

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

DEPARTMENT: PUBLIC LAW AND JURISPRUDENCE

**THE RATIFICATION OF THE INTERNATIONAL COVENANT
ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS,
STRATEGIC LITIGATION AND THE RIGHT OF ACCESS TO
ADEQUATE HOUSING**

**MINI-THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE LL.M DEGREE IN THE FACULTY OF LAW OF THE UNIVERSITY OF
THE WESTERN CAPE**



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There are many people who have contributed to my life. Thank you to all.

A special thank you to the Law Faculty of the University of the Western Cape, the UWC Law Clinic at its staff, my parents, my supervisor and our heavenly father.



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DECLARATION

I declare that THE RATIFICATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, STRATEGIC LITIGATION AND THE RIGHT OF ACCESS TO ADEQUATE HOUSING, is my own work, that it has not been submitted before for any degree or examination in any other university and the all the sources I have used or quoted have been indicated and acknowledged as complete references.

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A handwritten signature in black ink, appearing to read "W. Le Roux", positioned above the text "Signature:".

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Date: 26 November 2018.

KEYWORDS

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Access to adequate housing is one of the greatest challenges facing the South African government today.¹

CHAPTER ONE

INTRODUCTION

1.1 Introduction

Access to adequate housing² is an important socio-economic right and is of central importance for the enjoyment of all rights³. The right to access adequate housing is viewed as a fundamental human right and has been described in both International Law and by the South African courts as being essential to the dignity of human beings.⁴

Access to adequate housing thus plays an important part in ensuring human dignity for all persons. It is also one of the key elements needed to ensure that all persons have access to an adequate standard of living.

Access to adequate housing further plays a vital role in maintaining and improving the lives of all people as it provides both security and shelter.⁵ In modern day South Africa, access to adequate housing is held in very high regard. This is evident in the recognition it has received in the National Development Plan as two of the fourteen outcomes of the plan are to ensure that “all people are and feel safe” and “sustainable human settlements and improved quality of household life.”

¹ Chenwi L ‘Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of those Subject to Evictions’ (2008) 8 *Human Rights Law Review* 105 105.

² Constitution of the Republic of South Africa, 1996. Section 26 provides for a right to access *adequate* housing. However, the United Nations Committee have in their general comments spoken about a right to housing.

³ In this mini-thesis any reference to socio-economic rights always includes reference to housing rights and the right to access adequate housing.

⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 83.

⁵ Ebadolahi B ‘Using Structural Interdicts and the South African Human Rights Commission to achieve judicial enforcement of economic and social rights in South Africa’ (2008) 83 *New York University Law Review* 1565 1567.

The drafters of the South African Constitution recognised the importance of access to adequate housing as provision was made for the right to access adequate housing in the Final Constitution in section 26.⁶

In considering the report submitted by South Africa, the United Nations Committee on Economic, Social and Cultural rights indicated (hereinafter referred to as the “Committee on ESCR”) the housing landscape in South Africa continues to be divided as a result of the past and that the apartheid spatial divide continues to dominate the landscape.⁷ Viljoen notes that despite numerous attempts to transform the housing regime from one which was grossly discriminatory to a welfare-orientated legal system that functions under the auspices of the rights and values entrenched in the Constitution of the Republic of South Africa the poorest households in South Africa remain subject to not only a lack of access to housing but also intolerable housing conditions.⁸ He writes further that the judicial enforcement of the right to access adequate housing is a difficult, complex and multi-layered issue with which the courts have been grappling for some time.⁹

An examination of the housing rights jurisprudence reveals that housing rights and access to adequate housing has been one of the most fiercely contested and frequently litigated topics in the country.¹⁰ The jurisprudence also shows that housing is an area where much legislative, policy and infrastructure progress has been made.

⁶ The content of section 26 and what the right to adequate housing entails is discussed in Chapter 3 below.

⁷ Government of the Republic of South Africa *Initial Report of South Africa* (2017) 11.

⁸ Viljoen S ‘The Systemic Violation of Section 26(1): An Appeal for Structural Relief by the Judiciary’ (2015) 30 *SAPL* 42 43.

⁹ Viljoen S ‘The Systemic Violation of Section 26(1): An Appeal for Structural Relief by the Judiciary’ (2015) 30 *SAPL* 42 44.

¹⁰ Royston L, Molopi E & Budlender J ‘A place for the poor? Realising the right to adequate housing in Johannesburg’ available at <https://www.dailymaverick.co.za/article/2016-07-29-a-place-for-the-poor-realising-the-right-to-adequate-housing-in-johannesburg/#.WQXk7PmGPIU> (accessed on 30 April 2017).

However, while the legislative framework as well as the jurisprudence around housing rights and the right to access adequate housing is extensive and progressive, the reality is that many South Africans still do not have access to adequate housing. Pillay writes that rampant homelessness and inadequate housing in South Africa raise the question of the extent to which the state has adhered to the constitutional imperative to progressively realise the right of access to adequate housing.¹¹

Due to the nature of housing rights and that the realisation thereof requires the taking of positive action, housing rights can thus be included into a category which Liebenberg describes as positive socio-economic rights in that in order for housing rights to be realised, positive conduct needs to be taken.¹² Wesson adds to this and notes that housing rights are a key component of the Constitution's transformative agenda inasmuch as they impose redistributive obligations on the state to take positive action.¹³ As will be shown below the realisation of the right to adequate housing is not a simple process and includes access to sufficient basic services, materials, facilities and infrastructure as well as ensuring that the occupants are given security of tenure. Furthermore having access to adequate housing involves more than simply having a dwelling, but rather having somewhere to live in peace, with security, privacy.¹⁴

However despite being seen as a positive right, housing rights have both negative and positive obligations attached to it. The positive obligations lie in that states are obliged to take action which will lead to the progressive realisation of the right. While the

¹¹ Pillay K 'Implementation of Grootboom: Implications for the enforcement of socio-economic rights' (2002) 6 *Law Democracy and Development* 255 256.

¹² Liebenberg S *The Interpretation of Socio-Economic Rights in Constitutional Law of South Africa* 2ed (2005) 33-1.

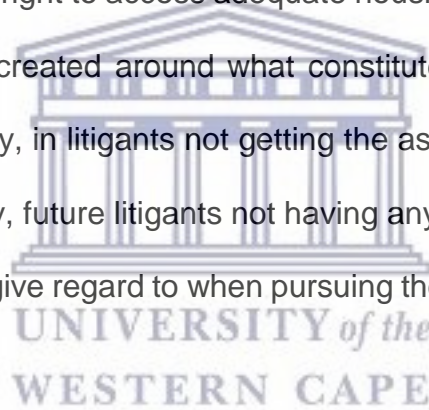
¹³ Wesson M 'Reasonableness in Retreat? The Judgment of the South African Constitutional Court in *Mazibuko v City of Johannesburg*' (2011) 11 *Human Rights Law Review* 390 391.

¹⁴ Chenwi L 'Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions' (2008) 8 *Human Rights Law Review* 105 105.

negative obligation focuses on the notion that housing rights should not be violated in any way and can only be taken away by an order of court made after considering all the relevant circumstances.¹⁵

Muller in commenting on the right to access adequate housing states that “facilitating the progressive realisation of the right to adequate housing takes place in a vacuum.”¹⁶ He notes further that as a result of the courts favouring the reasonableness approach, this has led to a failure to engage in a substantive analysis of the content of the right of access to adequate housing and the obligations which flow from this right.¹⁷

It will be argued in this mini-thesis that the failure of the court to engage in a substantive analysis on the right to access adequate housing has resulted in very little substantive content being created around what constitutes adequate housing. This has moreover resulted firstly, in litigants not getting the assistance which they sought from the court and secondly, future litigants not having any real precedent to follow or any substantive content to give regard to when pursuing their right to access adequate housing.



Muller states that by providing substantive content to the right to access adequate housing this will lead to government having a clear benchmark from which it can ensure the progressive realisation of the right to access to adequate housing and also will provide the public with a standard against which the government can be held accountable.¹⁸

¹⁵ For more on this please see the discussion in Chapters 2 and 3 below.

¹⁶ Muller G 'Proposing a way to develop the substantive content of the right to access adequate housing: An Alternative to the reasonableness review model' (2015) 30 *SAPL* 71 72.

¹⁷ Muller G 'Proposing a way to develop the substantive content of the right to access adequate housing: An Alternative to the reasonableness review model' (2015) 30 *SAPL* 71 76.

¹⁸ Muller G 'Proposing a way to develop the substantive content of the right to access adequate housing: An Alternative to the reasonableness review model' (2015) 30 *SAPL* 71 73.

In January 2015, the South African government ended a close to 20 year wait when they ratified the International Covenant on Economic, Social and Cultural Rights (“hereinafter referred to as the ICESCR or the Covenant”). Ratification refers to an act taken by a state in the international plane whereby it establishes its consent to be bound to a treaty.¹⁹ In ratifying the ICESCR so long after it was first signed, South Africa re-affirmed its commitment to the protection and the fulfilment of socio-economic rights.

The ratification of the ICESCR also brings South Africa a step closer to the realisation of socio-economic rights.²⁰ It is also important to note that the language used in and obligations contained in the Final Constitution to a large extent mirror the socio-economic norms and standards of the ICESCR.²¹ The ratification of the ICESCR comes as a result of an extensive campaign by civil society aimed at ensuring the ratification of the ICESCR. The organisations who supported the campaign viewed the ICESCR as a treaty which was important for enforcing the rights of those living in poverty and that it was relevant to the majority of communities in South Africa, who do not have access to some of the most basic human rights. It was thus critical that South African Civil Society advanced the call for the State to ratify the ICESCR.²²

The United Nations Committee on Economic, Social and Cultural Rights (hereinafter referred to as “the Committee on ESCR”) have indicated that the socio-economic rights which are contained in the ICESCR are all fundamental human rights which are important to ensure that a human being lives a life of dignity and is able to develop

¹⁹ Europatientrights ‘SIGNING AND RATIFYING A TREATY’ available at http://europatientrights.eu/countries/signing_and_ratifying_a_treaty.html (accessed 8 May 2017).

²⁰ Government of the Republic of South Africa *Initial Report of South Africa* (2017) 4.

²¹ Government of the Republic of South Africa *Initial Report of South Africa* (2017) 4.

²² Dullar Omar Institute ‘International Covenant on Economic, Social and Cultural Rights (ICESCR)’ available at <https://dullahomarinstitute.org.za/socio-economic-rights/international-covenant-on-economic-social-and-cultural-rights-icescr> (accessed 15 November 2017).

and that state parties must as far as possible comply with their obligations in terms of the ICESCR.

The ratification of the ICESCR is a significant event for socio-economic rights in South Africa as it demonstrates the importance of socio-economic rights in South Africa and the role it plays in improving people's lives. McLaren notes that the ratification of the ICESCR binds South Africa to its provisions and brings new opportunities for ordinary citizens to shape and accelerate dialogue and actions towards the realisation of socio-economic rights.²³ McLaren notes further that the ICESCR provides new opportunities for the government and civil society to explore what social and economic justice requires of us today.

In addition to this, the ratification of the ICESCR also has the potential to kick start a second round of litigation around the right to access adequate housing as it opens doors for litigation not previously possible before ratification.

Muller shortly after the ratification of the ICESCR writes that the ratification of the ICESCR by the South African government would make it difficult for the Constitutional Court to persist with the view that section 26(1) of the Constitution is distinct from article 11(1) of the ICESCR and that that post ratification, the time is ripe for the Constitutional Court to infuse its interpretative approach of section 26(1) of the Constitution with a more rigorous and substantive reading of the section which is grounded in international law.²⁴

²³ McLaren 'Ratification of Human Rights Treaty Reaffirms SA's Commitment to Socio-Economic Rights and Internationalism' available at <http://sacsis.org.za/site/article/2264> (accessed 29 February 2016).

²⁴ Muller G 'Proposing a way to develop the substantive content of the right to access adequate housing: An Alternative to the reasonableness review model' (2015) 30 *SAPL* 71 72.

The basis of Muller's statement lies in the fact that international law makes reference to a minimum core standard for socio-economic rights. The Constitutional Court has however chosen to adopt a reasonableness approach instead of giving effect to the minimum core obligation when dealing with cases involving socio-economic rights.

In addition to this, certain writers have also noticed that the Constitutional Court, in the pre-ratification era, has to some extent been reluctant to adjudicate cases where there is a complex dispute involving access to adequate housing. Roux states that the Constitutional Court has been somewhat conservative when adjudicating cases around access to adequate housing and states that "often the court made pragmatic decisions instead of decisions grounded in legal principle."

Writing in 2018, Muller's statement raises the question whether the Constitutional Court has made pragmatic decisions in certain cases in the past, and if so what were the reasons for this. It further raises the question whether in cases involving housing rights and the interpretation of the right to access adequate housing, the court has also chosen to avoid dealing with the issue at hand in a particular case and in doing so avoided providing substantive content to the right to access adequate housing.

Muller's statement then further raises the question whether three years post ratification, the time is still ripe for the Constitutional Court to change its interpretive approach to section 26(1) and bring it more in line with international law. This mini-thesis looks to investigate Muller's statement and also looks to test Muller's premise by examining domestic law remedies which can be pursued in litigation post-ratification of the ICESCR in order to determine whether the ratification of the ICESCR is enough to achieve what Muller is proposing or whether more still needs to be done. This mini-thesis also examines whether there are any international remedies available

post-ratification which South Africa should consider and what effect these international law remedies are likely to have.

Therefore this mini-thesis uses Muller's statement as a base and looks to examine what effect South Africa's ratification of the ICESCR is likely to have on domestic remedies currently available and whether the ratification of the ICESCR can, through the use of strategic litigation, bring about a change in access housing rights and lead to an in access adequate housing. Muller notes that the burgeoning jurisprudence on the right to housing in international law provides a wealth of material which the Constitutional Court should consider in terms of section 39(1)(b) of the Constitution for purposes of developing the content of the right of access to adequate housing.²⁵

Wilson points out that litigation, although not successful in the courts, can still indirectly affect social change through the mobilisation which comes with both the preparation and the lead up to a case and the aftermath of a judgment being handed down.²⁶ Wilson thus endorses using rights and obligations as an instrument for progressive change and argues that constitutional rights and progressive jurisprudence provide authoritative statements of the public policy goals of a country. Furthermore when combining the South African Constitution with the current jurisprudence as well as the provisions of the ICESCR, this could lead to a change in the interpretive approach of the courts regarding the right to access adequate housing.²⁷

The ICESCR, as will be seen below has been relied upon by parties in legal argument and considered by courts in the past. However, at the time that those cases were

²⁵ Muller G 'Proposing a way to develop the substantive content of the right to access adequate housing: An Alternative to the reasonableness review model' (2015) 30 *SAPL* 71 79.

²⁶ Wilson S 'Litigating Housing Rights in Johannesburg's Inner City: 2004 – 2008' (2011) 27 *South African Journal of Human Rights* 127 129.

²⁷ Wilson S 'Litigating Housing Rights in Johannesburg's Inner City: 2004 – 2008' (2011) 27 *South African Journal of Human Rights* 127 129.

argued and those judgements were written, South Africa had not yet ratified the ICESCR. However since the ICESCR has now been ratified, its status has been upgraded and South Africa is now bound to its provisions as section 231(2) of the Constitution.²⁸

This mini-thesis will thus look to investigate whether in a pre-ratification era, the Constitutional Court failed to provide substantive content to section 26(1) and why and further whether three years post ratification the time is ripe for the Constitutional Court to infuse its interpretive approach of section 26(1) of the Constitution with international law. This will be done by way of testing the domestic remedies currently available in litigation to determine whether the ratification of the ICESCR is enough ensure that the Constitutional Court changes its interpretive approach, or whether more still needs to be done.

1.2 Structure

This mini-thesis will be divided into three main chapters which starts at chapter 2 and continues through until chapter 4. Chapter 5 is the conclusion.

Chapter 2 is entitled the Right to Access Adequate Housing in the ICESCR and International Law. In this Chapter the focus is on the right to housing in international law. This chapter starts by looking at what the ICESCR is, its history and how it came into existence. Thereafter it examines the content given to the right to housing in the ICESCR and its supporting documents as well as the positive and negative obligations attached to housing rights. Chapter 2 continues with a discussion on the minimum core standard which has been adopted in international law and the emphasis given to this standard in international law. This chapter also looks at the provisions of the

²⁸ Dugard J *International Law – A South African Perspective* 3ed (2010) 59.

ICESCR and its supporting documents and how these assist in explaining and giving content to the minimum core standard.

Chapter 2 also includes an examination of the mechanisms available for the monitoring of and ensuring compliance with the provisions of the ICESCR. In this section, the reporting obligations of member states as well as the mechanisms available to ensure compliance with the ICESCR in terms of the Optional-Protocol and the African Charter are discussed. Chapter 2 also includes an examination of South Africa's initial report and the feedback given at the 64th session of the Committee on ESCR which took place recently.

Chapter 3 of this mini-thesis is entitled the role and place of the ICESCR in the housing rights jurisprudence of the South African Constitutional Court before ratification. The focus of this chapter is on South Africa and the South African Constitutional Court. This chapter starts with an examination of section 26 of the Constitution of the Republic of South Africa and examines the content and obligations of the right to access adequate housing provided by this section. After the discussion on section 26, this chapter looks at the place of the ICESCR in South African law post ratification with reference to section 39(1)(b) and section 233 of the Constitution of the Republic of South Africa.

Chapter 3 then shifts its focus to the courts and an examination of the jurisprudence of the Constitutional Court is undertaken. Cases where the ICESCR has played a role are examined in order to determine what arguments were made regarding the ICESCR and also how the Constitutional Court viewed the ICESCR.

The examination of the jurisprudence ties in with Muller's statement that the Constitutional Court has been slow to heed its obligation to consider international law

when it interprets the right of access to adequate housing.²⁹ Thus it is important for one to re-visit the current jurisprudence in order to determine whether Muller's statement has any merit. Re-examining the jurisprudence will also enable one to determine whether the courts have played the role asked of them and done everything they could to give effect to housing rights and also added the necessary content to the right to access adequate housing.

This chapter concludes with an examination of the reactions by academics and legal practitioners to the stance taken by the Constitutional Court regarding the ICESCR. An examination of the work of authors such as Brand, Bilchitz, Roux and Fowkes is undertaken to assist with this. These authors have noticed that a certain trend has emerged in judgments on cases involving socio-economic rights. This is examined in this chapter as well as the possible reasons for this.

Chapter 4 is entitled the role and place of the ICESCR in the interpretation and enforcement of section 26 of the South African Constitution after ratification. This chapter starts by acknowledging Muller's submission that the ratification of the ICESCR can represent a new start for the right to access adequate housing. In chapter 4, Muller's premise is tested through an examination of the domestic remedies which can be pursued through the courts post ratification.

In Chapter 4 the concept of strategic litigation is introduced and discussed as it is through the use of strategic litigation that Muller's premise can be tested. The remedies examined in this chapter looks to test the statement made by Muller that since the ratification of the ICESCR, the time is ripe for the Constitutional Court to infuse its interpretive approach with a more rigorous and substantive reading that is

²⁹ Muller G 'Proposing a way to develop the substantive content of the right to access adequate housing: An Alternative to the reasonableness review model' (2015) 30 *SAPL* 71 73.

grounded in international law. In the discussion of these remedies, the relevant parties, causes of action, relief requested and the facts and evidence which should be alleged and proved will be examined while also the possible arguments which should be made are discussed. The purpose of this is to determine how pursuing these remedies in courts will likely play out post ratification and further to determine whether the ratification of the ICESCR is enough to ensure the change in interpretive approach which Muller is predicting.

This chapter concludes with an examination of the international law mechanisms and remedies which are available post ratification and examines what role these remedies can play with regard to Muller's premise and also in increasing access to adequate housing.

This mini-theses will then conclude in chapter 5 where the entire journey will re-visited. The basis for the study and the route followed will be discussed as well as the significant events which became important points in the study will be highlighted. All which looks to respond to Muller's statement that the ratification of the ICESCR by the South African government would make it difficult for the Constitutional Court to persist with the view that section 26(1) of the Constitution is distinct from article 11(1) of the ICESCR and that the time is ripe for the Constitutional Court to infuse its interpretive approach to section 26(1) of the Constitution with a more rigorous and substantive reading that is grounded in international law.³⁰

³⁰ Muller G 'Proposing a way to develop the substantive content of the right to access adequate housing: An Alternative to the reasonableness review model' (2015) 30 *SAPL* 71 72.

CHAPTER TWO

THE RIGHT TO ACCESS ADEQUATE HOUSING IN THE ICESCR AND INTERNATIONAL LAW

2.1 Introduction

In this chapter a focus will be placed on the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as “the ICESCR”) and its supporting documents. The focus of this chapter will be two-fold. This chapter will first examine the content given to the right to access adequate housing in international law and then proceed to examine the monitoring and enforcement mechanisms currently in place to ensure compliance with the provisions of the ICESCR. In addressing the monitoring and enforcement mechanisms, this chapter will conclude with a brief discussion on the report recently submitted by South Africa to the Committee on ESCR and the response received.

In determining the content given to housing rights in international law, the ICESCR as well as the General Comments of the Committee of ESCR and other soft law instruments will be examined. The rationale behind choosing to examine these documents is given by Roux who writes that the Committee on ESCR, in its general comments, provided the best framework for the interpretation of socio-economic rights and that this framework could be incorporated in a future interpretation of the South African Constitution.³¹

³¹ Roux T *The Politics of Principle* (2013) 268.

2.2 The History and Origin of the ICESCR

The ICESCR is a multilateral treaty which was adopted by the United Nations General Assembly by the General Assembly Resolution 2200 A (XXI) on 16 December 1966 and came into operation on 3 January 1976.³² It reflects the commitments which were adopted after World War 2 to promote social progress and better standards of living. While this was the main goal of the ICESCR, the ICESCR also had the effect of reaffirming faith in human rights.³³

The ICESCR can thus be described as an international human rights treaty which creates legally binding international law obligations on those member states which have, through the ratification thereof, agreed to be bound by the standards and obligations contained in it. As of November 2006, around 155 states are parties to the ICESCR. The number of member states which have chosen to be bound by the provisions of the ICESCR is an indication of the global consensus which exists around international human rights standards.³⁴

Since being introduced in 1966, the ICESCR has been ratified by over 80 countries. Lotilla notes that the ratification by so many countries gives the ICESCR a firm status as an international instrument which gives rise to certain legal obligations.³⁵ In the preamble the ICESCR provides that member states should promote respect for and the observance of universal human rights and freedoms. The ICESCR thus obliges

³² UN General Assembly 'International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3' available at: <http://www.refworld.org/docid/3ae6b36c0.html> (accessed 13 March 2017).

³³ ESCR-Net 'Section 5: Background Information on the ICESCR' available at <https://www.escr-net.org/docs/i/425251> (accessed 11 January 2016).

³⁴ ESCR-Net 'Section 5: Background Information on the ICESCR' available at <https://www.escr-net.org/docs/i/425251> (accessed 11 January 2016).

³⁵ Lotilla R 'State Implementation of the International Covenant on Economic, Social and Cultural Rights' (1986) 61 *Philippines Law Journal* 259 259.

member states to adopt a wide range of legislative and policy measures to ensure the protection of individuals, groups and communities and also promote fundamental human rights. Member states are thus required to ensure that the socio-economic rights, which are grouped under the right to an adequate standard of living in the ICESCR, are promoted, realised and fulfilled. In relation to housing rights this involves ensuring that people are provided with access to housing which includes the necessary security of tenure to ensure protection against forced evictions.³⁶

The Preamble of the ICESCR provides that all member states recognise that all human beings are equal and possess certain inalienable rights. It further provides that all economic, social and cultural rights derive from the inherent dignity of a human being. It has also been noted that in order to achieve the ideal of free human beings, conditions must be created whereby everyone can enjoy their economic, social and cultural rights³⁷ in addition to their civil political rights.³⁸

2.3 The Right to Access Adequate Housing - Adequate Housing in the ICESCR and International Law

The right to housing is given effect to in Article 11(1) of the ICESCR and forms part of the right to an adequate standard of living. This article provides that:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right,

³⁶ Chenwi L 'Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions' (2008) 8 *Human Rights Law Review* 105 106.

³⁷ Fraser N *Scales of Justice: Reimagining Political Space in a Globalizing World* (2008) 16.

³⁸ ESCR-Net 'Section 5: Background Information on the ICESCR' available at <https://www.escr-net.org/docs/i/425251> (accessed 11 January 2016).

recognizing to this effect the essential importance of international co-operation based on free consent.³⁹

Thus, while housing is not specifically made provision for and protected in the ICESCR, it is protected as part of the adequate standard of living to which a person is entitled under the ICESCR. Grant writes that the right to housing is identified as an aspect of a more general right to an adequate standard of living in the Universal Declaration of Human Rights and that article 25(1) of the Universal Declaration of Human Rights provides that:

‘Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing and housing’⁴⁰

Thus the right to adequate housing is of central importance for ensuring that everyone has an adequate standard of living and also for the enjoyment of all socio-economic rights.⁴¹ In paragraph 6, of General Comment 4, the Committee states that the right to adequate housing applies to everyone despite the fact that article 11 of the ICESCR makes reference to an adequate standard of living for “himself and his family”. The Committee notes that the concept of family must be understood in a wide sense and that the phrase used in the ICESCR cannot be read as implying any limitations upon the applicability of the right to individuals or female-headed households.⁴²

³⁹ UN General Assembly ‘International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3’ available at: <https://www.refworld.org/docid/3ae6b36c0.html> (accessed 21 November 2018).

⁴⁰ Grant E *Enforcing Social and Economic Rights: The Right to Adequate Housing in South Africa* (2007) 4.

⁴¹ UN Committee on Economic, Social and Cultural Rights (CESCR) ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23’ available at: <http://www.refworld.org/docid/47a7079a1.html> (accessed 20 November 2018).

⁴² UN Committee on Economic, Social and Cultural Rights (CESCR) ‘General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23’ available at: <http://www.refworld.org/docid/47a7079a1.html> (accessed 20 November 2018).

It is in paragraph seven of General Comment 4 where the Committee on ESCR begins to link housing with the concept of having an adequate standard of living. Paragraph seven states that the Committee on ESCR does not view the right to housing narrowly but rather adopts a wide view which includes the right to live somewhere in security, peace and dignity.⁴³ It notes that this wider view is the appropriate one as the right to housing is integrally linked to the other human rights, such as the right to human dignity and the principle of non-discrimination, and also to the fundamental principles upon which the ICESCR is premised.

In addition to the above, the Committee on ESCR states that the concept of adequacy is significant when determining whether particular forms of shelter actually constitute adequate housing.⁴⁴ It then goes on to list a number of factors which must be taken into account when determining whether adequate housing exists. These factors include legal security of tenure, availability of materials, services and infrastructure and habitability. Moreover, the United Nations in writing on the right to adequate housing, state that in order to be considered adequate, housing must provide more than four walls and a roof.⁴⁵ They also provide that for housing to be considered adequate, the following criteria must be met; there must be security of tenure and services, materials, facilities and infrastructure must be available and the housing must not be located where people will be cut off from their employment or various services. Housing must also be affordable, habitable, accessible and culturally adequate.⁴⁶

⁴³ UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23' available at: <http://www.refworld.org/docid/47a7079a1.html> (accessed 20 November 2018).

⁴⁴ UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23' available at: <http://www.refworld.org/docid/47a7079a1.html> (accessed 20 November 2018).

⁴⁵ UN Habitat: The Right to Adequate Housing at page 3.

⁴⁶ UN Habitat: The Right to Adequate Housing at page 3.

These factors are viewed as basics which need to be in place for housing to be considered adequate. It is here where the Committee on ESCR confirms that there are certain minimum factors which must be present when determining whether housing is adequate. These minimum factors which must be present is referred to in international law as the minimum core.

2.4 The Minimum Core and The Right to Adequate Housing

The minimum core standard is a concept introduced by the Committee on ESCR with the aim of ensuring “the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.” The minimum core concept aims to set a quantitative and qualitative floor of socio-economic and cultural rights that must be immediately realised by the state as a matter of top priority.⁴⁷

The minimum core obligation is spelled out in paragraph 10 of the Comment:

‘On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties’ reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is 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.’

Tasioulas writes that on the basis of the extensive experience gained by the Committee on ESCR over more than a decade of examining the reports of member

⁴⁷ Fisher A ‘Minimum Core Obligations of Socio-Economic Rights’ available at <http://www.worldbank.org/en/about/legal/publication/minimum-core-obligations-of-socioeconomic-rights> (accessed 14 October 2018).

states, the Committee on ESCR is of the view that a minimum core obligation to ensure the satisfaction of minimum essential levels of each of the rights is incumbent upon every state party.⁴⁸ Grant adds to this and writes that in order to give content to the obligation of progressive realisation, members states must immediately provide a minimum core of each of the rights provided for under the ICESCR.⁴⁹

The existence of a minimum core standard is confirmed by the Basic Principles and Guidelines on Development based Evictions and Displacement which provides that as a minimum standard, access to adequate housing should include having safe and secure access to essential food, potable water and sanitation, basic shelter and housing.⁵⁰ Regarding housing specifically, the minimum core includes, having access to a dwelling which offers both protection from the elements as well as privacy, having access to water, sanitation and refuse removal facilities. Katherine Young takes it one step further and links these minimum standards to human dignity and notes that certain interpretations of dignity are consistent with the protection of economic and social rights and affirms “that people who are denied access to the basic social and economic rights are denied the opportunity to live their lives with a semblance of human dignity.”⁵¹

Through the minimum core the Committee on ESCR seeks to set a minimum content for socio-economic rights and establish a minimum standard that must be realised by member states.⁵² The minimum core concept has also been recognised on a regional level by the African Commission in Principles and Guidelines on the Implementation

⁴⁸ Tasioulas J *Minimum Core Obligations: Human Rights in the Here and Now* (2017) 9.

⁴⁹ Grant E *Enforcing Social and Economic Rights: The Right to Adequate Housing in South Africa* (2007) 7.

⁵⁰ Basic Principles and Guidelines on Development-based Evictions and Displacement (Feb 2007) A/HRC/4/18.

⁵¹ Young K ‘The minimum core of economic and social rights: A concept in search of content’ (2008) 33 *Yale International Law Journal* 113 135.

⁵² Fuo O & Du Plessis A ‘In the face of judicial deference: Taking the “minimum core” of socio-economic rights to the local government sphere’ (2015) 19 *Law Democracy and Development* 1 5.

of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights although here the emphasis is placed on the minimum duties of a state as opposed to minimum essential levels of a right.⁵³ Fowkes writes that the minimum core represents a bid to respond to socio-economic scepticism and to the conviction that socio-economic rights will not be enforceable until they have concrete content.⁵⁴

The minimum core is accepted as a standard in international law and refers to the obligation on states to ensure that no significant number of individuals are deprived of the "minimum essential levels" of socio-economic rights.⁵⁵ Wesson writes that the minimum core entails that socio-economic rights generate a minimum level of provision that a member states should realise as a matter of priority and that it serves as the starting point for progressive realisation.⁵⁶ The minimum core standard flows from the premise that a basic minimum level of subsistence is required for the enjoyment of a dignified human existence.⁵⁷

2.5 Taking Appropriate Steps to Ensure Progressive Realisation

Article 2 of the ICESCR provides that each member state is required to take steps which are aimed at achieving the progressive realisation of the rights contained in the ICESCR.⁵⁸ Grant writes that the Committee on ESCR has distinguished between

⁵³ Chenwi L 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46 *De Jure* 742 754.

⁵⁴ Fowkes J *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (2016) 266.

⁵⁵ African Commission on Human and People's Rights (ACHPR) *Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples Rights* (Banjul: ACHPR (2010) at 13.

⁵⁶ Wesson M 'Reasonableness in Retreat – The Judgment of the South African Constitutional Court in *Mazibuko v City of Johannesburg*' (2011) 11 *Human Rights Law Review* 390 399.

⁵⁷ Fuo O & Du Plessis A 'Taking the Minimum Core Social Economic Rights to the Local Government Sphere' (2015) 19 *Law Democracy and Development* 1 3.

⁵⁸ UN General Assembly 'International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3' available at: <https://www.refworld.org/docid/3ae6b36c0.html> (accessed 21 November 2018).

obligations of conduct and obligations of result and that both come into play in determining whether a member state has fulfilled its obligations under article 2.⁵⁹

General Comment 3 deals with the nature of the obligations of member states, and provides that article two of the ICESCR describes the nature of the general legal obligations undertaken by member states to the ICESCR.⁶⁰ Article 2 must thus be viewed as having an active relationship with the other provisions of the ICESCR.

Article 2(1) of the Covenant provides that:

“each State Party undertakes to take steps, individually and through international assistance and co-operation and to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant and that this including particularly the adoption of legislative measures.”⁶¹

Tasioulas writes that the principle reflected in article 2(1) is to take steps with a view to achieving progressively the full realisation of the rights recognised in the ICESCR and that the failure of a member state to take steps constitutes a contravention on the part of that member state.⁶²



The Committee on ESCR however also notes that certain obligations need to have an immediate effect. According to Liebenberg, upon ratification of the ICESCR, a member state is under an obligation to begin immediately taking steps aimed towards the full realisation of the rights contained in the ICESCR and that such steps should be deliberate, concrete and targeted towards meeting the obligations recognised by the

⁵⁹ Grant E *Enforcing Social and Economic Rights: The Right to Adequate Housing in South Africa* (2007) 6.

⁶⁰ UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23' available at: <https://www.refworld.org/docid/4538838e10.html> (accessed 14 November 2018).

⁶¹ UN General Assembly 'International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3' available at: <https://www.refworld.org/docid/3ae6b36c0.html> (accessed 21 November 2018).

⁶² Tasioulas J *Minimum Core Obligations: Human Rights in the Here and Now* (2017) 13.

ICESCR.⁶³ Alston and Quinn add to this and write that the key point is that the undertaking to take steps is of immediate application and that in this respect the ICESCR imposes an immediate and readily identifiable obligation upon state parties.⁶⁴ Thus, while the full realisation of housing and other socio-economic rights may be achieved progressively, steps geared towards that goal must be taken either immediately or within a short time after ratification.⁶⁵ Examples of such steps will include adopting the ICESCR into domestic law or instructing Parliament to start a legislative process geared towards doing so.

Paragraph 3 of the Committee on ESCR's General Comment 3 states that the steps taken by member states should involve all appropriate means and that this includes the adoption of legislative measures.⁶⁶ Thus the Committee on ECSR recognises that legislation plays an important part in ensuring access to housing and other socio-economic rights.

This obligation is confirmed by the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as "the Limburg Principles"). The Limburg Principles provide that:

'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

⁶³ Liebenberg S 'The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa' (1995) 11 *SAJHR* 359 365.

⁶⁴ Alston P & Quinn G 'The nature and scope of State Parties obligation under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156 166.

⁶⁵ Alston P & Quinn G 'The nature and scope of State Parties obligation under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156 166.

⁶⁶ UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23' available at: <https://www.refworld.org/docid/4538838e10.html> (accessed 14 November 2018).

full realization of the rights recognized in the present Covenant by all appropriate means.⁶⁷

De Visser adds to this and notes that the obligation to promote fundamental rights means that member states must encourage and advance the realisation of these rights and that the obligation to fulfil fundamental rights means that the state must take appropriate legislative, administrative, budgetary, judicial and other measures towards their realisation.⁶⁸

Article 25 ties in with this and provides that member states are obligated to ensure minimum subsistence rights for all.⁶⁹ Bilchitz writes that the United Nations Committee on ESCR has held that socio-economic rights contain a minimum core obligation that must be fulfilled by member states and that such an obligation requires every member state to fulfil certain essential levels of the right in question and that a failure to do so constitutes a *prima facie* failure by a member state to discharge its obligations under the ICESCR.⁷⁰



Chenwi writes that the ICESCR and the South African Constitution are instruments which recognise that socio-economic rights have to be realised over time.⁷¹ She argues further that meeting the essential minimum levels of the rights is an initial step towards progressive realisation.⁷² Liebenberg notes that when interpreting whether

⁶⁷ ESCR Net 'Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' available at <https://www.escr-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural/> (accessed on 15 November 2017).

⁶⁸ De Visser J 'A perspective on local government's role in realising the right to housing and the answer of the Grootboom Judgment' (2003) 7 *Law Democracy and Development* 201 204.

⁶⁹ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, (1986) UN Doc. E/CN.4/1987/17 at 25.

⁷⁰ Bilchitz D 'Giving Socio-Economic Rights teeth: The minimum core and its importance' (2002) 119 *South African Law Journal* 484 485.

⁷¹ Chenwi L 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46 *De Jure* 742 743.

⁷² Chenwi L 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46 *De Jure* 742 754.

there has been compliance by the government, the courts should be concerned to hold the government accountable for meeting essential minimum levels of each of the rights in the ICESCR as required by the Committee on ESCR and recommended in the Limburg Principles.⁷³

2.6 Within Available Resources

Chenwi writes that the ICESCR recognises that socio-economic rights have to be realised over time and the progress towards full realisation is dependent on the availability of resources.⁷⁴ Liebenberg writes that the obligation of progressive realisation is qualified by phrase to the maximum of its available resources and that this qualification recognises the reality that the extent of fulfilment of the rights contained in the ICESCR will depend on the financial capacity of the member state.⁷⁵

Thus while the ICESCR provides for the progressive realisation of the right to housing and other socio-economic rights, it also acknowledges the constraints which exist due to the limitation of available resources. Alston and Quinn note that most of the rights granted depend in varying degrees on the availability of resources and this fact is recognised and reflected in the concept of "progressive achievement or progressive realisation".⁷⁶ However, while the Committee on ESCR acknowledges that resources constraints may be an obstacle to member states meeting their obligations, the obligation remains on the member state to ensure the widest possible enjoyment of the relevant rights.

⁷³ Liebenberg S 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 *SAJHR* 359 376.

⁷⁴ Chenwi L 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46 *De Jure* 742 743.

⁷⁵ Liebenberg S 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 *SAJHR* 359 366.

⁷⁶ Alston P & Quinn G 'The nature and scope of State Parties obligation under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156 172.

Currie and De Waal note that resource scarcity does not relieve member states of the minimum core obligations and that violations will occur when the member state fails to satisfy obligations to ensure the satisfaction of the minimum essential levels of the right.⁷⁷

2.7 Negative Obligations with regard to Housing Rights

While housing rights are mainly viewed as positive rights, it also comes with negative obligations. The negative obligations are centred on that existing housing rights should not be violated and that member states should ensure that this does not happen.

In International law the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (hereinafter referred to as the “Maastricht Guidelines”) provide further content to the negative obligation attached to housing rights and links the negative obligations around housing rights to obligations of member states to respect and protect housing rights and access to housing.

The obligation to respect requires member states to refrain from interfering with the enjoyment of housing and other socio-economic rights.⁷⁸ Respecting individuals and communities housing rights requires member states to refrain from performing, sponsoring, or tolerating any practice, policy or measure which violates the integrity of individuals or infringes upon their use and enjoyment thereof. It further requires member states to refrain from engaging in any conduct which will have a negative effect on an individual or a community’s access to and enjoyment of their rights.

⁷⁷ Currie I & De Waal J *The Bill of Rights Handbook* 6ed (2015) 572.

⁷⁸ International Commission of Jurists (ICJ) ‘Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997’ available at <http://www.refworld.org/docid/48abd5730.html> (accessed 21 November 2018).

The obligation to protect socio-economic rights requires member states to prevent the violation of socio-economic rights by third parties.⁷⁹ This entails that member states or their agents have to ensure that the socio-economic rights of an individual or a community are not violated by any individual or non-state actor. Where a third party does violate the socio-economic rights of an individual or a community, the obligation to protect requires member states to guarantee access to remedies, both legal and otherwise, for the violation.

2.8 Reporting Obligations under the ICESCR

Articles 16 and 17 contain the reporting obligations of member states under the ICESCR. Liebenberg writes that the supervision of the obligations of member states is done through a system of periodic reporting by member states on the measures they have adopted and the progress they have made in achieving the observance of the rights recognised in the ICESCR.⁸⁰ Article 16 of the ICESCR requires member states to undertake to submit in conformity with this part of the ICESCR reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.⁸¹

The reports contain the progress made by the particular member state and also indicate the factors and difficulties faced by the particular member state in fulfilling their obligations under the ICESCR.

⁷⁹ International Commission of Jurists (ICJ) 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997' available at <http://www.refworld.org/docid/48abd5730.html> (accessed 21 November 2018).

⁸⁰ Liebenberg S 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 *SAJHR* 359 369.

⁸¹ UN General Assembly 'International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3' available at: <https://www.refworld.org/docid/3ae6b36c0.html> (accessed 21 November 2018).

Liebenberg writes further that the system presently in force requires member states to submit its initial report within 2 years of ratifying the ICESCR and thereafter member states are required to report at 5 year intervals.⁸² The Committee examines the reports at public meetings to which the reporting member state sends representatives to answer questions relating to and debate issues around the report.

2.9 South Africa's Initial Report and the Issues Raised at the 64th Session of the Committee on ECSR

South Africa's initial report was due in 2017 and was received by the Committee on ESCR on 25 April 2017. In its initial report, South Africa acknowledged that acceding to the ICESCR represented an important step forward in ensuring the realisation of socio-economic rights and that the ratification of the ICESCR will continue to deepen the enforcement of socio-economic rights in the country.⁸³

In addressing policies strategies and legislation in the initial report, the South African government acknowledged that the state is compelled to respect, protect, promote and fulfil the range of socio-economic rights as a matter of obligation.⁸⁴ Furthermore, the South African government also acknowledged that the core socio-economic rights impose positive obligations on the state to take reasonable legislative and other measures to ensure that the entitlements promised by the rights are progressively achieved.⁸⁵ In addition to this, the South African government further acknowledged in their initial report that "municipalities must ensure that the right to housing is realised"

⁸² Liebenberg S 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 *SAJHR* 359 369.

⁸³ Government of the Republic of South Africa *Initial Report of South Africa* (2017) 4.

⁸⁴ Government of the Republic of South Africa *Initial Report of South Africa* (2017) 10.

⁸⁵ Government of the Republic of South Africa *Initial Report of South Africa* (2017) 10.

and that the municipality must identify and designate land for housing and ensure that water, sanitation, electricity, roads, storm water drainage and transport are provided.⁸⁶

In the list of issues in relation to the initial report of South Africa, the Committee on ESCR raised various issues regarding the right to housing and requested information on the measures taken to enhance coordination between the national, provincial and local governments in providing housing with basic services, the measures taken to ensure that evictions are carried out in accordance with relevant domestic laws and international human rights standards and also information on the obstacles being faced in improving access to safe drinkable water and adequate sanitation facilities.⁸⁷

In response to the issues raised by the Committee on ESCR regarding housing rights and access to adequate housing, the South African government in their reply confirmed that there are currently measures in place to provide assistance to households in obtaining mortgage finance to acquire residential property.⁸⁸ It also noted that service delivery has stagnated recently due to the problems experienced in rolling out those services in densely populated and volatile areas and further that obtaining land from its rightful owners, rezoning it and planning service delivery options are proving to be challenging.⁸⁹

The initial report of South Africa was considered by the Committee on ESCR at the 64 session which took place from 24 September 2018 to 12 October 2018. Introducing the report, John Jeffery, Deputy Minister of Justice and Constitutional Development of South Africa, said that the Covenant was a major source of influence for the inclusion

⁸⁶ Government of the Republic of South Africa *Initial Report of South Africa* (2017) 39.

⁸⁷ United Nations Committee on Economic, Social and Cultural Rights *List of Issues in Relation to the Initial Report of South Africa* (2018) 5.

⁸⁸ Government of the Republic of South Africa *Replies of South Africa to the list of issues* (2018) 19.

⁸⁹ Government of the Republic of South Africa *Replies of South Africa to the list of issues* (2018) 20.

of economic, social and cultural rights in the national Constitution.⁹⁰ He further emphasised the value of the Covenant was that it helped the Government to measure whether its domestic laws, policies and programmes complied with its international obligations. The Government found that the Covenant was making a difference in the realisation of socio-economic rights in the country, and it was of the view that the Covenant was not static but a living document and that the value of the Covenant was that it helped the Government to measure whether its domestic laws, policies and programmes complied with its international obligations.⁹¹ It should also be noted that one of the issues raised at the session was access to adequate housing and it was acknowledged that with regard to housing and other socio-economic rights a lack of domestic enforcement mechanisms do exist.

2.10 Enforcement Mechanisms under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

It is important to note that despite ratifying the ICESCR, the South African government has not ratified the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as “the OP-ICESCR”). Viljoen and Orago note that in ratifying the ICESCR the government have shown a commitment to the realisation of socio-economic rights. However in the same breath they state that post ratification the question becomes one of adding enforcement mechanisms to the

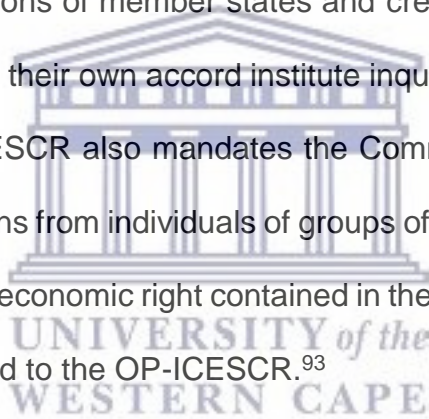
⁹⁰ Committee on Economic, Social and Cultural Rights ‘Committee on Economic, Social and Cultural Rights considers the report of South Africa’ available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23683&LangID=E> (accessed 16 October 2018).

⁹¹ Committee on Economic, Social and Cultural Rights ‘Committee on Economic, Social and Cultural Rights considers the report of South Africa’ available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23683&LangID=E> (accessed 16 October 2018).

already accepted standards.⁹² It is here where the OP-ICESCR comes in as it contains the enforcement mechanism necessary to ensure compliance with the ICESCR.

The accession to the OP-ICESCR by the South African government would thus be a crucial step for the enforcement of the right to access adequate housing. Viljoen and Orago state that accession to the OP-ICESCR would be of great benefit to South Africa as it would provide an additional safety net in instances where persons whose rights have been violated have not been able to get recourse at the domestic level as the OP-ICESCR provides additional international law mechanisms for rights violations.

The OP-ICESCR provides the procedures which the victims of rights violations must follow, the reporting obligations of member states and creates the possibility that the Committee on ESCR can of their own accord institute inquiries into member states. In addition to this, the OP-ICESCR also mandates the Committee on ESCR to receive and consider communications from individuals or groups of individuals who are victims of the violation of any socio-economic right contained in the ICESCR from state parties who have ratified or acceded to the OP-ICESCR.⁹³



Viljoen and Orago note that South Africa's accession to the ICESCR is likely to ensure constitutional, legislative and policy conformity with South Africa's international socio-economic rights obligations. They also acknowledge that while South Africa has put in place an extensive range of mechanisms for the protection and promotion of socio-

⁹² Viljoen F & Orago N 'An Argument for South Africa's Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in Light of its Importance and Implications' (2014) 17 *Potchefstroom Electronic Law Journal* 2554 2575.

⁹³ Viljoen F & Orago N 'An Argument for South Africa's Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in Light of its Importance and Implications' (2014) 17 *Potchefstroom Electronic Law Journal* 2554 2558.

economic rights at the national level,⁹⁴ there are instances where these domestic mechanisms fail to adequately or effectively protect rights and that when this occurs access to an international mechanism provides an essential procedure victims of socio-economic rights violations can access to remedy the violation or contravention.⁹⁵

2.11 Enforcement Mechanisms Under the African Charter

South Africa both signed and ratified the African Charter on Human and People's Rights (hereinafter referred to as "the African Charter") on 9 July 1996.⁹⁶ While through the ratification of the African Charter the South African government recognises that fundamental human rights stem from the attributes of human beings and recognised its duty to protect and promote human and people's rights.⁹⁷ South Africa has failed to put in place a mechanism to achieve or enforce this.

The Protocol to the African Charter on Human and People's Rights, in article 1 establishes an African Court Human and Peoples` Rights (hereinafter referred to as "the African Court"). Articles 2 and 3 of the Protocol to the African Charter on Human and People's Rights provides that the African Court shall complement the protective mandate of the African Commission and that the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.

⁹⁴ Viljoen F & Orago N 'An Argument for South Africa's Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in Light of its Importance and Implications' (2014) 17 *Potchefstroom Electronic Law Journal* 2554 2577.

⁹⁵ Viljoen F & Orago N 'An Argument for South Africa's Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in Light of its Importance and Implications' (2014) 17 *Potchefstroom Electronic Law Journal* 2554 2577.

⁹⁶ African Commission of Human and People's Rights 'Ratification Timetable: African Charter on Human and People's Rights' available at <http://www.achpr.org/instruments/achpr/ratification/> (accessed 13 June 2018).

⁹⁷ Preamble to the African Charter on Human and People's Rights

However, despite having signed and ratified the African Charter, South Africa has failed to pass a declaration in terms of Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and People's Rights which would empower the African Court to allow and hear complaints lodged by non-governmental organisations with observer status before the commission as well as hear and decide on complaints brought by individuals or groups of individuals.

2.12 Conclusion

The ratification of the ICESCR by the South African government reaffirms the government's commitment to the protection, promotion and realisation of socio-economic rights. Moreover, the ratification of the ICESCR has the potential to breathe new life into the effort to ensure that everyone has access to adequate housing.

One of the effects of the ratification of the ICESCR is that it provides a new international law standard around housing rights. As we have seen in this chapter, housing rights and the right to access adequate housing has been given extensive content in international law and that the minimum core standard has been adopted in both international law and in the ICESCR. This minimum core standard provides clear guidelines as to what is considered as adequate housing and what minimum standard must be complied with.

In this chapter we saw that South Africa has complied with its initial reporting obligations under the ICESCR and that access to adequate housing was highlighted as an issue which requires attention. This Chapter however revealed that at present,

South Africa does not have many mechanisms available to ensure compliance with or enforce the provisions of the ICESCR.

This Chapter further indicated that mechanisms are available in international law but that the South African government would need to take certain steps in order for these mechanisms to be applicable in South Africa. In its concluding observations on the initial report of South Africa the Committee on ESCR encouraged South Africa to ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.⁹⁸

The acknowledgement by the South African government at the 64th session of the Committee on ESCR that the access to adequate housing remains an issue is an indication that the past should be revisited and that the *status quo* should be reconsidered. As the executive have taken a step in ratifying the ICESCR, one now needs to determine whether the judiciary has played its role and whether post ratification more can be done. In Chapter 3 the judiciary's stance with regard to socio-economic rights cases and also their views on the ICESCR will be examined.

⁹⁸ Committee on Economic, Social and Cultural Rights *Concluding Remarks on the Initial Report of South Africa* (2018) 13.

CHAPTER THREE

THE ROLE AND PLACE OF THE ICESCR IN THE HOUSING RIGHTS JURISPRUDENCE OF THE SOUTH AFRICAN CONSTITUTIONAL COURT BEFORE RATIFICATION

3.1 Introduction

In spite of the prominent place the right to adequate housing had assumed in international human rights law by the start of the 1990's,⁹⁹ the interim Constitution of South Africa which was drafted in 1993 did not include any reference to article 11(1) of the ICESCR or the right to adequate housing.¹⁰⁰ It was only when section 26 of the Final Constitution came into operation on 4 February 1997, that South Africans could finally also lay claim to this internationally recognised right. The section has an interesting drafting history.¹⁰¹

Section 26 was not yet in force when the ICESCR was signed by former President Mandela but was drafted and finalised during 1996 with the knowledge that the ICESCR had been signed. It is also significant that former President Mandela signed the ICESCR at a time that the content of the Final Constitution had not yet been finalised and it could even be argued that Mandela signed the ICESCR in order to bolster the case for the inclusion of such a right in the so-called "final" Constitution. As we will see, despite the Technical Committee strongly supporting the international law position during the draft process, the final text of section 26 deviated from the

⁹⁹ See chapter two above. Recall that the Committee on ESCR had by then issued General Comment 3 (December 1990) and General Comment 4 (December 1991).

¹⁰⁰ For a discussion of the background to the inclusion of the right in the 1996 Constitution see Roux 265-273. Roux points out that the ANC's Draft Bill of Rights (1990) accepted that the international law approach under the ICESCR provided the best framework for the protection of social rights (270).

¹⁰¹ In *S v Makwanyane* 1995 (3) SA 391 (CC) at para 25 the Court ruled that the undisputed drafting history of the Bill of Right may be considered when the right is interpreted.

international law formulation.¹⁰² Roux writes that the Technical Committee took the view that there were certain advantages to be had in following the ICESCR formulation. These advantages being that adopting the ICESCR formulation would help to harmonise South Africa's international and domestic obligations and that the General Comments of the Committee on ESCR would provide a steady source of guidance on how social rights ought to be interpreted.¹⁰³

Whatever the case might be, section 26 of the Constitution reads as follows:

26(1) Everyone has the right to have access to adequate housing.

26(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

*26(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.*¹⁰⁴

The inclusion of section 26 in the Final Constitution was widely supported and rightly celebrated at the time by academics and legal practitioners alike. Motala and Ramaphosa write that the right to access adequate housing had to be included in the Final Constitution as the right to access adequate housing cannot be seen in isolation and should be viewed as having a close relationship with other socio-economic rights.¹⁰⁵

¹⁰² Roux T *The Politics of Principle* (2013) 270.

¹⁰³ Roux T *The Politics of Principle* (2013) 270.

¹⁰⁴ Section 26 of the Constitution of the Republic of South Africa, 1996.

There are three important differences between the formulation of the right in article 11 of the ICESCR and in section 26 of the Bill of Rights: (i) the inclusion of the word "access" before "adequate housing" in the Bill of Rights; (ii) the duty to take "reasonable" as opposed to "appropriate" measures in the Bill of Rights; and (iii) the inclusion of the latter duty immediately after the right in the same section of the Bill of Rights.

¹⁰⁵ Motala and Ramaphosa *Constitutional Law Analysis and Cases* (2002) 395.

As is clear from the text, the right to access adequate housing contains both positive and negative obligations. These obligations are given effect to in terms of section 7(2) of the Bill of Rights which provides that the state has the constitutional duty to “respect, protect, promote and fulfil” all the rights contained in the Bill of Rights.¹⁰⁶

The positive obligations are set out in sections 26(1) and 26(2) and form the focus of this mini-thesis.¹⁰⁷ In addition to the positive obligations the right to access adequate housing also comes with negative obligations which are contained in section 26(3) of the Constitution. Grant writes that section 26(3) is freestanding and is not subject to the qualifications attached to the general right.¹⁰⁸ As indicated in chapter 2 above, the negative obligation encompasses a duty to respect, protect and not violate existing housing rights.¹⁰⁹

Currie and De Waal write that section 26(3) expressly entrenches a conventional negative right and that this right protects against the eviction of persons or the demolition of a person home without a court order.¹¹⁰ An example of a failure to respect housing rights would be the arbitrary forced eviction of an individual or a community from their homes. The significance of the negative obligation within the context of housing rights was emphasised in *Jafta v Schoeman; Van Rooyen v Stoltz*¹¹¹ where the court emphasised that the negative duty is not subject to qualifications of subsection (2) such as reasonableness, resource constraints and progressive

¹⁰⁶ Section 7(2) Constitution of the Republic of South Africa, 1996.

¹⁰⁷ In *Dladla and Another v City of Johannesburg and Others* 2018 (2) SA 327 (CC) it was argued by the *amicus curiae* at para 29 that the right to adequate housing is recognised in international human rights law as a self-standing right. Cameron J at para 64 however held that “The three parts of section 26 must be read and understood together”.

¹⁰⁸ Grant E *Enforcing Social and Economic Rights: The Right to Adequate Housing in South Africa* (2007) 16.

¹⁰⁹ Please see discussion in section 2.7 above.

¹¹⁰ Currie and De Waal *The Bill of Rights Handbook* 6ed (2015) 587.

¹¹¹ *Jafta v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) at para 39.

realisation and further held that a violation of this negative duty constitutes a violation of the right which can only be justified in terms of the limitations clause.¹¹²

Viljoen writes that the question of whether the right to access adequate housing is justiciable is uncontested. Fowkes takes it a step further and writes that the idea that the state has the obligation to provide housing enjoys very substantial public status in South Africa.¹¹³ However, despite this the judicial enforcement of the right to access adequate housing is a difficult issue which the courts have struggled with.¹¹⁴ As the case law discussed in this chapter will indicate, the Constitutional Court has struggled to come to terms with the positive obligations contained in section 26 and that the question as to what constitutes adequate housing still remains unanswered.

Muller's hypothesis is that after the ratification of the ICESCR in 2015, the time is ripe for the Constitutional Court to infuse its interpretive approach of section 26 of the Constitution with a more rigorous and substantive reading of international law.¹¹⁵ In setting the basis for this statement, Muller notes that the Constitutional Court has failed to properly engage with the substantive content of section 26(1) and that this lack of engagement can be attributed to the interpretive approach that the court adopted and the strong reliance which the Constitutional Court places on the reasonableness of the measures adopted by the government.¹¹⁶

¹¹² Liebenberg S *Socio-Economic Rights adjudication under a transformative constitution* (2010) 215.

¹¹³ Fowkes *Building the Constitution The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (2016) 246.

¹¹⁴ Viljoen S 'The Systemic Violation of Section 26(1): An Appeal for Structural Relief by the Judiciary' (2015) 30 *SAPL* 42 44.

¹¹⁵ Muller G 'Proposing a way to develop the substantive content of the right to access adequate housing: An Alternative to the reasonableness review model' (2015) 30 *SAPL* 71 73.

¹¹⁶ Muller G 'Proposing a way to develop the substantive content of the right to access adequate housing: An Alternative to the reasonableness review model' (2015) 30 *SAPL* 71 72.

The aim of the rest of this chapter is to assess the merits of Muller's critique. The focus thus shifts to the right to access adequate housing in South Africa as interpreted by the Constitutional Court in the era before the ratification of the ICESCR. This chapter investigates how the ICESCR was presented to the Constitutional Court pre-ratification and the views adopted by the Constitutional Court towards the ICESCR. The chapter ends by looking at how various writers, academics and legal professionals reacted to the stance taken by the Constitutional Court towards the ICESCR.

The case law and literature on the subject is vast.¹¹⁷ Given the scope of this mini-thesis, it is impossible and unnecessary to explore all the finer nuances between cases and authors around the issue. Muller claims that the ratification of the ICESCR will compel the Court to adopt a new housing rights jurisprudence. Therefore this chapter deals selectively with the case law and literature only in as far as it is necessary to confirm or dispel his hypothesis. To test his hypothesis, it is first necessary to understand the Court's interpretation of section 26 in broad terms and the reasons why this interpretation was adopted.

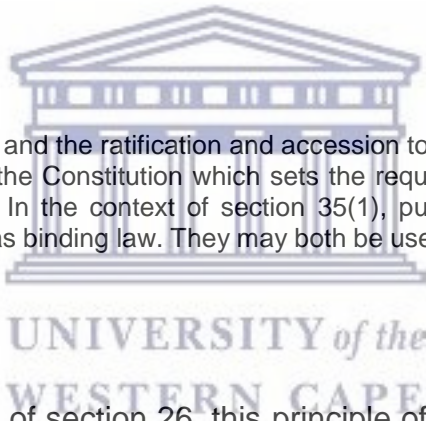
3.2 International law as an Interpretive Aid

President Mandela's signing of the ICESCR under section 82(1)(i) of the interim Constitution did not commit South Africa to ratify the ICESCR under section 231(2) of the interim Constitution, nor did it place an obligation on South Africa to immediately comply with its terms. Under article 18 of the Vienna Convention on the Law of Treaties, a signatory to a Convention is nevertheless "obliged to refrain from acts which would defeat the object and purpose" of the Convention "until it shall have made

¹¹⁷ Cases include *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC); *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); *City of Johannesburg Metropolitan v Blue Moonlight Properties 39 (Pty) Ltd and Another* 69 2012 (2) SA 104 CC and *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

its intention clear not to become a party to the treaty”.¹¹⁸ South Africa is not a party to the Vienna Convention, but article 18 is widely regarded as a rule of customary international law.¹¹⁹ This means that the article 18 obligations applied to South Africa under section 231(4) of the interim Constitution and 232 of the Constitution but that the ICESCR was not binding international law as far as South Africa was concerned. Interestingly enough, this was not a decisive factor when it came to the interpretation of the positive obligations imposed on the state by section 26(1).

In *S v Makwanyane* the Court considered the role and importance of international law in the interpretation of the Bill of Rights under section 35(1) of the interim Constitution (the almost identical predecessor of section 39(1)(b) of the Constitution).¹²⁰ The Court stated:



‘Customary international law and the ratification and accession to international agreements is dealt with in section 231 of the Constitution which sets the requirements for such law to be binding within South Africa. In the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation.’¹²¹

Applied to the interpretation of section 26, this principle of comparative interpretation means that the ICESCR had to be considered under section 39(1)(b) when the Constitutional Court set out to interpret the content of the right to access adequate housing for the first time.

In the chapter below I briefly explore whether and how the Court complied with this interpretive injunction in the period before the ratification of the ICESCR. Before doing

¹¹⁸ Article 18 11. Vienna Convention on the Law of Treaties (with annex), 1969 (1969) 8 ILM 679.

¹¹⁹ Palchetti P ‘Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means of Strengthening Legal Cooperation?’ in Cannizarro E (ed) *The Law of Treaties Beyond the Vienna Convention* (2011) 25 26.

¹²⁰ *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

¹²¹ *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

so, the precise nature of the obligation needs to be clarified in a little more detail. Having just interpreted the meaning of “international law” broadly, to also include non-binding international law, the Court in *S v Makwanyane* immediately pulled back on the potentially radical implications of this interpretation. The court held that:¹²²

‘In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument [...], and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.’

In this passage the Court essentially summarised the method of constitutional interpretation that Du Plessis and Corder,¹²³ and Botha,¹²⁴ describe as the holistic, comprehensive, inclusive and contextual method of purposive interpretation. When interpreting the meaning of the right to have access to adequate housing, the Court thus had to undertake a grammatical, systematic, purposive (teleological) and comparative analysis of section 26. This means that the Court had to carefully consider (i) the wording and the differences between the formulation of the right in the Constitution and the ICESCR; (ii) the internal structure of section 26 together with the cluster of surrounding socio-economic rights with which it is associated; (iii) the purpose behind the inclusion of the right and the constitutional values which the right is said to operationalise; and (iv) the interpretation of the same right in international human rights law. In the end, what is required is the “judicious interpretation and assessment of all these factors to determine what the Constitution permits and what it prohibits”.¹²⁵

¹²² *S v Makwanyane* 1995 (3) SA 391 (CC) para 29.

¹²³ Lourens du Plessis and Hugh Corder *Understanding South Africa's transitional Bill of Rights* (1994) 73-74.

¹²⁴ Botha C *Statutory interpretation: An introduction for students* 5ed (2012) 111; 192.

¹²⁵ *S v Makwanyane* 1995 (3) SA 391 (CC) para 266 (per Mahomed J).

As the next section shows, this inclusive approach to constitutional interpretation placed the text of article 11 of the ICESCR at the centre of the debate about the scope and content of section 26.

3.3 Interpreting the scope and content of section 26

The cases discussed below are examples of cases where the provisions of the ICESCR and its supporting documents were considered by the Constitutional Court in terms of the *Makwanyane* approach to constitutional interpretation. The purpose of examining these selected cases is to get an indication of how the ICESCR was presented to the Constitutional Court and also how the Constitutional Court viewed the ICESCR in the pre-ratification era. For this purpose it is not necessary to look beyond the judgments in *Grootboom* and *Mazibuko*.¹²⁶

Both cases dealt with the positive obligations of socio-economic rights. In both cases, either the parties to the litigation or the *amicus curiae* argued for the adoption of the minimum core standard of international human rights law and that compliance with the positive obligation should be measured against the minimum core standard of international human rights law.¹²⁷

In both cases, the hearings were held and the judgments were handed down before the ratification of the ICESCR in 2015. The first case discussed deals specifically with the right to access adequate housing (*Grootboom*), and the second case deals with

¹²⁶ In the pre-ratification era, the ICESCR was referred to in the following cases namely: *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) at paras 23 and 24 (right to access to adequate housing). *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (11 April 2011) at para 40 (in the context of education). *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC); (2007) 28 ILJ 537 (CC); 2007 (4) SA 395 (CC) at para 138 (in the context of the right to work).

Motswagae and Others v Rustenburg Local Municipality and Another (CCT 42/12) [2013] ZACC 1; 2013 (3) BCLR 271 (CC); 2013 (2) SA 613 (CC) at para 12.

¹²⁷ See the discussion in Chapter 2 above.

socio-economic rights more broadly and the right to have access to sufficient water in particular (*Mazibuko*).

The views of the court will provide a base from which Muller's premise of whether, after the ratification of the ICESCR, the time is ripe for the court to adopt a new interpretive approach towards section 26(1) which is more in line with international law can be tested.

3.3.1 *Government of the Republic of South Africa and Others v Grootboom and Others*

Perhaps the most famous case regarding housing rights is *Government of the Republic of South Africa and Others v Grootboom and Others*¹²⁸. This matter is referred to by Wesson as being the most significant case involving socio-economic rights ever decided by the Constitutional Court and one which laid the basis for the future adjudication of socio-economic rights issues.¹²⁹

In this matter, a group of people living in a suburb on the outskirts of Cape Town were rendered homeless as a result of being evicted from private land which had been earmarked for formal low-cost housing. The group applied to the High Court to order the Municipality to provide them with basic shelter (tents, portable latrines and transported water) this being the minimum core obligation protected by section 26(1) of the Constitution. The applicants relied heavily on the ICESCR as interpreted in General Comment 3 and the Limburg Principles as discussed in chapter 2 to support their interpretation of section 26(1) as a right to access to basic shelter.

¹²⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

¹²⁹ Wesson M 'Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal on Human Rights* 284 285.

The High Court (per Davis J) dismissed the application in as far as it rested on section 26(1).¹³⁰ The Court held that the Municipality had introduced a rational housing programme and that section 26(1), read in context with section 26(2), and in light of the historical context and economic realities of post-apartheid South Africa, did not entitle Mrs Grootboom to be provided with free shelter on demand.¹³¹ The High Court nevertheless provided some relief to Mrs Grootboom as a parent of her child, based on section 28 or the best interest of the child principle.¹³² The Court ordered that the government should provide shelter to the children and their parents and specified that tents, portable latrines and a regular supply of water would constitute a bare minimum of what should be provided for the residents.¹³³

The Municipality thereupon appealed against the decision of the High Court to the Constitutional Court. The latter Court upheld the appeal in part but, unlike the High Court, found that the housing policy of the Municipality violated section 26(2) because it did not include reasonable measures to provide shelter for “people who have no access to land, no roof over their heads, and who are living in intolerable situations and crisis conditions”.¹³⁴ In a separate order, the Court ordered the Municipality to provide the applicants with permanent toilets, permanent taps, and building material to the value of R760 each with which to waterproof their existing accommodation on the Wallacedene sports field.

The Court (per Yacoob J) unanimously confirmed the finding of the High Court that section 26(1) is not a free-standing right which entitles every right bearer to be

¹³⁰ *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C).

¹³¹ *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C) at para 7.

¹³² *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C) at para 22.

¹³³ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 16.

¹³⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 99.

provided with a minimum level of housing or shelter on demand. However, the Court disagreed with the High Court that the housing policy of the Municipality was a “reasonable measure” within “available resources” to achieve the “progressive realisation” of access to adequate housing in that it “failed to provide relief to those desperately in need of access to housing”.¹³⁵

It is the first aspect of the judgment that is of relevance here. The Court confirmed the *Makwanyane* approach to the interpretation of constitutional rights and set out to interpret the scope and content of section 26(1) in its textual and socio-historical context.¹³⁶ The Court also confirmed that “relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary”.¹³⁷ The rest of the judgment provides a striking example of this varied reliance on international law. Read on its own, the wording of section 26(1) seems to confer an unqualified right to have access to adequate housing. This includes a negative obligation not to be deprived of existing access;¹³⁸ a right reinforced by the anti-eviction and demolition provisions of section 26(3). The key terms are “access” and “adequate”. In line with the jurisprudence under the ICESCR, the Court held that the latter term recognises that housing entails more than brick and mortar. However, the inclusion of the word “access” marks a “significant” difference between the Constitution and the ICESCR.¹³⁹ This difference is deepened by that fact

¹³⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 95.

¹³⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 22.

¹³⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 26.

¹³⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 34.

¹³⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 28.

that section 26(2) speaks about “reasonable” measures and the ICESCR about “appropriate steps”.¹⁴⁰

The crux of the Court’s interpretation is that section 26(1) and section 26(2) must be read together.¹⁴¹ The varied reliance on the ICESCR is again evident here. The Court relies heavily on the ICESCR to give content to section 26(2) and the concept of “progressive realisation”,¹⁴² stating that the concept was derived from the ICESCR and that “there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived”.¹⁴³ In so-doing the Court accepted the interpretation provided in paragraph 9 of General Comment 3 as authoritative. This fact makes the Court’s rejection of paragraph 10 of the same General Comment all the more remarkable. As discussed in chapter 2, this paragraph establishes that the right to adequate housing contains a core substantive content or minimum essential level. The Court was urged to also adopt this aspect of international law as authoritative and to define the core content or the minimum level of shelter to which section 26(1) entitles every person in South Africa.

The amici curiae, using the provisions of the ICESCR as a basis, made the argument that the minimum core obligations for housing as laid out in the international law treaties and supporting documents should be given effect to. The legal representatives on behalf of the *amici curiae* presented argument which contended that all the respondents, including those of the adult respondents without children, were entitled

¹⁴⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 28.

¹⁴¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 34.

¹⁴² *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 45.

¹⁴³ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 45.

to shelter in line with and by reason of the minimum core obligation incurred by the state in terms of section 26 of the Constitution.¹⁴⁴ It was then argued further on behalf of the *amici curiae* that article 11.1 of the ICESCR is of significance when understanding the positive obligations created by socio-economic rights in the Constitution and that article 11.1 must be read with article 2 of the ICESCR.¹⁴⁵

The *amici* relied on the relevant general comments issued by the Committee on ESCR concerning the interpretation and application of the ICESCR, and argued that these general comments constitute a significant guide to the interpretation of section 26. In particular they argued that in interpreting this section, we should adopt an approach similar to that taken by the committee in paragraph 10 of general comment 3 issued in 1990, in which the committee found that socio-economic rights contain a minimum core.¹⁴⁶ It was then argued further that it is clear from this extract that the Committee on ESCR considers that every state party is bound to fulfil a minimum core obligation by ensuring the satisfaction of a minimum essential level of the socio-economic rights, including the right to adequate housing.¹⁴⁷

The court noted that the minimum core is the floor beneath which the conduct of the state must not drop if there is to be compliance with the country's international obligations.¹⁴⁸ The Constitutional Court, however, controversially adopted the view that the right delineated in section 26(1) is a right of access to adequate housing and

¹⁴⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 17.

¹⁴⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 27.

¹⁴⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 29.

¹⁴⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 30.

¹⁴⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 31.

is distinct from the right to adequate housing encapsulated in the ICESCR and that the difference in formulation is significant.¹⁴⁹ As such the Court declined the invitation and preferred to decide the case on the basis of the reasonableness of the housing policy before it.

Does this mean that the Court rejected the minimum core concept, or merely that it preferred not to rely on the minimum core to make its decision on this occasion? The difference is of little practical significance if the Court consistently refuses to define the minimum core of the right in all cases (as it has done), but the former seems to be the better interpretation. The Court rejected the idea that section 26(1) is a free-standing right with its own substantive core. There are also indications that, in as far as the Court is willing to entertain the idea of a minimum core, that it will only be as part of the reasonableness test “to determine whether the measures taken by the state is reasonable”.¹⁵⁰ The Court deals extensively with the minimum core obligation imposed by the ICESCR, but Yacoob J presents numerous reasons why the Court is not in a position to define the minimum core of the right to have access to adequate housing. The first is that the General Comment itself does not “specify precisely” what that minimum core is.¹⁵¹ Second, it is complex if not conceptually impossible to determine the minimum content in a society marked by deep divides between urban and rural, and different economic levels in society.¹⁵² Third, the Court lacks the experience and

¹⁴⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 35.

¹⁵⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 33.

¹⁵¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 30.

¹⁵² *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at paras 32-33.

information gained by the Committee over more than a decade of examining Reports submitted by State parties.¹⁵³

The *Grootboom* thus indicates how the Constitutional Court viewed the ICESCR and the minimum core in relation to housing rights and the right to access adequate housing. We see a court embrace the existence of a minimum core standard but choose not to directly apply it. In the *Mazibuko* case discussed below, we see a court having to answer similar questions but in a different context.

3.3.2 *Mazibuko and Others v City of Johannesburg and Others*

More recently, the issue of the minimum core again came before the courts in *Mazibuko and Others v City of Johannesburg and Others*¹⁵⁴ (“the *Mazibuko* case”) which centered around the first attempt to litigate a case on the right of access to sufficient water in terms of section 27(1)(b) of the Constitution. In this matter, the Applicants continued their pursuit for the adoption of the minimum core standard as provided for in international law. In this case, the Constitutional Court was thus invited to revisit its stance on the minimum core and was also requested to define the content of the right to water.

In this matter, the Applicants challenged the City’s free water policy arguing that it was insufficient and constituted an infringement of their right to access water as well as their right to dignity and equality.¹⁵⁵ The Applicants furthermore asked the court to determine whether a quantified amount of water could be considered as sufficient water.¹⁵⁶

¹⁵³ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 31.

¹⁵⁴ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC).

¹⁵⁵ Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2015) 579.

¹⁵⁶ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at para 44.

As in previous cases argument was made for the adoption of the minimum core and a basic, minimum amount of water which must be provided, as laid out in the ICESCR and the general comments.¹⁵⁷ It was argued that every social and economic right has a minimum core or a basic content which must be provided by the state and that in international law the view is that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party.¹⁵⁸

As in the *Grootboom* case, the court looked at the relationship between section 27(1)(b) and section 27(2) of the Constitution.¹⁵⁹ In making reference to the *Grootboom* case and the *TAC* case and in applying the same interpretive approach used, the court held that “Section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2)”.¹⁶⁰

The court then, in applying the interpretive approach to section 27(1)(b) of the Constitution, held that it is clear that the right does not require the state to provide every person with sufficient water on demand and that it requires the state to take reasonable legislative and other measures to progressively achieve access to sufficient water within available resources.¹⁶¹

While noting the arguments made in favour of the minimum core in the *Grootboom* case as well as the *TAC* case, the court in the *Mazibuko* case again rejected the application of the minimum core approach stating that courts are ill-suited to adjudicate

¹⁵⁷ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at para 52.

¹⁵⁸ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at para 52.

¹⁵⁹ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at para 46.

¹⁶⁰ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at para 49.

¹⁶¹ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at para 50.

upon issues where Court orders could have multiple social and economic consequences for the community. The court also further held that it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right.¹⁶²

The court did however note that the state has an obligation to respond to the basic needs of the people and by doing so the rights in the Bill of Rights will acquire content.¹⁶³ It held further that if government takes no steps to realise the rights, the courts will require the government to take steps.¹⁶⁴ These two statements have left the door open for the minimum core standard to be tested in a court law post ratification of the ICESCR. As post ratification the minimum core standard now binds South Africa in international law and in cases where the basic needs of people have not been responded to or the government has taken no steps to realise rights, the courts will intervene and require the government to take steps.

The judgment in the *Mazibuko* case might look like another loss in the argument for the use of the minimum core approach in cases involving access to socio-economic rights. However, a reading of the last paragraph of the judgment as well as looking at the circumstances in which we currently operate reveals that there is still much hope. O Regan J, in concluding her judgment, noted that while litigation around socio-economic rights is expensive and requires great expertise, in South Africa there exists an expertise in litigating for the interests of the poor to the great benefit of society. She

¹⁶² *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at para 61.

¹⁶³ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at para 66.

¹⁶⁴ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at para 67.

notes further that while the challenges in litigation of this nature are significant, but given the benefits it can offer, it should be pursued.¹⁶⁵

The cases discussed above leave many questions unanswered and many issues have not been address. As a result of the stance taken by the Constitutional Court in these cases, the judgments have also elicited a mixed reaction from legal practitioners and legal academics. In the next section, an examination of the reaction of members of the legal profession is undertaken.

3.4 Academic reactions to the Jurisprudence

3.4.1 *Grootboom* as a flight from doctrine: Brand and Bilchitz

Roux writes that there is a divergence of opinion in the academic literature on the Chaskalson Court's social rights jurisprudence with the court's reluctance to adopt the minimum core approach receiving the most attention.¹⁶⁶

In cases involving the right to access adequate housing, the minimum core standard, as discussed and set out in Chapter two above, is the one favoured in international law. Brand in referring to Michelman writes that with the minimum core or the minimum protection approach, one is able to approach the evil of poverty as if it were composed on complex deprivations which can be solved by creating a society which places emphasis on everyone's basic needs and looks to address this.¹⁶⁷

However, the approach taken by the Constitutional Court was one dominated by the reasonableness standard. Fowkes writes that the Court's reasonableness test is commonly taken as the symbol of what is wrong with its socio-economic rights

¹⁶⁵ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at para 165.

¹⁶⁶ Roux T *The Politics of Principle* (2013) 262 - 263.

¹⁶⁷ Brand D 'The proceduralisation of South African socio-economic rights jurisprudence, or 'what are socio-economic rights for?' in Botha H; Van der Walt A & Van der Walt J *Rights and Democracy in a Transformative Constitution* (2003) 36.

jurisprudence and is further seen as a symptom of its failure to take these rights as seriously as other types of rights.¹⁶⁸ In the context of access to adequate housing, the Constitutional Court chose to rather than impose upon the state a minimum core obligation which must be complied with, adopt the standard of reasonableness which within it has the obligation to cater to people in desperate need as an essential element.¹⁶⁹ Brand writes that in doing so, the Constitutional Court has proceduralised the adjudication of socio-economic rights¹⁷⁰ and that when dealing with socio-economic rights cases the court is concerned with the structure of good governance rather than the deprivation and alleviation of need.¹⁷¹

Steinberg writes that the Constitutional Court's adoption of the reasonableness paradigm is integrally linked to its interpretation of section 26.¹⁷² She writes that the reasonableness approach "strikes a balance between the need to ensure that constitutional obligations are met, on the one hand, and recognition for the fact that the bearers of those obligations should be given leeway to determine the best way to meet the obligations in all circumstances".¹⁷³ Roux notes that one of the key features of the reasonableness approach is its flexibility.¹⁷⁴ It is this flexibility which makes the

¹⁶⁸ Fowkes J *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (2016) 235.

¹⁶⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 63.

¹⁷⁰ Brand D 'The proceduralisation of South African socio-economic rights jurisprudence, or 'what are socio-economic rights for?' in Botha H; Van der Walt A & Van der Walt J *Rights and Democracy in a Transformative Constitution* (2003) 36.

¹⁷¹ Brand D 'The proceduralisation of South African socio-economic rights jurisprudence, or 'what are socio-economic rights for?' in Botha H; Van der Walt A & Van der Walt J *Rights and Democracy in a Transformative Constitution* (2003) 43.

¹⁷² Steinberg C 'Can Reasonableness Protect the Poor – A Review of South Africa's Socio-Economic Rights' (2006) 123 *SALJ* 264 266.

¹⁷³ Steinberg C 'Can Reasonableness Protect the Poor – A Review of South Africa's Socio-Economic Rights' (2006) 123 *SALJ* 264 266.

¹⁷⁴ Roux T *The Politics of Principle* (2013) 290.

reasonableness approach ideal when faced with the complex legal and social issues which housing rights and ensuring access to adequate housing are characterised by. Supporters of the reasonableness approach argue that the courts' limited institutional competence might result in judges getting it wrong and that defining the minimum content of rights should be recognised as a specialised policy making exercise to which the process of adjudication is not well suited.¹⁷⁵ Roux, when commenting on the *Grootboom* case, writes that in its judgment, the Constitutional Court rather than imposing a minimum core obligation; prioritise the reasonableness standard. This makes the state's obligation to cater to people in desperate need and not to exclude a significant segment of society, an essential requirement of reasonableness.¹⁷⁶

Bilchitz however argues that this was the wrong decision and that the court misunderstood what its role in defining the minimum core required.¹⁷⁷ Despite argument from the *amici curiae* to adopt the minimum core, the court rejected the minimum core as a standard for determining the access to adequate housing. The argument was rejected on the basis that access to housing was conditioned by varying needs and opportunities for the enjoyment of the right and that this was an issue which the court had little knowledge of and thus the court was not in a position to offer a determination of the minimum core.¹⁷⁸ Bilchitz however argues that the court simply needed to state in general terms what the universal standard for the satisfaction of the minimum core obligation was, as the court itself conceded that the minimum core had been developed on the back of extensive experience.¹⁷⁹

¹⁷⁵ Steinberg C 'Can Reasonableness Protect the Poor – A Review of South Africa's Socio-Economic Rights (2006) 123 SALJ 264 268.

¹⁷⁶ Roux T *The Politics of Principle* (2013) 290.

¹⁷⁷ Roux T *The Politics of Principle* (2013) 286.

¹⁷⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 31.

¹⁷⁹ Roux T *The Politics of Principle* (2013) 286.

Bilchitz also criticises the judgment in the *Grootboom* case for confusing principle and policy. He argues that the court failed to draw a crucial distinction between the universal standard that must be met in order for an obligation to be fulfilled and the numerous particular methods that can be adopted to this standard.¹⁸⁰ He further states that the minimum core could provide a useful guideline to courts when faced with cases such as the *Grootboom* case and that the notion of progressive realisation does not exempt states from immediately providing at the minimum survival needs of its population under all circumstances.¹⁸¹

Brand writes that in its adjudication of socio-economic rights cases, the Constitutional Court fled from substance and he describes this as the court taking a thin approach.¹⁸² He writes further that one of the practical effects of this approach is that it will limit the creative use of litigation to effect social change and further that it discourages people without housing from approaching the courts for relief on the basis of their socio-economic rights.¹⁸³

In response to these writers, Roux states that the court's real objection to the minimum core approach had more to do with the long-term institutional consequences of adopting this understanding of its mandate and that the stance taken by the court depended on managing its relationship with the ANC as they were set to govern for some time.¹⁸⁴

¹⁸⁰ Bilchitz D 'Giving socio-economic rights teeth: The minimum core approach and its importance' (2002) 19 *SA LJ* 484 487.

¹⁸¹ Bilchitz D 'TOWARDS A REASONABLE APPROACH TO THE MINIMUM CORE' (2003) 19 *SA JHR* 12.

¹⁸² Brand D 'The proceduralisation of South African socio-economic rights jurisprudence, or 'what are socio-economic rights for?' in Botha H; Van der Walt A & Van der Walt J *Rights and Democracy in a Transformative Constitution* (2003) 52.

¹⁸³ Brand D 'The proceduralisation of South African socio-economic rights jurisprudence, or 'what are socio-economic rights for?' in Botha H; Van der Walt A & Van der Walt J *Rights and Democracy in a Transformative Constitution* (2003) 52.

¹⁸⁴ Roux T *The Politics of Principle* (2013) 288.

3.4.2 *Grootboom* as strategically compromising doctrine: Roux

Another aspect of the academic critique of the *Grootboom* case discussed above is that the Court had failed to give the right to have access to adequate housing sufficient substantive content or the correct substantive content. For these critics, the attraction of the ICESCR is that it provides the right with the correct content and could thus be latched upon to end the Court's "flight from substance". The critics of the Court's substantive jurisprudence are generally not convinced by institutional or separation of powers concerns.

Many academics write that it was through the use of strategic adjudication and concepts such as minimalism, judicial deference and judicial avoidance that the Constitutional Court was able to avoid providing substantive content for socio-economic rights. Supporters of this line of thinking argue that through the use of strategic adjudication the court can in certain cases avoid making decisions or make pragmatic decisions, which took into account the circumstances around the case, as opposed to making strictly principled decisions grounded in law.

Young writes that judicial avoidance or deference involves courts choosing not to make a particular decision and deferring it to, in most cases, another branch of government or avoiding to decide a hotly contested legal issue by choosing to instead deal with an apparently more straightforward legal argument.¹⁸⁵ Young notes also that in a South African context judicial avoidance came to the fore through the preference showed by the Constitutional Court in its early decisions for slow and incremental

¹⁸⁵ Young K 'The Avoidance of Substance in Constitutional Rights' (2014) 5 *Constitutional Court Review* 233 233.

doctrinal development.¹⁸⁶ In making reference to Ray, Young notes that the South African Constitutional Court's avoidance techniques include the use of the reasonableness standard.¹⁸⁷

Fowkes writes that the *Grootboom* case can generally be understood as an exercise in restraint or minimalism.¹⁸⁸ Sunstein views it as minimalism and notes that minimalism refers to judges who seek to avoid broad rules and abstract theories in favour of focusing their attention only on what is necessary to resolve particular disputes.¹⁸⁹ Sunstein further writes that the minimalist path makes more sense when the court is dealing with complex issues which people feel deeply about and on which there is disagreement.¹⁹⁰ Roux in making reference to Sunstein writes that in the *Grootboom* case the Constitutional Court set out a novel and promising approach to judicial protection of socio-economic rights but without mandating protection for each person whose socio-economic needs are at risk.¹⁹¹

Roux argues that in adopting this reasonableness standard, the Constitutional Court abdicated its responsibility to enforce socio-economic rights. It can thus be argued that through the use of these concepts courts would often make pragmatic decisions which took into account the circumstances surrounding a case instead of principled ones founded in law which resulted in the litigants in a case having nothing to show from the litigation despite having invested so much in approaching a court for relief.

¹⁸⁶ Young K 'The Avoidance of Substance in Constitutional Rights' (2014) 5 *Constitutional Court Review* 233 236.

¹⁸⁷ Young K 'The Avoidance of Substance in Constitutional Rights' (2014) 5 *Constitutional Court Review* 233 234.

¹⁸⁸ Fowkes J *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (2016) 251.

¹⁸⁹ Sunstein C *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999) 9.

¹⁹⁰ Sunstein C *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999) 9.

¹⁹¹ Roux T *The Politics of Principle* (2013) 39.

Roux in assessing all of this writes that the Constitutional Court has often made pragmatic decisions and that the Court does appear to have traded off its duty to do justice according to law or make a decision based solely on legal principle against the need to manage the impact of its decision on its institutional independence.¹⁹² Roux writes further that the adjudicative strategy used by the Constitutional Court in the early part of its existence was centred around allowing the court to fulfil its mandate while at the same time attempting to reconcile the judges' commitment to the ideal of adjudication according to law with the need to take account of the long-term impact of the decision on the Court's independence.¹⁹³ Fowkes argues that the Constitutional Court has in certain cases strategically elected to avoid doctrine and to instead focus on building its institutional capacity.

Roux and Fowkes both accept the critique as an accurate description of the Court's housing rights jurisprudence, but reject the negative evaluation of the compromise on substance which usually accompanies the critique.

Roux notes that in the initial years of its existence, the Constitutional Court was aware that the ANC was likely to be in power for some time and thus knew that it would need to make judgments which would not incur the wrath of the ruling party.¹⁹⁴ The court thus often made use of an adjudicative strategy in order to balance the interests of the ruling party with that of the public and in doing so insured that it survived pressure being applied from both sides.¹⁹⁵

¹⁹² Roux T *The Politics of Principle* (2013) 390.

¹⁹³ Roux T *The Politics of Principle* (2013) 257.

¹⁹⁴ Roux T 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *Int'l J. Const Law* 106 138.

¹⁹⁵ Roux T 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *Int'l J. Const Law* 106 138. Roux writes that "The main reason for this is that the ANC political elite has shielded the Court from the political repercussions of its most unpopular decisions".

Roux argues further that the Court's reluctance to embrace the minimum core concept can be attributed to the Court's need to strategically negotiate its relationship with the other branches of government in order to ensure its survival. If this analysis is correct, then the ratification of the ICESCR will not have any significant influence on the jurisprudence of the Court, because the Court is institutionally constrained to change its doctrinal stance. Not adopting the minimum core approach was essentially a survival strategy.

Roux explains the rejection of the minimum core approach of the ICESCR as the court stating that the textual differences between section 26 of the South African Constitution and article 11.1 of the ICESCR particularly the qualification of the right to access adequate housing, suggests that the real question which must be answered is whether the measures taken by the state to realise the right to access adequate housing are reasonable.¹⁹⁶

Roux argues that the real reason for the courts objection to the minimum core approach had to do with the long-term institutional consequences of adopting this understanding of its mandate rather than the absence of adequate information before it. The strategy was motivated by managing the courts relationship with the ANC in a political context as the ANC was set to govern for some time.¹⁹⁷

Roux starts his analysis of the *Grootboom* case and the rest of the social rights jurisprudence by noting the difference between the positive reaction to the case among foreign (mostly USA) scholars and the largely negative reaction of local scholars.¹⁹⁸

Roux suggests that the different reactions is attributable to the fact that the foreign

¹⁹⁶ Roux T 'Understanding *Grootboom* – A Response to Cass R. Sunstein' (2007) 12 *Const F* 41 45.

¹⁹⁷ Roux T *The Politics of Principle* (2013) 288.

¹⁹⁸ Roux T *The Politics of Principle* (2013) 264.

scholars are used to and willing to accept the strategic compromises that constitutional courts in transitional societies may be required to make, while South African scholars consider such compromises as illegitimate or irrelevant from their doctrinal perspective.

Roux aligns himself with the foreign scholars who are mostly willing to accept the strategic compromises that a Constitutional Court, especially those operating in a young democracy, are required to make. He writes further that in the case of social rights, the court needed to develop a review standard that would allow it to defer to other branches of government where necessary.¹⁹⁹

3.5 Conclusion

The analysis of the jurisprudence however shows that the Constitutional Court has been reluctant to engage with and add substantive content to cases involving socio-economic rights. Moreover, an analysis of the jurisprudence proves Roux's submission that the Constitutional Court "often the court made pragmatic decisions and that the Court does appear to have traded off its duty to do justice according to law against the need to manage the impact of its decision on its institutional independence."²⁰⁰ Roux writes that from the court's perspective, the danger was that if the court had adopted the minimum core approach, it would have tied the court down to a standard of review that was too interventionist and too flexible and that given the political climate at the time and the sensitivity of the role of the court, this was something which the court wanted to avoid.²⁰¹ He writes further that however conceptually flawed, the court's rejection of the minimum core standard must be understood in this light.²⁰²

¹⁹⁹ Roux T *The Politics of Principle* (2013) 264.

²⁰⁰ Roux T *The Politics of Principle* (2013) 390.

²⁰¹ Roux T *The Politics of Principle* (2013) 264.

²⁰² Roux T *The Politics of Principle* (2013) 390.

Fowkes adopts a different perspective and states that what the Constitutional Court was doing with its judgments was constitution building as the Constitutional Court bears the duty to make the constitution work.²⁰³

This Chapter has thus shown that, despite the court being a forum which must decide and rule on disputes, in certain circumstances the Constitutional Court has often made pragmatic decisions instead of making strictly principled decisions and that this has often left litigants in the same position as they were before they approached the court. Moreover, the strategy adopted by the court has left future litigants without any substantive content which can be used in future cases around the right to access adequate housing.

The cases examined in this chapter were chosen as they both dealt with questions of what constitutes adequacy in a particular right and the ICESCR played a significant role in each one. The judgments in both the *Grootboom* case and the *Mazibuko* case showed a court strongly in favour of the reasonableness standard and also one that felt that courts were not the appropriate forum to deal with questions regarding what constitutes adequacy. Moreover, in both cases the court dismissed the argument made for the adoption of the minimum core standard in favour of the reasonableness standard. Fowkes however states that what the court did in the *Grootboom* case amounts to a refusal to articulate content on the facts of the case rather than simply reject the minimum core.²⁰⁴

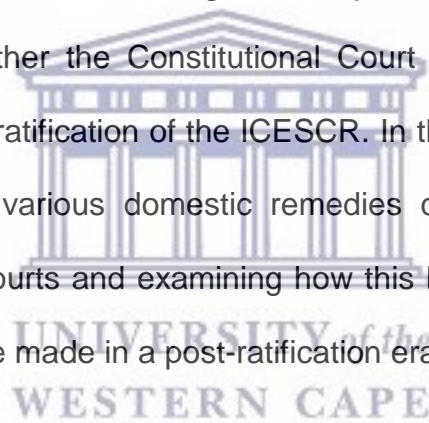
Choma in commenting on the constitutional enforcement of socio-economic rights writes that despite cogent statements from the Constitutional Court concerning the

²⁰³ Fowkes J *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (2016) 30.

²⁰⁴ Fowkes J *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (2016) 266.

justiciability of socio-economic rights effective remedies for their enforcement remain jurisprudentially elusive and problematic.²⁰⁵ Fowkes adds to this and states that the election of the court to build its institutional capacity raises the question of whether these missed opportunities will present themselves again and if so when.²⁰⁶ Based on Muller's premise, the opportunity has now presented itself with the ratification of the ICESCR.

The judgment specifically in the *Grootboom* case proves Muller's premise that the Constitutional Court's interpretation of section 26(1) is different from the international law standard. This then raises the question whether the ratification of the ICESCR can lead to the Constitutional Court infusing its interpretation of section 26(1) with international law and whether the Constitutional Court will be able to sustain its interpretive approach post ratification of the ICESCR. In the next Chapter this will be tested through proposing various domestic remedies currently available through litigation in the domestic courts and examining how this litigation can be conducted and what arguments can be made in a post-ratification era.



²⁰⁵ Choma H 'Constitutional Enforcement of Socio-Economic Rights: South African Case Study' (2009) 6 *US-China Law Review* 41 45.

²⁰⁶ Fowkes J *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (2016) 283.

CHAPTER FOUR

THE ROLE AND PLACE OF THE ICESCR IN THE INTERPRETATION AND ENFORCEMENT OF SECTION 26 OF THE SOUTH AFRICAN CONSTITUTION AFTER RATIFICATION

4.1 A New Start: The Muller Hypothesis

Muller, shortly after the ratification of the ICESCR, writes that the ratification of the ICESCR by the South African government would make it difficult for the Constitutional Court to persist with the view that section 26(1) of the Constitution is distinct from article 11(1) of the ICESCR and that post ratification, the time is ripe for the Constitutional Court to infuse its interpretative approach of section 26(1) of the Constitution with a more rigorous and substantive reading of the section which is grounded in international law.²⁰⁷

In this chapter the provisions of the ICESCR and its supporting documents will be tested from a litigation perspective in order to determine whether the ratification of the ICESCR can result in the infusion of the interpretive approach which Muller is proposing. In this Chapter various domestic remedies which are available to litigants post ratification are examined in order to determine what the likely outcome will be should these domestic remedies be pursued by litigants in the post ratification era.

Thereafter, this chapter examines remedies currently available in international and continental law in order to determine whether these should be pursued by the South African government. The remedies are examined in this chapter in order to answer the

²⁰⁷ Muller G 'Proposing a way to develop the substantive content of the right to access adequate housing: An Alternative to the reasonableness review model' (2015) 30 *SAPL* 71 72.

question whether the ratification of the ICESCR is enough to ensure the change in interpretive approach which Muller foresees or if more needs to be done.

4.2 The Ratification of the ICESCR and What It Means.

Article 2(1) of the Vienna Convention on the Law of Treaties states that ratification is an act whereby a state consents to be bound by a treaty and thus the ratification of a treaty binds a state on an international level.²⁰⁸ According to article 2(1) of the Vienna Convention on the Law of Treaties, it is through the ratification that a state establishes on the international plane its consent to be bound by a treaty.²⁰⁹ Therefore, once the ICESCR had been ratified, its provisions became binding on South Africa under international law.²¹⁰

General Comment 9 of the Committee on ESCR provides that domestic law should be interpreted as far as possible in a way which conforms to the international legal obligations of that member state.²¹¹ Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter.²¹²

Section 39(1)(b) of the Constitution of the Republic of South Africa provides that “when interpreting the Bill of Rights, any court, tribunal or forum must consider international

²⁰⁸ Sucker F ‘Approval of an International Treaty in Parliament: How does Section 231(2) ‘Bind the Republic?’ (2013) *Constitutional Law Review* 417 420.

²⁰⁹ Sucker F ‘Approval of an International Treaty in Parliament: How does Section 231(2) ‘Bind the Republic?’ (2013) *Constitutional Law Review* 417 420.

²¹⁰ Currie I & De Waal J *The Bill of Rights Handbook* 6ed (2015) 570.

²¹¹ UN Committee on Economic, Social and Cultural Rights (CESCR) ‘General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24’ available at: <https://www.refworld.org/docid/47a7079d6.html> (accessed 15 November 2018).

²¹² UN Committee on Economic, Social and Cultural Rights (CESCR) ‘General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24’ available at: <https://www.refworld.org/docid/47a7079d6.html> (accessed 15 November 2018) at Article 15.

law”.²¹³ Section 233 of the Constitution of the Republic of South Africa ties in with this and provides that when interpreting any legislation, every court must prefer a reasonable interpretation of the legislation which is consistent with international law over any alternative interpretation that is inconsistent with international law.²¹⁴ Therefore while South African courts must consider international law²¹⁵ the act of ratification does not result in a binding agreement and legislative action is required before an international agreement can bind the Republic.²¹⁶

It then raises the question of whether the ratification of a treaty leads to the provisions of that treaty being applicable in domestic law. Section 231(1) of the Constitution of the Republic of South Africa provides that “an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces. The exception to this rule is found in section 231(3) where the treaty is of a technical, administrative or executive nature or an agreement which does not require ratification. Such a treaty binds the Republic without approval in the National Assembly or the National Council of Provinces.”²¹⁷

This question was answered by the Constitutional Court in *Glenister v President of the Republic of South Africa*.²¹⁸ In this matter the court held that “the approval of an international agreement by the resolution of Parliament does not amount to its incorporation into our domestic law.”²¹⁹

²¹³ Section 39(1)(b) of the Constitution of the Republic of South Africa, 1996.

²¹⁴ Section 233 of the Constitution of the Republic of South Africa, 1996.

²¹⁵ Dugard J *International Law – A South African Perspective* 3ed (2010) 70.

²¹⁶ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 95.

²¹⁷ Section 231(3) of the Constitution of the Republic of South Africa, 1996.

²¹⁸ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC).

²¹⁹ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 95.

The court then went on to state that the ratification of an international agreement by a resolution of Parliament cannot just be dismissed as an “ineffectual act” and that ratification of an international agreement is a positive statement by Parliament that South African will act in accordance with the ratified agreement subject to the provisions of the Constitution.²²⁰ The court also stated that while international conventions are an interpretive aid, this does not give them the status of domestic law²²¹ and that for an international agreement to be incorporated into our domestic law under section 231(4), our Constitution requires, in addition to the resolution of Parliament approving the agreement, further national legislation incorporating it into domestic law. This is done either by incorporating the provision of the international agreement into the text of an Act, including the agreement in the schedule to a statute or enabling legislation by way of a proclamation or notice in the Government Gazette.²²²

Since its ratification the ICESCR has come before the Constitutional Court in *Dladla and Another v City of Johannesburg and Others*²²³ and also in *Nkwane v Nkwane and Others*²²⁴ in both matters the court noted that it had a duty to consider international law.

4.3 Strategic Litigation

In *Claasen v MEC for Transport and Public Works, Western Cape Provincial Department*²²⁵ it was held that international law has played a somewhat insignificant

²²⁰ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 96.

²²¹ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 98.

²²² *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 99.

At the time that this mini-thesis was submitted the government had not performed any of the acts described here.

²²³ *Dladla and Another v City of Johannesburg and Others* 2018 (2) SA 327 (CC).

²²⁴ *Nkwane v Nkwane and Others* [2018] ZAGPPHC 153.

²²⁵ *Claasen v MEC for Transport and Public Works, Western Cape Provincial Department* [2016] ZAWCHC 167.

role in the development of socio-economic rights jurisprudence.²²⁶ Post ratification, strategic litigation would be the ideal mechanism to use to introduce a new stream of litigation around access to adequate housing. As Roa and Klugman write,

“Strategic litigation creates an opportunity for legal activists and judges to convene in a democratic debate around a specific case. Through this process, if there is a legal victory, the conditions for implementation will be enabled. However, if there is not a victory, the conditions to advance the cause through other avenues will have improved, the movement will be stronger and public opinion will be better informed.”²²⁷

Strategic litigation is thus described as the bringing of selected cases to court which are geared towards achieving a specific goal. These cases are carefully selected and are brought to achieve a specific purpose such as testing a particular point of law or developing the jurisprudence. Strategic litigation is moreover a method whereby litigation is used to set a precedent and to bring about significant changes in the law.²²⁸

Strategic litigation cases can also be used to hold the government to account. It achieves this by challenging government policies and procedures which violate either human rights or equality standards.

This type of litigation is not uncommon in South Africa both before and in the years since the advent of democracy the courts have dealt with many public interest litigation cases brought by organisations such as the Legal Resources Centre, the Centre for Applied Legal Studies and the Socio-Economic Rights Institute of South Africa. While

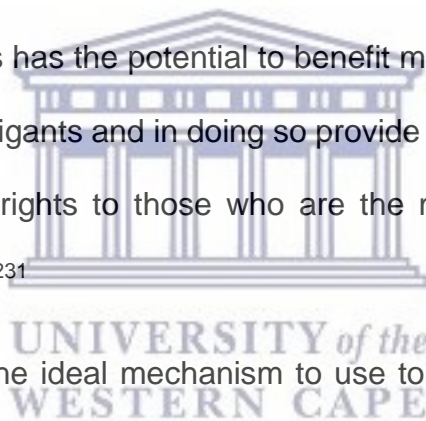
²²⁶ *Claasen v MEC for Transport and Public Works, Western Cape Provincial Department* [2016] ZAWCHC 167 at para 51.

²²⁷ Roa M and Klugman B ‘Considering strategic litigation as an advocacy tool: a case study of the defence of reproductive rights in Colombia’ available at <https://www.tandfonline.com/doi/full/10.1016/S0968-8080%2814%2944804-3> (accessed on 13 November 2018).

²²⁸ MDAC ‘What is Strategic Litigation’ available at http://mdac.info/en/what-we-do/strategic_litigation (accessed on 1 March 2016).

in these types of cases, the above mentioned organisations often act for individual clients or groups of persons. In many cases the litigants are in fact organisations such as the Open Democracy Advice Centre or the Right2Know campaign. An example of this is the case of *Primedia Broadcasting (A Division of Primedia (Pty) Ltd) and Others v Speaker of the National Assembly and Others*²²⁹ where the Right2Know campaign together with Primedia Broadcasting worked together on a case where it was held that the rule in Parliament's Policy on Broadcasting which allowed for the jamming of signals where there was disorder in the house was unconstitutional.

Strategic litigation through the court ties in with the statement made by Viljoen that judges must be actively involved in the realisation of socio-economic rights.²³⁰ A strategic litigation case thus has the potential to benefit many persons who fall within the same category as the litigants and in doing so provide access to justice as well as access to socio-economic rights to those who are the most in need but who find themselves furthest from it.²³¹



Strategic litigation is thus the ideal mechanism to use to test Muller's premise as it enables litigants to both test a point of law and also hold government to account. The need to test a point of law flows from the ratification of the ICESCR creating new obligations and the need to hold government to account flows from the duty which government has to meet a new international law standard post ratification.

²²⁹ *Primedia Broadcasting (A Division of Primedia (Pty) Ltd) and Others v Speaker of the National Assembly and Others* (784/2015) [2016] ZASCA 142 [2016] 4 All SA 793 (SCA).

²³⁰ Viljoen S 'The Systemic Violation of Section 26(1): An Appeal for Structural Relief by the Judiciary' (2015) 30 *SAPL* 42 56.

²³¹ PILSNI 'About Public Interest Litigation' available at <http://www.pilsni.org/about-public-interest-litigation> (accessed 13 March 2016).

4.4 Testing Muller's Hypothesis Using Domestic Remedies

The realisation of housing rights and ensuring that everyone has access to adequate housing is a complex and layered procedure which has many different aspects and requires input from many different parties. Therefore the remedies used and orders handed down in such cases should take all these different aspects and interests into account and should ensure involvement from all parties to make sure that the progressive realisation of the right is achieved. Ideally remedies in cases involving housing rights should also make provision for mechanisms aimed at enforcing the right to access adequate housing and reporting back after any judgment has been handed down and the order has been made.

Roach writes that socio-economic rights may require more complex remedies such as declarations or injunctions that invite or require positive governmental action.²³² Trengove agrees with this and notes that it is indeed a striking feature of the Constitution that the courts are given the widest possible powers to develop and forge new remedies for the protection of constitutional rights and the enforcement of constitutional duties.²³³ Liebenberg however, warns that to the extent that the courts' remedial approach to constitutional rights is premised on an articulated private law model of adjudication, this will limit the willingness of the courts to innovate and design remedies best suited for violations of socio-economic rights.²³⁴ Liebenberg notes

²³² Roach K 'The Challenges of Crafting Remedies for Socio-economic Rights' available at https://www.law.utoronto.ca/documents/Roach/challenge_crafting.pdf (accessed 11 May 2017).

²³³ Trengove W 'Judicial Remedies for Violations of Socio-economic Rights' available at http://www.chr.up.ac.za/chr_old/centre_projects/socio/esrvol1no4.html#5 (accessed 15 May 2017).

²³⁴ Liebenberg S *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 378.

further that the provision of appropriate remedies is vital to the effective realisation of the rights in the ICESCR.²³⁵

In the remainder of this chapter, domestic remedies are firstly discussed and examined to test Muller's premise. The purpose of the examination of these domestic remedies is to determine what effect the ratification of the ICESCR will have on domestic remedies and what the likely outcome will be should these remedies be pursued in cases involving the right to access adequate housing post ratification.

4.4.1 Application for a Declaratory Order

Viljoen writes that a declaratory order or a declaration of rights clarifies the legal position without placing any obligations onto another party.²³⁶ Hoexter notes that a declaration of rights or a declaratory order enables a court to make a declaration on the rights of the parties or to state the legal position.²³⁷ Ebadolahi writes that when deciding a constitutional matter, a court must declare any law or conduct which is inconsistent with the South African Constitution as being invalid and that such relief may include declaratory order.²³⁸

Section 38 of the South African Constitution gives effect to this and provides that any person who falls within the scope of paragraphs a – e may approach a competent

²³⁵ Liebenberg S 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 *South African Journal on Human Rights* 359 365.

²³⁶ Viljoen S 'The Systemic Violation of Section 26(1): An Appeal for Structural Relief by the Judiciary' (2015) 30 *SAPL* 42 45.

²³⁷ Hoexter C *Administrative Law in South Africa* 2ed (2015) 557.

²³⁸ Ebadolhali M 'Using Structural Interdicts And The South African Human Rights Commission To Achieve Judicial Enforcement Of Economic And Social Rights In South Africa' (2008) 83 *NYU Law Review* 1565 1577.

court in alleging that a right in the Bill of Rights has been infringed and the court may then grant appropriate relief which may include a declaration of rights.²³⁹

In *JT Publishing v Minister of Safety and Security*²⁴⁰ it was held that a declaratory order is a discretionary remedy.²⁴¹ In *Rail Commuters Action Group v Transnet Ltd*²⁴², it was held that a declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of the Constitution. Du Plessis writes that a declaratory order is a flexible remedy which can assist in clarifying issues of law expeditiously and will only find application where the issue at hand is purely a question of law or is interlocutory in nature.²⁴³

Approaching a court and asking it to make a declaratory order or make a declaration on the status of the provisions of the ICESCR after the ratification would be an ideal first post ratification step as Liebenberg notes that “a declaratory order stipulates what parties obligations are in terms of the law and the Constitution.”²⁴⁴ Therefore through making a declaratory order the courts could clarify how the court views the provisions of the ICESCR and its supporting documents post-ratification, to what extent the provisions are applicable in South African law and also to what extent the government is bound to them.

In selecting in which court the application for a declaratory order must be made, the following legislative provisions provide guidance. Section 21(1)(C) of the Superior Court Act provides that a High Court may at the instance of any interested person

²³⁹ Section 38 of the Constitution of the Republic of South Africa, 1996.

²⁴⁰ *JT Publishing v Minister of Safety and Security* 1997 (3) SA 514 (CC).

²⁴¹ *JT Publishing v Minister of Safety and Security* 1997 (3) SA 514 (CC) at para 15.

²⁴² *Rail Commuters Action Group v Transnet Ltd* 2002 (5) SA 721 (CC) at para 12.

²⁴³ Du Plessis M *Constitutional Litigation* (2013) 120.

²⁴⁴ Liebenberg S *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 398.

inquire into any existing, future or contingent right or obligation, notwithstanding that no consequential relief may be claimed or is claimed by the Applicant.²⁴⁵ This provision must be read with section 172 of the South African Constitution which grants the courts discretion when framing its orders and allows a court to make an order which is prospective.²⁴⁶ Section 19 of the Supreme Court Act also confers upon a High Court the power to determine rights or obligations even if a person cannot claim any further relief as a consequence of the application.²⁴⁷ An example of this came in the case of *President of the Republic of South Africa v Hugo*²⁴⁸ where the court considered the validity of the Presidential Act that ordered the release from prison of all mothers who had children under 12. In handing down a declaratory order, the majority of the court held that the Presidential Act did not violate the right to equality and non-discrimination.

In order for a declaratory order to be given, the first requirement which must be met is that the applicant must be an interested person or group of persons. Thus, the right must attach to the Applicant personally and should not be a not simply be a derivative interest.²⁴⁹ This principle was confirmed in *Ex Parte Nell*²⁵⁰ where the court in handing down a declaratory order held that a requirement for the exercise of the court's declaratory jurisdiction are interested parties on whom the order may be binding.

The second requirement which must be met is that the Applicant must have an interest in an existing or future right. This requirements flows from the rule that a court will not

²⁴⁵ Superior Courts Act 10 of 2013, S21(1)(c).

²⁴⁶ Motala Z and Ramaphosa C *Constitutional Law: Analysis and Cases* (2002) 84.

²⁴⁷ Supreme Court Act 59 of 1959, S19.

²⁴⁸ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

²⁴⁹ This principle was confirmed in *Hlophe v Constitutional Court of South Africa* [2008] ZAPGHC 289 (25 September 2008) where the court held that a matter where a declaration of rights is sought must not be an abstract, academic or hypothetical matter, but a matter in which the applicant has real and substantial rights.

²⁵⁰ *Ex Parte Nell* 1963 (1) SA 754 (A).

decide abstract, academic or hypothetical questions which are unrelated to any interest.²⁵¹ Hoexter writes that while there is no need for an existing dispute, the right or obligation in question must not be purely speculative.²⁵² In using either an individual or a community who do not have access to adequate housing would meet this requirement because the client would have an interest in what would be considered to be adequate housing in terms of the new provisions contained in the ICESCR and its supporting documents.

An Application for a declaratory order would be brought by way of an application and be instituted by way of a Notice of Motion accompanied by a Founding Affidavit. The Notice of Motion will contain the relief prayed for and the Founding Affidavit will set out the basis for the case and provide evidence to support the relief being sought. The evidence which would have to be presented should include the history of the applicants or applicants, their current housing conditions as well as their living conditions. As a declaratory order is not made against any particular person or organisation the application can be brought by way of an *Ex Parte* application.²⁵³

The relief sought would be a declaration as to the status of the provisions of the ICESCR and its supporting documents, which have been discussed in chapter 2, and to what extent they are applicable in South African law. Furthermore, one would also seek an order regarding to what extent the government is obliged to comply with the standards set out in the ICESCR and its supporting documents. Currie and De Waal note that as far as the positive obligations imposed by socio-economic rights are concerned, applications for declaratory orders compel the responsible government

²⁵¹ *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC).

²⁵² Hoexter C *Administrative Law in South Africa* 2ed (2015) 558.

²⁵³ An *Ex Parte* Application is an application to a court, which requests the court to grant relief which will not affect anybody other than the person who is bringing the application.

agency to explain why its policies are reasonable and this has the effect of holding the relevant agency accountable.²⁵⁴ This was taken further in *Rail Commuters Action Group v Transnet Limited t/a Metrorail*²⁵⁵ where despite emphasising the benefit of declaratory orders the court noted that this remedy enables the court to declare the law but leave to the other arms of government the decision of how the law should be observed.²⁵⁶

An obstacle which litigants bringing this application would have to overcome is that currently South African courts are only bound to consider international law but it does not find direct application. Therefore the likely outcome of such an application would be that the court sticks to the jurisprudence and rules that the provisions of the ICESCR and its supporting documents must only be considered by domestic courts but are not binding on domestic courts.²⁵⁷

4.4.2 Mandamus or Application to Compel

A mandatory interdict, also known as a *mandamus* when it is granted against a public authority, is a court order which compels an administrative body to perform a statutory duty or to cure a state of affairs.²⁵⁸ This type of interdict orders positive action to be taken by a party to remedy a wrongful state of affairs.²⁵⁹ Liebenberg writes that where a violation of a socio-economic right exists because of a failure to take particular steps

²⁵⁴ Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2015) 196.

²⁵⁵ *Rail Commuters Action Group v Transnet Limited t/a Metrorail* 2005 (2) SA 359 (CC).

²⁵⁶ *Rail Commuters Action Group v Transnet Limited t/a Metrorail* 2005 (2) SA 359 (CC) at para 86.

²⁵⁷ Recently declaratory orders came before the court again in *The Minister of Social Development of the Republic of South Africa & others v Net1 Applied Technologies South Africa (Pty) Ltd & others; The Black Sash Trust & others v The CEO: The South African Social Security Agency & others* (825/2017 & 752/2017) [2018] ZASCA 129 (27 September 2018). However in this matter the parties did not persist in seeking a declaratory order.

²⁵⁸ Hoexter C *Administrative Law in South Africa* 2ed (2015) 561.

²⁵⁹ Van Loggenberg D *Superior Court Practice* 2ed (2015) D6-3.

or adopt measures to give effect to a positive duty, a mandatory order may constitute appropriate relief.²⁶⁰

An example where a mandatory interdict was used, is the case of *August v Electoral Commission*.²⁶¹ In this matter the Constitutional Court ordered that a prisoner's right to vote had been violated by the Electoral Commission in that it had failed to take steps to ensure that all prisoners register as voters on the national common voters' roll. The court ordered the Electoral Commission to make arrangements for them to register, and once registered, vote in the election.²⁶²

In the *Mazibuko* case the High Court made use of a mandatory interdict to enforce a socio-economic right and furthermore referred to the minimum standard as a benchmark for how much water the City was compelled to provide. In this matter, the South Gauteng High Court ordered the City of Johannesburg to provide each of the applicants and also residents in similar positions as the applicants with a free water supply of 50 litres per person per day.²⁶³ The High Court judgment in the *Mazibuko* case indicates that a mandatory interdict or a *mandamus* can be used in a socio-economic rights context.

In an access to adequate housing context an application for a mandatory interdict would be geared towards compelling the state to firstly provide housing to persons who do not have access to any form of housing or compelling the state to improve and upgrade existing housing. The application would focus on using the positive obligations which have been placed on government by section 26(2) of the

²⁶⁰ Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 410.

²⁶¹ *August v Electoral Commission* 1999 (3) SA 1 (CC).

²⁶² Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2015) 595.

²⁶³ *Mazibuko v The City of Johannesburg (Centre on Housing Rights and Evictions as amicus curiae)* [2008] 4 All SA 471 at paras 83 – 93.

Constitution and linking it to the international standard regarding what constitutes adequate housing.

The mandatory interdict will look to compel government to provide housing which is in line with the international law standard and where existing housing is not, compel it to take steps to ensure that the standard is adhered to.

An application for a mandatory interdict would have to be brought against both the National and Provincial government as Part A of Schedule 4 of the Constitution provides that housing is an area of concurrent National and Provincial Legislative competence. In cases involving persons in need of emergency housing, local government or the relevant municipality would have to be party in the proceedings as in the *Bluemoonlight case*²⁶⁴, it was held that the provision of emergency housing falls onto local government.

Applications for a mandatory interdict or a *mandamus* must be brought by way of a Notice of Motion which will be supported by a Founding Affidavit. As in the application for a declaratory order the Notice of Motion will contain the relief claimed and the Founding Affidavit will set out the basis for the case and provide evidence to support of the relief being sought.

The two different kind of applications which could be brought are geared towards the same goal. Firstly, the application can be brought by persons who do not have access to any form of housing and would seek an order compelling the government to provide housing to them. Secondly, an application can be brought by persons who do have access to housing, but the housing does not meet the standard set out in the supporting documents to the ICESCR and would seek an order compelling

²⁶⁴ *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 (1) SA 470 (W).

government to improve these houses and bring them in line with international law standard.

A case where a similar strategy was followed in the case of *Mohau Melani and Others v City of Johannesburg and Others* (hereinafter referred to as the “Slovo Park case”).²⁶⁵ While this matter was actually an application for the review of a decision taken by the City of Johannesburg to relocate the applicants in order for a housing development to be built, it was linked to a failure of the City to make use of the Upgrading of Informal Settlements Policy (“UISP”) and instead of forcing the applicants to relocate, rather conduct an *in situ* upgrade of the houses on the property. Thus along with applying to have the decision to not use the UISP set aside, the applicants also sought an order compelling the upgrading of the property. The applicants argued that wherever possible an *in situ* upgrade must be preferred to relocation.²⁶⁶

The City opposed the application on the basis that the intended relocation was susceptible to development²⁶⁷ and that the decision to not make use of the UISP was a policy decision and was thus not susceptible to review.²⁶⁸ The court however reviewed and set aside the decision of the City and also compelled them to apply to the provincial MEC for funding to upgrade the property in terms of the UISP.

When bringing an application for an interdict, there are certain common law requirements which have to be met. These requirements were confirmed in the matter of *Setlogelo v Setlogelo*²⁶⁹. These requirements are that a *prima facie* right must be

²⁶⁵ *Mohau Melani and Others v City of Johannesburg and Others* (02752/2014) [2016] ZAGPJHC 55; 2016 (5) SA 67 (GJ) (22 March 2016).

²⁶⁶ *Mohau Melani and Others v City of Johannesburg and Others* (02752/2014) [2016] ZAGPJHC 55; 2016 (5) SA 67 (GJ) (22 March 2016) at para 12.

²⁶⁷ *Mohau Melani and Others v City of Johannesburg and Others* (02752/2014) [2016] ZAGPJHC 55; 2016 (5) SA 67 (GJ) (22 March 2016) at para 11.

²⁶⁸ *Mohau Melani and Others v City of Johannesburg and Others* (02752/2014) [2016] ZAGPJHC 55; 2016 (5) SA 67 (GJ) (22 March 2016) at para 2.

²⁶⁹ *Setlogelo v Setlogelo* 1914 AD 221.

established, that this right has been violated or infringed or is likely to be violated or infringed, that the balance of convenience is in favour of the granting of the remedy and that there is no other satisfactory remedy available.²⁷⁰

Applications for mandatory interdicts must be brought in terms of Rule 6 of the Uniform Rules of Court and will be brought by way of a Notice of Motion accompanied by an affidavit. As the purpose of the application is to compel government to bring existing housing up to standard, the Applicant should either be a person who has benefited from a government housing scheme or a person or a group of people who do not have access to housing.

In the Founding Affidavit, one would firstly submit that the Applicant has a right to have access to adequate housing, then one would set out the living conditions of the Applicants and show how housing which the Applicant currently has access to does not meet the international law standard. The legal argument which would be made would then be that the factual conditions described are not in line with the international law standard and that an order should be granted which compels that the international law standard be complied with.

Based on the position previously taken by the Constitutional Court regarding the international law standard and section 231(4) of the Constitution, the Applicant will struggle to get a domestic court to hand down this type of order. Thus based on the current jurisprudence it is unlikely that an application for a mandatory interdict will succeed in compelling government to provide adequate housing in line with the international law standard. The likely outcome is that the court will simply revert back to what it has always done and apply the reasonableness standard. Therefore the

²⁷⁰ Du Plessis writes in his book *Constitutional Litigation* at page 123 that although not bound by it, the courts generally apply the common law requirements as stated to constitutional matters.

ratification of the ICESCR is unlikely to lead to a successful application for a mandatory interdict geared to increasing access to adequate housing.

4.4.3 Application for a Structural Interdict

Viljoen defines a structural interdict as being a remedy which enables a court to retain jurisdiction over a matter with the aim to effectively supervise state actions and ensure compliance with the order handed down by the court.²⁷¹ Ebadolahi describes structural interdicts as being a remedy which a court can apply when taking a flexible approach.²⁷² Hoexter defines structural interdicts as a mandatory remedy which enables a court to retain jurisdiction over a case and supervise the government's compliance with the order handed down by the court over a period of time.²⁷³ Roach and Budlender state that structural interdicts involve requiring the government to report back to the court at regular intervals about the steps taken to comply with the constitution and flows from situations where the court fears that there will be non-compliance with the order."²⁷⁴

Viljoen writes that the typical elements of a structural interdict include a declaration by the court indicating governmental non-compliance with its constitutional obligations, an order mandating the state to comply with the Constitution and a duty to produce a report stipulating the steps that the government has taken as well as the steps which will be taken.²⁷⁵

²⁷¹ Viljoen S 'The Systemic Violation of Section 26(1): An Appeal for Structural Relief by the Judiciary' (2015) 30 *SAPL* 42 58.

²⁷² Ebadolhali M 'Using Structural Interdicts And The South African Human Rights Commission To Achieve Judicial Enforcement Of Economic And Social Rights In South Africa' (2008) 83 *NYU Law Review* 1565 1568.

²⁷³ Hoexter C *Administrative Law in South Africa* 2ed (2015) 561.

²⁷⁴ Roach K and Budlender G 'MANDATORY RELIEF AND SUPERVISORY JURISDICTION: WHEN IS IT APPROPRIATE, JUST AND EQUITABLE?' (2005) 122 *SALJ* 325 333.

²⁷⁵ Viljoen S 'The Systemic Violation of Section 26(1): An Appeal for Structural Relief by the Judiciary' (2015) 30 *SAPL* 42 58.

Currie and De Waal note that a structural interdict is a remedy which directs the violator to rectify the breach of fundamental rights under the courts supervision²⁷⁶ and that from an early stage of the development of our constitutional jurisprudence, the High Courts have granted structural interdicts as a form of relief in cases dealing with socio-economic rights.²⁷⁷ Viljoen in arguing for the use of structural interdicts writes that a structural interdict is different from other interdicts. As it can consist of different remedial phases over which the court retains jurisdiction to ensure that the state complies with its obligations.

Structural interdicts are an underutilised remedy in South African law as the argument is that by making such an order, the court is overstepping the boundaries of the separation of powers doctrine. However, a counter argument to this is that through the use of structural interdicts, the court is giving effect to the principle of accountability and employing a form of checks and balances. As the court held in *Pretoria City Council v Walker*, South African courts have the power to ensure government compliance with court orders and that in appropriate cases they should exercise such a power if it is necessary to secure compliance with a court order.²⁷⁸ Ling notes that the first benefit of the structural interdict is that it allows a court to exercise supervisory jurisdiction even after they have handed down judgment and it is this retention of jurisdiction that can address the problems of both governments refusing to obey court orders and the lack of participation in the deliberation of remedies.²⁷⁹

²⁷⁶ Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2015) 199.

²⁷⁷ Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2015) 199.

²⁷⁸ *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) at para 96.

²⁷⁹ Ling E 'FROM PAPER PROMISES TO REAL REMEDIES: THE NEED FOR THE SOUTH AFRICAN CONSTITUTIONAL COURT TO ADOPT STRUCTURAL INTERDICTS IN SOCIOECONOMIC RIGHTS CASES' (2015) 9 *Hong Kong Journal of Legal Studies* 51 66.

Thus an application for a structural interdict would be the ideal remedy to pursue post ratification of the ICESCR to ensure government compliance with its obligations as the court would be able to monitor compliance and also issue directives for government to report back on the progress made. The application would be brought by way of a Notice of Motion accompanied with a Founding Affidavit. The Applicants would need to show a continuous failure on the part of the government to act in accordance with its obligations and that as a result of this continuous failure on the part of the government the Applicant has been prejudiced. It is the continuous failure on the part of government which will open the door for the granting of a structural interdict as one will be able to argue that because of the continuous failure by government to comply with its duties, the court should retain jurisdiction over the case, and order that government reports back to the court so as to ensure compliance with the order.

The matter would then be conducted as follows: after the initial arguments in court, the court would issue a declaration as to how the government has infringed its obligations and mandate the government to comply with its obligations. The government would then be given an opportunity to comply and would be required to present to the court a comprehensive report regarding the compliance. A timetable for the government to comply will also be set. After perusing the report, the court will give a final order.

Post ratification of the ICESCR, the application for a structural interdict might face the same obstacles as an application for a mandatory interdict, in that the provisions of the ICESCR and its supporting documents have not yet been incorporated into domestic law and as such it is unlikely that a court hearing the matter will move away from the current jurisprudence. In addition to this, Du Plessis writes that the Constitutional Court has been somewhat reluctant to grant such supervisory orders as they involve the courts becoming involved in day-to-day administrative matters which

falls within the executive's domain.²⁸⁰ However, if the applicants are able to show blatant non-compliance this could open the door for the court to hand down a structural interdict as the court has previously held, in the *Mazibuko* case, where the state fails to comply, the court will intervene.

4.4.4 Application for Judicial Review

Viljoen writes that decisions taken by organs of state that relate to section 26(1) and (2) of the Constitution are often of an administrative nature as it impacts the rights of households and as such these decisions therefore fall under the ambit of administrative law principles.²⁸¹ Viljoen writes further that in the constitutional dispensation it is clear that the courts generally have the jurisdiction to oversee state actions and all exercise of public power is to some extent justiciable under the Constitution.²⁸²

Judicial Review is provided in Rule 53 of the Uniform Rules of Court²⁸³ and also in section 6 of the Promotion of Administrative Justice Act (hereinafter referred to as "the PAJA").²⁸⁴ Judicial review is a mechanism which develops from constitutional and administrative law and operates as a bridge between these two fields of law. While in a constitutional law context, judicial review is mainly concerned with the establishment

²⁸⁰ Du Plessis M *Constitutional Litigation* (2013) 124.

²⁸¹ Viljoen S 'The Systemic Violation of Section 26(1): An Appeal for Structural Relief by the Judiciary' (2015) 30 *SAPL* 42 54.

²⁸² Viljoen S 'The Systemic Violation of Section 26(1): An Appeal for Structural Relief by the Judiciary' (2015) 30 *SAPL* 42 55.

²⁸³ Rule 53 of the Uniform Rules of Court.

²⁸⁴ Promotion of Administrative Justice Act No. 3 of 2000.

and structuring of a system of government. However in an administrative law context, judicial review is primarily concerned with the daily business of government.²⁸⁵

Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town Council*²⁸⁶ held that there were three types of review in the South African legal system namely; review of the decisions of inferior courts, common-law review of the decisions of administrative authorities and a wider form of statutory review.

Hoexter describes judicial review in the constitutional law sense as being the power of the courts to scrutinise and declare unconstitutional, any type of legislation or state conduct that infringes on the rights contained in the Bill of Rights. In the administrative law, sense judicial review refers to the power of the courts to scrutinise and set aside administrative decisions or rules on the basis of certain grounds of review.²⁸⁷ Section 6 of the PAJA regulates the judicial review of administrative action and provides that a court has the power to judicially review administrative action if the administrator who performed the action was not authorised to do so or was biased or is reasonably suspected of bias. Further grounds of review include that the action was taken for an ulterior purpose or motive or was taken in bad faith. An administrative action which consists of a failure to take a decision or an administrative action which is unconstitutional or unlawful can also be taken on review.

An example from case law where this course of action was taken is the Slovo Park judgment²⁸⁸. In this matter, the Applicants sought to review, and set aside the refusal or failure of the City of Johannesburg to apply to the MEC for Human Settlements for funding to upgrade Slovo Park. The Applicants consisted of a group of around 10000

²⁸⁵ Hoexter *Administrative Law in South Africa* 2ed (2015) 23.

²⁸⁶ *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111.

²⁸⁷ Hoexter *Administrative Law in South Africa* 2ed (2015) 113.

²⁸⁸ *Mohau Melani and Others v City of Johannesburg and Others* 2016 (5) SA 67 (GJ) at para 55.

people in around 3700 households who were living in an informal settlement. The basis of the application stemmed from the failure of the City of Johannesburg to make use of the Upgrading of Informal Settlement Policy to ensure the upgrading of the living conditions and housing of the Applicants. The court reviewed and set aside the failure of the City of Johannesburg to make an application for funding for upgrade Slovo Park and compelled them to do so within three months of the date of the order.

The Slovo Park judgment provides an example of Applicants who did not have access to housing or adequate housing making use of judicial review to have a decision or conduct which does not ensure the progressive realisation of the right to access adequate housing reviewed and set aside.

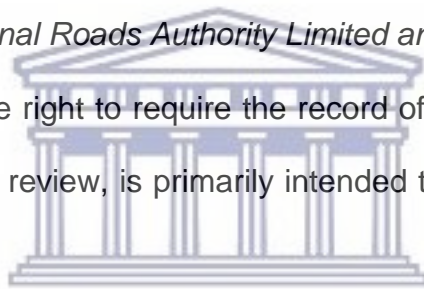
Rule 53 of the Uniform Rules of Court provides that all review proceedings shall be brought by way of Notice of Motion and that the application should be served on all other parties affected.²⁸⁹ The Notice of Motion shall set out the decision or proceedings sought to be reviewed and shall be supported by an affidavit which sets out the grounds and the facts and circumstances upon which the applicant relies. The procedure in applications for review is similar to that of applications in terms of Rule 6 as the application should still be brought by way of a Notice of Motion, be accompanied by a Founding Affidavit and all parties from whom relief is being sought must be joined, cited and served in the usual way.²⁹⁰

Rule 53(1)(b) further provides that the application for review must call upon the relevant party to within fifteen days after receipt of the application file with the registrar the record of the proceedings sought to be corrected or set aside. The rationale behind

²⁸⁹ Rule 53(1) of the Uniform Rules of Court.

²⁹⁰ Van Loggenberg DE '*Erasmus Superior Court Practice*' 2ed (2016) D1-700.

this rule by was explained by Kriegler AJA in *Jockey Club of South Africa v Forbes*²⁹¹ where he maintained that not infrequently the private citizen is faced with an administrative or quasi-judicial decision adversely affecting his rights, but has no access to the record of the relevant proceedings nor any knowledge of the reasons founding such decision. Were it not for Rule 53 he would be obliged to launch review proceedings in the dark and, depending on the answering affidavit(s) of the respondent(s), he could then apply to amend his notice of motion and to supplement his founding affidavit. Manifestly the procedure created by Rule 53 is to his advantage in that it obviates the delay and expense of an application to amend and provides him with access to the record.²⁹² This view was confirmed by Ponnien JA in *City of Cape Town v South African National Roads Authority Limited and Others* where it was held that in terms of Rule 53, the right to require the record of the proceedings of a body whose decision is taken on review, is primarily intended to operate for the benefit of the applicant.²⁹³



In the context of this mini-thesis, the judicial review procedure is ideally suited to instances where an organ of state has failed to take a decision which has resulted in another party being prejudiced. In a right to access adequate housing context, this type of remedy is suited to cases where parties have been on a waiting list for a long period of time and a decision regarding them has not been taken, or where the state has taken a decision which is detrimental to the housing rights of persons and denies them access to adequate housing. An example would be that a housing development

²⁹¹ *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A).

²⁹² *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at para 660.

²⁹³ *City of Cape Town v South African National Roads Authority Limited and Others* 2015 (3) SA 386 (SCA) at para 36.

excludes certain persons who do not fall into the category of beneficiaries. An application can be brought for the decision to be reviewed and possibly set aside.

As with an application for a structural interdict, the provisions of the ICESCR and its supporting documents need not be invoked directly in an application for Judicial Review. Rather, the provisions will be used as authority for the argument being made. The argument which can be made will be centred on how the decision taken was not in line with everyone having a right to access adequate housing and having the right to an adequate standard of living. Decisions which violate the rights of person could be taken on review on the basis that the decision is not in line with the provisions of the ICESCR and its supporting documents. However an application for judicial review post ratification will face similar obstacles as the other remedies pursued in this chapter and the likely outcome would be that the court would only order the decision maker to reconsider its decision.

4.5 International Law Remedies²⁹⁴

4.5.1 Ratifying or Acceding to the OP-ICESCR²⁹⁵

Article 1 of the OP-ICESCR affirms that the Committee on ESCR is competent to receive and consider communications related to violations of the rights contained in the protocol.²⁹⁶ The OP-ICESCR thus mandates the Committee on ESCR to receive complaints from individuals, groups of individuals who have been victims of rights violations.²⁹⁷ The OP-ICESCR has thus taken the enforcement of socio-economic

²⁹⁴ The Reporting Obligations on member states in terms of the ICESCR are discussed in section 2.8 above.

²⁹⁵ For more see section 2.10 above

²⁹⁶ UN General Assembly 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights : resolution / adopted by the General Assembly, 5 March 2009, A/RES/63/117' available at: <http://www.refworld.org/docid/49c226dd0.html> (accessed 21 November 2018).

²⁹⁷ Viljoen F and Orago N 'An Argument for South Africa's Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the Light of Its Importance and Implications' (2014) 14 *Potchefstroom Electronic Law Journal* 2554 2558.

rights a step further and created an international law mechanism whereby victims of socio-economic rights violations can lodge complaints against member states. Article 1 of the OP-ICESCR thus provides access to an international law mechanism for victims of human rights violations who have not received adequate relief in their own country or through their domestic courts.

The OP-ICESCR is a treaty which promotes a culture of accountability regarding compliance with the provisions of the ICESCR and through the creation of the mechanism discussed in the above paragraph it empowers vulnerable and marginalised groups to lodge individual complaints at the international level regarding violations of their socio-economic rights. Viljoen and Orago write that the OP-ICESCR adds important enforcement mechanisms to already accepted standards.²⁹⁸

In the South African context, the value of acceding to the OP-ICESCR is that the jurisprudence of the South African Constitutional Court has shown that courts have been reluctant to give substantive content to the right to access adequate housing and in doing so the court has often not given litigants the relief which they sought. Thus an examination of the jurisprudence and the examination on domestic remedies above indicates that domestically victims of rights violations will only be able to take their matter so far. Therefore the complaints mechanism created in terms of the OP-ICESCR provides a complementary avenue for rights claimants to access justice, thereby enhancing the overall realisation of socioeconomic rights.²⁹⁹

²⁹⁸ Viljoen F and Orago N 'An Argument for South Africa's Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the Light of Its Importance and Implications' (2014) 14 *Potchefstroom Electronic Law Journal* 2554 2575.

²⁹⁹ Viljoen F and Orago N 'An Argument for South Africa's Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the Light of Its Importance and Implications' (2014) 14 *Potchefstroom Electronic Law Journal* 2554 2578.

It is thus crucial that additional international complaints mechanisms are available to rights holders as they provide a complementary avenue for access to justice which enhances the overall realisation of socio-economic rights.³⁰⁰ Foreman writes that in addition to creating an international law enforcement mechanism the OP-ICESCR also provides an important source of interpretation which can advance understanding of economic, social and cultural rights.³⁰¹

Therefore by acceding to the OP-ICESCR, South Africa will enhance the protection of socio-economic rights through the provision of further complementary safeguards against their violation and thus enhance the social transformation envisaged by the 1996 Constitution.³⁰² Furthermore, it will provide victims of rights violations with a further mechanism from which to seek relief.

4.5.2 Remedies Available Under the African Charter³⁰³

South Africa signed the African Charter on Human and People's Rights (hereinafter referred to as "the African Charter") on 9 July 1996 and ratified it on the same day. In the context of this mini-thesis, it is important to note that the African Charter does not specifically recognise a right to housing.³⁰⁴ On 9 June 1999 South Africa signed the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (hereinafter referred to as "the

³⁰⁰ Viljoen F & Orago N 'An Argument for South Africa's Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in Light of its Importance and Implications' (2014) 17 *Potchefstroom Electronic Law Journal* 2554 2578.

³⁰¹ Forman L 'Can Minimum Core Obligations Survive a Reasonableness Standard of Review under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2016) 47 *Ottawa Law Review* 561.

³⁰² Viljoen F & Orago N 'An Argument for South Africa's Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in Light of its Importance and Implications' (2014) 17 *Potchefstroom Electronic Law Journal* 2554 2579.

³⁰³ For more see section 2.11 above.

³⁰⁴ In *Social and Economic Rights Action Center (Serac) and Center for Economic and Social Rights (CESR) v Nigeria* (2001) it was that the African Charter is also understood to include the right to housing as implicit in the African Charter in light of its provisions on the right to life, right to health and right to development.

Protocol”) and ratified it on 3 July 2002.³⁰⁵ The Protocol in article 1 establishes an African Court on Human and Peoples` Rights (hereinafter referred to as “the African Court”). In article 3 the Protocol provides that the jurisdiction of the African Court shall extend to all cases and disputes concerning the interpretation and application of the African Charter, the Protocol and any other relevant human rights instrument which will include the ICESCR.³⁰⁶

Nalbandian writes that the rationale for the African Court is to strengthen the human rights protection system³⁰⁷ and that the African Court has the power to condemn violations and order appropriate remedies.³⁰⁸

In terms of article 5, the African Court can only receive complaints and/or applications submitted to it by bodies listed in article 5(1)(a – e).³⁰⁹ The African Court has the jurisdiction to hear and decide on requests from state parties and also complaints lodged by non-governmental organisations with observer status, individuals and groups of individuals.³¹⁰

However in order to allow NGO with observer status, individuals or groups of individuals access to the court, article 34(6) of the Protocol provides that a State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3)

³⁰⁵ Hopkins K ‘The Effect on an African Court on the Domestic Legal Orders of African States’ (2002) 2 *African Journal of Human Rights* 234 245.

³⁰⁶ Mubangizi & O’Shea ‘African Court on Human and Peoples Rights’ (1999) 24 *S.Afr.Y.B.Int’l L.* 256 262.

³⁰⁷ Nalbandian E ‘The Challenges Facing African Court of Human and People’s Rights’ (2007) 1 *Mizan Law Review* 75 75.

³⁰⁸ Nalbandian E ‘The Challenges Facing African Court of Human and People’s Rights’ (2007) 1 *Mizan Law Review* 75 76.

³⁰⁹ Article 5(1) The following are entitled to submit cases to the Court: (a) The Commission; (b) The state party which has lodged a complaint to the Commission; (c) The state party against which the complaint has been lodged at the Commission; (d) The state party whose citizen is a victim of a human rights violation and (e) African Intergovernmental Organisations.

³¹⁰ Mubangizi & O’Shea ‘African Court on Human and Peoples Rights’ (1999) 24 *S.Afr.Y.B.Int’l L.* 256 264.

involving a State Party which has not made such a declaration.³¹¹ Therefore currently no South African who has been a victim of a rights violation will be able to access the African Court as South Africa has not yet made the necessary declaration.

The African Court will provide an additional avenue and mechanism for victims of rights violations who have not received adequate redress in domestic courts. However, before this avenue is available for South Africans, the government would have to pass the declaration under article 5(3) accepting the competence of the court to receive cases from individuals, groups or NGO's with observer status. As Hopkins writes, the success of the African Court is dependent on the willingness of state to embrace with a real sense of obligation the core values of the African human rights system.³¹²

4.6 Conclusion

As indicated in this chapter the courts have an important role to play in the enforcement and the realisation of the right to access adequate housing. In supporting this statement, Fowkes writes that the judiciary has a crucial role with regard to the transformation of our society.³¹³ In this chapter it also became clear the cases involving housing rights and the right to access adequate housing require unique, thorough and well thought through remedies and because of this, the role which the judiciary has to play in ensuring the realisation of the right is even more important.

It was thus important to test whether the ratification of the ICESCR would have any affect on the remedies usually pursued by litigants in cases involving housing rights and access to adequate housing and if so what the effect would be.

³¹¹ Article 5(3) provides that The Court may entitle relevant non-governmental organisations (NGO's) with observer status before the commission, and individuals to institute cases directly before it, in accordance with article 34(6) of the Protocol.

³¹² Hopkins K 'The Effect on an African Court on the Domestic Legal Orders of African States' (2002) 2 *African Journal of Human Rights* 234 235.

³¹³ Viljoen S 'The Systemic Violation of Section 26(1): An Appeal for Structural Relief by the Judiciary' (2015) 30 *SAPL* 42 56.

The discussion in Chapter 2 above revealed the provisions of the ICESCR and its supporting documents will only find application in the domestic courts once it has been enacted into national legislation. Thus the provisions of the ICESCR and its supporting documents are only an interpretive aid but do not bind domestic courts.³¹⁴

As a result of this, this chapter showed that litigants wishing to invoke the provisions of the ICESCR and its supporting documents in pursuing domestic remedies to give effect to their housing rights and increase access to adequate housing will face an uphill battle both in terms of substantive and procedural law. Substantively, the fact that the international instruments are currently only an interpretive aid and only need to be considered means that any argument made in a court which relies on the provisions of the ICESCR and its supporting documents will most likely get to the same point as the cases brought before the court before ratification. It is thus unlikely that the courts will move away from their current jurisprudence and adopt a new interpretive approach.

In addition to this, litigants will also eventually reach the end of the procedural line and will eventually exhaust all forums available to them. Thus the lack of enforcement mechanisms currently in place represent a further challenge for litigants as once they have reached the apex court and the Constitutional Court rules against them, litigants have no further recourse or mechanism available to them to remedy the violation of their rights.

Therefore Muller's submission that after the ratification of the ICESCR, the time is ripe for the Constitutional Court to infuse its interpretation of section 26(1) with international law is not as imminent as one would think or as simple as he proposes. As the precedent set by the jurisprudence of the court is likely to have more persuasive value

³¹⁴ For full discussion see Chapter 3 above.

than the international law provisions contained in the ICESCR and its supporting documents it is likely that the post ratification cases will have the same outcome as those brought pre ratification.

Therefore domestically it is unlikely that the ratification of the ICESCR will have the effect which Muller envisions and it is unlikely that the ratification of the ICESCR on its own will change the Constitutional Court's interpretive approach of section 26(1).

As seen above, the solution to this conundrum lies in the continental and international law remedies discussed in this chapter above. By acceding to the OP-ICESCR and making the necessary declaration to accept the jurisdiction of the African Court, the South African government will provide victims of rights violations and litigants access to mechanisms beyond the borders of South Africa. Performing these two acts will also solve the current issue of the lack of enforcement mechanisms currently in place in that there is no forum which victims of rights violations can access beyond the Constitutional Court.

Granting victims of rights violations access to these forums outside of the borders of South Africa will firstly, grant victims of rights violations access to an additional forum which can resolve disputes. Furthermore, granting victims of rights violations access to these forums will also open the door for a judgment which can be used by future litigants as a precedent which can be used to in subsequent cases.³¹⁵ As Viljoen and Orago write acceding the OP-ICESCR will enhance the protection of socio-economic rights through the provision of complimentary safeguards against their violation³¹⁶ and

³¹⁵ Stone L 'The 38th ordinary session of the African Commission on Human and Peoples' Rights, November 2005, Banjul, The Gambia' (2006) 6 *African Human Rights Law Journal* 225 228. At 228 Stone writes that it has been acknowledged that accession to international law treaties can lead to restructuring and capacity building in government.

³¹⁶ Viljoen F and Orago N 'An Argument for South Africa's Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the Light of Its Importance and Implications' (2014) 14 *Potchefstroom Electronic Law Journal* 2554 2579.

further that these international complaints mechanisms provide a complementary avenue for rights claimants to access justice and thereby enhancing the overall realisation of socio-economic rights.³¹⁷



³¹⁷ Viljoen F and Orago N 'An Argument for South Africa's Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the Light of Its Importance and Implications' (2014) 14 *Potchefstroom Electronic Law Journal* 2554 2578.

CHAPTER FIVE

CONCLUSION

In January 2015, the South African government ended a close to 20 year wait when they ratified the ICESCR. Through the ratification of the ICESCR, South Africa became bound to the provisions of the ICESCR and its supporting documents in international law. As indicated above, many in the legal profession view the ratification of the ICESCR as a significant step for the realisation of housing and socio-economic rights in South Africa. The ratification of the ICESCR is also seen as the South African government reaffirming their commitment to the progressive realisation of socio-economic rights. The ratification of the ICESCR also has the potential to breathe new life into and kick start a new wave of litigation around access to adequate housing which could have an effect on and could possibly lead to a change in the current jurisprudence.

Muller, shortly after the ratification of the ICESCR, writes that the ratification of the ICESCR by the South African government would make it difficult for the Constitutional Court to persist with the view that section 26(1) of the Constitution is distinct from article 11(1) of the ICESCR and that, post ratification of the ICESCR, the time is ripe for the Constitutional Court to infuse its interpretative approach to section 26(1) of the Constitution with a more substantive interpretation that is grounded in international law.³¹⁸

In this mini-thesis, the merit of Muller's submission was firstly investigated and thereafter, this mini-thesis tested whether the ratification of the ICESCR would have

³¹⁸ Muller G 'Proposing a way to develop the substantive content of the right to access adequate housing: An Alternative to the reasonableness review model' (2015) 30 *SAPL* 71 72.

an effect on the remedies pursued in the courts to determine whether the ratification of the ICESCR was enough to lead to the change in the interpretive approach of the section 26(1) which Muller foresees or whether more still needs to be done.

This mini-thesis achieved this by firstly, in chapter two, examining the content which has been given to the right to access adequate housing in international law, as well as the obligations which are attached to this right. This chapter revealed that in international law a minimum core standard applies and that this standard finds application when determining what constitutes adequate housing. This chapter also examined what monitoring and enforcement mechanisms are currently in place in international law to ensure compliance with the provisions of the ICESCR. Chapter two also revealed that there are reporting obligations in terms of the ICESCR which member states must comply with and that South Africa recently submitted their initial report. An examination of this report revealed that access to adequate housing is one of the issues which are of concern to the Committee on ESCR and that they indicated that more should be done to ensure access to adequate housing. Lastly chapter two also revealed that there were additional enforcement mechanisms in international and continental law which the South African government should consider implementing and the committee also suggested that these mechanisms should be pursued.

The focus then shifted from international law to South Africa and in chapter three this mini-thesis examined what content had been given to the right to access adequate housing in South African law before the ratification of the ICESCR. After which cases where the ICESCR and its supporting documents played a role were discussed to determine what arguments were made in relation to the ICESCR and also how the court viewed the ICESCR and its supporting documents. This examination revealed that the courts have been reluctant to engage with or directly apply the international

law content given to the right to access adequate housing and that the courts have also been reluctant to give substantive content to the right to access adequate housing. This chapter however revealed that the overriding view is that the Constitutional Court has not done enough to add substantive content to socio-economic rights. This mini-thesis has shown further that Muller is correct in stating that as a result of the courts favouring the reasonableness approach, this has led to a failure to engage in a substantive analysis of the content of the right of access to adequate housing. However, the reactions from academics such as Roux and Fowkes reveal that the court had legitimate reasons for doing so.

Thereafter, in Chapter four, this mini-thesis tested Muller's premise from a litigation perspective and looked at whether the ICESCR could be used by litigants in pursuing domestic remedies which are available post ratification and whether the ratification of the ICESCR will bring about a change in the interpretive approach of the Constitutional Court of section 26(1). This Chapter, using the mechanism of strategic litigation, took the domestic remedies which can be pursued through the courts post ratification and examined how the litigation, in pursuance of these remedies, would be conducted and would likely to play out in a post ratification era.

The examination of these remedies showed that the ratification of the ICESCR on its own is unlikely to lead to the change in the interpretation of section 26(1) which Muller envisions. Chapter four revealed that the fact that the ICESCR cannot be applied directly in South African courts means that litigants are not able to invoke the provisions of the ICESCR and its supporting documents directly in their arguments. Thus the ratification of the ICESCR is unlikely to lead to any major change domestically. Furthermore, chapter four also revealed that there is a lack of enforcement measures currently in place and that this presents a further obstacle for

litigants as the Constitutional Court is the last resort for persons whose rights to access adequate housing have been violated

Therefore, Muller's statement that post ratification the time is ripe for the Constitutional Court to infuse its interpretation of section 26(1) of the Constitution with international law is however unfounded as it is clear that the ratification of the ICESCR is not enough to ensure that this happens.

The answer in ensuring the enforcement of the ICESCR and making sure persons get the full benefit from the ratification thereof lies in acceding to the OP-ICESCR and making the declaration to accept the jurisdiction of the African Court. By performing these two acts, the government will provide access to an additional mechanism for victims of rights violations who have not received any relief in the domestic courts and this will in turn lead to a body of jurisprudence which can be used as precedent by future litigants. The Committee on ESCR in its concluding remarks on the initial report of South Africa did recommend that government accede to the OP-ICESCR.

However, while the impact of the ICESCR in domestic litigation might not be seen immediately litigation using the ICESCR as a base should still be pursued and cases should still be brought post ratification of the ICESCR. As O Regan J noted that while the challenges in litigation around socio-economic rights are significant, given the benefits it can offer, it should be pursued.³¹⁹

A new stream of cases around the right to access adequate housing could also kick-start the legislature into action and start the legislative process required to enact the provisions of the ICESCR and its supporting documents at a domestic level. The

³¹⁹ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at para 165.

benefits of the ratification of the ICESCR will then not been seen in the courts, but will still be evident. As Roa and Klugman in writing on strategic litigation state,

'If there is a legal victory, the conditions for implementation will be enabled. However if there is not a victory, the conditions to advance the cause through other avenues will have improved, the movement will be stronger, and public opinion better informed. All of these are will recognised factors in the efforts to promote social change.'³²⁰

(30986 Words)



³²⁰ Roa M and Klugman B 'Considering strategic litigation as an advocacy tool: a case study of the defence of reproductive rights in Colombia' available at <https://www.tandfonline.com/doi/full/10.1016/S0968-8080%2814%2944804-3> (accessed on 13 November 2018).

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