it is important to protect the constitutional authority of the executive to formulate and implement policy.<sup>207</sup> The role of the courts is not to make policy and allocate budget to complex policy laden programs/measure, but to review the program and budget allocations.<sup>208</sup> Thus, the courts are required to defer to the executive on matters that fall within the exclusive domain of the executive.<sup>209</sup> However, the application of the reasonableness standard has generated an overly deferential approach.<sup>210</sup>

The court's application of the standard of reasonableness to assess the measures and programs adopted by the state to fulfil socio-economic rights is not appropriate to ensure effective realisation of the rights. The challenge is that the standard of reasonableness does not focus on whether socio-economic rights have been realised.<sup>211</sup> Rather, the emphasis is on the steps government has taken to realise the rights and whether such steps are capable of realising the rights.<sup>212</sup> This raises the question of whether measures or programs can be deemed reasonable if they do not provide for the actual realisation of the rights. If measures and programs do not realise socio-economic rights, the rights lose meaning.<sup>213</sup> The sub-parts below consider the impact of the court's application of the reasonableness standard when adjudicating socio-economic rights disputes.

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<sup>205</sup> *Doctors for Life* (note 7 above) para 37.

<sup>206</sup> O'Regan (note 126 above) 139.

<sup>207</sup> O'Regan (note 126 above) 141.

<sup>208</sup> Brennan (note 125 above) 72-74.

<sup>209</sup> O'Regan (note 126 above) 140.

<sup>210</sup> Davis (note 192 above) 708.

<sup>211</sup> L Chenwi 'Unpacking "Progressive Realisation", its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance' (2013) 46 (1) *De Jure Law Journal* 784.

<sup>212</sup> F Coomans 'Reviewing Implementation of Social and Economic Rights: An Assessment of the "Reasonableness" Test as Developed by the South African Constitutional Court' (2005) 65 *Heidelberg Journal of International Law* 186.

<sup>213</sup> Coomans (note 212 above) 188.

#### 4.2.1 Avoidance of determining the core content of rights

Since the reasonableness standard evaluates whether the state has programs and measures capable of facilitating the realisation of the sections 26 and 27 constitutional rights, the Constitutional Court avoids a determination of the contents of the rights within the prescribed delineates of sections 26(2) and 27(2) of the Constitution. By focusing predominantly on the reasonableness of the measures and programs adopted by the state,<sup>214</sup> the Constitutional Court has avoided the determination of the actual goods and services that can be claimed in respect of socio-economic rights.<sup>215</sup>

It is clear that the Constitutional Court is not prepared to deal with the requirement to provide a specific social service.<sup>216</sup> The focus is on structural or procedural requirements of coherence, flexibility, inclusivity, and comprehensiveness without defining the content of the rights and state obligations about the provision of a specific social service within the limitations prescribed by the Constitution.<sup>217</sup> For instance, in *Mazibuko v City of Johannesburg*, the Constitutional Court held that it was inappropriate for the lower courts to quantify the content of the right to have sufficient water.<sup>218</sup> Even so, O'Regan J declined to define the substantive content of the right.<sup>219</sup> The Justice held that it is not appropriate for the court to ascertain specifically what the achievement of a particular socio-economic right entails.<sup>220</sup> The executive is better placed to investigate social conditions in line with available budget and set targets.<sup>221</sup>

Many scholars argue that the Constitutional Court should have decided whether the amount of water offered to residents was sufficient within the context of section 27(1)(b) of the Constitution.<sup>222</sup> Davis argues that the Constitutional Court has failed to interpret the core meaning of sections 26(1) and 27(1) and define the precise

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<sup>214</sup> Bilchitz (note 15 above) 52.

<sup>215</sup> Bilchitz (note 15 above) 52.

<sup>216</sup> Seedorf & Sibanda (note 124 above) 63.

<sup>217</sup> Brand (note 149 above) 421.

<sup>218</sup> *Mazibuko* (note 108 above) para 68.

<sup>219</sup> Brand (note 152 above) 425.

<sup>220</sup> *Mazibuko* (note 108 above) para 61

<sup>221</sup> *Mazibuko* (note 108 above) para 61.

<sup>222</sup> Brand (note 149 above) 428.

contents of the rights.<sup>223</sup> In his view, the Constitutional Court should first interpret the core meaning and the contents of the rights,<sup>224</sup> and thereafter, assess the measures and programs adopted by the state.<sup>225</sup> Davis explains that the application of the standard of reasonableness merges substantive rights with internal qualifications. Hence, the scope and range of socio-economic rights is not defined.<sup>226</sup> This provides far less clarity about the core content of the rights.<sup>227</sup> Bilchitz echoes similar sentiments that the reasonableness standard does not deal with the substance of the rights, and what the rights entitle persons to claim.<sup>228</sup> Seedorf & Sibanda agree that reasonableness does not enable the courts to determine the contents of rights and state obligations.<sup>229</sup> As Cooman observes, what is reasonable depends on context. Therefore, the reasonableness standard is flexible and it can be given different interpretations depending on the circumstances.<sup>230</sup>

Chenwi contends that while regular review can improve programs and measures, the question which is not addressed is whether regular review of programs or measures has improved the level of actual access to socio-economic rights. She argues that the standard of reasonableness does not assist poor households to access necessities promised by the Constitution.<sup>231</sup> Likewise, Bilchitz argues that the standard of reasonableness has made it difficult for the poor to litigate successfully.<sup>232</sup> Significant evidence is required to show that the measures and programs are unreasonable.<sup>233</sup> This has impacted on the number of socio-economic rights cases adjudicated, particularly in a country with high level of poverty and inequality.<sup>234</sup> Due to the standard of reasonableness, the Constitutional Court has failed to ensure that poor citizens have access to necessities and this

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<sup>223</sup> Davis (note 192 above) 699

<sup>224</sup> Davis (note 192 above) 697.

<sup>225</sup> Davis (note 192 above) 697.

<sup>226</sup> Davis (note 192 above) 698.

<sup>227</sup> Davis (note 192 above) 699

<sup>228</sup> Bilchitz (note 15 above) 52 & 54.

<sup>229</sup> Seedorf & Sibanda (note 196 above) 66.

<sup>230</sup> Coomans (note 210 above) 187.

<sup>231</sup> Chenwi (note 211 above) 749.

<sup>232</sup> Bilchitz (note 15 above) 53.

<sup>233</sup> Bilchitz (note 15 above) 53.

<sup>234</sup> Bilchitz (note 15 above) 53.

has reduced the effectiveness of these rights.<sup>235</sup> As Bilchitz contends, the reasonableness standard weakens the socio-economic rights because section 26(1) and 27(1) confer specific substantive rights.<sup>236</sup>

#### 4.2.2 Failure to grant effective appropriate relief

The courts have constitutional authority to grant appropriate relief to protect and enforce socio-economic rights. In *Fose*, Ackermann J highlighted that an appropriate relief is a remedy that protects and enforces the rights.<sup>237</sup> An appropriate relief can be a declaratory order, an interdict, a *mandamus*, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. The courts may also create new remedies to secure the protection and enforcement of rights.<sup>238</sup>

The reasonableness standard has impacted on the nature of appropriate relief granted by the Constitutional Court to poor litigants,<sup>239</sup> as the court is reluctant to grant supervisory orders and prefers declaratory orders. However, structural interdicts may strike an appropriate balance between the need for effective relief and maintenance of the separation of powers.<sup>240</sup> According to Olivier and van Rensburg, supervisory jurisdiction is an effective remedy to enforce socio-economic rights. The court can direct the state to comply with the court order and then retain supervisory jurisdiction.<sup>241</sup>

In *Treatment Action Campaign*, the Constitutional Court confirmed that mandatory and structural interdicts do not infringe separation of powers doctrine.<sup>242</sup> It held that the power to grant mandatory orders includes the authority to grant supervisory

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<sup>235</sup> Bilchitz (note 15 above) 54.

<sup>236</sup> Bilchitz (note 15 above) 52.

<sup>237</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (hereafter '*Fose*') para 19.

<sup>238</sup> *Fose* (note 237 above) para 19.

<sup>239</sup> *Treatment Action Campaign* (note 97 above) paras 112-113.

<sup>240</sup> See S van der Berg 'A Capabilities Approach to Remedies for Systemic Resource-Related Socio-Economic Rights Violations in South Africa' (2019) (19) 1 *African Human Rights Law Journal* 293. Ebadolahi echoed the same sentiments that an appropriate relief include structural interdicts. M Ebadolahi 'Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa' (2008) 83 (5) *New York University Law Review* 1568.

<sup>241</sup> Olivier & van Rensburg (note 136 above) 94.

<sup>242</sup> *Treatment Action Campaign* (note 97 above) paras 112-113.

orders so that courts retain jurisdiction to ensure that the order is implemented.<sup>243</sup> Nkabinde J reiterated that supervisory orders arising from structural interdicts ensure that courts actively keep an eye on the enforcement of orders, thereby ensuring accountability and effective compliance with court orders.<sup>244</sup> Notwithstanding the above, the court declined to issue a supervisory order in the case. It decided that there was no reason to believe that the state would not execute the court order.<sup>245</sup> However, the state was slack to implement the court order, which led to contempt of court proceedings.<sup>246</sup>

In *Grootboom*, the Constitutional Court granted a declaratory order. However, the order was delayed by over three years while poor litigants continued to live in squalor and intolerable conditions.<sup>247</sup> This outcome is particularly disappointing because the court has authority to issue structural interdicts, but failed to do so.<sup>248</sup> As van der Berg argues, the courts must retain supervision of socio-economic rights violations. A structural interdict was granted in *AllPay Consolidated Investment Holdings* when the Constitutional Court ordered the South African Social Security Agency to report back on various stages of the new tender process until completion.<sup>249</sup>

The Indian and Brazilian courts have created mechanism to retain control and jurisdiction over the implementation of court orders.<sup>250</sup> A similar approach was adopted by the Argentina Supreme Court of appeal when it ordered the National Ombudsman to create a monitoring body to monitor the implementation of the court order.<sup>251</sup> Brand suggests that the Constitutional Court should adopt the Indian and Brazilian approach and retain jurisdiction to monitor the implementation and obtain progress reports on the execution of court orders.<sup>252</sup>

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<sup>243</sup> *Treatment Action Campaign* (note 97 above) para 104.

<sup>244</sup> *Pheko and Others v Ekurhuleni Metropolitan Municipality and Others* 2016 (10) BCLR 1308 (CC) (hereafter '*Pheko*') para 1.

<sup>245</sup> Davis (note 192 above) 701.

<sup>246</sup> Brennan (note 125 above) 80.

<sup>247</sup> S van der Berg (note 240 above) 296 & 297.

<sup>248</sup> Coomans (note 210 above) 188.

<sup>249</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2015 (6) BCLR 653 (CC) para 3.

<sup>250</sup> Brand (note 149 above) 425.

<sup>251</sup> Brand (note 149 above) 426.

<sup>252</sup> Brand (note 149 above) 425.

### 4.2.3 Failure to scrutinise availability of resources

The rate at which socio-economic rights can be progressively realised depends on the availability of resources<sup>253</sup>. The state must take full advantage of available resources to ensure that these rights are fully realised. In *Soobramoney*, the Constitutional Court stated that socio-economic rights are dependent on the availability of resources.<sup>254</sup> Therefore, the rights are defined based on the availability of resources and are limited due to lack of resources.<sup>255</sup> Notwithstanding, the above, the court decided that budgetary decisions must be left to the state.<sup>256</sup> The court cannot interfere with rational government budgetary decisions on socio-economic rights programs. Therefore, court does not scrutinise whether appropriate budget was made within available resources to progressively realise the rights.<sup>257</sup> This is not a rigorous standard for effective realisation of socio-economic rights.<sup>258</sup>

According to Chenwi, the courts must assess whether the state has allocated a reasonable budget within available resources to realise the rights.<sup>259</sup> Van der Berg argues that the Constitutional Court must scrutinise budgetary allocations.<sup>260</sup> This means that the courts should probe the availability of resources and the reasonableness of budget allocation decisions.<sup>261</sup> This approach slightly correlates with article 2 para 1 of the CESC, which requires the state to show that every effort has been made to use available resources to fulfil socio-economic rights.

The Constitutional Court has not expressed how it would scrutinise the overall availability of resources, and the allocation of resources between the local, provincial, and national spheres of government. The availability of resources is an important factor on the realisation of socio-economic rights. Therefore, the court

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<sup>253</sup> See Heywood (note 50 above) 358, who states that a budget is a non-negotiable component of a reasonable plan to realise socio-economic rights.

<sup>254</sup> *Soobramoney* (note 16 above) para 59.

<sup>255</sup> Davis (note 192 above) 692.

<sup>256</sup> Coomans (note 210 above) 175.

<sup>257</sup> *Grootboom* (note 18 above) paras 39 & 68.

<sup>258</sup> Coomans (note 210 above) 175.

<sup>259</sup> Chenwi (note 211 above) 751.

<sup>260</sup> Van der Berg (note 240 above) 290.

<sup>261</sup> Van der Berg (note 240 above) 296.

should develop a mechanism to scrutinize the availability of resources.<sup>262</sup> A broader definition of available resources is required.<sup>263</sup> The contents of the rights do not exist independently from the availability of resources; they must be determined subject to availability of resources.<sup>264</sup>

The Constitutional Court does not pay attention to equitable and effective use of available resources in determining whether adequate measures have been taken for the effective realisation of socio-economic rights. This is critical, particularly when the level of corruption and financial irregularities is high within the state.<sup>265</sup> Where available resources are demonstrably inadequate, the obligation remains on the state to strive to ensure that available resources are used effectively and efficiently to ensure that the needs of those in desperate conditions are prioritised.<sup>266</sup>

Section 195(1) (b) of the Constitution mandates the state to promote efficient economic and effective use of resources in the public administration. Therefore, if the available resources have not been expended efficiently, the court should make an adverse finding against the state.<sup>267</sup> Quinot & Liebenberg agrees that failure to use available resources efficiently should be a strong indication of the state's failure to fulfil socio-economic rights obligations.<sup>268</sup>

In the *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* matter, the Constitutional Court stated that the City provided information relating specifically to its housing budget, but did not provide information relating to its budget situation in general.<sup>269</sup> This demonstrates that the court can scrutinize government budget allocation and determine the reasonableness of the budget allocation.

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<sup>262</sup> S Liebenberg 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty' (2002) 6 (2) *Law, Democracy and Development* 189.

<sup>263</sup> Coomans (note 210 above) 191.

<sup>264</sup> Coomans (note 210 above) 192.

<sup>265</sup> Chenwi (note 211 above) 750.

<sup>266</sup> Chenwi (note 211 above) 750.

<sup>267</sup> Van der Berg (note 57 above) 576-577

<sup>268</sup> Quinot & Liebenberg (note 139 above) 652.

<sup>269</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) (hereafter '*Blue Moonlight Properties*') para 74.

In the *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* matter, the Constitutional Court reasoned that resource constraints are not sufficient to justify failure to fulfil socio economic rights.<sup>270</sup> The court must be furnished with the details of resource constraints, whether human or financial in line with the constitutional principles of accountability.<sup>271</sup> The court rejected the notion that only a housing budget should be reviewed and confirmed the need to peruse a wider pool of 'available' resources.<sup>272</sup> Furthermore, the court emphasised that national government is responsible to provide adequate budgetary support to the provincial and local governmental spheres to realise socio economic rights.<sup>273</sup>

The Constitution presents a shift from a culture of authority to a culture of justification. The exercise of public power must be justified.<sup>274</sup> Therefore, the Constitutional Court must evaluate state resource allocation because realisation of socio economic rights is dependent on availability of resources.<sup>275</sup> The Court must evaluate whether available resources decisions are reasonable and whether expenditure is effective and efficient to fulfil socio economic rights.<sup>276</sup> The state should not only ensure that reasonable measures or programs have been adopted, but must also account and justify its resource allocation decisions and how available resources have been expended to realise the rights.<sup>277</sup>

According to Shanelle van der Berg, the state priorities are clearly reflected in its budgetary allocations. The courts should scrutinise budgetary allocations that impact on socio economic rights.<sup>278</sup> Where it is claimed that socio economic rights have been violated, the courts should evaluate the reasonableness of the program and the budget allocated to implement the program. Where socio economic rights

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<sup>270</sup> See Heywood (note 50 above) 358-359, who states that it is not a defence for the state to simply aver that it does not have available resources. It must provide evidence that it does not. In planning for rights, the state must look at the availability of resources within its overall budget and not just in one particular envelope.

<sup>271</sup> *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 88.

<sup>272</sup> *Blue Moon Properties* (note 269 above) para 74.

<sup>273</sup> *Grootboom* (note 18 above) para 68.

<sup>274</sup> Van der Berg (note 240 above) 294.

<sup>275</sup> Van der Berg (note 57 above) 577.

<sup>276</sup> Van der Berg (note 57 above) 578.

<sup>277</sup> Quinot & Liebenberg (note 139 above) 650.

<sup>278</sup> Van der Berg (note 240 above) 290.

are violated due to unreasonable budget allocation, the court should impose an effective remedy including retaining judicial supervision.<sup>279</sup>

#### **4.2.4 Deference in relation to complex social and economic policy issues and lack of technical expertise**

Since the dawn of the constitutional democracy, the Constitutional Court has made great strides on adjudicating socio-economic rights. However, the court has raised concerns about threats to institutional integrity if it issues orders that may not be enforceable due to lack of resources.<sup>280</sup> Furthermore, the court has expressed concern about its capacity to evaluate complex social and economic policy issues, such as resource allocations, citing lack of technical expertise.<sup>281</sup> For instance, in *Grootboom*, due to complex policy laden issues, the Constitutional Court deferred to the state to decide on the precise contours and content of the measures to be adopted.<sup>282</sup> In *Soobramoney*, the Constitutional Court stated that it is not competent to make resource allocations decisions and indicated that the state is better equipped to make those decisions.<sup>283</sup> A similar stance was noted in *Mazibuko* when the Constitutional Court declined to define substantive right to have access to sufficient water and deferred to the state.<sup>284</sup>

The court has also raised issues of legitimacy to evaluate policy and programmes adopted by democratically accountable branches of the state.<sup>285</sup> In the *Bato Star*, O'Regan J cautioned that a court should not involve itself on matters entrusted to other state organs.<sup>286</sup> Due weight must be given to policy decisions made by administrators with special expertise and experience.<sup>287</sup> A decision taken by an administrator with necessary expertise must be respected.<sup>288</sup> The court must treat

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<sup>279</sup> Van der Berg (note 240 above) 292.

<sup>280</sup> Brand (note 149 above) 430.

<sup>281</sup> Brand (note 149 above) 430.

<sup>282</sup> *Grootboom* (note 18 above) para 41.

<sup>283</sup> Brand (note 149 above) 424.

<sup>284</sup> *Mazibuko* (note 108 above) para 159.

<sup>285</sup> Brand (note 149 above) 430.

<sup>286</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 48.

<sup>287</sup> *Bato Star Fishing* (note 286 above) para 48.

<sup>288</sup> *Bato Star Fishing* (note 286 above) para 48.

the decisions of other state organs with respect.<sup>289</sup> This flow from the principle of separation of powers.<sup>290</sup>

While the separation of powers doctrine must be respected, this does not suggest that a court cannot make an order that impacts on policy,<sup>291</sup> particularly where a policy is challenged based on inconsistency with the Constitution. The court can intrude in the domain of the executive, if the intrusion is mandated by the Constitution.<sup>292</sup> In *Mazibuko v Sisulu and Another*,<sup>293</sup> the Constitutional Court cited checks and balances as a justification for intrusion.

### 4.3 Conclusion

The present chapter established that the standard of reasonableness is not appropriate for effective realisation of socio-economic rights since it does not focus on the contents of the rights, state obligations and what entitlements persons can claim progressively within available resources.

Furthermore, the Constitutional Court does not scrutinize whether a reasonable budget allocation was provided within available resources. Lastly, the relief granted by the Constitutional Court is not effective because often the state fails to fully implement declaratory orders.

The Constitutional Court must determine the substantive content of the relevant socio-economic right, examine the reasonableness of the programs/measures, and scrutinise available resources to progressively realise socio-economic rights. This is significant for the effective realisation of socio-economic rights. This requires analyses of historical, social, economic, and cultural context.<sup>294</sup> Scrutinising available resources and the reasonableness of budget allocation decisions is important to hold the state accountable for the realisation of socio-economic rights.<sup>295</sup>

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<sup>289</sup> *Bato Star Fishing* (note 286 above) para 46.

<sup>290</sup> *Bato Star Fishing* (note 286 above) para 46.

<sup>291</sup> *Treatment Action Campaign* (note 97 above) para 98.

<sup>292</sup> *Treatment Action Campaign* (note 97 above) para 99.

<sup>293</sup> *Mazibuko v Sisulu and Another* 2013 (6) SA 249 (CC) para 21.

<sup>294</sup> Quinot & Liebenberg (note 139 above) 648.

<sup>295</sup> Van der Berg (note 240 above) 296.

The Constitutional Court should adopt a wider interpretation of available resources and look beyond the resources allocated for socio-economic rights.<sup>296</sup> This outlook has already been adopted by the Constitutional Court when it rejected that only a housing budget should be examined. The court confirmed the need to peruse a wider pool of 'available' resources.<sup>297</sup>

According to Brennan when courts adjudicate socio-economic rights, the lines between organs of the state are blurred. The courts are mandated to ensure that the state complies with constitutional obligations.<sup>298</sup>

Separation of powers concerns cannot be used to render the organs of state immune from constitutional challenge.<sup>299</sup> As the ultimate guardians of the Constitution,<sup>300</sup> the courts have constitutional authority to venture into the domain of other state organs to uphold, protect and enforce the Constitution.<sup>301</sup> This is line with the power to review matters falling within the exclusive domain of other state organs.<sup>302</sup>

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<sup>296</sup> Van der Berg (note 57 above) 581.

<sup>297</sup> *Blue Moon Properties* (note 269 above) para 74.

<sup>298</sup> Brennan (note 127 above) 74-72.

<sup>299</sup> O'Regan (note 126 above) 133.

<sup>300</sup> *Glenister* (note 123 above) para 33.

<sup>301</sup> *Glenister* (note 123 above) para 33.

<sup>302</sup> T Mogabe & O Kola 'Separation of Powers, Checks & Balances and Judicial Exercise of Self-Restrain' (2021) 42 (3) *Obiter* 547.

## CHAPTER 5: CONCLUSION

### 5.1 Introduction

The present study analysed the appropriateness of the reasonableness standard in ensuring the effective realisation of socio-economic rights in South Africa. This concluding chapter summarises the findings of the study and makes recommendations to ensure the more effective realisation of socio-economic rights in South Africa. The chapter is divided into four parts. Part 5.2 provides an overview of the key findings of the study and their significance. Thereafter part 5.3 offers recommendations. Finally, part 5.4 concludes the chapter and the study.

### 5.2 Overview of Findings and their Significance

*Chapter 1* set out the introduction, statement of the research problem, research aims, research questions, motivation, and hypothesis, together with the scope of the study, and research methodology.

*Chapter 2* gave a background on the purpose of socio-economic rights and why the rights were included in the Constitution. The chapter evaluated the nature, scope, and status of socio-economic rights in international human rights law and the South African Constitution. The chapter showed that socio-economic rights are recognised under international and regional human rights treaties, which also embrace the notion of the minimum core obligation. In contrast, the South African Constitutional Court has not recognised minimum core obligations in respect of socio-economic rights, emphasising that socio-economic rights are subject to qualifications, such as availability of resources. The chapter further showed that socio-economic rights are justiciable and the courts have an obligation to enforce the rights.

*Chapter 3* dealt with how the separation of powers and judicial deference have impacted on the realisation of socio-economic rights. It showed that separation of powers distributes public power between distinct organs of state to ensure that public power is not concentrated in one state organ. Due to separation of powers, the courts are required to treat state decisions with deference on matters that fall outside of the court's domain. The chapter further showed that while separation powers and judicial deference are important, this does not suggest that the

Constitutional Court cannot make an order, which impact on budgetary decisions, measures, programs, and policies.

Chapter 3 further showed that the jurisprudence of the Constitutional Court is deferential when adjudicating socio-economic rights cases. This was illustrated in *Soobramoney*, where the Constitutional Court decided that decisions about budgets and resource allocations fall within the domain of the executive. *Grootboom* also demonstrated that the courts assess whether the measures adopted by the state to realise socio-economic rights are reasonable, and not whether the rights have been fulfilled within the confines of the limitations. Moreover, in *Treatment Action Campaign*, court stated that the Constitution requires a restrained role of the courts. Finally, in *Mazibuko*, the Constitutional Court stated that it is not suitable for it to ascertain specifically what the achievement of a particular socio-economic right entails. Chapter 3 additionally showed that judicial deference has impacted on the granting of appropriate relief for socio-economic rights violations. This is evident, *inter alia*, in the observation that the Constitutional Court prefers declaratory orders as opposed to directory orders. Although the court has powers to issue mandatory orders, which include supervisory orders when socio economic rights are violated, the Constitutional Court prefers declaratory orders.

*Chapter 4* assessed whether the application of the reasonableness standard to adjudication of socio-economic rights is appropriate in ensuring their full realisation and the achievement of the goal of large-scale social and economic transformation. The chapter confirmed that the application of the reasonableness standard to assess measures and programs adopted by the state is not appropriate to ensure effective realisation of socio-economic rights, since the standard has generated a deferential approach. Importantly, the standard does not determine the core contents of the rights and what persons in South Africa can claim within the confines of the prescribed limitations. The chapter further found that notwithstanding that the realisation of socio-economic rights is dependent on availability of resources, the Constitutional Court does not scrutinise budget allocation decisions. It also found that the Constitutional Court has expressed concern about its ability to scrutinize complex social programs and policies. As a result, the court defers these matters to the other branches of government. Therefore, application of the reasonableness

standard to adjudication of socio-economic rights is not appropriate in ensuring their full realisation and the achievement of the goal of large-scale social and economic transformation.

### **5.3 Recommendations**

On the issue of possible alternative approaches to ensuring the full-realisation of socio-economic rights and ultimately achieving the goals of transformative constitutionalism, the present study recommends that the Constitutional Court should define the contents of socio-economic rights and scrutinise both the decision or measure adopted by the state to realise the right, as well as the reasonableness of budget allocation decisions, given that the realisation of socio-economic rights is dependent on availability of resources. The Constitutional Court must evaluate whether allocated budgets on socio-economic rights have been expended efficiently to maximize the fulfilment of the rights. Therefore, this calls for the state to justify its resource allocations to socio economic rights. The Constitutional Court must retain supervision of socio-economic rights violations. This would enable the court to monitor the implementation of its orders.

### **5.4 Conclusion**

The above research questions were addressed in order to meet the objectives of the dissertation, being, to scrutinize the appropriateness of the reasonableness standard in ensuring the effective realisation of socio-economic rights.

The dissertation set out an overall analysis which confirms that the reasonableness standard is not appropriate in ensuring the effective realisation of socio-economic rights in South Africa. While the separation of powers doctrine must be respected, but this does not suggest that a court cannot intrude into the sphere of the executive or parliament to ensure that socio economic rights are enforced.

Accordingly, the objectives of the dissertation have been met through the analysis and recommendations which confirms that the reasonableness standard is not appropriate in ensuring the effective realisation of socio-economic rights. This dissertation recommends that the Constitutional Court should define the contents of socio-economic rights and scrutinise both the decision or measure adopted by the state to realise the rights, as well as the reasonableness of budget allocation decisions.

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