

**THE STATE'S OBLIGATION TO REALISE THE SOCIOECONOMIC RIGHTS OF
VULNERABLE GROUPS: A CASE STUDY OF CHILDREN ON THE CAPE FLATS**

*Mini-thesis submitted in partial fulfilment of the requirements for the award of the
Degree of Legum Magister*

THE UNIVERSITY OF THE WESTERN CAPE



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KEYWORDS

Socioeconomic rights; Human rights obligations; State legislative obligations; Cape Flats; Vulnerable groups; Children; Generational poverty; Resource allocation; Meaningful engagement; Chapter 9 Institutions.



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ABSTRACT

The Cape Flats is known for poverty, gangsterism, over population and a general lack of basic necessities. What is often overlooked is where this negative perception emanates from. Generational poverty is an existent issue and has been influential in shaping the Cape Flats to what it is today.

What this study aims to do, is to provide a background on a possible theory for this typecast that accompanies the areas broadly known as the Cape Flats. The study will show how the Apartheid era created a ripple effect for future generations, and how this may be the cause of these vulnerable groups of children being failed by a system which have long forgotten about them. The study demonstrates how vulnerable groups on the Cape Flats, struggling and pleading for State intervention in the delivery of basic human rights, have fallen on deaf ears. The study further reveals that the State has not fulfilled its constitutional mandate, neither has it lived up to the enabling provisions contained in international instruments which has been adopted by the South African government, and confirms that all three spheres of government have lacked in the accomplishments it set out to achieve upon the adoption of various pieces of legislation, notwithstanding the proclamation of domestic laws to help the State realise its socioeconomic rights obligations.

The study was a particularly challenging task to undertake, as research topics on the issue of socioeconomic rights realisation on the Cape Flats is not a well-studied subject. The intention behind the study is to make an important contribution towards awareness of the issue under discussion, paving the way for future knowledge sharing and an open dialogue focusing on the role of the State in the realisation of socioeconomic rights of children on the Cape Flats.

DECLARATION

I, **BRILAINE LISA MANASSE**, declare that ***THE STATE'S OBLIGATION TO REALISE THE SOCIOECONOMIC RIGHTS OF VULNERABLE GROUPS: A CASE STUDY OF CHILDREN ON THE CAPE FLATS*** is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Full name: Brilaine Lisa Manasse



Signed:

Date: 2019/08/08



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And to my love, my daughter, Haylie Shea-

Thank you for allowing me the time and space I needed to complete this study. You were a champ throughout. I trust that this study will encourage you to do great things, for yourself and also for those less fortunate.



DEDICATION

*For all the children of the Cape Flats:
May this mark the beginning of your journey towards an enriched future.
Be heard. Be seen. Be remembered.*



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And to Grant Lester Cupido, who never had the opportunity to tell his story.

17/02/1986- 01/09/2018

CHAPTER ONE: INTRODUCTION

1.1 Background to the study

The concept behind this area of research is to investigate the realisation of rights of vulnerable groups by the State. The study focuses on children, particularly those residing within the Cape Flats, and the realisation of their socioeconomic rights and how these rights and the allocation of resources towards it affect them. These needs primarily include nutrition, health, education, clothing and shelter and are collectively referred to as socioeconomic rights.

In many respects, children born and bred in Africa are predisposed to a violation of their socioeconomic rights, more so than children who are from other continents.¹ The difficulty in promoting these rights, lies in the generalised lack of resources,² followed by poor implementation objectives set by the State through provisions in legislation.

The International Covenant on Economic, Social and Cultural Rights provided the foundation on socioeconomic constitutional provisions are based.³ This is evident in the comparison between Sections 26 and 27 of the Constitution of the Republic of South Africa⁴ with the provisions of the ICESCR. Children fall under a class of a vulnerable group of people and guidelines on how children and their rights should be protected, is stipulated in Convention on the Rights of the Child.⁵ It is therefore necessary to address the socioeconomic rights of the average South African child, and thus came about the ratification

¹ Viljoen F 'The African Charter on the Rights and Welfare of the Child' in C J Davel *Introduction to Child Law in South Africa* (2000) 214. [Hereafter Viljoen].

² Rwezaura B 'Law, Culture and Children's Rights in Eastern and Southern Africa, Contemporary Challenges and Present-day Dilemmas' in Ncube W *Law Culture and Children's Rights in Eastern and Southern Africa* (1998) 289.

³ International Covenant on Economic, Social and Cultural Rights of 16 December 1966 and entered into force on 3 January 1976. [Hereafter the ICESCR]. The ICESCR aims to ensure the protection of economic, social and cultural rights including- protection and assistance to the family (article 10); the right to an adequate standard of living (article 11); the right to health (article 12); the right to education (articles 13–14).

⁴ Constitution of the Republic of South Africa of 1996 [Hereafter the Constitution]. Sections 26(1) reads: Everyone has the right to have access to adequate housing. Section 27(1) reads: Everyone has the right to have access to – (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

⁵ United Nations Convention on the Rights of the Child of 1989. [Hereafter the CRC]. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (accessed 29 January 2017). The Committee on the Rights of the Child has identified four pillars on which the CRC is based. These are the best interest of the child (article 3), non- discrimination (article 2), survival and development (article 6 (2) and the right to participate (article 12 (1)). Security rights come under the child's right to survival and development. These include health and health related rights, education, and food, housing freedom from exploitation and family protection and care rights.

of the African Charter on the Rights and Welfare of the Child⁶ by the South African government.⁷ Section 28 of the Constitution⁸ enforce responsibilities on both the State and families to provide for children. The primary duty to deliver on the assurance contemplated by section 28, rests firstly with the family of the child, and only alternatively with the State where primary caregivers are unable to provide for their children.⁹

The Cape Flats, situated to the southeast of central the Cape Town CBD, is an area rich in political history as most of the families subjected to forced removals during the apartheid era, were relocated here.¹⁰ The Cape Flats is made up of predominantly black and coloured areas such as Gugulethu, Khayelitsha, Langa, Nyanga, Lavender Hill, Manenberg, Mitchell's Plain, and Philippi. Serious social problems such as a high rate of unemployment and disturbing levels of illegal gang activities contribute to these communities remaining highly poverty stricken. The Cape Flats is quite popular as areas in which violence is rife and poverty reigns. It is thus understandable that the children growing up under these circumstances are exposed to the volatile nature of their environment. Without the necessary and required government intervention, one may assume that the children of the Cape Flats are destined to be forgotten as the rights of more and more people are being given preference, at the cost of those who do not have the knowledge or resources to ensure that their socioeconomic rights are being realised in an equal and dignified manner.

This study undertakes to discuss the concept of the State's legislative obligation in the promotion, provision and protection of the socioeconomic rights of children, in particular, children on the Cape Flats.

⁶ The African Charter on the Rights and Welfare of the Child of 1999. [Hereafter the ACRWC].

⁷ The ACRWC was signed by the South African government on 10 October 1997, ratified on 7 January 2000. The ACRWC came into operation on 21 January 2000. Available at <http://www.achpr.org/instruments/child/ratification/> (accessed 30 January 2017).

⁸ Section 28(1) (c) of the Constitution provides, "Every child has the right to basic nutrition, shelter, basic health care services and social services".

⁹Section 27(1) (c) provides for access to these basic rights by the State.

¹⁰Forced removals under Apartheid. Available at <https://www.sahistory.org.za/article/forced-removals-south-africa> (accessed 8 December 2018).

1.2 Problem Statement

The Bill of Rights¹¹ guarantees a wide array of rights based on human dignity,¹² which, in essence include socioeconomic rights. The real test for the realisation of human rights, generally, is the extent to which they are protected and enforced, and the progressive effect on people's lives. Flowing from inadequacies and inequality of the Apartheid era, generational poverty is a prime factor of the national socioeconomic deprivation that has afflicted South Africa.¹³ The changeover to a democratic, unprejudiced society finds its basis on the progressive realisation of socioeconomic rights,¹⁴ and the ratification of instruments including the ICESCR, the CRC, the African Charter on Human and Peoples' Rights¹⁵ and the ACRWC. The ICESCR recognises the right of everyone to an adequate standard of living. This includes the right to adequate food, clothing, housing, and "the continuous improvement of living conditions".¹⁶ However, many South Africans suffer at the hands of poverty, without adequate access to education, healthcare, food, clean water and proper sanitation,¹⁷ exposing them to further vulnerability.

The Institute for Security Studies has revealed shocking statistics relating to the number of violent crimes reported on the Cape Flats.¹⁸ The Mitchells Plain area remains on the radar with one of the highest rates of violence in the country. With an increasing level of gang-related violence, Mitchells Plain and surrounding areas such as Nyanga, Khayelitsha and Gugulethu, require in-depth multi-disciplinary intervention, since these areas acknowledged for being the most violent areas of the Cape Peninsula, based on its population sizes. For more than a decade, these areas have been depicted as having

¹¹ The Bill of Rights is in Chapter 2 of the Constitution.

¹² Section 10 of the Constitution.

¹³ Sherer G 'Intergroup economic inequality in South Africa: the post-apartheid era' (2000) 90 *American Economic Review* 2 317-321. [Hereafter Sherer].

¹⁴ In the preamble to the Constitution it is specifically stated that the injustices of the country's past are recognised and that the Constitution is adopted as the supreme law of the country so as to heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights.

¹⁵ The African Charter on Human and Peoples' Rights of 1986 [Hereafter the African Charter].

¹⁶ Article 11 of the ICESCR.

¹⁷ In the 2015 General Household Census, about one-quarter of households expressed concern of poor lighting, inadequate water and sanitation. The Household Food Insecurity Access Scale which is aimed at determining households' access to food showed that the percentage of South African households with inadequate or severely inadequate access to food decreased from 23, 9% in 2010 to 22,6% in 2015. Statistics South Africa, General Household Survey, 2015, 14-15. Available at http://www.statssa.gov.za/?page_id=1854&PPN=P0318 (accessed 31 January 2017).

¹⁸ South African Police Services leadership needs to operate without political interference. Available at <https://issafrica.org/about-us/press-releases/police-not-coping-with-serious-violent-crime> (accessed 8 December 2018).

experienced abnormally high murder rates.¹⁹ Although it is hard to determine the exact membership of Cape Flats gangs, it has been estimated at between eighty thousand and one hundred thousand.²⁰

While the Constitution acknowledges the injustices of the past, it also aims to portray the new South Africa as an open and democratic society based on human dignity, equality and freedom.²¹ It is important to note that children were ‘collateral damage’ in past discriminatory practices against older generations of black and coloured people. The degradation imposed upon children’s parents under the Apartheid system had, and to an extent still has, a severe impact on them.²²

1.3 Review of Literature

Research for this study had made extensive use of local publications from the Centre for Child Law, the South African Human Rights Commission and the Socioeconomic Rights Institute, international publications on the subject of socioeconomic rights, as well a host of historical readings concerning the realisation of socioeconomic rights of children, on part of the State, in South Africa. The question is whether our enabling provisions have been effectively and efficiently implemented, following the adoption of legislation to promote socioeconomic rights of children. Thus, it is important to look at the balance between the availability and allocation of State resources, how the determination was made to decide how, where, when and to whom these resources will be distributed. One must also consider whether the State’s socioeconomic mandate to deliver on the rights aspect is being realised.

According to Viljoen, the ordinary interpretation of the African Charter supports the conclusion that children are protected,²³ both as individuals and as members of society, and their rights should be similarly promoted. States therefore have an international duty towards

¹⁹ Lancaster L ‘Where murder happened in South Africa 2012/2013’ Available at <https://africacheck.org/2013/09/19/where-murder-happens-in-sa/> (accessed 10 February 2017).

²⁰ MacMaster L ‘Social and economic emasculation as contributing factors to gangsterism on the Cape Flats’ (2007) 95 *Scriptura* 278–289.

²¹ The Bill of Rights, in section 7(1) of the Constitution, provides that the Bill of Rights, as ‘a cornerstone of democracy in South Africa’, enshrining the rights of all people in our country and affirming ‘the democratic values of human dignity, equality and freedom’. See also Liebenberg S ‘Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of ‘meaningful engagement’ (2012) 12 *AHRLJ* 11.’

²² Van der Vyver J.D ‘Constitutional Protection of Children and Young Persons’ in Robinson J *The Law of Children and Young Persons in South Africa* (1997) 267. (Hereafter referred to as Van der Vyver).

²³ Viljoen F (2000) 216.

children according to enabling provisions.²⁴ Lloyd goes on to emphasise that the best interests principle is of paramount importance and all rights to apply to children²⁵ without exception and further imposes an obligation on the State to ensure the child's survival and development.²⁶ Van der Vyver has written about the State's obligations at municipal level to ensure effective implementation of children's rights.²⁷ This is an important aspect for the purpose of this study and the role, action and outcome of the municipalities' obligation shall be scrutinised in the study. The review of literature will conceptualise these deliberations, pulling on South African and international findings where relevant information is available.

Being that socioeconomic rights are imbedded in legislation, the study intends to focus on the wording on international instruments, and the intention behind the provisions giving socioeconomic rights to children. The study will also look at the adoption and adaptation of international and regional instruments which had been the cornerstone for the promulgation of national enabling provisions. The CRC, the ICESCR, The ACRWC and the Constitution have already been introduced as an integral party of the study.

Upon the inception of the new democratic South Africa in 1994, the country was marked by generations of children who have been systematically marginalised as a result of apartheid policies, which led to the exclusion of certain groups of children. These groups of children were excluded from basic services, the outcome of which led to high levels of poverty which resulted in poor nutrition, poor health and low levels of education.²⁸ The objective behind Constitutional provisions regarding children sought to address the predicament of the social-ills of children, by complementing these rights protected by similar child rights provisions in instruments such as the CRC and the African Charter.²⁹ Furthermore, the ACRWC is Africa's pre-eminent document on children's rights. It was considered to be a necessary document to address concerns which are typical to Africa but

²⁴Viljoen F (2000) 217.

²⁵ See also Article 3 of the CRC.

²⁶ Lloyd A 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 *AHRLJ* 1 19. [Hereafter Lloyd].

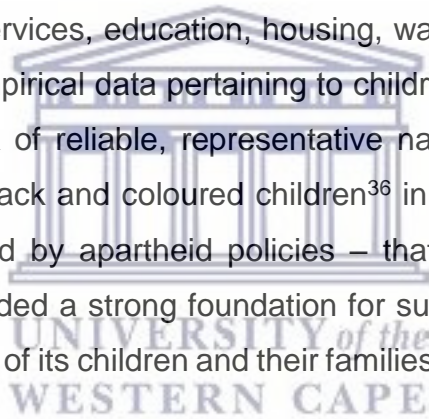
²⁷ Van der Vyver JD 'Municipal legal obligations of State Parties to the Convention on the Rights of the Child: South African Model' (2006) 15 *Emory Law Review* 5 40. Available at <http://www.scielo.org.za/pdf/pelj/v15n5/14.pdf> (accessed 18 June 2017).

²⁸Sherer (2000) 317-321.

²⁹ Section 28 of the Constitution provides specific rights for "every child", flowing from provisions of international and regional instruments such as the CRC and the African Charter. South Africa is a signatory to the United Nations Convention on the Rights of the Child (CRC) and is thus required to measure progress towards fulfilling children's rights. South Africa has ratified the African Charter which also imposes requirements on the South African government.

which have not been included in the CRC, particularly the difficult socioeconomic conditions of the continent.³⁰ The protected rights includes a bundle of socioeconomic rights including health care, proper nutrition and access to education, which unlike the similar rights for adults, were not made subject to progressive realisation and available resources.³¹ The ACRWC provides that, “every child shall has the right to enjoy the best attainable State of physical, mental and spiritual health. This includes the provision of nutritious food and safe drinking water, as well as adequate health care”.³² Article 1 of the ACRWC mandates State Parties, of which South Africa is one, to recognise these rights and adopt laws thereto.³³

With the necessity to bring children’s rights to the fore, came about the adoption and enactment of legislation, with its core focus on the protection, promotion and respect of the constitutional rights of children.³⁴ The National Institute of Economic Policy had undertaken a situational analysis of children in South Africa in 1993.³⁵ The report, published in 1996, provided a comprehensive description of children and poverty in terms of the effects of Apartheid, access to health services, education, housing, water, food security, land, etc. It also highlighted the lack of empirical data pertaining to children’s issues and argued that a major constraint was the lack of reliable, representative national and provincial data on children, especially data on black and coloured children³⁶ in South Africa. These targeted children, formerly marginalized by apartheid policies – that is to say black African and coloured children - have provided a strong foundation for substantial improvements in the living conditions of the majority of its children and their families over the past several years.³⁷



³⁰ United Nations Interregional Crime and Justice Research Institute. Available at www.unicrit/wwd/trafficking/minor/legal_africa.php (accessed 11 May 2017).

³¹ Some provisions under the ICESCR are capable of immediate implementation; and some rights in the Constitution, such as children’s socioeconomic rights in section 28, are not subjected to “progressive realisation”. The African Charter is silent on the terminology, “progressive realisation”. The African Charter does, however, use the progressive realisation *qualification* on children’s right to education (see Art 11(3) (b)).

³² Article 14 of the ACRWC.

³³ Article 1 provides, “Member States of the Organization of African Unity Parties will recognize the rights, freedoms and duties in this Charter and will adopt laws these rights”.

³⁴ The National Prosecuting Authority (NPA) was developed after the ratification of the CRC. The NPA sought to ensure that Government policies were child friendly. Child rights advocacy groups were active in ensuring that the rights of children were given priority. See also the Child Justice Act No 75 of 2008, The Children’s Act No 38 of 2005, The National School Health Policy and Implementation Guidelines of 2003 and the National Development Plan (NDP), for laws and policies promoting and protecting the rights of “every child”, as envisioned by the Constitution.

³⁵ Abrahams K and Matthews T ‘Child Rights Manual: Handbook for Parliamentarians’ 2011.

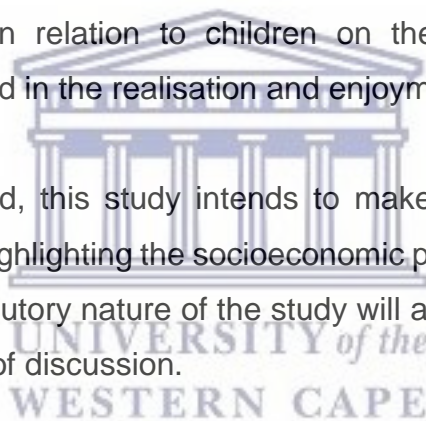
³⁶ National Institute for Economic Policy (NIEP), a report commissioned by the Reconstruction and Development Office. (1996). Children, Poverty and Disparity Reduction: Towards Fulfilling the Rights of South Africa’s Children. Pretoria. South Africa, 9- 10.

³⁷ A situation analysis, conducted by the Western Cape Government in 2009, has found that progress has been made in promoting the rights of children in South Africa. Provision of universal education, primary health care, social protection

For the purposes of an example, there seems to exist well-documented cases of the South African education system being overwhelmed by challenges, which are particularly relevant to the literacy outcomes for children of school-going age in South Africa.³⁸ In this regard, difficulties range from the low enrolment rates at foundation and primary phases of education, to the exclusion of children in early childhood education programmes in areas of high levels of violence and poverty.³⁹ Implementation challenges, coupled with poor knowledge of rights and responsibilities, also has the effect of excluding vulnerable children attributing to further prejudices against them.⁴⁰

While large volumes of literature exist about State obligations in legislation, the practical implementation of socioeconomic rights realisation, and the inclusion of relevant role-players in the decision making process around allocation of resources, very little information is available on the cooperative relationship between the three. More troubling is the fact that there is even less knowledge pertaining to this relationship within a South African context, particularly in relation to children on the Cape Flats who are most susceptible to being overlooked in the realisation and enjoyment of these rights.

Against this background, this study intends to make an important contribution to awareness in this regard, by highlighting the socioeconomic predicaments faced by children on the Cape Flats. The contributory nature of the study will allow future knowledge sharing within the context of the topic of discussion.



and the safety of children are issues which preoccupy the Government. Available at https://www.westerncape.gov.za/text/2009/5/situation_analysis_of_children_in_south_africa.pdf (accessed 18 April 2017.)

³⁸Education researcher, Nicholas Spaul, has conducted research in this area since 2012. His study indicated that pupils in South Africa's wealthiest 25% of schools excel over their counterparts in poorer schools. Spaul wrote that there are "two types of school systems in South Africa, largely split along historical-school-system and socioeconomic lines". Wilkinson K 'Checked: 80% of schools indeed dysfunctional' Mail and Guardian 25 March 2015. Available at <https://mg.co.za/article/2015-03-25-are-80-of-south-african-schools-dysfunctional> (accessed 14 April 2017).

³⁹Department of Basic Education Support Pack. <http://www.education.gov.za/Portals/0/Documents/Publications/CSTL%20National%20Support%20Pack.pdf?ver=2015-03-20-104216-440> (accessed 12 April 2017). See the South African Schools Act, 84 of 1996. The Act aims to redress past inequalities in educational provision and to provide an education of progressively high quality for all learners. Furthermore, The Norms and Standards for Educators (Government Gazette 20844, 2000: 48) list "community, citizenship and pastoral care" as one of the seven roles of educators in terms of which they must demonstrate a caring, ethical attitude, respect and professional behaviour towards learners, thereby respecting and promoting the rights of children as a vulnerable group.

⁴⁰ Poverty traps and social exclusion among children in South Africa. Available at http://www.gov.za/sites/www.gov.za/files/poverty_childrens.pdf (accessed 14 April 2017).

1.4 Research Questions

The questions that need to be considered are:

- (i) What legal framework exists for the realisation of socioeconomic rights of children and to what extent are relevant stakeholders involved in the drafting process?
- (ii) What connection exists between the availability of resources, resource allocation to designated groups and the realisation of socioeconomic rights of children?
- (iii) Which socioeconomic rights issues have been identified in investigating whether the government lived up to its obligation to realise socioeconomic rights of vulnerable and marginalised groups such as children on the Cape Flats?
- (iv) To which extent does meaningful engagement between stakeholders address the gaps in legislation and policies and how does it affect the realisation of socioeconomic rights of children?
- (v) What are the roles of Chapter 9 Institutions in the promotion and protection of socioeconomic rights of children, and what measures should they adopt towards its realisation?

1.5 Limitation of the Study

The study will be an analysis of the socioeconomic rights of children in South Africa, with the focal area of the study being limited to the Cape Flats, within the Western Cape Province.

Another limitation to this study is the method in which the study is undertaken. The study will primarily be a desktop study of literature, information and data relating to the experiences of children on the Cape Flats, spanning over several years. The study is further limited to the information available for analysis. As such, the study may not be a true reflection of the current situation on the Cape Flats, nor the experiences of the children in these areas.

1.6 Research Methodology

The research methodology followed in this study can be described as descriptive and contextual in focus. The study itself structures the research and is contextually based on how the State's obligations affected the realisation of socioeconomic rights of children on the Cape Flats.

A critical analysis of international and regional instruments will be made to establish the scope and content of socioeconomic rights of children. The study will also scrutinise the State's budget lines over periods of time, so as to convey the priority given to the socioeconomic rights provision of children, in the distribution of the State's meagre resource allocation. The purpose of this method of research is to determine whether the State has met its obligation in realising the socioeconomic rights of children on the Cape Flats.

Primary resources will include the relevant government departmental documents, and reports based on experimental research and studies. Secondary sources will include scholarly articles, textbooks and literature articles and reviews.

1.7 Summary of Chapters

The study is divided into 7 chapters.

Chapter 1 provides an outline of the dissertation.

Chapter 2 will consider the State's obligations in respect of international and regional instruments that have influenced the promulgation of national enabling provisions in respect of socioeconomic rights of children. Case law discussions will facilitate in understanding the legislated duties of State Parties in regards to advocating for the realisation of these rights.

Chapter 3 will consider children's rights on a general level and the extent to which the South African government satisfied its mandate to ensure that the rights of children, particularly poor and marginalised children, have been fulfilled. This chapter also aims to observe the effects of generational poverty, violence and gangsterism on children on the Cape Flats, and the socioeconomic implications of these factors on these children in particular.

Chapter 4 will address the inter-relationship between the obligation on the State for progressive realisation and the allocation of the available resources needed to meet that obligation. This chapter will then evaluate this relationship in relation to its effect on the children it touches.

Chapter 5 will address the concept of meaningful engagement in relation to role players and the consequences for failed meaningful engagement. The chapter will conclude with a critical analysis of the content discussed in the chapter.

Chapter 6 will cover the nature and content of the Constitutional obligation on Chapter 9 institutions. The chapter will deliberate the interpretation of Section 184(3) of the Constitution, the roles of organs of State in this regard and the challenges it faces in the realisation of socioeconomic rights.

Chapter 7 will conclude the study by weighing up the research and make recommendations on the issue under discussion.



CHAPTER TWO

TRANSITION THOROUGH LEGISLATION: THE STATES' LEGISLATIVE OBLIGATIONS IN SOCIOECONOMIC RIGHTS

2.1 Introduction

The legal definition of children's rights can be found in international human rights treaties, such as the ICESCR, the CRC, regional human rights treaties, such as the ACRWC and country-specific legislation, like the South African Constitution. To this end, these enabling provisions aim to improve the lives of children across the globe, but is reliant on the implementation of international treaties and the adoption of domestic laws in order for State Parties to meet its relevant obligations.⁴¹ In cases of violations of the socioeconomic rights of children, special rules and mandates are required so as to regulate the rights and privileges of children.

A prominent feature of the South African Constitution is its modern and liberal approach in dealing with democratic issues. In order to develop a proper understanding of the importance behind provisions for social and economic rights, one must consider the principals of the Constitution.⁴² In light of the background of South Africa's apartheid era and the legacy hereof, it is palpable that the drafters of the Constitution aimed at overcoming this appalling history and move towards a society of social justice and the promotion of fundamental human rights.⁴³ To establish how far South Africa has managed to move away from the stark effects of Apartheid, one simply has to look at the status of its children.⁴⁴ The study will show that the common case is that children's lives continue to be disrupted by socioeconomic inequalities⁴⁵ that were a side-effect of apartheid-era legislation and which are prolonged by continued poverty and unemployment.⁴⁶

⁴¹ Sloth-Nielsen J 'Chicken soup or chainsaws: Some implications of the constitutionalisation of children's rights in South Africa' 1996 6 *Acta Juridica* 25.

⁴² Coomans F 'Reviewing Implementation of Social and Economic Rights: An Assessment of the "Reasonableness" Test as Developed by the South African Constitutional Court' 2005 *Heidelberg Journal of International Law* 65 168. Available at http://www.zaoerv.de/65_2005/65_2005_1_a_167_196.pdf (accessed 13 May 2017).

⁴³ See the Preamble of the Constitution.

⁴⁴ Desai A *We are the Poors: Community Struggles in Post Apartheid South Africa* 1 (2002) 17.

⁴⁵ Jamieson L, Berry L & Lake L *South African Child Gauge 2017* Available at http://www.ci.org.za/depts/ci/pubs/pdf/general/gauge2015/Child_Gauge_2015-Focus_youth.pdf (accessed 9 July 2018).

⁴⁶ Davis D 'The Case Against the Inclusion of Socioeconomic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *SAJHR* 4 475-490. For a more recent rehearsal of such arguments, see Pieterse M 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited' (2007) 29 *Human Rights Quarter* 3 781.

Approximately 85% of all children in South Africa are of Black African descent, and are the largest group of children across the provinces with the exception of the Western Cape where 58% of all children are classified as coloured.⁴⁷ South Africa has asserted its commitment to the progressive realisation of children's rights by implementing laws and policies in an attempt to create better opportunities for access to education and improved health services. This appears to be an effort to break the course of disadvantage that has been passed on to the present generation of children.⁴⁸

A number of laws have major implications for children. This chapter aims to examine the legislative provisions behind the promotion of the socioeconomic rights of children and will look at the socioeconomic issues that had been litigated on. This section will also show how the Constitutional Court has been too reluctant to separate the socioeconomic rights of children from those of their parents. While the Constitution is resolute on pushing for central equality, a high level of inequality still exists. This is evident when looking at children and the multiple degrees and layers of inequality they are exposed to, especially in consideration of poverty alleviation. Poverty is multi-dimensional and complex in light of its social, economic, political aspects, apart from the more obvious instances of instable incomes or lack of commodities needed to make ends meet and participate effectively in society.⁴⁹

The ratification of international instruments, promoting children's rights, cannot solely effectively address the struggles of the South African children. The effective and specific implementation of these instruments together with domestic laws is required. Hence, this chapter discusses the incorporation of children's socioeconomic rights in the South African Constitution and the domestication of international and regional children's rights instruments.

⁴⁷ The terms 'coloured', black African and white were racial categories used under apartheid in South Africa to classify people according to their race. Residential areas in Cape Town remain highly segregated along racial lines, largely due to ongoing socioeconomic disparities between racial groups. Available at <http://www.statssa.gov.za/publications/Report-03-19-00/Report-03-19-002009.pdf> (accessed 27 May 2017).

⁴⁸ Pampel F, Kreuger P 'Socioeconomic Disparities in Health Behaviours' (2010) 36 *Annual Review of Sociology* 1 349–370. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3169799/> (accessed 1 June 2017).

⁴⁹ Sen A *Development as Freedom* 1 (1999) 89.

2.2 Unpacking Legislation: The interpretation of socioeconomic rights in enabling provisions

2.2.1 The Convention on the Rights of the Child

The CRC is the most all-inclusive law enacted on the rights of children.⁵⁰ Based entirely on the comprehensive list of substantive rights therein, it is the longest U.N. human rights treaty in operation. The CRC defines a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.⁵¹

The CRC is significant firstly because it standardises the movements of State Parties towards the rights of their children.⁵² The CRC is primarily concerned with fundamental underlying principles of children’s rights. Therefore, once reasons for the violation of children’s rights are determined, prejudices can be exposed and the principles upon which the CRC is drafted can be promoted.⁵³ The material concern when evaluating any matter affecting a child, would be whether the child’s best interests are being upheld.⁵⁴ The spirit of the CRC demands that the best interests approach take into account the feelings and opinions of the child. An additional right stipulated is the right to participate, which includes the right to be heard.⁵⁵ The intention behind allowing children to freely express their views, taking into account their age and maturity,⁵⁶ is to advance their status as individuals.

Based on this, South Africa has adapted its own legislation so as to give effect to the CRC while recognising children as the holder of rights, and ensuring further changes to existing domestic laws unique to children’s rights.⁵⁷ To this end, and while the full implementation of the CRC is progressing, it is notable that the absorption of its principles

⁵⁰ The Convention on the Rights of the Child, with a Preamble and 54 articles, was adopted by the U.N. General Assembly on November 20, 1989, and entered into force on September 2, 1990.

⁵¹ Article 1 of the CRC.

⁵² Proudlock P ‘Children’s socioeconomic rights’ in Boezart T *Child Law in South Africa* (2009) 309-310.

⁵³ Article 2.

⁵⁴ Article 3.

⁵⁵ Article 12.

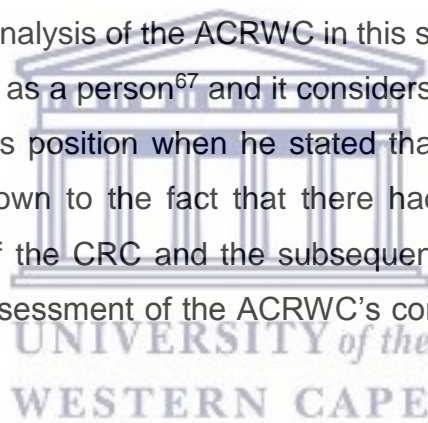
⁵⁶ Article 5.

⁵⁷ South Africa is described as having a monist legal system because section 231(4) of the Constitution States that an international agreement becomes law once it is enacted by national legislation. See Sloth-Nielsen J and Kruse H ‘A maturing manifesto: The constitutionalisation of children’s rights in South African jurisprudence 2007–2012’ (2013) 21 *International Journal of Children’s Rights* 4 646–678.

will create a platform for its integration into South African law.⁵⁸ General Comment 1 takes note of Article 29(1) of the CRC which highlights the far-reaching importance of the right to education.⁵⁹ Article 29(1) insists for the need for education to be child-centred, child-friendly and empowering. It highlights the need for the right to education to be based on the very principles it enunciates.⁶⁰ In 2003, the Committee published General Comment 3, which looked at HIV/ Aids and the rights of the child. The objective of the General Comment was to promote the realisation of human rights of children in the context of HIV/Aids as guaranteed under the CRC.⁶¹ South African case law has indicated that the recommendations by the Committee had been considered, based on the right to non-discrimination⁶² as well as the best interest principle.⁶³

2.2.2 The African Charter on the Rights and Welfare of the Child

The ACRWC has been described as 'Africa sensitive',⁶⁴ 'the most progressive of the treaties on the rights of the child'⁶⁵ and 'the most forward thinking of all the regional systems' on children.⁶⁶ The inclusion and analysis of the ACRWC in this study, is important in that it has a clearer definition of the child as a person⁶⁷ and it considers African-specific issues facing children. Viljoen confirmed this position when he stated that the reasons why a regional charter was adopted, boils down to the fact that there had been obvious side-lining of Africans during the drafting of the CRC and the subsequent exclusion of Africa-specific issues from the CRC.⁶⁸ An assessment of the ACRWC's core provisions compared to the



⁵⁸ The Preamble to the Children's Act No 38 of 2005 [hereafter the Children's Act] does refer to the CRC and other instruments.

⁵⁹ 'The aims of education' in Article 29 (1) of CRC General Comment 1 of 2001 on 17 April 2001. CRC/GC/2001/1. Available at <http://www.refworld.org/docid/4538834d2.html> (accessed 30 August 2017).

⁶⁰ Article 13 of the ICESCR is given reference to General Comment 13 of 1999 which deals with the aims of education.

⁶¹ Viviers A 'General Comments of the Committee on the rights of the child' (2014). Available at https://www.unicef.org/southafrica/SAF_resources_crcgeneralcomments.pdf (accessed 25 August 2017).

⁶² Article 2 of the CRC.

⁶³ Article 3 of the CRC. See below *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 703. [Hereafter TAC].

⁶⁴ Lloyd A 'Evolution of the African Charter on the Rights and Welfare of the Child and the Committee of Experts: Raising the Gauntlet' (2002) 10 *IJCR* 2 179.

⁶⁵ Van Bueren G *The International Law on the Rights of the Child* (1995) 332.

⁶⁶ Lloyd (2002) 179.

⁶⁷ Article 2 of the ACRWC specifies that a person who had not yet attained the age of 18 years will be considered to be a child.

⁶⁸ Viljoen F 'Why South Africa Should Ratify the ACRWC' (1991) 16 *SALJ* 660.

CRC shows that in many respects, the ACRWC sets a higher level of protection despite their numerous similarities in the two instruments.⁶⁹

The effective implementation of the ACRWC and other international and regional instruments on children's rights must take on an interdisciplinary approach in dealing with children's rights involving stakeholders. Overall, South Africa's legislative framework appears to be protective of children's rights, and significant legislative developments have been noted since South Africa ratified the ACRWC on 7 January 2000.⁷⁰ The ACRWC enshrines particular socioeconomic rights to children, such as the right to health and education in Articles 14 and 11, respectively as well the best interest principle in Article 20.

The objectives of treaty monitoring bodies, such as the African Committee of Experts on the Rights and Welfare of the Child⁷¹ is to develop and set down principles and rules with the core deliverable of protecting the welfare of children in Africa.⁷² It is mandated to examine State reports submitted to the African Committee, on children's situation in that particular State,⁷³ to collect information and receive communication⁷⁴ on children, to make recommendations to governments and to handle complaints on child rights violations. Its most important role is to monitor how States implement the ACRWC by examining State reports.

South Africa submitted an initial report, on the implementation of the ACRWC, to the African Committee in December 2013, for consideration in the first quarter of 2014, with the intention for the African Committee to review the implementation of the instrument.⁷⁵ The African Committee noted the adoption of the Children's Act and the Child Justice Act⁷⁶ which are predominantly in line with the ACRWC, as well as the establishment of the South African Human Rights Commission. The African Committee raised concerns around the fact that despite South Africa's broad range of laws and policies which protect and promote the rights

⁶⁹ Viljoen (1991) 660.

⁷⁰ Ratification instruments. Available at <http://www.achpr.org/instruments/child/ratification/> (accessed 30 January 2017).

⁷¹ Hereafter the African Committee.

⁷² Article 42 of the ACRWC.

⁷³ Article 43 of the ACRWC.

⁷⁴ Article 44 of the ACRWC.

⁷⁵ The report was submitted with considerable delay, which prevented the African Committee from reviewing the implementation of the ACRWC by South Africa for a significant number of years after the ratification.

⁷⁶ Child Justice Act No 75 of 2008.

of children, the historical and socioeconomic context of South Africa, particularly the prevalence of violence, poverty and inequality are affecting the full realisation of these laws and policies for the benefit of children. It was recommended that South Africa commits itself to the necessary measures, including legislative and administrative processes, to accelerate its efforts to deal with this gap in equality. This can be achieved by raising public awareness and capacity building of those who work for and with children about its laws and policies, and by earmarking the required financial resources, and use these sufficiently to promote and protect the rights of children.⁷⁷

South Africa was instructed to submit its combined periodic reports to the African Committee by 21 January 2017. Upon inspection for the purpose of this study, it has been established that South Africa did not submit its periodic reports by this date, instead submitting it on 21 April 2017.⁷⁸ In its report, the South African government stressed its progressive Constitution that includes a wide range of socioeconomic rights as well as the challenges it faces in the implementation of the ACRWC.⁷⁹ In March 2019, the African Committee submitted its concluding observations and recommendations to South Africa, noting the measures taken towards implementation. A significant measure adopted by the South African government, was the creation of a schools-based prevention programme which educates learners about the dangers and consequences of violence.⁸⁰ The introduction of these programmes may be beneficial for children on the Cape Flats in the progressive realisation of their socioeconomic rights.

⁷⁷ Concluding Remarks by the African Committee on South Africa's Initial Report, Ethiopia October 2014. Available at http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ZAF/INT_CRC_IFS_ZAF_24687_E.pdf (accessed 9 September 2017).

⁷⁸ Reporting calendar to the African Committee of Experts on the Rights and Welfare of the Child. Available at <http://www.achrc.org/reporting-calendar/> (accessed 9 September 2017).

⁷⁹The Socio Economic Rights Institute of South Africa (SERI) press Statement 'South African civil society submits parallel report on the realisation of socioeconomic rights to UN Treaty Body' 13 September 2018. Available at <http://www.seri-sa.org/index.php/latest-news/834-civil-society-engagement-south-african-civil-society-organisations-submit-a-parallel-shadow-report-to-the-united-nations-treaty-body-on-the-implementation-of-socioeconomic-rights-13-september-2018> (accessed 25 October 2018).

⁸⁰ Concluding observations and recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on the implementation of the African Charter on the Rights and Welfare of the Child. Available at <https://acerwc.africa/wp-content/uploads/2019/07/Concluding%20observation%20for%20South%20African%20Periodic%20State%20Party%20Report.pdf> (Accessed on 5 August 2019) page 2.

2.2.3 The ICESCR

The ICESCR stipulates that “norms must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place”.⁸¹ The ICESCR received approval on 10 October 2012 by the South African cabinet for ratification, and ratified the instrument in January 2015. The ratification comes several after South Africa signed the ICESCR, thereby indicating its intention to be legally bound by its provisions.⁸² The ICESCR is the underlying principle of the recognition of socioeconomic rights at the international level.

What stands out from this instrument is the additional rights afforded to children. Not only are they afforded general human rights to equality and human dignity but the ICESCR goes further and affords them additional socioeconomic rights, including the right to family and parental care, or to appropriate alternative care, basic nutrition, shelter, health care and social services.⁸³ General Comments 14 of 2000 and 19 of 2008 specifically deal with the right to health as envisioned in Article 12 and social security, as envisioned in Article 9, respectively. Education, including free universal primary education, generally available secondary education and equally accessible higher education is listed under Article 13. The intention is that the implementation of this right should be directed to “the full development of the human personality and the sense of its dignity”.⁸⁴

The African Committee noted that, while the South African government ratified the ICESCR, it is necessary to consider withdrawing its reservation of making the right to basic education progressively realisable, so that basic education is made immediately realisable.⁸⁵ This is also required by the ACRWC.⁸⁶

⁸¹ Draft General Comment 9 ‘The domestic application of the Covenant published by the UN Committee on Economic, Social and Cultural Rights’ 3 December 1998 para 2.

⁸² South Africa ratified the International Covenant on Economic, Social and Cultural Rights, Right to Education January 2015. Available at <http://www.right-to-education.org/news/south-africa-ratifies-international-covenant-economic-social-and-cultural-rights> (accessed 23 May 2017).

⁸³ September R ‘A New Children’s Act for South Africa: Making it work for Children and Families’ (2008) 44 *Social Work Journals* 2 147 Available at <http://socialwork.journals.ac.za/pub/article/view/247/229> (accessed 29 August 2017).

⁸⁴ Article 13.1 of the ICESCR.

⁸⁵ Concluding Observations and Recommendations, African Committee, March 2019 p3.

⁸⁶ Article 11(3)(a) of the ACRWC.

2.3 The South African Constitution

Socioeconomic rights are explicitly included in chapter two of the Bill of Rights. The purpose hereof is to focus on addressing the prejudices of the past.⁸⁷ The Constitution is considered as an instrument to change South African society from a society based on socioeconomic deficiency, to one where there is equal dispersal of accessible resources.⁸⁸ Socioeconomic rights recognise that “human rights and the basic social conditions in which people live are fundamentally interconnected”.⁸⁹ The recognition and inclusion of socioeconomic rights in the Constitution aims to ensure that material inequalities that exist are addressed so that people in disadvantaged social and economic circumstances are able to live their lives that are characterised by dignity, freedom and equality.⁹⁰

Designed to respect, protect, promote and fulfil the rights of all people in the country, the rights of children are too preserved in the Constitution. This guarantee resonates strongly with international principles. The former United Nations Secretary General, Mr Kofi Annan, argued "there is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they can grow up in peace".⁹¹ A duty rests on governments to protect and promote the well-being of children, which ultimately affects their quality of life.⁹²

In 1997, tasked with a mandate to look into and propose reviews on the Child Care Act⁹³ and make recommendations to the Minister of Social Development, the South African Law Reform Commission⁹⁴ released the report together with a draft on the Children’s Bill (the Bill) in December 2002. The primary intention behind this was to repeal the Child Care

⁸⁷ Christiansen E ‘Adjudicating Non-Justifiable Rights: Socioeconomic Rights and the South African Constitutional Court’ (2007) 38 *Columbia Human Rights Law Review* 321 45-6.

⁸⁸ Pieterse E and van Donk M ‘Incomplete Ruptures: The Political Economy of Realising Socioeconomic Rights in South Africa’ (2002) 6 *LDD* 209- 211.

⁸⁹ Brickhill J and Ferreira N ‘Socio economic rights’ in Currie and De Waal *The Bill of Rights Handbook* 6 (2013) 564.

⁹⁰ Proudlock (2009) 310.

⁹¹ United Nations General Secretary, Mr Kofi Annan, Children’s Rights Quotes, <http://www.betterworld.net/quotes/children-quotes-3.htm> (accessed 3 July 2017).

⁹² Dutschke M and Abrahams K ‘Children’s Right to Maximum Survival and Development’ (2006) *Children’s Survival Project*, Children’s Institute, University of Cape Town.

⁹³ Child Care Act No 74 of 1983.

⁹⁴ Hereafter “the Commission”.

Act, which was found to be inconsistent with the Constitution in a number of instances. More was needed to protect children from abuse and neglect⁹⁵ but the Commission also found that, more importantly, there needed to be legislative developments on socioeconomic conditions to line up the focus to the provisions of section 28(1)(c) of the Constitution.⁹⁶

The lengthy passage involved in the development of legislation, was heavily supported by the NGO community, and the inclusion of section 4(2) in the general principles at the outset of the Child Care Act, was described as a major victory.⁹⁷ This section reads, "...recognising that competing social and economic needs exist, organs of State in the national provincial and where applicable, local spheres of government must, in the implementation of this Act, take reasonable measures to the maximum extent of their available resources to achieve the realisation of the object of this Act".⁹⁸

International law provides guidance for the interpretation of socioeconomic rights in the Constitution. Notwithstanding the significant contribution it has made in this respect, the continued absence of applicable precedent from other domestic jurisdictions remains a shortcoming.⁹⁹ This may be the reason behind why the first few socioeconomic rights cases failed to provide remedies that enhanced socioeconomic rights.¹⁰⁰

2.4 Case studies in relation to the State's legislative obligations towards children

2.4.1 Grootboom¹⁰¹

A group of adults and children moved onto private land in an effort to escape the dreadful conditions of living in an informal settlement.¹⁰² The issue the court had to decide was whether section 26 of the Constitution found application together with section 28(1)(c), which

⁹⁵ Section 28 (1) (d) of the Constitution.

⁹⁶ Stewart (2008) 'Interpreting and limiting the basic socioeconomic rights of children in cases where they overlap with the socioeconomic rights of others' *SAJHR* p 473.

⁹⁷ Sloth-Nielsen J 'A Developing Dialogue – Children's Rights, Children's Law and Economics: Surveying Experiences from Southern and Eastern African Law Reform Processes' (2008) 12 *Electronic Journal of Comparative Law* 3 11.

⁹⁸ Skelton A and Proudlock P 'Interpretation, objects, application and implementation of the Children's Act' in Skelton A and Davel CJ (2007) *A Commentary on the Children's Act* 1-12. Section 4 came into force on 1 July 2007.

⁹⁹ Liebenberg S 'The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa' (1995) 11 *SAJHR* 3 379-358.

¹⁰⁰ Brand D 'The Politics of Need Interpretation' and the Adjudication of Socioeconomic Rights in South Africa' in van der Walt AJ *Theories of Social and Economic Justice* (2005) 18-25.

¹⁰¹ *Government of the Republic of South Africa and Others vs. Grootboom* 2001 (1) SA 46 (CC). [Hereafter *Grootboom*].

¹⁰² *Grootboom* para 3.

provides for access to housing and children's right to shelter, respectively.¹⁰³ While the High Court had found that the children and, through them, their parents were entitled to shelter under section 28(1) (c), the Constitutional Court held that it is the State who had a legal obligation to deliberate the issue under discussion and to develop a strategy, within its available resources, and progressively attend to realising the right of access to adequate housing.¹⁰⁴

Grootboom gave substance to socioeconomic right issues by providing platforms on they could be enforced, thereby requiring the State to 'devise, fund, implement and supervise measures to provide relief to those in desperate need within available resource'.¹⁰⁵ However, the *Grootboom* decision was more intrusive upon the separation of powers doctrine due to the effect it had on government policy.

2.4.2 TAC¹⁰⁶

The ratification of the CRC showed commitment on the part of the South African government to promote the children's rights to health care by allowing the implementation of this specific right in South Africa's domestic legislation. Children's right to health care is stipulated, firstly in section 27(1), which accords the right to have access to health care services for all South Africans and secondly in section 28(1)(c), which entitles every child to the right to basic health care service.

The Treatment Action Campaign (TAC) challenged the government's policy on the prevention of mother-to-child transmission of HIV. In terms of the policy rolled out by government, Nevirapine was to be used at pre-determined pilot sites. Subsequently, a significant group of HIV-positive mothers and children did not have access to these sites and were effectively denied access to a potentially life-saving medical intervention. The Court, having due regard to the pilot project, Stated that a single dose of Nevirapine was critical for the children, as the needs of children were the most urgent. The State must ensure that children are afforded the protection contemplated in the Bill of Rights.

¹⁰³ Irene Grootboom, who brought the case, was one of 390 adults and 510 children living in appalling circumstances in Wallacedene informal settlement.

¹⁰⁴ *Grootboom* para 99.

¹⁰⁵ *Grootboom* para 96.

¹⁰⁶ Viljoen F (2000) 217.

The judgement essentially means that children born to HIV-positive mothers, are provided with the necessary access to medical care, as a vulnerable group of society. Children whose parents lack the financial resources and who are dependent on the State for the provision of health care services have a claim against the State for the provision of health care services.¹⁰⁷ The *TAC* case handed the State a specific directive to extend its program of providing Nevirapine, despite the budgetary implications.

2.5 The Constitutional Court and empowering provisions: Socioeconomic implications for children

Litigation in the area of socioeconomic rights was still a theoretically fresh concept at the time the Court was established in 1994. While the core function at the time of its establishment was to oversee the new democratic dispensation,¹⁰⁸ it was also established as the court of final instance in constitutional matters. Given the limited experience in other comparable common law jurisdictions, interpreting and enforcing socioeconomic rights guarantees entrenched in the Bill of Rights became a function of this court. An important role in interpreting and giving content to these rights vests in this court. While the court is responsible for adjudicating upon socioeconomic rights cases, very few guidelines exist to execute this duty.¹⁰⁹ The judiciary then, is within the scope provided for in the Constitution to develop new and innovative remedies if it is found that these rights have been infringed upon.¹¹⁰

In *Grootboom*, the court found that State Parties under the CRC are mandated to fulfill the socioeconomic rights obligations of children immediately, and holding parents ultimately accountable to their children.¹¹¹ In that sense, the Court found that the provision of shelter of children rests first with the parents. Where parental care is lacking or absent,

¹⁰⁷ Proudlock (2009) 300.

¹⁰⁸ Spitz R and Chaskalson M *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* 6 (2001) 191.

¹⁰⁹ Pieterse E & van Donk M 'The Politics of Socioeconomic Rights in South Africa. Ten Years after Apartheid' (2004) *5 ESR Review* 5 12-15.

¹¹⁰ See 172(1) (b) of the Constitution vests in competent courts a broad discretion to grant 'just and equitable' remedies for breaches of the Constitution.

¹¹¹ Article 18 of the CRC.

only then would the legal framework require the State to provide families with access to housing and other services.¹¹²

The Court found that all the families did, in fact, have a right to access to housing. The government's plan was to progressively realise this right upon the availability of the required resources and the court ultimately found that the government's plan was irrational.¹¹³ The court did not rule on how the State was to prioritise families with children, but it reiterated that children should not be used as 'stepping stones' for the realisation of the socioeconomic rights of their parents. The effect of the *Grootboom* judgment essentially meant that children's socioeconomic rights would be directly and immediately enforceable, and not subject to progressive realisation, if they were 'lacking parental care'.¹¹⁴

2.6 The State's implementation strategy: Socioeconomic factors and its effect on children

The rights of children were found to have been violated during the apartheid era so much so that large numbers of minors were incarcerated for being involved in political activities.¹¹⁵ It was during this period that organisations falling outside the scope of the South African government attempted to promote the rights of socially vulnerable children within its borders.¹¹⁶ Socioeconomic rights forms the foundation on which people are able to live and develop to their fullest potential, simultaneously addressing the inequalities of the past. Consequently, the Constitution gives ample attention to the protection of those rights.¹¹⁷

Several factors contribute to poverty on the Cape Flats, specifically. The impact of apartheid has been long been regarded as the leading factor, since it resulted in distorted economic markets after people were stripped of their assets as a result of racial

¹¹² See *Grootboom* para 52 as well as the Housing Act No 107 of 1997, the statutory framework for the State's measures to give effect to the right to have access to adequate housing, was found to be lacking in that it made no provision for the shelter needs of those in housing crisis.

¹¹³ *Grootboom* para 39-45.

¹¹⁴ CESCR General Comment No 11 Plans of Action for Primary Education UN doc E/C12/1999/4 (1999) para 9.

¹¹⁵ Skelton A (1996) 'Developing a juvenile justice system for South Africa: international instruments and restorative justice', *Acta Juridica* 180.

¹¹⁶ Hendrickse RF *Governance and financial sustainability of NGOs in South Africa* (Unpublished. University of the Western Cape, 2008) 23-31.

¹¹⁷ De Vos P '*Grootboom*: The Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 *SAJHR* 2 258-276.

discrimination. This led to destabilised and overcrowded communities and violence, the misuse of resources and a lack of accountability at all levels of government.

Around 2003, research was conducted in the community of Hanover Park, which was developed as a 'coloured' area under the Population Registration Act. Hanover Park continues to reflect this profile, with 98.75% of the current population being coloured. Afrikaans is the predominant language spoken in Hanover Park, followed by English. The residents of Hanover Park live in blocks of flats. At the time of the study, the unemployment rate stood at 62% while only 13% of the community completed high school.¹¹⁸

Nearly a decade later, the Department of Women, Children and People with Disabilities reported an improvement in living conditions of children. Policies to promote social security, nutrition and environmental health were successfully rolled out. Notwithstanding the success of these programmes, it was found that the associated benefits were not fully enjoyed by the children owing to geographical and largely racial inequalities.¹¹⁹ It was also reported that more historically marginalised children were able to attend school, owing to changes in budgets and legislation.¹²⁰

2.7 Conclusion

This chapter demonstrated how children's rights has been on the fore of global discussions. The vulnerability of children both within families and society should be the driving force behind the realisation of their socioeconomic rights in legislation and also in practice. The Bill of Rights is testament to this with children's rights expressly catered for. The development and well-being of children rests firstly with the parents but ultimately with government where the former is lacking. A good quality of life would entail the fulfilment of the rights of children. While South Africa delivered a system of laws and programmes to ensure basic support for children, and essential services has been expanded to include all groups of people, inequalities still exist. These inequalities affect the ways in which children

¹¹⁸ Social Profile of South Africa, Statistics South Africa (2003) Available at <http://www.statssa.gov.za/publications/Report-03-19-00/Report-03-19-002009.pdf> (accessed 9 July 2017).

¹¹⁹ South Africa's Initial Report on the African Charter on the rights and Welfare of the Child, Reporting Period January 2000- April 2013 p 14. The statistical data provided in the report cover the period until June 2012, whereas the narrative includes legal and related developments (as well as input received through submissions on the draft report) that extend until April 2013. Available at https://www.unicef.org/southafrica/SAF_resources_africanunionreport9.pdf (accessed 28 June 2017).

¹²⁰ Initial Report p16.

access opportunities and it is apparent that children within poor and marginalised communities have enjoyed the benefits of this progress the least since the end of apartheid.

This chapter considered the instruments which South Africa has ratified in an attempt to implement domestic legislation for the purpose of addressing the socioeconomic rights of children. The importance behind the inclusion of these instruments is to demonstrate the measures adopted by South Africa, as a State Party, as it aligns itself with other State Parties. It also indicated the legislative mandates and responsibilities South Africa has taken upon itself in its commitment to enhance children's socioeconomic rights.

The chapter further looked at the State as a stakeholder behind the enforcement of children's socioeconomic rights, and indicated that they have an important role as duty-bearers of children's rights to ensure that children enjoy an improved quality of life. In terms of the work undertaken by the State to deliver services that would benefit children, more needs to be done. Through the synopsis of case law discussed in this chapter, it is evident that the separation of powers cannot always be the scapegoat in the adjudication and realisation of socioeconomic rights. As the study shows South African policy makers are required to pay special attention to government programmes and monitoring systems that aim to prioritise children's rights. This chapter showed that, even with the implementation of instruments such as the ACRWC, the South African government has failed in its obligation to submit its reports to the African Committee, as required. This raises a necessary concern as to whether policy makers and implementing agents are addressing their legislated socioeconomic mandates with the urgency it requires. There is an urgent requirement for policy makers to redress past inequities and tackle the obstacles that are faced by the poorest children.

The judgments discussed in this chapter demonstrates the degree to which the Constitutional Court's mandate has embraced the available legislation in its application to children's rights. In addition, the courts tend to apply the CRC and ACRWC together, and at times the one supports the wording of the other. The ability to rely on both the CRC and the ACRWC in this way, and to fill in detail through reference to soft law and general comments, gives South African children's rights litigators a strong supply from which to draw. The use of international law over foreign law may be attributed to the differences between foreign law and the South African Bill of Rights. The Constitutional Court bases its interpretation of the Bill of Rights by its application of international children's rights law and shows signs of

developing its own jurisprudential path in children's socioeconomic law rather than follow the lead of other jurisdictions.



CHAPTER THREE

GENERATIONAL POVERTY AND GANGTERISM: THE INTER-RELATIONSHIP BETWEEN TWO CAPE FLATS REALITIES

3.1 Introduction

Poverty and inequality are hallmarks of a highly unjust society, and the dramatic growth in crime and violence, are legacies of the past years marked by Apartheid that confront South Africa.¹²¹ Poor South African children, who are for the most part black or coloured and located in the historically disadvantaged corners of the communities, are at risk of perpetuating the poverty cycle into which they were born.¹²² Therefore, the most logical and essential mechanism is the implementation of successful poverty-ending interventions focussed on children.¹²³ The cycle of poverty is described as a self-perpetuating cycle passed on from generation to generation.¹²⁴ This involves a low income, coupled with feelings of indifference, along with a lack of encouragement and self-respect.¹²⁵

As a result, many children face derelict situations growing up, and so become accustomed to a certain lifestyle, one which is seriously lacking in the way of socioeconomic necessities. At this backdrop, this chapter will illustrate how the children on the Cape Flats fall into a cycle of opportunistic survival. These opportunities present themselves on a continual basis in the form of gang activity, thereby presenting itself as a practical preference to make ends meet. Gangsterism on the Cape Flats is not a foreign concept and this chapter will show how generational poverty and the ensuing engagement in gang activity has an impact on the socioeconomic rights of children on the Cape Flats.¹²⁶

¹²¹ Field S 'I dream of our old house, you see there are things that can never go away': memory, restitution and democracy' in Field S *Lost Communities, living memories: remembering forced removals in Cape Town* (2001) p117–210.

¹²² Bickford-Smith V 'Mapping Cape Town: From slavery to apartheid' in S. Field *Lost communities, living memories: Remembering forced removals in Cape Town* (2001) p15–19.

¹²³ Field (2001) 200.

¹²⁴ MacMaster (2007) 279.

¹²⁵ Dinitto D and Dye T *Social Welfare: Politics and Public Policy* 7 (1983) 144- 153.

¹²⁶ MacMaster L 2010 *In search of a family: The challenge of gangsterism to faith communities on the Cape Flats* (Unpublished. University of Stellenbosch. 2010). p38. The study traces the rise of gangsterism on the Cape Flats to a District Six based gang called Globe, who appear to have been a kind of vigilante group which rose to prominence in the 1930s. MacMaster's view contrasts with that of a recent Statement by the former Minister of Police, Nathi Mthethwa, who stated that 'gangsterism is a deep-seated legacy of more than 200 years'. See Underhill G 'Gangs in Cape Town: A daily dance with death' Mail & Guardian 23 August 2013 p 2.

This chapter further seeks to investigate the magnitude to which groups of vulnerable children are trapped between poverty and inequality, and to what extent they are excluded from policies and additional efforts implemented by the State. The kind of intervention that would be necessary to bring about this change, will be shown to be effective through literature reviews and policy simulations.¹²⁷

3.2 Analysing the cycle of poverty

Poverty is a social problem and often duplicates itself from generation to generation. In most cases, people from a poor background often have a narrow chance of being wealthy.¹²⁸

This generational shortcoming is a reality for many people living on the Cape Flats, measurable through indicators of income and access to services such as health care, nutritional status and employment.¹²⁹ Singh submits that it is almost impossible to express an objective meaning of poverty because the different people affected may only have a lack of resources to meet their basic needs in common. Due to the complex nature of poverty, it is not really possible to give a uniform account of the conditions leading to people becoming poor.¹³⁰ From a sociological perspective, poverty is viewed within the social context of the family, community and society, not just the individual.¹³¹

These attitudes make it challenging for the poor to utilise legitimate opportunities for upward mobility that may be available to them. Increasing the income of the poor may not positively influence and lack of education opportunities, unstable family life, or the high incidence of crime, and other social problems among the poor.¹³² As socioeconomic circumstances remain unchanged, so too does the desire to maintain a form of survival through gang activities.

¹²⁷ Helen Zille, the Premier of the Western Cape, has at times called for the deployment of the army in gang hotspots. Available at <https://www.news24.com/SouthAfrica/News/army-necessary-to-stop-gang-fuelled-genocide-in-cape-town-residents-20171011> (accessed 16 August 2018). Instead, national government has chosen for intensive police action as well as socioeconomic interventions. The deployment of the army in the past has not deterred gangs in the way it was hoped for. Maphalala M & Mabunda P 'Gangsterism: Internal and external factors associated with school violence in selected Western Cape high schools' (2014) 5 *Journal of Sociology and Sociology Anthropology* 1 61–70.

¹²⁸ Bickford-Smith V (2001) p22–26.

¹²⁹ National Social Development Report, 1995.

¹³⁰ Mohanty A and Misra G *Psychology of Poverty and Disadvantage* (2000) 22-25.

¹³¹ Haralambos M and Holborn M *Sociology Themes and Perspective* 4 (1995) 107-119.

¹³² Dinitto and Dye (1983) 149.

The court stated, in *Soobromoney*,

“...millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist, that aspiration will have a hollow ring.”¹³³

It is critical that vigorous measures are developed to quantify the nature and extent of socioeconomic deprivation experienced by children and thereby accurately identify the areas of greatest need.

3.3 Socioeconomic deprivation, and gangsterism through history¹³⁴

Poverty is multi-dimensional, marked by poor access to health and food and poor housing conditions, affecting people's human dignity. Studies show that families who experience these living conditions struggle daily with poverty and this ultimately disturbs family life.¹³⁵ Feeling alienated from society, it is not difficult to understand why young people move towards finding acceptance within a family-like structure such as a gang.¹³⁶ Gangs make many young people feel at home by giving them a sense of belonging even though they are aware of often engaging in illegal activities.¹³⁷

When Pinnock studied Cape Town gangs in the 1980s, he found that gangs are formed from a political - economic theoretical framework. He argued that “coloured” gangs exist simply as a means to survive the socioeconomic and political transitions that reproduce

¹³³ *Soobromoney* para 8

¹³⁴ Gangsterism may be defined in various ways. According to Mncube and Madikizela-Madiya, gangs range from scavenger types (petty crimes) to territorial types (well organised with initiation rites) to corporate gangs (they are well structured, conduct illicit activities and have distinct names and symbols attached to said names). Mncube V and Madikizela-Madiya N ‘Gangsterism as a cause of violence in South African schools: The case of six provinces’ (2014) 5 *Journal of Sociology and Social Anthropology* 1 43–50.

¹³⁵ Blackburn C *Poverty and Health, Working with Families* 1 (1991) 87-101.

¹³⁶ Daniels D and Adams Q ‘Breaking with township gangsterism: the struggle for place and voice’ (2010) 11 *African Studies Quarterly* 4 45–57.

¹³⁷ Mncube and Madikizela-Madiya (2014) 48.

poverty in the ghettos of the Cape Flats.¹³⁸ In addition, Ross Kemp expressed his dismay when he vocalised, "...the Cape Flats is a racial dumping ground", during his investigation on gangs in South Africa. The Cape Flats was visited by Kemp in an attempt to better understand the legacy and effects of the Apartheid era, with a particular focus on coloureds and the greater Cape Flats communities.¹³⁹

In his 2006 study titled *Organized Crime: a Study of the Cape Flats*, Andre Standing notes that in little over 20 years 50,000 families had been displaced during the apartheid era, into various areas forming part of the Cape Flats.¹⁴⁰ Standing builds on the theory by Don Pinnock and writes, "It was in this situation that large numbers of unsupervised youths formed street gangs, primarily as a coping mechanism".¹⁴¹ In these communities, insecure and stigmatised youths, impressed by the lifestyle of gangsters, continue to form collective security agreements that is the basis for gang formation.¹⁴² Observing parts of the Cape Flats, Pinnock and Standing noted that youth form gangs amongst themselves in an effort to address their vulnerability in an unpredictable environment.¹⁴³

3.4 Socioeconomic challenges on the Cape Flats

Statistics South Africa conducts regular national surveys, thereby providing information on a range of national issues around socioeconomic situations of its people within their households. The surveys are not focused on children, so the information and data gathered is of limited use in understanding the situation of children. For example, where statistics describe the unemployment rate, it will not show how many children are in the home where no adult is employed, as the analysis is not child-centred. Many young children under the age of six live in households facing challenges related to poverty and lack of service delivery.¹⁴⁴

¹³⁸ Pinnock D *The brotherhoods: Street gangs and State control in Cape Town* (1984) 63-84, 99.

¹³⁹ Ross Kemp on Gangs in South Africa, 2006. Published by Blanked Videos on 13 March 2016. Available online at <https://www.youtube.com/watch?v=mPb9dnPI2TM> (accessed on 23 May 2018).

¹⁴⁰ Standing A *Organized Crime: A study from the Cape Flats* (2006) p 118-130. Available online at https://issafrica.s3.amazonaws.com/site/uploads/Book2006OC_CapeFlats.PDF (accessed 1 November 2018).

¹⁴¹ Standing (2006) 219-227.

¹⁴² MacMaster (2010) 35.

¹⁴³ MacMaster (2010) 37.

¹⁴⁴ South African Early Childhood Review. Available at http://www.childrencount.uct.ac.za/uploads/publications/SA-ECR2017_web.pdf (accessed 9 July 2018).

3.4.1 Lavender Hill

Lavender Hill developed from the Group Areas Act in 1981¹⁴⁵ and was labelled a 'coloured' area. This community was created to exclude, such that people who stay there have limited access to resources such as schools, job hubs, shops and so forth. Gangsterism in Lavender Hill is viewed as a mechanism for meeting the needs of the youth. Children in Lavender Hill have fewer role models to aspire to. Most of the people in the area have no jobs and children grow up knowing that their parents or siblings do not go to work.¹⁴⁶ Therefore, it becomes normal for the child to not attend school, and to engage in gangs or criminal activities.¹⁴⁷ It has been noted that youth unemployment is increasing, raising serious alarms for policy-makers about the continuation of generations of unemployment cycles among households.¹⁴⁸ The 2011 census of Lavender Hill revealed that children made up 29.1% of the total population of the area, of which 10.7% completed primary school.¹⁴⁹

Gang fighting is one of the lead causes of absenteeism across schools on the Cape Flats. In May of 2017, parents in Lavender Hill had opted to withhold children from schooling as a result of ongoing gang violence. Parents opt to keep their children at home as they fear for the safety of the children should they be forced to attend school amid the violence.¹⁵⁰ ¹⁵¹ The fight for territorial space at schools on the Cape Flats is corroborated by Lambrechts,¹⁵² and aptly illustrated in newspaper articles.¹⁵³ Boulle argues that "school closures will



¹⁴⁵ The Group Areas Act No 41 of 1950. The Group Areas Act legislated race-based residential segregation in 1950 and caused the forced removal of approximately 750 000 people in urban areas between the 1960s and 1980s.

¹⁴⁶ Wonnacott H *Young adolescent girls' experience of occupational engagement in Lavender Hill* (Unpublished. University of Cape Town, 2005) 42-66.

¹⁴⁷ Bloch G *The toxic mix: what's wrong with South Africa's schools and how to fix it* (2009) 89- 114.

¹⁴⁸ Kanengoni M *An exploration of Lavender Hill youth's pathways to employment* (Unpublished. University of Cape Town, 2016) 15-20.

¹⁴⁹ In 2011 the population of 2011 Census suburb Lavender Hill was 32 598 and the number of households was 6 504. The average household size was 5.01. City of Cape Town, 2011 Census of Lavender Hill, July 2013 p2-3 available at http://resource.capetown.gov.za/documentcentre/Documents/Maps%20and%20statistics/2011_Census_CT_Suburb_Lavender_Hill_Profile.pdf (accessed 9 July 2018).

¹⁵⁰ Parents put schools in lockdown over gang violence. Available at <https://www.iol.co.za/capetimes/news/parents-put-schools-in-lockdown-over-gang-violence-9350366> (accessed 9 July 2018).

¹⁵¹ Mutyala Q 'Pupils are kept home after racial violence' Cape Times 21 March 2012 available online at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-01002016000200006 (accessed 24 August 2018). See also Maregele B 'Less than 50% of pupils turn up at three schools after 'gang shootings'' Cape Times 21 August 2013 available online at <https://www.highbeam.com/doc/1G1-345831506.html> (accessed 23 August 2018).

¹⁵² Lambrechts D 'The impact of organised crime on State social control: Organised criminal groups and local governance on the Cape Flats, Cape Town, South Africa' (2012) 38 *Journal of Southern African Studies* 4 787-807. Available at <https://doi.org/10.1080/03057070.2012.749060> (accessed 27 August 2018).

¹⁵³ Boulle C 'This is not an issue for closed minds' Cape Times 17 September 2012 p9 and Butana K. "Khayelitsha school overcomes turmoil". Cape Times, 6 January 2012 p7.

inadvertently intensify gang violence”, as learners expressed fear that violence would break out between rival gangs at school and on the walk to school, if they are to be relocated to high schools in a different neighbourhood.¹⁵⁴ A 14-year-old boy from Lavender Hill additionally told Dolley “if we don’t join, we [are] going to be slaughtered”.¹⁵⁵

There is a defined link between school violence and gangsterism, where the latter contributes to the high levels of violence within the school community on the Cape Flats. In turn, school-going children are adversely affected, leading to unsafe learning conditions, interrupted education and school dropouts. This worldwide problem is predominant in areas where poverty and inequality is prevalent. School dropouts dedicate their time to standing on street corners, participating in illegal activities, and making no positive contribution to the low socioeconomic communities from which they come.

3.4.2 Nyanga

The gangsters of KTC informal settlement have contributed to Nyanga maintaining its position as the country’s murder capital.¹⁵⁶

During an interview with Peter Luhanga from City Press, Nomvo Lekker expressed her concern around the violence carried out by children, against community members. The community leader and neighbourhood watch member has lived in the township all her life. Now, living with her child and two minor grandchildren, she describes her fear as young local gang members recruit even younger men into gangs and provide them with the tools to wander the township and commit crime. These young people do not attend school and carry out their activities of any time during the day. With their blatant disregard for the law, the school dropouts have opted for gangsterism over employment as a means to beat poverty.¹⁵⁷

¹⁵⁴ Boulle (2012) 9.

¹⁵⁵ Dolley C ‘All about the bavana for Cape gang youth’ Cape Times 4 October 2012 available at <http://www.iol.co.za/capetimes/all-about-thebavana-for-cape-gang-youth-1396336> (accessed 27 August 2018).

¹⁵⁶ Western Cape Provincial Crime Analysis Report 2016/2017 p 7 available at https://www.westerncape.gov.za/assets/crime_analysis_western_cape_2016-17.pdf (accessed 18 September 2018). Nyanga had the highest rate of murder, recording over 300 murders during the period. <https://businesstech.co.za/news/government/270771/this-is-south-africas-murder-capital/> (accessed 20 September 2018).

¹⁵⁷ Welcome to hell life in crime-ridden Nyanga. Available online at <https://www.news24.com/SouthAfrica/News/welcome-to-hell-life-in-crime-ridden-nyanga-20180916> (accessed 18 September 2018).

3.5 Establishing interventions

Law-enforcement based techniques have primarily been used as gang intervention strategies. Not only have the strategies showed limited application, it also failed to “eliminate” criminal gangs.¹⁵⁸ Given the basis on which gangs are formed on the Cape Flats, it would be essential to shift the focus to meeting the socioeconomic needs of children as opposed to solely looking to eradicate gang-related crimes.¹⁵⁹ In order to understand exactly what needs are required to be met, young people in disadvantaged communities should be consulted, and given the opportunity to actively contribute to the development and implementation of strategies that are aimed at them and having their needs met.¹⁶⁰

The Constitutional rights guaranteed to children must be restored. The rights to a safe environment, a usable education and human dignity should not just be adorned on paper, but are an inherent requirement for the development of children.¹⁶¹ The development and implementation of socially focussed programmes should consider the specific needs and surroundings of children, and in the process reduce and ultimately eliminate their vulnerability and disadvantage. These programmes and policy responses to poverty are particularly important, in that the “best interests of the child” are first to be considered.¹⁶²

Programmes acting as interventions that seeks to meet the needs of children and young people do still exists. The New World Foundation of the Lavender Hill offers after school activities during the week and over weekend with the purpose of keeping children off the

¹⁵⁸ MacMaster (2007) 281-2.

¹⁵⁹ Interventions are thus needed at all levels of society to effectively undercut the root causes of crime and violence. Available at <https://www.salga.org.za/Documents/Knowledge%20Hub/Gazettes/SaferSpaces-Gazette-2016.pdf> page 3 (accessed 20 September 2018).

¹⁶⁰ Developing an active citizenry for sustainable safety is therefore underpinned by the co-creation of solutions from the ground up, with a particular focus on ensuring the inclusion of marginalised communities. Community Safety Forums (CSFs) are expected to play a leading role in this regard; creating a platform for dynamic and permanent processes for discussion and engagement that supports the co-production of ideas and solutions. Oversight mechanisms will coordinate, monitor, evaluate and report on the implementation of crime prevention priorities across the three spheres of government. Available at <https://www.salga.org.za/Documents/Knowledge%20Hub/Gazettes/SaferSpaces-Gazette-2016.pdf> page 3 (accessed 20 September 2018).

¹⁶¹ Kanengoni (2016) 38-44.

¹⁶² South African Child Gauge. Part 2: Children and Inequality: Closing the Gap. http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Child_Gauge/South_African_Child_Gauge_2012/children_equality_rights.pdf page 30 (accessed on 17 September 2018).

street with dance lessons, computer training opportunities and sporting activities.¹⁶³ While the efforts are admirable, it does not promise to fulfill the socioeconomic needs of children in the area. This is a duty which has been placed in the hands of the State.

This then begs the question: what has the State done to promote its legislated mandate in relation to the socioeconomic rights of children?

The National Planning Commission (NPC) was established in 2010 to advise Cabinet and guide government's long-term strategic vision for South Africa – which was then outlined in the National Development Plan (NDP). The NPC recognises children as a source of inspiration, energy and resourcefulness, and their right to participate in all decisions affecting their lives. The first two workshops with children were conducted in March 2017 in the Western Cape. Children from the community of Groendal – a community housing mostly seasonal farm workers – were concerned about child abuse, housing, sanitation, education, drugs and pollution. They would like to see a future with better access to quality social services. At the second workshop, the youth in the Groot Drakenstein Correctional Centre were concerned about crime, making rights real, household poverty, housing, water, drugs, gangsters, leadership, unemployment, abortion, the costs of university and election promises. They encouraged commissioners to dream of a gang-free South Africa.¹⁶⁴

UN member States adopted a new global development agenda, establishing 17 Sustainable Development Goals (SDGs) to be fulfilled by 2030.¹⁶⁵ These SDGs foresee a significant reduction in inequality.¹⁶⁶ The 2030 Global Agenda recognises children as vulnerable group across all societies. The approach adopted is predominantly mainstreamed, notwithstanding the fact that children often require special measures in order to facilitate their full participation in society,¹⁶⁷ as guaranteed by their right to be heard and

¹⁶³ New World Foundation is a non-governmental organisation (NGO). The organisation was founded in 1980 and works in Lavender Hill and surrounding communities near Cape Town. See <http://newworldfoundation.org.za/> (accessed 24 August 2018).

¹⁶⁴ Harrison D 'Investing in children: The drivers of national transformation in South Africa' in South African Child Gauge 2017, Children's Institute p47.

¹⁶⁵ United Nations General Assembly 2015. Transforming our World: The 2030 Agenda for Sustainable Development 21 October 2015 A/RES/70/1. New York: UN.

¹⁶⁶ United Nations General Assembly 2015 Goal 1.

¹⁶⁷ United Nations Economic and Social Council 2016. Mainstreaming Disability in the Implementation of the 2030 Agenda for Sustainable Development E/CN.5/2017/4 22 November 2016. Commission for Social Development, 55th session, 1 – 10 February 2017.

give their views in the CRC.¹⁶⁸ The SDGs further require State Parties to safeguard early childhood development, care and pre-primary education. This is measured by the percentage of children under the age of five who are developmentally on track in terms of their health and psychosocial well-being.¹⁶⁹

3.6 Obstacles identified in fulfilling socioeconomic rights

When considering the challenges associated with fulfilling socioeconomic rights, the first challenge is associated with the 'separation of powers'. The courts have been assigned a pivotal role in effectively protecting and translating socioeconomic rights into material entitlements within the framework of constitutional democracy. Socioeconomic rights are therefore enforceable within the extensive powers given to the courts, against the backdrop of the Constitutional court having declared socioeconomic rights violations justiciable and worthy of being protected.¹⁷⁰ The simple fact that these rights can be adjudicated upon, provides for the courts to transform socioeconomic rights into actual entitlement. The rights-holders can, through the judicial process, insist upon the fulfilment of these rights.¹⁷¹

3.6.1 The Separation of Powers

The South African government is divided into three separate branches, each allocated its own rights and powers. The judiciary is tasked with the interpretation and enforcement of laws, but is not permitted to take executive decisions, as judges are trained in the application of legal principles and not to assess complex questions on social policy.¹⁷² The decision-making competencies are debatable.¹⁷³ The strict nature of the division of powers has resulted in the inefficient application of laws. While empowered to ensure that laws are enforced, the judiciary cannot take over the role of the executive and command it to change policies.

¹⁶⁸ Article 12(2) of the CRC.

¹⁶⁹ United Nations General Assembly 2015 Goal 4.

¹⁷⁰ *In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 para 78.

¹⁷¹ Pieterse M 'Legislative and executive translation of the right to have access to health care services' (2010) 14 *LDD* 232-236.

¹⁷² *Glenister v The President of the Republic of South Africa and Others* (Centre for Constitutional Rights as amici curiae) 2009 (1) SA 287 (CC) para 30 – 33.

¹⁷³ Ebadolahi 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 *New York University Law Review* 5 1577-1582. Available online <https://ssrn.com/abstract=1312452> (accessed 13 November 2018).

Socioeconomic rights are positive in nature and as such, the government is mandated to do everything in its power to ensure that these rights are fulfilled.¹⁷⁴ However, if the Courts do not get involved in the implementation of a policy, the effect would result in the absence of a guideline on how to go about establishing the right to water, health care or education, for instance. The duty then rests with the Court to provide a threshold for the protection and fulfilment of socioeconomic rights. Limiting the arm of the judiciary creates a problem as to the application of any policy, and especially the enforcement of socioeconomic rights. Legislators and courts are unlikely to acknowledge and develop remedies to respond to poverty as a prohibited ground of discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act includes directives on socioeconomic status as one of the potential grounds of prohibited discrimination under this Act, which are yet to be officially included.¹⁷⁵

A court may still find that socioeconomic status falls within the ambit of grounds on which systematic disadvantage occurs, thereby undermining one's enjoyment of rights.¹⁷⁶ These provisions creates potential to promote effective policy and judicial remedies where children experience various forms and degrees of disadvantage and socioeconomic marginalisation. In *Western Cape Forum for Intellectual Disability v Government of South Africa*,¹⁷⁷ policies excluding children from schooling, based on their severe disabilities, was challenged at provincial and national levels of government. It also challenged insufficient budgetary provisions for the education of severely disabled children. On application of the section 9 test, the court indicated that the policy failed as government did not demonstrate the rationality behind the policy. The court found that the government failed to give reasons for the budgetary shortfall falling exclusively on the shoulders of the most vulnerable group of children, as opposed to being shared by all. To this end, the court turned to the principles established in *Grootboom* and reiterated that the socioeconomic needs of vulnerable groups cannot be disregarded in government policies. Furthermore, the Court also held that the

¹⁷⁴ Currie and De Waal (2013) 567.

¹⁷⁵ See Section 34 of The Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000. (Hereafter the Unfair Discrimination Act).

¹⁷⁶ Section 34(2) read with 1(xxii) (b) of the Unfair Discrimination Act.

¹⁷⁷ *Western Cape Forum for Intellectual Disability v Government of South Africa* (2011) 5 SA 87 (WCC).

right of children with severe or profound intellectual disabilities to a basic education were being infringed upon by the relevant policies.¹⁷⁸

3.7 Conclusion

This chapter explored the debates around the effects of poverty and the survival strategies that have been adopted by the people on the Cape Flats. It demonstrated the interrelationship of many of these causes and ultimately aimed at addressing the generational curse which has impacted the lives of children on the Cape Flats. The chapter considered the views of academics and journalists on their take on the relationship between socioeconomic deprivation and gang involvement.

The limited number of studies discussed in this chapter recommends a guideline for further research in this area. Interventions into gang recruitment and its associated activities are likely to be successful where components of interventions are focused on young children. Actively engaging with children and the provisions of leadership programmes outside of the gang structure may lead to reconciliation and reintegration back into society. The lack of sufficient data prevents concrete conclusions about which interventions are more likely to appeal to children while effectively reducing youth involvement in gangs. A vigorous evaluation of preventative gang programmes need to be conducted by researchers, law enforcement officials and NGOs.

The communities identified in this chapter should be empowered by giving them access to and control over resources. The collection of work focused on school violence raises some essential concerns around what can be achieved in the aspect of education while gang activities clearly has an influence on the schooling of young children. There is certainly a noticeable link between the experience of ongoing violence and the ability of children to learn. An analysis or strategy must be initiated to facilitate the empowerment of the communities by the State. It is evident from this chapter that the communities cannot depend on existing institutions to bridge the gap between poverty and the consequences of socioeconomic deprivation alone. Communities should, at least attempt to control its own development. Some actions are more urgent than others, because of the requisite on the

¹⁷⁸ Ngwena C and Pretorius L 'Substantive equality for disabled learners in State provision of basic education: A commentary on *Western Cape Forum for Intellectual Disability v Government of South Africa*' (2012) 28 SAJHR 1 81-115.

State to deliver, and because the existing conditions faced by children on the Cape Flats, particularly in terms of gangsterism holding hostage a whole generation, without fundamental changes to prevent this through policy simulations or State control. This chapter contributes to a much larger debate, namely the passive nature of State intervention.



CHAPTER FOUR:
THE RELATIONSHIP BETWEEN RESOURCE ALLOCATION AND
THE STATE'S OBLIGATION TOWARDS THE PROGRESSIVE REALISATION OF
SOCIOECONOMIC RIGHTS OF CHILDREN

4.1 Introduction

Key developments have been under the spotlights in terms of socioeconomic rights cases, resulting in positive relief being granted in favour of aggrieved persons. Through these cases, a standard has been developed in order to determine whether government has met its obligations towards the advancement of socioeconomic rights.¹⁷⁹

Influential judgments such as *Grootboom* in relation to housing, and *TAC* in relation to health care, set the precedent confirming the justiciability of these rights, if violated.¹⁸⁰ These cases confirmed the democratic values of human dignity and equality, enshrined in the Constitution are deemed to be denied to those who do not have access to basic essentials. The State is required to demonstrate that it had taken legislative and other measures to fulfill its obligations in the progressive realisation of socioeconomic rights. This progression is further required to be reasonable in concept as well as execution.¹⁸¹ Whether a State effectively performs this function would depend on both the rights being enjoyed as well as how the State's available resources are allocated and utilised.¹⁸²

The ICESCR makes explicit mention of the concept of progressive realisation¹⁸³ and referenced in General Comment 5 of the CRC.¹⁸⁴ The ACRWC is silent on this concept. Essentially, progressive realisation adequately represents certain rights cannot be realised

¹⁷⁹ Brand D 'What are socioeconomic rights for?' in Botha H and Van der Walt AJ *Rights and Democracy in a Transformative Constitution* (2004) 33.

¹⁸⁰ Stewart L 'Adjudicating socioeconomic rights under a transformative constitution' (2009) 28 *Penn State International Law Review* 3 489-496.

¹⁸¹ It is crucial to appreciate that economic and social rights are not absolute, but are qualified rights. The reason they are considered to be programmatic rights is because they were never designed to be achieved immediately in general. Their fulfilment generally depends on the country's available resources. See *TAC* para 23 and para 38.

¹⁸² Chenwi L 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46 *De Jure Law Journal* 3 472-4.

¹⁸³ Article 2 of the ICESCR.

¹⁸⁴ Article 4 reflects a realistic acceptance that lack of resources – financial and other resources – can hamper the full implementation of economic, social and cultural rights in some States; this introduces the concept of 'progressive realisation' of such rights: States need to be able to demonstrate that they have implemented 'to the maximum extent of their available resources' and, where necessary, have sought international cooperation.

overnight. There is an expectancy on the State to effectively communicate its plans of implementation as well as the constraints it faces, to those affected by these constraints.¹⁸⁵ The Maastricht Guidelines on Violations of Economic Social and Cultural Rights provide that, notwithstanding resource scarcity or availability within the country in question, the minimum core obligations will still be applicable to it.¹⁸⁶ The minimum core obligations also suggest that detailed information about vulnerable and disadvantaged be made available.¹⁸⁷

The objective behind progressive realisation is that it requires that measures be put in place for vulnerable groups of people.¹⁸⁸ In *Grootboom*, the Constitutional Court confirmed that even though the adopted measures seem successful, if it does not ensure the progressive realisation of the most desperate within society, then they cannot pass constitutional muster.¹⁸⁹ State Parties are required to go beyond merely abstaining from taking steps to prevent a negative impact on the enjoyment of rights. States must also take steps to promote, protect and fulfill them.¹⁹⁰ This positive obligation forces the State to take action to reduce inequality by giving the necessary preferential treatment to vulnerable groups, which may include personalised measures or additional resource allocation.¹⁹¹ The ICESCR's definition of the concept¹⁹² indicates that progressive realisation introduces some flexibility around the obligations of States and also in the implementation of socioeconomic rights. The full realisation of socioeconomic rights would not generally be attained in a short period of time, hence¹⁹³ the obligation on States "to move as expeditiously and effectively as possible" towards full realisation of the right of access to education, for example.¹⁹⁴ The African Charter does not explicitly refer to progressive realisation, however, it is widely accepted in the interpretation of economic, social and cultural rights and has been implied

¹⁸⁵ Liebenberg S 'The Value of Human Dignity in Interpreting Socioeconomic Rights' (2005) 21 *SAJHR* 112-19.

¹⁸⁶ It must be noted that the concept of "minimum core obligations" was refuted by the Court in the *Grootboom* case. See 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 3 691-701.

¹⁸⁷ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing* 1991 para 11 and 13.

¹⁸⁸ National Planning Commission report on 'Transforming the Present – Protecting the Future, Consolidated Report, Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa' March 2002 p55. Available at www.nationalplanningcommission.org.za/Documents/devplan_ch11_0.pdf (accessed 27 March 2018).

¹⁸⁹ *Grootboom* para 43-44.

¹⁹⁰ De Vos (2001) 261.

¹⁹¹ General Comment No 5 *Persons with Disabilities* UN doc E/1995/22 (1994) para 9.

¹⁹² General Comment No 3 *The Nature of States Parties Obligations* UN doc E/1991/23 (1990) para 9.

¹⁹³ General Comment No 9 *UN Committee on Economic, Social and Cultural Rights* doc E/C. 12/1998/24 (1999) para 10.

¹⁹⁴ General Comment No 13 *The Right to Education* UN doc E/C12/ 1999/10 (1999) para 44.

into the Charter in Articles 61 and 62.¹⁹⁵ The role of the courts is to ensure that government implementation strategies are in line with the progressive realisation of these rights.¹⁹⁶

4.2 Statutory obligations versus the availability of resources

In countries where resources are significantly constrained, it is understandable that the circumstances under which socioeconomic rights can be enjoyed, are brought about gradually as opposed to being immediate available. The obligations upon State Parties reflect that adequate resources are critical for the realisation of socioeconomic rights.¹⁹⁷ A State must then prioritise implementation of the rights contained in the ICESCR within its available resource capacity and within a reasonable time.¹⁹⁸ State Parties to the ICESCR are obligated to ensure that no deliberate retrogressive measures are taken in respect of socioeconomic rights.¹⁹⁹

Despite provisions in enabling legislation, government often alleges that it lacks the necessary resources to meet its legislated socioeconomic obligations towards its people.²⁰⁰ The process whereby budget is allocated by government, as a means to meet the needs of its people, is instrumental in planning and evolving government's socioeconomic rights obligations. Socioeconomic rights initiatives must be all-inclusive and co-ordinated, to the rights of all people across society, but it should specifically facilitate the realisation of the socioeconomic right in question. Government's comprehensive implementation plans must be balanced yet flexible and not exclude a significant part of society, and must respond to the urgent needs of those in desperate circumstances.²⁰¹

¹⁹⁵ African Commission on Human and Peoples' Rights *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* para 14. The Principles and Guidelines were formerly launched in 2011. Available at <http://www.saflii.org/za/journals/DEJURE/2013/39.html> (accessed 17 May 2018).

¹⁹⁶ Coomans (2005) 167.

¹⁹⁷ Chenwi (2013) 472-4.

¹⁹⁸ *Grootboom* para 46.

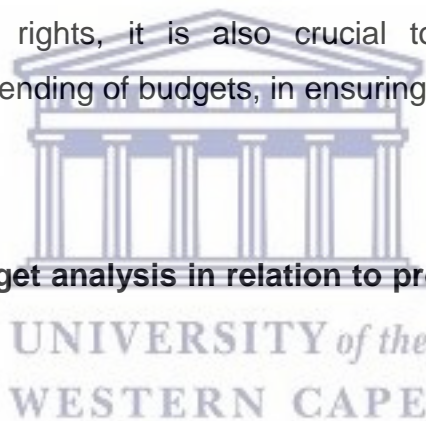
¹⁹⁹ See the right to water at General Comment No 15 E/C. 12/2002/11 published on 20 January 2003. Available at http://www.escrnet.org/rescwces/jinoreAesources_more_show.htm?doc_id=42524ti (accessed 3 April 2018).

²⁰⁰ Roux T 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 1 106-138.

²⁰¹ General Comment No 3 on Article 11 of the ICESCR para 10-12.

The Studies in Poverty and Inequality Institute²⁰² and the SAHRC has indicated that, notwithstanding legislative and other measures to give effect to the realisation of socioeconomic rights, there is still evidently a problem as to how government budget is allocated and expended in this regard. Part of the problem lies in the lack of available and accurate data, which is representative of the groups of people who continue to face discrimination based on socioeconomic status.²⁰³ Such data is particularly necessary for the evaluation of government budgets, specifically around whether the objective to achieve redress and social justice for vulnerable groups, can be established by looking at government budget formulation for this purpose. The absence of sufficient adequate data simply means that government is unable to prioritise these rights against the targets it has set for itself. An assessment of expenditure towards the advancement of these rights is most important for groups most affected by poverty and inequality.²⁰⁴

In addition to striving towards the implementation of laws and policies in the advancement socioeconomic rights, it is also crucial to understand the formation, prioritisation, allocation and spending of budgets, in ensuring that socioeconomic rights are in fact realised.



4.3 An examination into budget analysis in relation to progressive realisation on the Cape Flats

4.3.1 A budget for sanitation on the Cape Flats: Khayelitsha

Extensive budgetary analysis has been conducted by the Social Justice Coalition.²⁰⁵ The SJC was able to identify that the City of Cape Town had allocated R22 million to water and sanitation in informal settlements, relative to the R106 million allocated for a parking garage

²⁰² The Studies in Poverty and Inequality Institute aims to bring “...together policy makers, analysts and implementers from government, academia and civil society formations, as well as international role players / academics / researchers and activists”. See <https://www.spii.org.za/about-spii/> (accessed 25 March 2018).

²⁰³ McLaren D *Within its available resources: Socioeconomic Rights and the National Budget* (2016) 1-8 Policy Brief 2016/01 available at www.spii.org.za/wp-content/uploads/2016/02/SPII-Policy-Brief-2016-1.pdf (accessed 22 March 2018).

²⁰⁴ South African Human Rights Commission ‘Access to Housing, Local Governance and Socioeconomic rights vice Delivery – Investigative Hearing Report’ (2015). Available at www.sahrc.org.za/home/21/files/Access%20to%20Housing%202015.pdf (accessed 28 March 2018).

²⁰⁵ The Social Justice Coalition (hereafter the SJC) was founded on 16 June 2008. The SJC is a membership-based social movement made up of 17 branches across Khayelitsha, Kraaifontein, Crossroads, and Gugulethu in Cape Town. https://www.sjc.org.za/about_us (accessed 19 March 2018).

for the City's Finance Directorate. The SJC was also able to establish an increase in direct capital allocations to informal settlements for water and sanitation between 2007 and 2009, followed by a significant decrease significantly between 2009 and 2011, and then remained the same thereafter. It was further found that one out of three households in Khayelitsha, on the Cape Flats, does not have access to running water, while one out of four households do not have access to a flush toilet.²⁰⁶

The SJC and the City were due to appear before the Equality Court on 5 December 2017. The SJC approached the court with the intention of challenging the standard of sanitation provided in informal settlements, seeking to have the court order the City to address the inferior sanitation problem and draft a reasonable plan to further alleviate the problem.²⁰⁷ The SJC was also able to identify that informal settlements, which form at least 20% of the City's households, were generally allocated disproportionately small capital allocations of the overall budget, emphasising the prejudicial manner in which the City was spending its budget.²⁰⁸

In comparison to the total budget allocation to water and sanitation, the SJC identified a significant increase in allocation to communities with higher incomes as opposed to poorer communities that already have compromised water and sanitation infrastructure., Insufficiently allocated funds for water and sanitation to informal settlements failed to meet the level of adequacy required to argue that the City has used its available resources to progressively realise the right to water and sanitation.

²⁰⁹ This failure by the State was aggravated by the City's preference for providing temporary sanitation facilities to informal settlements as opposed to providing long-term,

²⁰⁶ See <https://www.sjc.org.za/sanitation> (accessed 7 April 2018).

²⁰⁷ The case has since been postponed and a new court date has not yet been set. The postponement is as a result of an amicable agreement between both the SJC and the City of Cape Town. The postponement will allow the SJC to file further papers in light of new information that has been made available during the court processes to date. Available at https://www.sjc.org.za/sanitation_case_postponed (accessed 3 April 2018).

²⁰⁸ Sixty six percent of informal clusters in Cape Town are older than 15 years old; 80% are older than 10 years and less than 4% is less than 5 years old. Available at <https://www.sjc.org.za/sanitation> (accessed 3 April 2018).

²⁰⁹ One hundred thousand people occupying 29 000 homes within informal settlements on the Cape Flats, have no access to any sanitation facilities. Available at <https://www.sjc.org.za/sanitation> (accessed 8 April 2018).

permanent infrastructure,²¹⁰ the former of which that was both expensive and of inferior quality.²¹¹

Despite documented proof of the City's unfair budget allocation to poorer communities in Cape Town, the City continues to dismiss these claims by the SJC. The analysis, however, furnished sufficient evidence to inspire these communities to insist on better access to water and sanitation. These human rights issues have been at the forefront of the City's consideration in the protection and promotion of these rights, particularly in future litigation processes for the security this right. The City must be held to account for its socioeconomic rights obligations.²¹²

The first ever comprehensive global assessment of access to water, sanitation and hygiene in schools – shows that 620 million children do not have decent toilets at school (or 34% of schools). Around 900 million children don't have access to good hygiene services, including the availability of soap, which are absent in nearly half of all schools (47%). The report – Drinking Water, Sanitation and Hygiene in Schools: Global baseline report 2018 – also confirms that 31 percent of schools do not have access to clean drinking water, affecting 570 million children.²¹³ Recent Water Research Commission research outcomes on the State of school sanitation found that failed sanitation is a widespread problem at South Africa's rural schools and violates children's rights to safety, health, and dignity, and those with special needs are inadequately supported. Children's right to education is compromised at schools with failed sanitation as demonstrated by the range of impacts seen on learning in the study School Sanitation Management Handbook.²¹⁴ For example, children miss class waiting for toilets or leave school seeking a place to relieve themselves, girls stay home during their menstrual cycles, illnesses are transferred in filthy toilets, degrading conditions and threatening or humiliating experiences in the toilets compromise children's ability to concentrate and to thrive at school.

²¹⁰ See also <https://www.sjc.org.za/sanitation> (accessed 8 April 2018) where it is recorded that 168 000 people in 48 000 homes in Cape Town still use bucket latrines.

²¹¹ Notywala A *The SJC is Obsessed with Budgets* Budget Analysis for Advancing Socioeconomic Rights 17 November 2016.

²¹² See spii.org.za/wp-content/uploads/2017/05/2016-SPII-SAHRC-Guide-to-Budget-Analysis-for-Socioeconomic-Rights.pdf (accessed 11 April 2018).

²¹³ Drinking Water, Sanitation and Hygiene in schools: Global Baseline Report 2018 available at <https://data.unicef.org/resources/wash-in-schools/> (accessed on 13 August 2018).

²¹⁴ School Sanitation Management Handbook available at <https://www.pid.co.za/component/jdownload/10-school-sanitation/52-school-sanitation-management-handbook.html> (accessed 15 August 2018).

4.3.2 Access to adequate housing on the Cape Flats: Marikana, Philippi

The right to adequate housing is inherently other cross-cutting rights, including the right to equality and human dignity. In *Grootboom*, the Court said that the right “to have access to” adequate housing means more than bricks and mortar.²¹⁵ In essence, these rights and socioeconomic necessities are meant to relieve poverty, reduce inequality and improve the quality of life.²¹⁶

It has been reported that the waiting period on the City’s housing list is roughly 60 years. Director of the Socio Economic Rights Institute, Stuart Wilson, reported that the occupation of vacant land in Philippi, on the Cape Flats, increased significantly since 2012,²¹⁷ as the State was reluctant to engage with the first group of people in order to address their needs. This, he says, was a result of the State’s refusal to plan for poor people.²¹⁸ On August 30th, 2017, the Western Cape High Court delivered an important judgement concerning the Marikana informal settlement in Philippi, in which it found that the City had caused the litigating parties constitutional rights to be violated, and ordered that the provincial government provide funding for the purchase of private properties, essentially allowing the dwellers to occupy the land legally.²¹⁹

The situation at Marikana highlights section 26(1) of the Constitution which, at the very least, implies a negative obligation on the State to abstain from impairing the right of access to adequate housing.²²⁰ The minimum core content of the rights means that the State should prioritise the realisation of the rights for the poorest and most vulnerable children in society, and similarly, it does not remove the duty to progressively realise the rights for all

²¹⁵ *Grootboom* para 35.

²¹⁶ Tissington K *Review of housing policy and development in South Africa since 1994* (2010) 16-7.

²¹⁷ An increase from an initial 20-30 people grew to 60 000 people.

²¹⁸ Maregele B ‘Waiting period on Cape Town’s housing list is 60 years, meeting told’ 3 October 2017 GroundUp. Available at <http://www.news24.com/SouthAfrica/News/waiting-period-on-cape-towns-housing-list-is-60-years-meeting-told-20171003> (accessed 3 October 2017).

²¹⁹ *Fischer v Persons listed on Annexure X to the Notice of Motion and those persons whose identity are unknown to the Applicant and who are unlawfully occupying or attempting to occupy Erf 150 (remaining extent) Philippi, Cape Division, Province of the Western Cape and Others; Stock and Others v Persons unlawfully occupying Erven 145, 152, 156, 418, 3107, Philippi & Portion 0 Farm 597, Cape Rd and Others; Copper Moon Trading 203 (Pty) Ltd v Persons whose identities are to the Applicant unknown and who are unlawfully occupy remainder Erf 149, Philippi, Cape Town and Others* [2017] ZAWCHC 99.

²²⁰ *Grootboom* para 34.

individuals.²²¹ When a State alleges that it has acted within its scope of realising socioeconomic rights, it must show that it allocated and used all available resources, and particularly that it worked towards the realisation of the minimum core content.²²² The most obvious distinction between progressive realisation and minimum core obligation as endorsed by the ICESCR in the interpretation of section 26, for example, would force the State to ensure that everyone had access to at least a basic level of housing.

4.4 Foregoing the essentials: Impacts on the socioeconomic rights of children

Economist Stefan De Vylder illustrates that macroeconomic policies, defined as “embracing the choice of development strategy, fiscal policies, monetary policies, and trade and exchange rate policies”, are of utmost importance for the wellbeing of children.²²³ He States that if economic growth is to be of any benefit to children, it needs to speak to the inclusivity, sustainability and equitability of the economic plan or strategy²²⁴ The State should budget and advocate for specific programmes for children, indicating its priority to children as a vulnerable group. Policy makers should consider creating and dedicating an office with the core responsibility for analysing budgets and making recommendations based on children’s issues and their requirements in terms of dealing with these issues.²²⁵

The question now arises: Have children, a vulnerable group with rights embedded in legislation, been given priority in terms of having their socioeconomic rights met? Certain racial classes of the population segregated by the apartheid regime continue to be divided along class lines.²²⁶ A majority of these people were raised in impoverished circumstances and remain so today.²²⁷ Furthermore, a major setback came about as the State failed to effectively spend and deliver on socioeconomic services for children across all spheres of government.²²⁸

²²¹ Article 4 of the CRC at para 11.

²²² Maastricht Guidelines para 13 and 15(e).

²²³ De Vylder S *Macroeconomic Policies and Children’s Rights* (2000) 17-43.

²²⁴ De Vylder (2000) 87.

²²⁵ South Africa did this by establishing the Institute for Democracy in South Africa (IDSA) Children’s Budget Unit in 1995. Its aim is to conduct research and training and disseminate information to make government budgets more responsive to child rights. South African Law Reform Commission ‘Juvenile Justice’ Issue Paper No. 9 (1997) SALRC.

²²⁶ Bray R *Missing Links? An examination of contributions made by social surveys to our understanding of child well-being in South Africa CSSR* (2002).

²²⁷ Sherer (2000) 322-323.

²²⁸ McLaren (2016) 1-8.

4.4.1 Inadequate sanitation and health

Sanitation is closely linked to a number of fundamental aspects of human welfare – health, housing, privacy and human dignity. Van der Vyver has stressed the severe impacts on health, safety and psychological well-being that results from a lack of access to decent sanitation that affect black people and particularly, children.²²⁹ Taking into consideration that 40.5% of the population in Khayelitsha falls within the 0-19 year age range, with 99.5% of the population being black,²³⁰ the Statement made by Van der Vyver sadly rings true. The Khayelitsha Transformation Research Project further found that the drinking water often makes people ill²³¹ and that privacy, in relation to sanitation, is a serious problem.²³² As devastating as these obvious human rights inadequacies are, the impacts on health is not the only consequence flowing from inadequate planning by the State.

4.4.2 Inadequate housing and education

Poor socioeconomic conditions has recognised as one of the lead factors in adverse impacts on education. One aspect hereof, the rights of access to adequate housing, and its relationship to literacy achievement in South Africa will be addressed.²³³ Pillay conducted an in-field analysis of the study of this relationship. A collection of data was taken from school-going children in a middle-class socioeconomic status school. The survey was conducted in English, despite the fact that children mostly spoke Sesotho and came from either informal settlements or middle-class homes.²³⁴ The research indicated that socioeconomic factors, and in particular, poor housing provisions, have a negative impact on children's academic success.²³⁵ Researches haven't narrowed down a single reason for this relationship, save to say that poor housing and overcrowding are experienced by people who are poor.²³⁶ The study undertaken has shown that it's highly probable that, in the absence of having a place to complete homework or study, and noisy environments may

²²⁹ Van der Vyver (2006) 47-50.

²³⁰ Khayelitsha Transformation Research Project (2017) p10-11. [Hereafter Khayelitsha Project]. Available online <http://blogs.sun.ac.za/urdr/files/2017/03/Khayelitsha.pdf> (accessed 24 May 2018).

²³¹ Khayelitsha Project 'The water here is dirty. People are often getting sick with cholera' p25.

²³² Khayelitsha Project 'We have to share the toilets. There should be one toilet for each house' p 25.

²³³ Pillay J 'The relationship between housing and children's literacy achievement: Implications for supporting vulnerable children' (2017) 37 *South African Journal of Education* 2 1-6.

²³⁴ Pillay (2017) 2-5.

²³⁵ Bramley G and Karley N 'Homeownership, poverty and educational achievement: School effects as neighbourhood effects' (2007) 22 *Housing Studies* 5 693-700.

²³⁶ Bramley (2007) 693-699.

not be conducive to learning.²³⁷ This results in the poor being socially excluded further impacting their overall school performance²³⁸ To this end, the issue of the cycle of poverty becomes relevant as poor academic performance of vulnerable children often leads to similar housing conditions as adults.²³⁹ Cognitive development demands an educational achievement for which success later in life can be achieved, however the socioeconomic background of children are often a predictor of whether this development will be successful.²⁴⁰ Against this background, children ought to be provided with the necessary socioeconomic tools, such as a safe and decent home as the foundation for a better life.

4.5 Conclusion

In attempting to elaborate comprehensively on the concept of progressive realisation this chapter emphasises three issues. Firstly, there has to be immediate and palpable progress towards the realisation of the rights and although progressive realisation allows the State Party room for flexibility in the enforcement of socioeconomic rights, it does not provide a green light to drag its feet. The principle of progressive realisation cannot be interpreted as implying that States defer efforts to ensure progressive realisation of socioeconomic rights but are instead required to immediately put in place measures aimed at fulfilling their obligations. Within the context of the ICESCR, each State Party has an obligation to take steps towards progressive realisation within a reasonably short time after entry into force of the Covenant for the State in question. Related to the issue of flexibility is that the State is also obligated to take measures that are flexible so as to adapt to its changing circumstances.

Secondly, a State Party cannot purport to take deliberate retrogressive measures. There is an immediate obligation on the State to ensure constant improvement in the realisation of socioeconomic rights and retrogressive measures are not permissible under the Covenant and if taken they have to be justified by reference to the totality of rights. The obligation requires that State Parties take more steps even where people already have access to socioeconomic rights to improve the nature and quality of services to which people have access.

²³⁷ Pillay (2017) 6.

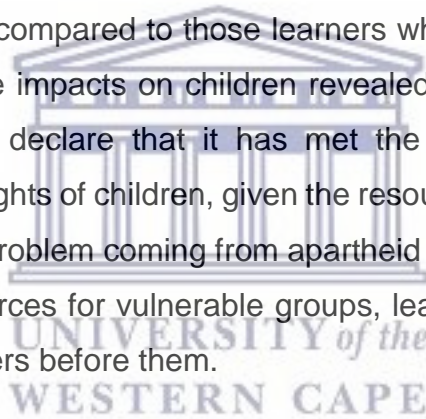
²³⁸ Brynner J *Risk and Outcomes of Social Exclusion*. Available online at <http://www.oecd.org/education/school/1855785.pdf> (accessed 19 May 2018).

²³⁹ Pillay (2017) 6.

²⁴⁰ Brynner (2007) 11-13.

Thirdly, progressive realisation requires that special measures be taken by the State Party in respect of the vulnerable and marginalized or disadvantaged groups in society which measures as was disused in the theoretical framework are underpinned by distributive justice. The State Parties are required to do more than refrain from taking retrogressive measures. It is expected to put in place affirmative action programs to reduce structural inequalities and to give appropriate differential treatment to vulnerable groups.

This chapter concluded with finding that, at least in the case of budgeting for sanitation, and access to adequate housing, within the Cape Flats, the State has failed in its legislated duty to progressively realise the socioeconomic rights of persons living there. This is evident given the number of years since the establishment of informal settlements, as well as the timeframe between then and now. In addition, the findings by Pillay indicate that most learners who live in informal structures generally don't perform as well in the literacy tests administered as compared to those learners who live in conventional houses that are not overcrowded. The impacts on children revealed in this chapter suggests that the State cannot reasonably declare that it has met the requirements of progressive realisation of socioeconomic rights of children, given the resources afforded to it. It is further evident that the generational problem coming from apartheid would perpetuate the problem around the allocation of resources for vulnerable groups, leaving behind children to suffer the same fate of their forefathers before them.



CHAPTER FIVE

MEANINGFUL ENGAGEMENT: A SYNOPSIS OF THE ROLE PLAYERS AND A CRITICAL ANALYSIS OF THE IMPLEMENTATION

5.1 Introduction

The development of the concept of meaningful engagement has effectively seen government draft reasonable policies, seen courts implement it during adjudicating on socioeconomic rights and is also used as a remedy to consider where inadequate engagement was employed. While it has garnered praise as an effective remedy, it has equally been criticised for creating yet another procedure in the adjudication of socioeconomic rights cases. In cases where socioeconomic rights overlap the provisions of administrative law, meaningful engagement may create an opportunity to address any procedural unfairness with a normative substance, rather than watering down on the administrative requirement.

The Constitutional Court has systematically developed the concept of meaningful engagement, and internationally, the issue of meaningful participation is also being advocated for, since it fosters the right to participation. Nationally, our courts have interpreted meaningful engagement to mean a process whereby consultations take place between government, the people within its communities and interested and affected stakeholders during policy planning processes so as to avoid the onslaught of conflicts later on.

The main focus of this chapter is to furnish the meaning and scope of meaningful engagement within the context of case law and judicial interpretations. Through this process, role players will be identified and emerging socioeconomic rights issues will be addressed. The link between administrative justice and the realisation of socioeconomic rights will be recognised and the proper application of this concept, or the lack thereof, will be discussed.

5.2 Understanding the significance of meaningful engagement

5.2.1 Meaning and scope

Meaningful engagement finds its origin in two cases, namely *Port Elizabeth Municipality v Various Occupiers*²⁴¹ and *Occupiers of Olivia Roads v City of Johannesburg*.²⁴² In *Olivia Road*, Yacoob J referred to the judgement in *PE Municipality*, where the requirements of meaningful engagement was considered, and he Stated that, "...Engagement is a two-way process in which the city and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives and that engagement has the potential to contribute towards the resolution of disputes and to increase understanding and sympathetic care if both sides are willing to participate in the process..... It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side".²⁴³

People aspire to participate in the application of fundamental principles that affect their lives, and should not simply rely on the judiciary and representative bodies in determining the content and degree of engagement on their behalf. A calculated model of a democratic society would demand the fulfilment of promises in the reconciliation of participation in resolving disputes and human rights norms.²⁴⁴ This approach invites equal participation of claims for, firstly the recognition and fulfilment of socioeconomic rights and secondly, whether the procedures conducted by institutions are correctly applied to the fulfilment of these rights²⁴⁵

²⁴¹ *Port Elizabeth Municipality v Various Occupiers* 2005 (10) SA 217 (CC) paras 39-43 [Hereafter *PE Municipality*].

²⁴² *Occupiers of Olivia Road v City of Johannesburg & Others* 2008 (3) SA 217 (CC) [Hereafter *Olivia Road*].

²⁴³ *Olivia Road* para 14.

²⁴⁴ Benhabib S (ed) 'Towards a deliberative model of democratic legitimacy' in *Democracy and difference: Contesting the boundaries of the political* (1996) p 69. According to the deliberative model of democracy, it is a necessary condition for attaining legitimacy and rationality with regard to collective decision making processes in a polity, that the institutions of this polity are so arranged that what is considered in the common interest of all results from processes of collective deliberation conducted rationally and fairly among free and equal individuals.

²⁴⁵ Benhabib p78- 79.

5.2.2. An overview of the role players in meaningful engagement

5.2.2.1 The State

Liebenberg has expressed that the courts should start using their remedial powers in socioeconomic rights cases more effectively.²⁴⁶ The point of departure in the submission of meaningful engagement practices by affected stakeholders within the community, is to apply a fitting interpretation for socioeconomic rights, so as to allow for participatory decision making. The process of participatory decision-making is more likely to achieve sustainable and equitable solutions to particular and localised problems, unique to a particular set of circumstances.²⁴⁷

The best interests of the child is of paramount importance when a child is involved and as such, and legislative measure must take cognisance of this requirement. This is a constitutional demand as well as an international standard.²⁴⁸ Justice Sachs, in *S v M*, confirmed that the law should strive to be “child-sensitive.” He went on to State that statutes must be interpreted and the common law developed “in a manner which favours protecting and advancing the interests of children; and the courts must function in a manner which at all times shows due respect for children’s rights”.²⁴⁹ Justice Sachs cited with approval Sloth-Nielsen’s view that the court of law and relevant administrative authorities should be “constitutionally bound to give consideration to the effect their decisions will have on children’s lives”.²⁵⁰

The *Grootboom* case acknowledged that because of the over-extension of the doctrine of the separation of powers and the submissiveness towards the remaining branches of government, the court ultimately failed to provide effective remedies to the affected parties.²⁵¹ What has also been evident, is that a strict reliance on the doctrine of separation of powers does not effectively address the enforcement of socioeconomic rights.²⁵²

²⁴⁶ Liebenberg S ‘Needs, Rights and Transformation: Adjudicating Social Rights’ (2005) 6 *ESR* 4 3-7.

²⁴⁷ Liebenberg (2012) 5.

²⁴⁸ Section 28(2).

²⁴⁹ *S v M* para 15.

²⁵⁰ Sloth-Nielsen J ‘Chicken soup or chainsaws: Some implications of the constitutionalisation of children’s rights in South Africa’ in Keightley R *Children’s Rights* (1996) 6-27.

²⁵¹ Klare K ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *SAJHR* 1 146-188.

²⁵² Liebenberg S *Socioeconomic rights: Adjudicating under a transformative constitution* 1 (2010) 66-68, 146-157.

5.2.2.2 Organisations

Other institutions such as the South African Human Rights Commission have a constitutional mandate to promote, monitor and reporting on human rights,²⁵³ and particularly to monitor any progress made by organs of State in the realisation of the constitutional rights enjoyed by children.²⁵⁴

A shortcoming discovered by the SAHRC, is that the reports received from government departments often don't include the measures taken by the department, nor does it set out the extent of the impact of those measures have had on the lives of any vulnerable group, let alone children.²⁵⁵ In 2012, the SAHRC developed the South African Human Rights Commission Charter of Children's Basic Education Rights. One of the aims of the Charter is to develop indicators for the role-players, which would focus on children specifically, so as to mark the progress made by various institutions as to their socioeconomic obligations it is mandated to fulfil.

The SAHRC can provide government by identifying weaknesses in its existing plans, formulating alternative plans for government and follow up on the implementation of these plans. Whether the formulation of these plans would occur before or after a court order would depend on the extent to which an existing plan has failed, the level of discomfort suffered and the extent to which socioeconomic rights violations have occurred prior to the SAHRC stepping in to assist. The role of the SAHRC will be advisory and supervisory in nature, depending on which issues are brought before the court. The court should be cautioned not to allow the SAHRC to take over the function of the court, but rather allow the SAHRC to make recommendations on the issues before it. The court is ultimately tasked with finding a sustainable and practical solution to the socioeconomic problem at hand. The General Comment on the role of independent human rights commissions issued by the CRC,²⁵⁶ demands that any decision taken by a broad-based human rights institution, should include a specific focus on children.²⁵⁷

²⁵³ These institutions are created in chapter 9 of the Constitution and are regulated by specific statutes such as the Human Rights Commission Act No 54 of 1994. See section 184(3) of the Constitution.

²⁵⁴ Jacob J in *Grootboom* para 88.

²⁵⁵ Murray I and Jansen van Rensburg L 'The Utilisation of the right of Children to Shelter to Alleviate Poverty in South Africa' (2004) 7 *Potchefstroom Electronic Law Journal* 1 1-26.

²⁵⁶ CRC General Comment 7.

²⁵⁷ CRC General Comment 7 para 6.

5.2.2.3 Children

An assessment of the ACRWC²⁵⁸ and the CRC provides for children's right of participation, and promotes the expression of opinions on any matter that affects them. This right of the participation of children is an important process if government is intent on progressively realising the rights of children.

The principle of participation, as envisioned in the CRC, is meant to respect the views of the child.²⁵⁹ The right to participation as provided for in Article 12 of the CRC²⁶⁰ includes three main components: the right to express views, the right to do so freely, and the right to have those views given due weight.²⁶¹ Accompanying this right is the right of access to receive adequate information.²⁶² The deeper meaning of this right of participation creates a new social contract by which children are fully recognised as the holders of rights, which rights they have a voice in and are worthy of being protected²⁶³ The objective behind the legislative provision, is for children or young people to become aware of their right to meaningful participation.²⁶⁴ These tools are designed to raise children's awareness of their right to be involved and consulted when decisions are being made that directly affect them.²⁶⁵

The Committee presented General Comments on this right. Firstly, it has been recommended to State Parties that interactions with children should be sensitive when it concerns the implementation of their participatory rights, for example, in family decision-making processes.²⁶⁶ Secondly, in response to the "due weight criterion", the age and

²⁵⁸ Article 4(2) para 20 of the ACRWC.

²⁵⁹ The principle of participation is anchored in Article 12 of the CRC.

²⁶⁰ See also Flekkøy M 'A Framework for children's participation' in Verhellen E (ed) *Understanding children's rights: Collected papers presented at the fifth international interdisciplinary course on children's rights* (2000) 131. Flekkøy emphasises the fact that art. 12 of the CRC, for example, is the most significant participation article.

²⁶¹ See paragraph 1 of Article 12 of the CRC.

²⁶² Article 13 of the CRC. Article 7 of the ACRWC, on the other hand, simply affords any child capable of communicating his or her views the right to express those views freely.

²⁶³ Forty-third session of the Committee on the Rights of the Child 11-29 September 2006 available at http://www2.ohchr.org/english/bodies/crc/docs/discussion/Final_Recommendations_after_DGD.doc (accessed 28 July 2017).

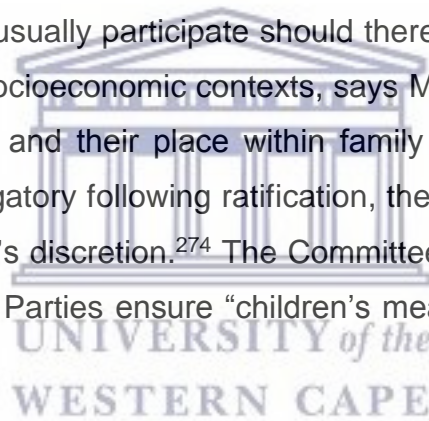
²⁶⁴ Article 12 of the CRC.

²⁶⁵ The Constitutional Court has expressed its interest in hearing children's views in the cases of *Christian Education SA v Minister of Education of the Government of South Africa* 2000 (4) SA 757 (CC) and *Minister for Education v Pillay* 2008 (1) SA 474 (CC).

²⁶⁶ Olowu D 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal for Children's Rights* 2 128-130. See also Committee on the CRC, General Comment No 5 para 12.

maturity of a child alone cannot determine the importance of a child's opinion.²⁶⁷ In fact, it has been established that participating within the family, school and society is key in learning to participate in society as a responsible citizen.²⁶⁸ Third, the Committee has found that, irrespective of age, a child's opinion is a key factor in decision-making processes concerning the child, and it is not enough to simply hear what the child says, but the views of the child must be considered in a serious light.²⁶⁹

Research has shown that children often dream of having a say in issues related to their own protection and well-being²⁷⁰ and that this can have positively affect their well-being and sense of safety and stability.²⁷¹ Rights are realised in particular social contexts. The CRC attempts creating a balancing act between the rights of the child as an individual, the rights of the child within a group of children and their placement and importance within their families. This balance aims to highlight the roles of the family as well as the role of the State to intervene where circumstances prescribe. A critical assessment of the different environments where children usually participate should therefore be considered in relation to national and international socioeconomic contexts, says Moses.²⁷² The CRC recognises children's rights to protection and their place within family and society,²⁷³ and although application of the CRC is obligatory following ratification, the measures used to implement it falls within each State Party's discretion.²⁷⁴ The Committee on the Rights of the Child²⁷⁵ had recommended that State Parties ensure "children's meaningful participation in public



²⁶⁷ Committee on the CRC General Comment No 12 para 29.

²⁶⁸ See United Nations report on 'The State of the world's children: A fair chance for every child' (2016) 41-51 available at http://www.unicef.org/publications/files/UNICEF_SOWC_2016.pdf (accessed 10 May 2018).

²⁶⁹ Committee on the CRC General Comment No 5 para 12.

²⁷⁰ Arild Vis S 'Participation and Health – A Research Review of Child Participation in Planning and Decision-Making' 16 (2011) *Child and Family Social Work* 3 325–35. Available at <http://dx.doi.org/10.1111/j.1365-2206.2010.00743.x> (accessed 17 May 2018).

²⁷¹ Arild Vis (2011) 325-35.

²⁷² Moses S 'Children and Participation in South Africa: An Overview' (2008) 16 *International Journal of Children's Rights* 3 327–42. Available at http://www.unicef.org/adolescence/cypguide/files/Children_and_participation_in_South_Africa_Susan_Moses_2008.pdf (accessed 16 May 2018).

²⁷³ Viviers A and Lombard A 'The Ethics of Children's Participation: Fundamental to Children's Rights Realization in Africa' (2013) 56 *International Social Work* 1 7–21. Available at <http://isw.sagepub.com/content/56/1/7.abstract> (accessed 11 May 2018).

²⁷⁴ Tobin J 'Increasingly seen and heard: the constitutional recognition of children's rights' (2005) 21 *SAJHR* 1 86-126.

²⁷⁵ The United Nations Committee on the Rights of the Child is a body of 18 independent experts that monitor the implementation of the CRC. Available at <http://www.ohchr.org/EN/HRBodies/CRC> (accessed 14 May 2018).

decision-making at all levels by allocating adequate technical, human and financial resources for that purpose”.²⁷⁶

There are several key reasons for making the right to participation the central symbol of the CRC and the ACRWC.²⁷⁷ First, the participation of children conveys the recognition of the child as an active and influential subject and clearly expresses the child’s right to dignity.²⁷⁸ Second, it enables a distinction between children while recognising each child’s specific abilities and needs.²⁷⁹ Third, this right places children’s concerns at the centre of decisions that affect them.²⁸⁰ Fourth, the right to participation is a major sign of the transition toward a conception of rights suited to children and their evolving capacities.²⁸¹ Approaches dealing with children’s rights prior to the CRC had emphasised issues of children’s autonomy, requiring complex discussions of children’s competence for decision making and emphasizing the tension between the best interest of the child principle and the right of children to freedom and autonomy.²⁸² The drafters of both instruments moved away from the authoritarian approach adopted in the preceding children’s rights declarations to a more democratic approach which recognises the right of everyone to participation, especially on matters concerning them.²⁸³

5.3 Consequences of failed meaningful engagement

Notwithstanding the waxing and waning of the obligation to engage meaningfully, the question remains as to whether the concept really adds anything to our jurisprudence.

In the case of *Mamba v Minister of Social Development*,²⁸⁴ the Applicants were foreigners who were victims of xenophobic violence and provided three months housing in a temporary camp. The government portrayed an aggressive attitude and refused to engage

²⁷⁶ Concluding Observations on the Second Periodic Report of South Africa (CRC/C/ZAF/2) 27 October 2016 available at <https://www.refworld.org/docid/587ce86b4.html> (accessed 17 April 2018).

²⁷⁷ Lansdown G *Promoting Children’s Participation in Democratic Decision-making* (2001) 2-33.

²⁷⁸ Lansdown (2001) 7-8

²⁷⁹ Lansdown (2001) 7-8.

²⁸⁰ Lansdown (2001) 12-17.

²⁸¹ Lansdown (2001) 24.

²⁸² Lee S ‘A Child’s voice VS a Parent’s control: Resolving a tension between the Convention on the Rights of the Child and US Law’ (2017) 17 *Columbia Law Review* 3 687-727.

²⁸³ Lansdown G ‘Can you hear me? The right of young children to participate in decisions affecting them’ (2005) 1-37 Working Paper 36.

²⁸⁴ *Mamba and Others v Minister of Social Development (T)* (unreported case no 36573/08) [Hereafter *Mamba*].

meaningfully with the refugees, prior to the closure of refugee camps by the government. Failing to resolve the dispute with meaningful engagement, the applicants then approached the court to interdict the government from dismantling the camps. The court found that the State was not required to provide accommodation.

Ray criticised the Court for not adhering to the engagement process laid down by *Olivia Road* and argued that in *Mamba*.²⁸⁵ The court ordered engagement to determine details of a reintegration plan but did not consider that the outcome would have prevented closure before engagement and created the kind of pressure to change policy.²⁸⁶ What is particularly concerning, is the absence of a legitimate guarantee in the engagement process between communities and authorities. No guarantee exists to vindicate constitutional rights that have been violated before a process of meaningful engagement had been undertaken. The imbalance of power that exists between the State and vulnerable groups already places these groups at a disadvantage.²⁸⁷ Measures to regulate resources and manpower to assist in redressing skewed power may be necessary where difficulties or differences are encountered between State officials and impoverished communities, especially where support is lacking from NGOs or public interest organisations.²⁸⁸

Potential litigants will have to consider the extensive collection of social programmes adopted by the State, as Socioeconomic rights are all interconnected, therefore potential litigants always have to consider the extensive collection of State programmes and other measures adopted before taking the decision to litigate a matter of similar merit that has already been adjudicated on. They will need to establish the resources available to the State to have met its socioeconomic obligations, and argue that the State's failure to meet their socioeconomic needs are unreasonable in light thereof.²⁸⁹ By extending engagement beyond litigation and turning it into an administrative requirement, meaningful engagement has the potential of remedying a socioeconomic rights violation.

²⁸⁵ Ray B 'Proceduralisation's Triumph and Engagement's Promise in Socioeconomic Rights Litigation' (2011) 27 *SAJHR* 107-126.

²⁸⁶ Ray B (2011) 109.

²⁸⁷ Liebenberg (2012) 12-23.

²⁸⁸ Hepple B 'Negotiating social change in the shadow of the law' (2012) 129 *SALJ* 2 248- 273

²⁸⁹ Liebenberg S 'South Africa's evolving jurisprudence on socioeconomic rights: An effective tool in challenging poverty?' (2002) 6 *LDD* 2 159-189.

5.4A critical analysis of the implementation of meaningful engagement in the realisation of the socioeconomic rights of children

Provincial and National governments should be encouraged to engage more frequently with children, to improve outcomes for them by taking their opinions into account, before final policy decisions are taken. This strategy will enable participation at more crucial times but while we have a paper commitment to engaging with children, there are inconsistent practices across South Africa and the evidence base of actual engagement with children is poor across the nation.²⁹⁰ Two significant issues which have been raised are the need to listen to the views of children in families where there is a history of generational poverty²⁹¹ and the views of children with socioeconomic shortages.²⁹²

The court can order the other branches of government to develop programmes which can bring about the desired changes. As a precursor to establishing an institutional framework for the promotion of socioeconomic rights through effective meaningful engagement, the State should take effective measures to increase awareness of socioeconomic rights. Through this, the State has the opportunity for specific action by the South African role-players on establishing ICESCR rights as justiciable human rights.

5.5 Conclusion

A substantial framework has been developed over time for effective meaningful engagement in litigation. Upon examination of the aforementioned cases, it is evident that for meaningful engagement to be successful, it should preferably commence before litigation, with the full participation of relevant parties, in the process. The chapter further looked at addressing effective remedies in socioeconomic rights issues in helping the most vulnerable people in society. The SAHRC was used as an example of the role an implementing agent will play in its duty to assist the State in its mandated obligations.

Regarding children's right to participation, the conditions and requirements discussed are merely basic aspects which are required for children to best enjoy this right. A combination of both the requirements and conditions discussed in this chapter will ensure that a child is meaningfully engaged with in the decision-making process of a matter which

²⁹⁰ Hepple (2012) 248-273.

²⁹¹ Viviers (2013) 7-21.

²⁹² National Review of Services for Disabled Young People (2011) available at <http://dera.ioe.ac.uk/2190/1/0114135.pdf> (accessed 27 May 2017).

them. The protection of this right does not come without its own set of challenges. The socioeconomic background of a family, together with cultural, traditional, gender and age based discrimination, could negatively impact the exercise of this right. Meaningful engagement is of core significance in promoting active participation and gives content to a child's right to participation.

The chapter concludes with the critique against the implementation of meaningful engagement. It essentially indicates that the State, at all levels, needs to engage more effectively with other stakeholders and address the issues underlying socioeconomic hardships among children. Cases such as *PE Municipality* and *Olivia Road* have emphasised the importance of procedural fairness and the need for parties to seek dialogic solutions to eviction conflicts through mediation or meaningful engagement. The State is encouraged to take a participatory role in ensuring compliance with International instruments and thereby supplement its domestic instruments in meeting its socioeconomic obligations towards children.

The General Comments discussed in this chapter is indicative of the State's responsibility in ensuring that meaningful engagement is an ongoing exercise. This is not to say that the South African government hasn't acted within its mandate, however, it leaves a lot to be desired that the most vulnerable groups are left at the mercy of the courts during litigious procedures, owing partly to the fact that the relationship between the realisation of socioeconomic rights and administrative justice has not been efficiently addressed.

CHAPTER 6

CHAPTER 9 INSTITUTIONS: ROLES AND CHALLENGES IN PROMOTING SOCIOECONOMIC RIGHTS

6.1 Introduction

The Constitution has founded several institutions aimed at ensuring the promotion and exercise of rights, including the South African Human Rights Commission.²⁹³ These institutions, referred to as Chapter 9 institutions²⁹⁴ were mandated with powers to strengthen constitutional democracy through various avenues. They are independent bodies, subject only to the Constitution and the law. They are required to be unbiased in the exercise of their duties and performance of their functions.²⁹⁵ These institutions must report on their activities and the performance of their functions to the National Assembly on annual basis.²⁹⁶ The Committee has emphasised the crucial role these human rights organisations play in, not just promoting socioeconomic rights but also ensuring the indivisibility and interdependence of human rights. It is therefore important that these institutions give their full attention to socioeconomic rights activities.²⁹⁷

The SAHRC has both general and special mandate, to monitor and assess the realisation of all human rights,²⁹⁸ and socioeconomic rights, respectively. This special role is essential to redress South Africa's history of racially based socioeconomic disadvantages.²⁹⁹ What this requires of the SAHRC, is to collate information from relevant organs of State each year, outlining the measures it has taken towards the realisation of the

²⁹³ Newman D 'Institutional monitoring of social and economic rights: a South African case study and a new research agenda' (2003) 19 *SAJHR* 2 189-216.

²⁹⁴ By virtue of the fact that they are contained in Chapter 9 of the Constitution.

²⁹⁵ S 181(2) of the Constitution.

²⁹⁶ S 181(5) of the Constitution.

²⁹⁷ General Comment No 10 of 1998.

²⁹⁸ S 184(1) (c) of the Constitution.

²⁹⁹ 'Research brief on race and equality in South Africa 2013-2017' 6-22. Available at <https://www.sahrc.org.za/home/21/files/RESEARCH%20BRIEF%20ON%20RACE%20AND%20EQUALITY%20IN%20SOUTH%20AFRICA%202013%20TO%202017.pdf> (accessed 27 October 2018).

rights in the Bill of Rights concerning housing,³⁰⁰ health care,³⁰¹ food,³⁰² water,³⁰³ social security,³⁰⁴ education³⁰⁵ and the environment.³⁰⁶

This special mandate merely requires of the SAHRC to request the organs of State to provide information and use this information in order to monitor and assess the realisation of the rights in question, as required by the general mandate. This chapter will identify an organ of State in terms of the constitutional mandate to provide information as well as consider the challenges faced by Chapter 9 institutions, and what it can adjust to facilitate its role in the realisation of socioeconomic rights.

6.2 The nature and content of the constitutional obligation on Chapter 9 Institutions

The Constitution makes provision for supplementary powers and functions of the SAHRC to be prescribed by national legislation³⁰⁷ through the Human Rights Commission Act, as amended.³⁰⁸ The SAHRC addresses this purpose by means of its Economic and Social Rights Reports. In these reports the SAHRC monitors the implementation of legislation and policy adopted, records the State's available resources, considers the budget allocated in the realisation of socioeconomic rights and views this against the actual results of the measures.³⁰⁹

There are some notable differences among the empowering provisions of the various institutions.³¹⁰ In section 190(1) (a) and (b) of the Constitution, the Electoral Commission

³⁰⁰ Entrenched in s 26 and 28(1) (c).

³⁰¹ Entrenched in s 27(1) (a) and 28(1) (c).

³⁰² Entrenched in s 27(1)(b) and 28(1)(c)

³⁰³ Entrenched in s 27(1) (b).

³⁰⁴ Entrenched in s 27(1) (c) and 28(1) (c).

³⁰⁵ Entrenched in s 29.

³⁰⁶ Entrenched in s 24. The special mandate is laid down by s 184(3).

³⁰⁷ Section 184 (4) of the Constitution.

³⁰⁸ Act No 54 of 1994, as repealed by the South African Human Rights Commission Act No 40 of 2013 [hereafter referred to as the SAHRCA] provides for the composition, powers and functions of the SAHRC. Certain amendments to the 1994 Act were suggested by the Commission in order to bring it in line with the Constitution and subsequent legislation. It was decided that a new Act was a better option than an extensive amendment Bill. SAHRCA.

³⁰⁹ Ramkissoon Y 'The importance of realising economic and social rights in alleviating poverty and ensuring transformation - reflections on the functions of South African Human Rights Commission' (2016) 17 *ESR* 1 3-7. Available at <https://journals.co.za/content/journal/10520/EJC-c2843e1cd> (accessed 17 May 2018)

³¹⁰ The one similarity is in the provisions making clear that each institution 'has the additional powers and functions prescribed by national legislation.' See sections 182(2), 184(4), 185(4), 187(3), 188(4), and 190(2) of the Constitution. This section and national legislation granting such powers and functions should arguably be read in conjunction with section 181(3).

'must manage elections . . . in accordance with national legislation' and 'must . . . ensure that those elections are free and fair'.³¹¹ The Auditor-General must audit and report on the accounts of 'all' departments and 'all' municipalities but the coverage of other institutions is to be 'required by national or provincial legislation' in terms of section 188(1). The SAHRC and the Commission for Gender Equality have 'the power[s], as regulated by national legislation, necessary to perform [their] functions'.³¹² The Commission for the Promotion of and the Protection of the Rights of Cultural, Religious and Linguistic Communities has diminished powers, enjoying only 'the power, as regulated by national legislation, necessary to achieve its primary objects'.³¹³ The provisions relating to the Public Protector do not have an initial objects or duties clause and provides simply that the Protector has the power, as regulated by national legislation, to engage in three specifically listed functions.

While it is thus broadly correct to regard the establishment legislation as implementing the constitutional provisions with respect to each of the institutions of Chapter 9, the powers and the functions of the SAHRC and the other institutions are not necessarily congruent with those of their establishment legislation. In some cases, that legislation may fail to recognize the full extent of the institution's constitutional authority.

Historically, The SAHRC has a history of analysing the information collected from government departments and developing an annual socioeconomic rights report the section 184 (3) report. All relevant organs of State must afford the SAHRC the assistance reasonably required for the effective and efficient execution of its duties.³¹⁴ In satisfying its mandate of monitoring socioeconomic rights, the SAHRC is faced with a number of challenges. Amongst the challenges facing the SAHRC, is the task of determining which organs of State are relevant for the purposes of the said section.

6.3 Section 184 (3) of the Constitution: An interpretation of the relevant Organs of State

Section 184(3) of the Constitution expressly provides that the Human Rights Commission must each year require "relevant organs of State" to provide the Commission with

³¹¹ There is no reference to national legislation in section 190(1) (b) of the Constitution, while there is in paras (a) and (c).

³¹² See sections 184(2) and 187(2) of the Constitution.

³¹³ Section 185(2) of the Constitution.

³¹⁴ Section 181(3) read with section 165(4) of the Constitution.

information on the measures that they have taken towards the realisation of the rights in the Bill of Rights.

Section 239 of the Constitution defines an organ of State as follows:

"Unless the context indicates otherwise - 'Organ of State' means: (a) Any department of State or administration in the national, provincial or local sphere of government; or (b) Any other functionary or institution - (i) Exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) Exercising a public power or performing a public function in terms of any legislation but does not include a court or judicial officer."

National government is empowered to pass legislation, including matters falling within the ambit of Schedules 4 and 5 of the Constitution.³¹⁵ Reference to any matter in the section includes all of the socioeconomic rights referred to in the Constitution. Provincial government is empowered to attend to functional areas listed in Schedules 4 and 5, as well as functional areas excluded from this listing but which is assigned to it by provincial legislation.³¹⁶ The provincial executive is at the helm of the provincial administration, and is accordingly a relevant organ of State in terms of section 239(a). Local government plays a substantial role in the realisation of socioeconomic rights. This role is strengthened by reference to certain enabling provisions make reference to the role of local government in implementing each of these rights.³¹⁷ It is evident from other prescripts that local government has a vital role to play in the realisation of the socioeconomic rights listed in section 184(3) and is accordingly a relevant organ of State.

Chapter 9 institutions do not have a specific mandate to realise or implement socioeconomic rights as opposed to the three tiers of government. Their functions primarily of an oversight function in promoting respect for human rights, and making recommendations so as to convert the socioeconomic rights in the constitution into practice.

³¹⁵ Section 44 (1) (a) (ii) Constitution.

³¹⁶ Section 104(1) (b) of the Constitution.

³¹⁷ Section 153 of the Constitution obliges local government to give priority to the basic needs of the community.

6.4 Challenges facing Chapter 9 Institutions

The development of protocols designed to provide the SAHRC with information on policy, legislative, budgetary and other measures adopted by an organ of State, relates to each of the socioeconomic rights being investigated.³¹⁸ The protocols were designed following the landmark Constitutional Court ruling in the *Grootboom* case. Both *Grootboom* and *TAC* have supported the view that a violation of socioeconomic rights by the State would depend on whether it has acted unreasonably or whether the policies it implemented was unreasonable.³¹⁹ These protocols aim to encourage State departments to set goals against which performance can be measured.³²⁰ One of the challenges Chapter 9 institutions face comes from the oversight function across three spheres of government in monitoring human rights violations.³²¹ In the *Grootboom* case the Constitutional Court called upon the SAHRC to monitor the State's compliance with its decision.³²² The report prepared by the SAHRC was lacking in substance did not examine the court's broader order for the State to develop a rational housing policy.³²³ Instead, it merely focused on the order directed to the particular affected community. In this case, the monitoring failed as it will be difficult to notice the implementation of human rights on such a low scale.

As a Chapter 9 institution, the Public Protector may be instrumental in enforcing the realisation of socioeconomic rights, when it is used as a mechanism of political accountability. The Public Protector is not a passive adjudicator between citizens and the State,³²⁴ but is mandated to strengthen democracy by ensuring that all state organs are accountable, fair and responsive in the way they treat all persons and deliver services. In its 2013/2014 report, the Public Protector reportedly received complaints regarding allegations of maladministration of defective RDP housing in Mpumalanga. The complaints were investigated and a visit to the affected communities was conducted. Subsequently, the Provincial Department of Human Settlement was instructed to address the issue of repairing 401 houses. A memorandum of understanding was entered into between the Public

³¹⁸ They also include questions on vulnerable groups, problems encountered by the departments, measures taken to address these problems, indicators of progress and budgetary measures. See <http://www.communitylawcentre.org.za/> (accessed 31 October 2018).

³¹⁹ Newman (2003) 189-216.

³²⁰ Ramkissoon (2016) 3-7.

³²¹ Newman (2003) 189-216.

³²² *Grootboom* para 97.

³²³ Pillay K 'Implementing Grootboom: supervision needed' (2002) 3 *ESR* 1 13-14.

³²⁴ *The Public Protector v Mail & Guardian Ltd* 2011 4 SA 420 (SCA) para 9.

Protector and the Department and the timeframe for implementation was put in place and monitored by the Public Protector.³²⁵

Another challenge faced by Chapter 9 institutions involves the ignorance of society. People lack the knowledge necessary to ascertain when to approach these institutions with either complaints or suggestions. It has been discovered that human rights violations often goes undetected by the Public Protector and subsequently seldom gets reported as members of society, firstly do not understand the role of the Public Protector.³²⁶ Furthermore, those who are aware of the function of the Office of the Public Protector, and their right to report violations and corruption, do not lodge complaints or avoid the role of whistle-blowers for fear of victimisation.³²⁷ The SAHRC has had a tough time engaging with society in order to get them to participate in the collection of information which are needed for the preparation of its report.³²⁸ Subsequently, there is a lack of society's input into making recommendations and advocating for change from the ground upwards.³²⁹

6.5 Conclusion

The SAHRC, plays a pivotal role in the monitoring and assessment of the realisation of socioeconomic rights in South Africa. The reports of the SAHRC serve as the primary measure in the fulfilment of its constitutional obligations, despite various shortfalls which can be levelled against both the reporting procedures and the contents of the reports. This far, the outcome has been relatively successful in the evaluation of government's activities relating to this mandate.

Chapter 9 institutions are concerned with delivering on its human rights mandate but are too fragmented to achieve the outcome for which is was initially established. These institutions are explicitly obligated to oversee State activities from a human rights aspect, and lack the decision-making mandate like the judiciary or other branches of the

³²⁵ Mbiada CJ 'The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa' (2017) 20 *Potchefstroom Electronic Law Journal* 1 6. Available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812017000100031 (Accessed on 5 August 2019).

³²⁶ Adetiba O *The challenges of curbing corruption in a democracy: The case of the Public Protector and Nkandla* (Published. Stellenbosch University. 2016) 30-46.

³²⁷ Adetiba (2016) 53-4.

³²⁸ Adetiba (2016) 76.

³²⁹ Liebenberg (2005) 12-19.

government. To accelerate service delivery, this study puts forward a recommendation that similar institutions consolidate their efforts and resources and effectively use them as to achieve compliance.

The effect of the *Grootboom* judgement, is that the State has no clear guidelines about what constitutes a socioeconomic right or about what the court will accept as their minimum realisation. This would not be the case, for example, had the court found in favour of a minimum core of rights. Instead, socioeconomic rights must be established case by case. This being the case, it is particularly important that South African citizens, especially the most vulnerable and the poor, have access to instruments and mechanisms through which they can exercise, or at least establish, their rights. This is especially pertinent for Chapter 9 institutions given that such rights are, ultimately, at the heart of many of the issues brought before them.



CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

7.1 Introduction

This concluding chapter presents an analysis of the study and recommendations established from the research findings. Recommendations are provided based on the findings and conclusions for the promotion of socioeconomic rights realisation through engagement with relevant stakeholders. The recommendations are targeted at organs of State with the mandate to realise socioeconomic rights, as well as other relevant stakeholders identified throughout the study.

7.2 Analysis of legislation versus implementation, and the implication of case law

One is begged to question whether the ratification of international instruments and the proclamation of domestic laws have been side-lined insofar as the promotion of socioeconomic rights of children on the Cape Flats are concerned. Children are surrounded by families and communities which fall short of having the basic needs for survival. Against this background, it is understandable why specific measures supporting communities and families to care for children adequately are indispensable, as required by the CRC and the ACRWC. The statutory measures envisaged legislation creating and empowering structures and institutions, as well as developing processes for the implementation of socioeconomic rights.

The promotion, fulfilment and equal enjoyment of all rights requires law and policy to adapt measures which would better suit the needs of different groups of vulnerable children. The checks and balances of these factors need to be reconsidered in light of what this chapter has aimed to establish. Socioeconomic rights jurisprudence is at the fore of an expanding literature that both engages between debates over democratic legitimacy as well as the court's with the long-standing debate over democratic legitimacy and courts' ability to push for the impositions of socioeconomic rights so as to address human rights issues. The courts should further move beyond this and address more complex challenges in seeking effective judicially enforced mechanisms.

The constitutional court in South Africa has ruled that all rights are justiciable, including socioeconomic rights. To that end, the court has committed to preparing an examination into the State's role in respecting, protecting, promoting and fulfilling its

obligations. The courts will not go so far as to involve itself in the drafting of laws or other legislature-related duties, but it does possess the power to intervene in the event that a law or policy fails the constitutional standard of rationality and reasonableness.

To this end, the study considers whether enabling provisions have been drafted to such an extent so as to allow this to transpire. The study indicated that, although legislation provides for the realisation of socioeconomic rights of children, very little has been done to ensure that the mandate of the State has passed. On the whole, it would be naive to assume that the actions taken by the State, based on the obligations imposed by the Bill of Rights, will pass constitutional muster.

7.3 An analysis of the Cape Flats: socioeconomic needs versus available resources

Places such as Khayelitsha, Nyanga, Philippi has come under the spotlight as areas which seriously lack socioeconomic implantation plans and facilities. Recent case studies contained in this study have looked at housing, sanitation and education on the Cape Flats and has shown an absence of the outcome of the constitutional intention behind the rights contained in the broader Bill of Rights. Where sections 26(2) and 27(2) of the Constitution require that the State take 'reasonable legislative ... measures to realise the right to have access to adequate housing and the rights to have access to health care services, food, water and social security and assistance, respectively, this study has shown that this is not the case on the Cape Flats.

In addition, the study has also proven that a lack of socioeconomic rights implementation tools has been in the forefront of generational poverty, subsequently leading to children being drawn into gangsterism as a means of escaping the cycle of poverty, but also to give them a chance at providing for their families, where the State has failed them. One also has to consider to which extent the State has failed to respect, promote, protect and fulfill these rights and the ensuing consequence of a booming rate of gangsterism as a means of survival. It is widely accepted that much of the current socioeconomic situation is a product of discriminatory practices of apartheid. However, children are still at a disadvantage if they do not have access to shelter or health care, despite implementation strategies and legislated measures to ensure that the rights are not being violated. Why is this, and how do we fix it?

Evidently, more needs to be done in order to “zoom in” on the disadvantaged groups of Cape Town; those who had gotten the short end of the stick during the Apartheid era. In looking at poverty alleviation methods, it is not sufficient to target the poor, but rather to address fundamental causes of poverty and work to deal with those issues directly.

7.4 The role players’ shortcomings in meaningful engagement

It is submitted that for meaningful engagement to work between parties, it must work hand-in-hand with one another in good faith to solve the issues between them and not against each other in a power struggle.

Moreover, precedent has been set in the jurisdiction of meaningful engagement and academics have indicated that this process has been erroneously applied, in that parties to litigation have been ordered by the courts to engage after litigious processes have commenced. Academics have suggested that it would make more sense to facilitate a process of ongoing engagement in the face of issues which require this to be done. This, in essence, would necessitate organs of State to consider available resources to ensure the promotion of socioeconomic rights, while simultaneously addressing the concerns faced by so many. It would further impose an active obligation on the State to action any remedies, where violations of socioeconomic rights are evident, which will accomplish its mandate in relation to the realisation of socioeconomic rights. Socioeconomic rights litigation and the decisions of courts in socioeconomic rights cases can operate as tools by, or on behalf of, vulnerable groups, to be used strategically within that struggle.

This study has demonstrated that parties to socioeconomic cases have not engaged meaningfully, or where meaningful engagement had been conducted, it was not undertaken by persons relevant to the issues at hand. In essence, meaningful engagement has failed for the purpose of this study.

7.5 Conclusion and recommendations

Judicial processes are important in the enforcement of rights but they are seldom adequate for that purpose. Vulnerable groups are less likely to use the courts in an effort to address socioeconomic rights violations. Older generations of black and coloured people become accustomed to their circumstances and their children, more often than not, fall into this cycle. Financial constraints and ignorance of the law are often the reasons vulnerable groups of people choose not to approach the courts for redress of socioeconomic issues.

The SAHRC's reports provides a mechanism to address these issues. The reports holds organs of State accountable to the SAHRC, by requesting annual reports on socioeconomic issues, measures adopted to address those issues and the result of the implementation of these measures. The SAHRC also plays an overseeing and monitoring role in ensuring transparency and accountability of government departments in relation to its efficient use of available resources. The study showed that, not only is it cumbersome to identify the relevant organs of State in terms of section 183(4) of the Constitution, but that these organs of State often fall short of its mandate, for several reasons. Regardless, these organs of State must assume primary responsibility for the

There is a strong need to raise awareness and educate people on the role and value of accessing Chapter 9 institutions. Chapter 9 institutions need to be proactive in creating public awareness of their existence. This can be done in a number of ways, including regular press briefings, television appearances and public meetings, thereby creating a platform for meaningful engagement. Those with limited institutional reach or insufficient capacity can compensate for this by using community based programmes to reach out to as wide an audience as possible.

This study is suggestive of what should be done to ensure the promotion of socioeconomic rights of children on the Cape Flats, and also aims to show that the State has not adequately addressed glaring symptoms of issues on the Cape Flats when it comes to the protection and realisation of socioeconomic rights for the children who reside there. Furthermore, it has not facilitated a legislated process of protecting the socioeconomic rights of these specific vulnerable groups of children. A clear and unequivocal localised policy framework on the provisions for the realisation of socioeconomic rights of children on the Cape Flats is paramount.

The primary responsibility for the successful implementation of this framework lies with the State. Leading authorities must expose its implementation plans fully, so as to show how provincial and local government will address socioeconomic issues relating specifically to children. All levels of government must commit to the protection and promotion of socioeconomic rights through interdepartmental cooperation. Coordinating how its plans will affect the socioeconomic rights of children, particularly those children on the Cape Flats, must take priority if implementation of a policy framework for this specific purpose is to be successful.

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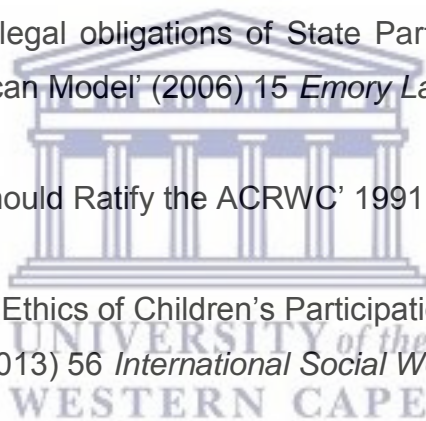
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