

# THE DEFENSIBILITY OF SOCIO-ECONOMIC RIGHTS IN A STATE OF DISASTER: A SOUTH AFRICAN PERSPECTIVE

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by Ishmael Khayelihle Mbambo\*



## Abstract

*The drafting of the final Constitution was a deliberate act of imposing an obligation on the newly formed democratic South Africa to recognise socio-economic rights. This was an important step in the transformation process brought about due to the transformative nature of the Constitution (better known as transformative constitutionalism), in a country that had witnessed the gross violation of human rights and institutionalised discrimination that considerably led to many of its citizens living in dire poverty through social and economic exclusion. This discussion aims to explore the justifiability of these constitutionally protected rights. In doing so, an analysis of international standards will be considered in determining whether the socio-economic rights could be said to be justifiable, followed by the constitutional influence, along with other legislative sources and judicial precedents on the matter including the role propagated by the value of ubuntu.*

\* LLB, University of Johannesburg; LLM Candidate, University of Johannesburg. ORCID iD: 0000-0002-7861-6169. This paper is a revised edition of my 2019 dissertation which was submitted to the University of Johannesburg, in partial fulfilment of the requirements for the degree of *legum baccalaureus* (LLB) in the field of Social Security Law at the Faculty of Law.

# 1 Introduction

From the dawn of a new reality of the global pandemic caused by the coronavirus disease (COVID-19), His Excellency, President Cyril Ramaphosa has strived to, '... save lives and livelihoods'.<sup>1</sup> Whether this ambitious task has been a success is an ongoing debate, as it was a very delicate balance that the Commander-in-Chief sought to achieve. His words not only embody good leadership but are also mandated by the highest law in the land. Since South Africa became a constitutional state with the adoption of the 1996 Constitution,<sup>2</sup> it founded a rights-based administration with clear goals of transforming society from a deeply divided past, and subsequently took away parliamentary sovereignty.<sup>3</sup> This transformation resulted in the formation of a hybrid system that contained characteristics of both capitalist and communist ideologies, striking a desirable balance between fostering economic growth and taking care of its previously disadvantaged citizens.<sup>4</sup>

In effect, this blend between the two distinct theories implies the inclusion of socio-economic rights in the Constitution, which commands the government to take reasonable measures to promote those rights as a way of redressing past injustices and forging human development.<sup>5</sup> The following discussion will explore the question of whether socio-economic rights are defensible in South Africa, particularly as the country is in a state of disaster, with limited resources that are continuously stretched further to flatten the curve of infections. In answering this question, I will assess what socio-economic rights are, the factual and philosophical dynamics that necessitate the existence of these rights, the views of the international community, and how our own courts deal with these rights.

## 2 Background of COVID-19 and South Africa's state of disaster.

In the interests of keeping the discussion in the legal realm and refraining from presenting a scientific viewpoint, this section will only

1 The Presidency 'President Cyril Ramaphosa: South Africa's response to the COVID-19 Coronavirus Pandemic' <https://www.gov.za/speeches/president-cyril-ramaphosa-south-africa%E2%80%99s-response-covid-19-coronavirus-pandemic-17-jun-2020> (accessed 27 January 2021).

2 Constitution of the Republic of South Africa 1996 (Constitution).

3 K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 1 *South African Journal on Human Rights* at 146.

4 RJ Goldstone 'A South African Perspective on Social and Economic Rights' (2006) 2 *Human Rights Brief* at 7.

5 S Liebenberg 'The Value of Human Dignity in Interpreting Socio-economic Rights' (2010) 1 *South African Journal on Human Rights* at 21

outline the definition and origins of the COVID-19 pandemic as a trigger for invoking the Disaster Management Act (DMA).<sup>6</sup> In 2020, COVID-19 became a household name as young and old alike were made aware of the global pandemic. It was unlike any other war that has been fought before since the world was fighting against an invisible enemy. The scientific community became instrumental in the fight and successfully traced the origins of the outbreak to Wuhan, China.<sup>7</sup> It became known as the 2019-novel coronavirus (2019-nCoV) on 12 January 2020, a term coined by the World Health Organization, but was officially named the coronavirus disease 2019 (COVID-19).<sup>8</sup>

The disease mainly attacks the respiratory system and spreads through the respiratory tract by way of droplets, respiratory secretions, and direct contact.<sup>9</sup> With COVID-19 quickly spreading across the globe and officially reaching the shores of the Republic on 05 March 2020,<sup>10</sup> the government took decisive action in a bid to slow down the rate of infections by declaring a state of disaster on 15 March 2020.<sup>11</sup> This decision was made possible by the powers vested in the government by virtue of section 27 (1) of the DMA.<sup>12</sup> Although limiting the rights of its citizens through imposing curfews and lockdowns, this was the necessary evil which managed to give the country a chance to better prepare for the effects of the pandemic.<sup>13</sup> This preparation was critical if the country was to stand a chance at winning against the enemy invisible to the naked eye.<sup>14</sup> Now that I have dealt with what COVID-19 is and why South Africa is, at the time of writing, in a state of disaster, I turn to the discussion on socio-economic rights and their defensibility.

6 Disaster Management Act 57 of 2002.

7 YR Guo et al 'The origin, transmission and clinical therapies on coronavirus disease 2019 (COVID-19) outbreak – an update on the status' (2020) 7 *Military Medical Research* at 10. It is believed to have originated from a reservoir of bats and unknown intermediate hosts, with high affinity as a virus receptor to infect humans.

8 Guo (n 7) 11. The Coronavirus Study Group (CSG) of the International Committee also proposed to name the new coronavirus 'SARS-CoV-2' on 11 February 2020 which is another scientific term used to refer to COVID-19.

9 Q Li et al 'Early transmission dynamics in Wuhan, China of novel coronavirus-infected pneumonia' (2020) 382 *New England Journal of Medicine* at 2.

10 National Institute for Communicable Diseases 'First case of COVID-19 announced – An update' 05 March 2020 <https://www.nicd.ac.za/first-case-of-covid-19-announced-an-update/> (accessed 31 January 2021).

11 Government Gazette 43096 (15 March 2020). See also *Mohammed and Others v President of the Republic of South Africa and Others* 2020 (5) SA 553 (GP) (*Mohammed*) para 11.

12 *One South Africa Movement and Another v President of the RSA and Others* 2020 (5) SA 576 (GP) paras 34-36.

13 *Mohammed* (n 11) para 77.

14 *Mohammed* (n 13); Neukircher J confirmed this and held, 'I cannot find that the restrictions imposed are either unreasonable or unjustifiable, and thus the application must fail'.

### 3 What are socio-economic rights?

Khoza accurately identifies that socio-economic rights are those rights that give people access to certain basic needs necessary for human beings to lead a dignified life.<sup>15</sup> Diko narrows down the scope of these rights and states that they consist of the rights to education, food, health, land, water, environmental rights, as well as the rights to social security and housing.<sup>16</sup> From the above list, the rights that have been greatly impacted by the pandemic and state of disaster are the right to food, health, social security, and housing.<sup>17</sup> The government's plan of action has been aimed at ensuring that there are no evictions during the state of disaster, and in increasing social assistance, expanding and upgrading hospitals, and providing food parcels to the most vulnerable.<sup>18</sup>

These rights are often referred to as second-generation rights which are mainly distinguishable from first-generation rights in that the former imposes a positive duty on the state whereas the latter infers a negative duty on the state (duty not to encroach on protected rights).<sup>19</sup> Frankenberg takes us through a historical analysis to determine the origins of second-generation rights and asserts that they date as far back as 1793 in the French Constitution which mandated the state to assist its citizens who were in need.<sup>20</sup> The eighteenth-century also has traces of the existence of these rights in Bavaria and Prussia where the state was viewed as an 'agent of social happiness' with the responsibility to care for the needy and to provide work for those who lacked the means and opportunities to support themselves.<sup>21</sup>

In South Africa, various statutes are in place to ensure that there is progressive realisation of these rights. The list includes (but is not limited to) the Reconstruction and Development Fund Act (RDFA),<sup>22</sup> the Social Assistance Act (SAA),<sup>23</sup> and the National Health Act (NHA).<sup>24</sup> The RDFA is '... an integrated, coherent socio-economic policy framework' that seeks to '... mobilise all our people and our country's resources toward the final eradication of apartheid and the

15 S Khoza *Socio-economic rights in South Africa* (2007) at 1.

16 T Diko *Socio-economic rights: Know your rights* (2005) at 3.

17 This is so because the restrictions imposed by the DMA impacted food security as well as the progressive realisation of social security and housing.

18 The Presidency (n 1).

19 DM Davis 'Socio-economic rights' (2012) 5 *The Oxford Handbook of Comparative Constitutional Law* at 1021.

20 G Frankenberg 'Why Care? The Trouble with Social Rights' (1996) 17 *Cardozo Law Review* at 1373.

21 Davis (n 19) 1023.

22 Reconstruction and Development Fund Act 7 of 1994 (RDFA).

23 Social Assistance Act 1 of 2004.

24 National Health Act 61 of 2003.

building of a democratic, non-racial and non-sexist future'.<sup>25</sup> Most people are familiar with Reconstruction and Development Plan (RDP) houses, which are the most notable features of the RDFA since they enable the provision of free low-cost housing on a means test basis. The SAA, on the other hand, gives effect to section 27(1)(c) of the Constitution. It allows people who are unable to support themselves the opportunity to receive a variety of government-funded grants.<sup>26</sup> More so, the NHA also ensures that people are given access to free primary healthcare considering the obligations imposed by the Constitution.<sup>27</sup>

It is unfortunate that little to no progress has been made since the announcement of the state of disaster to ensure that there is progressive realisation of the above statutory obligations. A vivid example of the government's failure to provide adequate housing saw the painful eviction of Bulelani Qolani, a resident of Khayelitsha, who was manhandled by police, while naked, for allegedly erecting an illegal structure on land owned by the City of Cape Town.<sup>28</sup> There are, however, some success stories to be told as the government was able to increase the value of social assistance grants from the beginning of the pandemic and bolstered the Department of Health's funding to allow for the procurement of vaccines and expansion of the number of hospital beds in public healthcare facilities across the country. A major hurdle that has effectively slowed down and inhibited the government's progress is corruption and the mismanagement of government funds which has resulted in the government taking three steps back after making a great stride forward.<sup>29</sup>

## 4 Underlying factors to socio-economic rights in South Africa

From a global perspective, South Africa is the most unequal society with a Gini coefficient of 0.72, meaning that the distribution of wealth is so uneven that a large part of the population is unable to benefit from economic growth.<sup>30</sup> Hamilton rightly identifies poverty

25 RDFA (n 22) sec 1.1.1.

26 They include (but are not limited to) the care dependency grant, child support grant, foster care grant, and the disability grant.

27 Constitution (n 2) sec 27(1)(a).

28 eNCA 'City of Cape under fire' 2 July 2020 <https://youtu.be/8PWIGfJKZsc> (accessed 25 March 2021).

29 Corruption Watch 'In South Africa Covid-19 has exposed greed and spurred long needed action against corruption' 4 September 2020 <https://www.transparency.org/en/blog/in-south-africa-covid-19-has-exposed-greed-and-spurred-long-needed-action-against-corruption> (accessed 26 March 2021)

30 L Hamilton *Are South Africans free?* (2014) at 4 which states 'The Gini coefficient is widely accepted summary measure of income (or wealth) inequality ranges from zero (perfect equality in the distribution of income or wealth) to one (perfect inequality in the distribution of income or wealth)'.

as the state of being unable to afford the minimum standard of living by individuals in a community.<sup>31</sup> This is the unfortunate reality faced by millions of people in South Africa. This state can be categorised as relative poverty as it exists along the racial divide, where the black racial group is the poorest in the country when compared to other races.<sup>32</sup> Socio-economic rights play a pivotal role in bridging the equality and poverty gaps through legislative interventions that promote equal opportunities for all and advance comprehensive social protection.

Much of this inequality and poverty can be said to be the result of many years of colonialism and oppression which began with the arrival of settlers in the Cape in 1652 under the leadership of Jan Van Riebeeck, to the beginning of the National Party's reign in 1948, through the apartheid regime which thereafter led to the dawn of democracy in 1994.<sup>33</sup> Consequently, the antiquity of racism and poverty, and the skewed distribution of wealth along racial lines ensure that distributional questions cannot be ignored.<sup>34</sup> More so, the apartheid government perpetuated inequality through its influx control policy which limited African occupation of urban areas.<sup>35</sup> It is for this reason that the 1992 Draft Bill of Rights proposed by the African National Congress (ANC) sought to address these problems through the inclusion of socio-economic rights.<sup>36</sup> The Draft Bill was also greatly influenced by the very first document that was drafted by the ANC which sought to advance African claims in South Africa, namely, the Atlantic Charter.<sup>37</sup> The majority of the political divide across South Africa had negotiated to have a constitutional state premised on the enjoyment of fundamental human rights in order to avert a possible catastrophe and put an end to the deep conflict between a minority which reserved all control over the political instruments of the state for itself, and a majority who sought to resist that domination.<sup>38</sup>

The state of disaster has worsened the poverty experienced by millions of South Africans since the various lockdowns enforced

31 Hamilton (n 30) 5.

32 Hamilton (n 30) 6.

33 DG Kleyn & F Viljoen *Beginners guide for law students* (2011) at 4.

34 DM Davis 'Socioeconomic rights: Do they deliver the goods?' (2008) 6 *Oxford University Press* at 688.

35 *Ex Parte Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2000 (4) BCLR 347 (CC) paras 41-47.

36 ANC Draft Bill of Rights 1996 at 215.

37 See the report on the Atlantic Charter Committee 1943 which was unanimously adopted on 16 December 1943.

38 *The Azanian People's Organisation (AZAPO) and Others v The President of the Republic of South Africa and Others* (CC) (CCT17/96) [1996] ZACC 16 paras 1-2.

limitations and halted economic activity, depending on which alert level of the lockdown the country is under.<sup>39</sup> Without any income, the most vulnerable of our communities get the short end of the stick. It has, however, not been all doom and gloom, since the government has tried to mitigate the impacts of these harsh restrictions on economic activity by introducing an emergency Social Relief of Distress Grant for the unemployed (unemployment grant).<sup>40</sup> The R350,00 unemployment grant was not the only mitigating factor as the government also distributed food parcels across the country and social assistance grants were increased.<sup>41</sup> Although, in my view, R350,00 a month is a small amount as an unemployment grant, it was better than deprivation of economic activity for nothing in return considering the extreme budget constraints that the government had and still has.

## 5 Ubuntu and human dignity: The philosophical basis for socio-economic rights

‘Ubuntu’, in the present democratic era, is an indispensable constitutional value that is aimed at preserving a person’s human dignity<sup>42</sup> and can be useful in determining the defensibility of socio-economic rights.<sup>43</sup> It constitutes the philosophical basis upon which to create dependable social and economic transformation which safeguards human welfare.<sup>44</sup> There is no single definition attached to it, but it can be understood to be a humanist thesis unique to African jurisprudence, aimed at ending human suffering,<sup>45</sup> and demands respect for human dignity regardless of outward appearances.<sup>46</sup> More so, it represents the core values of African ontologies which include respect for humans, human dignity, the need for humility,

39 SA Government ‘About alert system’ 07 August 2020 <https://www.gov.za/covid-19/about/about-alert-system#> (accessed 26 March 2021). The SA lockdown is split into five levels. The lowest (level 1) relaxes most restrictions whereas the highest (level 5) is the harshest level that halts all economic activity with the exception of essential workers.

40 Greytown Gazette ‘Sassa launches new Covid-19 relief grant programme’ *News24* 13 May 2020 <https://www.news24.com/news24/southafrica/local/greytown-gazette/sassa-launches-new-covid-19-relief-grant-programme-20200512> (accessed 26 March 2021). The grant was announced at the beginning of the hard lockdown in March 2020.

41 T Mathe ‘R350 a month: Inside the lives of special grant recipients’ *Mail & Guardian* 7 February 2021 <https://mg.co.za/news/2021-02-07-r350-a-month-inside-the-lives-of-special-grant-recipients/> (accessed 26 March 2021).

42 *S v Makwanyane* 1995 (3) SA 391 para 237.

43 M Rapatsa & G Makgato ‘Dignity and ubuntu: Epitome of South Africa’s socio-economic transformation’ (2016) 5 *Journal of Economic Literature* at 66

44 Rapatsa & Makgato (n 43) 65.

45 Rapatsa & Makgato (n 43) 66.

46 W Buqa ‘Storying Ubuntu as a rainbow nation’ (2015) 36 *Verbum et Ecclesia* at 36.

interdependence, and communalism, and it augments social solidarity.<sup>47</sup> In my view, ubuntu is undoubtedly the philosophical basis upon which the President established the Solidarity Fund which was set up to raise funds to help with the fight against COVID-19.

By the same token as the concept of ubuntu, human dignity has been considered an ambiguous term that ubuntu purports to preserve as it has no concise definition.<sup>48</sup> Rapatsa however describes it as a term that:<sup>49</sup>

... signifies human worth, an idea that no one should be stripped of self-worth, subjected to abuse, degradation, torture, harassment and/or neglect of any kind threatening one's dignity. It is concerned with respecting and protecting personhood.

Much of this respect for human dignity was absent during the leadership of the National Party, hence in the current South African perspective, human dignity is a constitutionally entrenched human right contained in section 10 of the Bill of Rights whereas ubuntu has an elevated status of being an underlying value of the Constitution.<sup>50</sup> More so, the Constitution has a retroactive effect insofar as it aims to redress the injustices of the past and to protect the eventualities of the future.<sup>51</sup>

The relevance of ubuntu in this discussion deserves acknowledgment, as it is the idea behind the recognition of defensible socio-economic rights in South Africa (albeit not the only one). Rapatsa rightly points out that from the birth of a new democracy, it became ostensibly clear that the post-1994 government had to strive for the restoration of human dignity, and that the notion of ubuntu would be instrumental to that pursuit.<sup>52</sup> This is so because South Africa did not punish wrongdoers of the apartheid government as the Germans did with the Nazi offenders who slaughtered millions of people and perpetuated gross human rights violations under Hitler's reign.<sup>53</sup> Instead, South Africa advocated the use of the world-renowned ideology, which ended colonial dominance and led to the overthrow of apartheid (avoiding a possible civil war), by using restorative rather than retributive justice to correct the past

47 NM Kamwangamalu 'Ubuntu in South Africa: a Sociolinguistic Perspective to a Pan-African Concept' (1999) 13 *Critical Arts: South-North Cultural and Media Studies* at 41.

48 D Shultziner 'Human Dignity – Functions and Meanings' (2003) 3 *Global Jurists Topics* at 21.

49 Rapatsa & Makgato (n 43) 67.

50 The Constitution of the Republic of South Africa Act 200 of 1993. The Preamble on national unity and reconciliation states that, '...there is a need for understanding but not vengeance, and for reparation but not for retaliation, a need for ubuntu but not victimization'. Despite this not being included in the final Constitution, it is inferred in the current jurisprudence.

51 Klare (n 3) above 182-184.

52 Rapatsa & Makgato (n 43) 68.

53 A McDonald *The Nuremberg Trials: The Nazis brought to justice* (2015) at 2.



injustices.<sup>54</sup> As a result, it would be futile to aspire for restoration without the reasonable socio-economic development which is promoted by ubuntu, using the wide-ranging pillars of dignity identified by Diczfalussy to ensure that people have access to clean water, sufficient food, shelter, health care, education, personal security, a healthy environment, and job opportunities.<sup>55</sup>

## 6 International instruments

Although this article is from the South African perspective, I will briefly consider the international standards since international instruments must be considered in interpreting the rights in the Bill of Rights.<sup>56</sup> The United Nations Committee on Economic, Social and Cultural Rights (Committee on ESCR) is instrumental in considering whether socio-economic rights are defensible. General Comment 24 (2017) of the Committee on ESCR states at paragraph 10 that every state party bears the responsibility of ensuring that it provides the minimum essential levels of protecting socio-economic rights.<sup>57</sup> More so, the Universal Declaration of Human Rights<sup>58</sup> imposes a similar duty on member states, and South Africa ratified the treaty in line with section 231(2) of the Constitution on 10 October 2012.

Biltchitz's interpretation of the minimum core obligation is that it is the yardstick below which individuals should not be allowed to fall without strong justification.<sup>59</sup> This minimum core obligation provides a lower standard that shows that socio-economic rights are defensible because member states are supposed to ensure that they act positively to provide basic necessities for their citizens. Our courts have also interpreted this minimum core obligation principle, as will be discussed below, to emphasise the point that South Africa is bound by international standards and must ensure that her citizens do not live below the lowest standard, as described.<sup>60</sup> The declared state of disaster therefore cannot reasonably be argued to be an exception to meeting the minimum core obligation and defensibility of socio-economic rights. I make this assertion based on the fact that the

54 This was made possible through the Truth and Reconciliation Commission which sought to provide closure to the victims of apartheid through public hearings and apologies. Whether this was the true justice that the people deserved is a question many still debate on, but it did help prevent a civil war.

55 E Diczfalussy 'In search of human dignity: gender equity, reproductive health and healthy ageing' (1997) 59 *International Journal of Gynaecology and Obstetrics* at 206.

56 Constitution (n 2) sec 39(1)(b).

57 International Covenant on Economic, Social and Cultural Rights 1996.

58 Universal Declaration of Human Rights 1948.

59 D Biltchitz 'Socio-economic rights, economic crisis and legal doctrine' (2014) 12 *Journal of Constitutional Law* at 730.

60 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) para 34-35.

lockdown restrictions negatively affect entrenched socio-economic rights and thus the government is obligated to take positive steps to mitigate the impacts as not doing so would be allowing its citizens to fall below the minimum core obligation on which it is bound to uphold.

The Constitutional Court in *Minister of Health and Others v Treatment Action Campaign and Others* (TAC case)<sup>61</sup> held that the minimum core obligation is not easily defined because it is country-specific and includes at least the minimum decencies of life consistent with human dignity that guarantee that no one should live a life below that of a dignified existence.<sup>62</sup> It also asserted that the very notion of individual human rights (including socio-economic rights) presupposes that anyone who is in that position should be able to find relief from a court of law.<sup>63</sup> This position emphasises the view that socio-economic rights are defensible when looking at the minimum core obligation because member states should ensure that their citizens live lives that are not below a dignified existence. The rights purport to achieve exactly that, to ensure that the government acts proactively in realising these rights to ensure that people lead dignified lives. Our courts have, however, rejected the minimum core obligation in *TAC and Mazibuko and Others v City of Johannesburg and Others* (Mazibuko case)<sup>64</sup> in favour of a higher threshold, with limitations for provision of basic necessities for historically disadvantaged groups.<sup>65</sup>

## 7 The judiciary's interpretation of socio-economic rights

### 7.1 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Republic of South Africa (First Certification Judgment)*<sup>66</sup>

The Constitutional Court, in this case, had to certify the proposed provisions of the final Constitution. The matter was brought by the Chairperson of the Constitutional Assembly, a member of task team that had been entrusted with drafting the Constitution. The Court decisively dealt with the question of whether socio-economic rights could be said to be defensible and legitimate from a constitutional

61 TAC (n 60).

62 TAC (n 60) para 28.

63 TAC (n 60) para 29.

64 2010 (4) SA 1 (CC).

65 NM Mlilo 'To be reasonable or not? A critique of the South African Constitutional Court's approach to socio-economic rights' LLM dissertation, University of Johannesburg, 2016 at 29.

66 1996 (4) SA 744 (CC).

law perspective. It held that the socio-economic rights in sections 26, 27, and 29 were indeed defensible regardless of the objections that they were not universally accepted fundamental rights.<sup>67</sup> The Court also dismissed the objection that adjudication on these rights and subsequent enforcement would be in direct violation of the doctrine of separation of powers since it would have budgetary implications on the state and encroach on the duties of the legislature and executive, stating that:<sup>68</sup>

In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.

It went on further to state that the fact that socio-economic rights will almost inevitably give rise to such implications, 'does not seem to be a bar to their justiciability'.<sup>69</sup>

## **7.2 *Government of the Republic of South Africa and Others v Grootboom and Others (Grootboom case)***<sup>70</sup>

This case dealt with the state's constitutional obligation in relation to the right to housing.<sup>71</sup> It was made clear that the government bears the responsibility to fulfil the minimum core obligation as discussed above. Yacoob J had the following view in relation to the case:<sup>72</sup>

The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions ...

Mrs Irene Grootboom and the other respondents, a vulnerable group of 510 children and 390 adults, were rendered homeless as a result of their eviction from their informal homes situated on private land which was earmarked for formal low-cost housing.<sup>73</sup> The owner of the land obtained an ejectment order against the occupiers on 8 December 1998 but they did not vacate as they had nowhere else to

67 *First Certification Judgment* (n 66) para 76. The Court reasoned by stating that, '... such an objection cannot be sustained because CP II permits the CA to supplement the universally accepted fundamental rights with other rights not universally accepted'.

68 *First Certification Judgment* (n 66) para 77.

69 *First Certification Judgment* (n 66) para 78.

70 2001 (1) SA 46.

71 Section 26 of the Constitution states that, '(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions'.

72 *Grootboom* (n 71) para 2.

73 *Grootboom* (n 71) para 4.

go.<sup>74</sup> The state now had the duty to provide alternative accommodation to the evicted settlers but the settlers were exposed to intolerable conditions and sought protection from the courts to intervene and enforce their rights.<sup>75</sup> In the High Court judgment, the Court held that the right to housing was not absolute and limited to the extent that the state takes reasonable steps to ensure the progressive realisation of the right.<sup>76</sup> It however additionally held that the children applicants' right to shelter contained in section 28 of the Constitution did not have any limitations and thus the Court ordered for the state to provide shelter.<sup>77</sup>

In the Constitutional Court judgment, the Court held that government must provide shelter for both the children and adults since they were in desperate need, and further held that the rights to housing/shelter 'must be understood in their textual setting ... a consideration of Chapter 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context'.<sup>78</sup> This reaffirmed the argument that even though these rights may have direct financial consequences on the government, their defensibility is indisputable. The Court came up with a 'test for reasonableness' which provides that where the state does not take reasonable measures within its available resources to fulfil its obligation to provide access to the socio-economic right in issue, it would be in breach of its constitutional obligation.<sup>79</sup>

### **7.3 *Soobramoney v Minister of Health (Kwazulu-Natal)* (Soobramoney case)<sup>80</sup>**

This case discussed, in depth, the meaning of the right to healthcare contained in section 27 of the Constitution. It gave an important precedent that held that, even though people may have legitimate socio-economic rights, which can be enforceable in a court of law, the budgetary implications are an equally important factor to be considered in granting relief. The appellant had brought his case to compel the government to provide him with access to emergency medical services because he required dialysis in order to save his life.<sup>81</sup> The concurring judgment by Madala J (albeit made with different reasoning) explained how limited resources affect the claim to this right in the following words:<sup>82</sup>

74 *Grootboom* (n 71) para 9.

75 *Grootboom* (n 71) para 11.

76 *Grootboom* (n 71) para 14.

77 *Grootboom* (n 71) para 16.

78 *Grootboom* (n 71) para 22.

79 *Grootboom* (n 71) para 9.

80 1998 1 SA 765 (CC).

81 *Soobramoney* (n 81) para 6.

82 *Soobramoney* (n 81) para 40.

In another sense the appeal before us brings into sharp focus the dichotomy in which a changing society finds itself and in particular the problems attendant upon trying to distribute scarce resources on the one hand, and satisfying the designs of the Constitution with regard to the provision of health services on the other. It puts us in the very painful situation in which medical practitioners must find themselves daily when the question arises: Should a doctor ever allow a patient to die when that patient has a treatable condition? In the context of this case, the question to be answered is whether everybody has the right of access to kidney dialysis machines even where resources are scarce or limited.

This supports the views expressed by Chaskalson P with whom the majority of the judges concurred, that if the government is not capable of providing apposite medical treatment as a result of its lack of resources, even a life-threatening permanent disease, which required dialysis in the specific case, could be denied by the public authorities.<sup>83</sup> In a critical analysis of these rights, Sachs opined that, '... SERs, however, by their very nature require rationing, at least for the main part. Competition for resources is built into the DNA of SERs'.<sup>84</sup> With that said, this does not affect the defensibility of socio-economic rights in South Africa since they were 'carefully crafted' to include internal limitations.<sup>85</sup>

## 8 Conclusion

From the above discussion, it is clear that the Constitution provides a firm foundation for a claim of defensibility of socio-economic rights in South Africa, and that these rights are not just benefits of having good leadership. Despite the current state of disaster, the position on their defensibility has not changed. In the government's efforts to save lives, it has not neglected its duty to progressively realise these rights, and its decision to expand its social assistance efforts to include the unemployment grant was the most commendable effort. Although there is still much to be done it is worth celebrating the small wins that the government makes which will, on aggregate, translate to huge progress. There is however very little the government has done on the economic side in their bid to save lives and livelihoods. In trying to achieve the delicate balance that was alluded to at the beginning of this discussion, more emphasis may have been put on saving lives than livelihoods. As there was little to no economic activity that was created by the government from the beginning of the state of disaster, I believe the scales on lives versus livelihoods tipped more favourably on the side of lives since the

83 *Soobramoney* (n 81) para 35.

84 A Sachs 'Introduction to the introduction' in M Clark et al *Socio-economic rights: Progressive realization?* (2016) at 27.

85 *Grootboom* (n 71) para

COVID-19 related death rate was significantly lower than in other countries which had the same number of infections as South Africa.

Having the rights entrenched in the Constitution means that when interpreted in a holistic view as affirmed in *Grootboom*, no one, including the state, should infringe upon these rights, and the state has a duty to promote and fulfil the obligations imposed by these rights. The obligations of the international society also support the view that these rights are fundamental to human existence and that, at the very minimum, governments should be able to provide for the most vulnerable who are unable to provide for themselves as a result of a wide number of contingencies that include (but are not limited to) poverty, unemployment, inequality and the death of breadwinners. Human life is sacred in all the diverse belief systems which people are inclined to and therefore preserving it along with human worth is of utmost importance. These rights undertake to ensure that this objective is fulfilled, and their defensibility cannot be denied, although constrained by the availability of resources as laid out in *Soobramoney*.