



# **The flattening of the COVID-19 pandemic curve and the legal paradox of socio-economic rights in South Africa**

**By**

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## DECLARATION

I, Pfariso Victoria Litshani (20009760), hereby certify that I am the author of this thesis submitted for the Master of Laws (LLM) Human Rights degree at the School of Law, University of Venda. It has never been submitted to this university or any other for a degree. In addition, it is my own work in design and execution, and I have properly cited all relevant sources.

## DEDICATION

To my late father, Pastor Tshimangadzo Jonas Litshani, my late sister, Phathutshedzo Virginia Litshani, and my mother, Dr Ndanganeni Florence Litshani.

## ACKNOWLEDGEMENTS

My participation in this programme has given me a wonderful and beneficial learning opportunity. I continued to discover new information throughout my studies about a range of topics related to international human rights law and the conflict brought on by COVID-19 measures regarding socio-economic rights in South Africa.

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## ABSTRACT

Major public health and socio-economic issues have been brought on by COVID-19, an infectious respiratory virus that causes symptoms similar to those of pneumonia. This study seeks to interrogate the implications of the legal approaches taken to address COVID-19 pandemic issues on the socio-economic rights in South Africa. To better understand the laws governing COVID-19 regulations and socio-economic rights and to provide an argument for their more effective application, the study used a doctrinal legal research methodology. Evidence that has been examined and interpreted in regard to socio-economic rights demonstrates that nations are obligated to act in a particular way in the event of pandemics under international human rights law. However, tension may arise as the performance of such obligations may clash with key individual rights of populations. South Africa is one of the most unequal nations in the world, yet its COVID-19 regulations were implemented with minimum regard for certain socio-economic rights of the population. Based on this finding, it is recommended that states, including South Africa need to respect, protect, and fulfil the enjoyment of basic human rights during pandemic times.

**Key words:** *COVID-19, paradox, human rights, public health, tension, state's obligation, socio-economic rights*

## LIST OF ABBREVIATIONS AND ACRONYMS

AU	African Union
ARO	African Reclaimers Organisation
BATSA	British American Tobacco South Africa
CER	Centre for Environmental Rights
CESCR	Committee on Economic, Social and Cultural Rights
COVID-19	Coronavirus disease -19
DBE	Department of Basic Education
DMA	Disaster Management Act
DWS	Department of Water and Sanitation
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MEC	Member of the Executive Council
MERS	Middle-East Respiratory Syndrome
NSNP	National School Nutrition Program
RDP	Reconstruction and Development Programme
SAHRC	South African Human Rights Commission
SARS-CoV-2	Severe Acute Respiratory Syndrome Coronavirus-2
SARS	Severe Acute Respirator Syndrome
SAWC	South African Water Caucus
TERS	Temporary Employer-Employee Relief Scheme
UN	United Nations
USA	United States of America
WHO	World Health Organisation

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## CHAPTER 1

### INTRODUCTION

#### 1.1. Background

SARS-CoV-2, a coronavirus, was discovered in Wuhan, China, for the first time at the end of 2019.<sup>1</sup> Since then, the virus - now known as COVID-19 - has spread worldwide and can cause serious illness and death. The COVID-19 pandemic was classified a global pandemic by the World Health Organisation (WHO).<sup>2</sup> The international and national responses to COVID-19 have presented distinctive and rapid evolving challenges for the promotion and protection of people's human rights across the world.<sup>3</sup> As one of the most infected nations in the world, South Africa is not an exception in the fight against COVID-19.<sup>4</sup> Global response against COVID-19 was swift,<sup>5</sup> and South Africa followed suit by imposing restrictions, although they have been relaxed, through a five-tier structure,<sup>6</sup> since March 17, 2020,<sup>7</sup> in accordance with the Disaster Management Act.<sup>8</sup> The implementation of extensive public health measures during the nationwide lockdown was permitted by the regulations adopted under this Act.<sup>9</sup> To curb the spread of the virus, South Africa adopted all these extensive measures,<sup>10</sup> however, these measures generated tension between the

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<sup>1</sup> P C Ikwegbue, A O Enaifoghe, H Maduku & L U Agwauna 'The challenges of COVID-19 pandemic and South Africa's response' (2021) 18(1) *African Renaissance* 272.

<sup>2</sup> Ikwegbue et al (note 1 above) 272.

<sup>3</sup> Ikwegbue et al (note 1 above) 273.

<sup>4</sup> Ikwegbue et al (note 1 above) 273.

<sup>5</sup> S A Karim & P Kruger 'Which Rights? Whose Rights? Public health and Human Rights through the lens of South Africa's COVID-19 jurisprudence' (2021) 11 *Constitutional Court Review* 535.

<sup>6</sup> level 5 means "that drastic and strict measures required to contain the spread of the virus", level 4 means "that some activity can be allowed to resume, subject to extreme precautions", level 3 involves "the easing of some restrictions, including on work and social activities", level 2 involves "the further easing of restrictions but still maintaining social distancing", level 1 means "that most normal activities can resume".

<sup>7</sup> Regulation 3, in accordance with section 27(2) of the Disaster Management Act 57 of 2002, *Government Gazette* No. 43096 on March 15, 2020.

<sup>8</sup> Section 27 of the Disaster Management Act 57 of 2002.

<sup>9</sup> Regulations 6, 11A, 11B (1) (a) (i), 11B (b)-(c) and section 16(3) of Regulation 22(1) implemented strict measures. These measures included total lockdowns of economy, such as curfews and quarantines, prohibition of going to work, save essential workers, social-distancing, isolation, closed schools and prohibition of social activities.

<sup>10</sup> *Freedom Front Plus v President of the Republic of South Africa and Others* (22939/2020) [2020] ZAGPPHC 266 para 40.

obligations of the state and human rights of populations.<sup>11</sup> When COVID-19 emerged, the economy was struggling due to weak economic growth as well as insufficient and unbalanced wealth redistribution, since South Africa is one of the most unequal nations in the world.<sup>12</sup>

Human rights, inclusive of socio-economic rights are protected by national legislation, for example in South Africa they are protected by the Bill of Rights,<sup>13</sup> and they are also protected at the international level in terms of UN treaties.<sup>14</sup> Socio-economic rights protect people's dignity and well-being by guaranteeing their access to state-subsidies and other rights such as - the right to work, food, adequate housing, water and sanitation. It is, therefore, not surprising that national legislation and international human rights law both recognise and guarantee socio-economic rights. The recognition and protection are evident in the Universal Declaration of Human Rights (UDHR),<sup>15</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>16</sup> and Constitution of the Republic of South Africa.<sup>17</sup>

To protect the threat to public health, South Africa's response to COVID-19 was made in good faith.<sup>18</sup> A legal paradox, regarding the protection of public health in considering the need to realise individual socio-economic rights, however, evolved in response to COVID-19. This legal paradox arises from the fact that international human rights law

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<sup>11</sup> R Nanima and E Durojaye *The Socio-Economic Rights impact of COVID-19 in selected informal settlements in Cape Town* (2020) 6.

<sup>12</sup>V Futshane 'Recovering from COVID-19 and inequality: the experience of South Africa' (2021) 1.

<sup>13</sup>Chapter 2, of the Constitution of the Republic of South Africa, 1996.

<sup>14</sup>International Covenant on Civil and Political Rights, 1966, Article 12 "(1) everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence, (2) everyone shall be free to leave any country, including his own." International Covenant on Economic, Social and Cultural Rights 1966, Article 6 "(1) the States Parties to the present Covenant recognize the right to work... Article 11 '(1) the States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food..., (2) the States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger...,," Article 13 "(1) the States Parties to the present Covenant recognize the right of everyone to education..."

<sup>15</sup> Universal Declaration of Human Rights. Adopted 10 December 1948. UNGA RES 217 A (III) U.N. DOC A/810 at 71 (1948).

<sup>16</sup> Article 3 of the International Covenant on Economic, Social and Cultural Rights. Adopted and opened for signature, ratification and accession by the General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.

<sup>17</sup> Section 7(1) of the Constitution "enshrines the right of all people in the Republic and affirms the democratic values of human dignity, equality, and freedom."

<sup>18</sup>*One South African Movement and Another v President of the Republic of South Africa and Others* (24259/2020) [2020] ZAGPPHC 249; [2020] 3 All SA 856; 2020 (5) para 90.

permits certain rights to be limited in case of threats to public health,<sup>19</sup> yet, upholding rights is necessary to meet socio-economic needs of populations during COVID.

This study aims to examine the legal paradox of state's obligations during pandemics against individuals' socio-economic rights and public health and proffer a possible way forward.

## 1.2. Problem statement

In the quest to flatten the COVID-19 pandemic curve, the government in accordance with the Disaster Management Act,<sup>20</sup> implemented total lockdowns, which are a variety of non-pharmaceutical interventions which include quarantines, stay-at-home orders and curfews, social-distancing, isolation, and closure of schools.<sup>21</sup> As a result of these strict measures, many people lost their jobs, had limited or no income, experienced an increase in food insecurity and/or hunger, limited access to education, were exposed to inadequate housing conditions and had limited or no access to water and sanitation.<sup>22</sup> This is so because, many people rely on movement to earn a living and to obtain food, for access to education, water and sanitation and adequate living conditions.<sup>23</sup>

## 1.3. Aim and Objectives

### 1.3.1. Aim

The aim of the study is to examine the legal approaches that were adopted to address COVID-19 pandemic and socio-economic rights in South Africa. This aim is encapsulated in the objectives below.

### 1.3.2. Objectives

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<sup>19</sup> United Nations, COVID-19 and Human rights: We are all in this together (2020) available at [https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un\\_-\\_human\\_rights\\_and\\_covid\\_april\\_2020.pdf](https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf) (accessed 4 February 2022).

<sup>20</sup> Section 27 of the Disaster Management Act.

<sup>21</sup> S Sifunda, T Mokhele, T Manyapelo et al 'Preparedness of self-isolation or quarantine and lockdown in South Africa: results from a rapid online survey' (2021) 21(1) *BMC Public Health* 2.

<sup>22</sup> F Hamadziripi & H Chitimira 'The socio-economic effects of COVID-19 national lockdown on South Africa and its response to the COVID-19 pandemic' (2021) 17(1) *Acta Universitatis Danubius Juridica* 30.

<sup>23</sup> Karim & Kruger (note 5 above) 536.

1. To determine the obligations of states during pandemics in terms of international human rights law.
2. To examine the extent to which the legal measures taken by the Government in flattening the COVID-19 curve generated tension with human rights law in South Africa.
3. To determine whether the courts have been able to balance the tension between human rights and state measures involved in COVID-19 litigation.

#### **1.4. Research questions**

The main research question that this study sought to answer is: What are the implications of the legal approaches taken to address the COVID-19 pandemic on socio-economic rights in South Africa? This main research question is subdivided into the following questions:

1. What are the obligations of states during pandemics in terms of international human rights law?
2. To what extent have legal measures taken by the Government in flattening the COVID curve generated tension with human rights in South Africa?
3. Have the courts been able to balance the tension between human rights and Government measures involved in COVID-19 litigations?

#### **1.5. Assumption**

This study assumes that there are legal approaches that should have been adopted in flattening COVID-19 curve and addressing the implications of COVID-19 measures on socio-economic rights in South Africa.

#### **1.6. Literature Review**

There is robust literature on COVID and socio-economic rights at national and international levels, however, literature is only just emerging on the tension between rights generated by the flattening of the COVID-19 curve and government measures.

Socio-economic rights have been included in various human rights documents, such as the UDHR,<sup>24</sup> the Constitution of the Republic of South Africa,<sup>25</sup> and the ICESCR which in their preambles recognise that socio-economic rights are the foundation of freedom, justice, and peace.<sup>26</sup> In a statement, the UN Committee on Economic, Social, and Cultural Rights (CESCR) cautioned that measures by countries to curb the spread of COVID-19 must not jeopardise the enjoyment of socio-economic rights.<sup>27</sup>

Viljoen discusses what constitutes international human rights laws and the various layers of international human rights law that are regulated by the African Union and the United Nations.<sup>28</sup> Cassel,<sup>29</sup> and Viljoen,<sup>30</sup> concur that international human rights law is found mainly in the provisions of international human rights' treaties. The UDHR, a 1948 declaration, although it is not legally binding, certain of its provisions have become binding as customary international law; it is described by Baderin and Ssenyonjo as the beginning of international human rights law.<sup>31</sup>

Three generations of international human rights law are highlighted by Viljoen; the second generation will be discussed in this study because it addresses socio-economic rights.<sup>32</sup> The second generation imposes a positive obligation on States. This translates to the idea that socio-economic rights are those 'whose objective is to insure that human beings have the opportunity to acquire and maintain a minimum decent level of life consistent with human dignity'.<sup>33</sup> Lebret discusses the COVID-19 regulations in South Africa alongside international human rights law, contending that in terms of international human rights law, States can restrict the use of fundamental

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<sup>24</sup> Article 1 of the UDHR, "all human beings are born free and equal in dignity and rights".

<sup>25</sup> Section 7(2) of the Constitution, "the state must respect, protect, promote and fulfil the rights in the Bill of Rights".

<sup>26</sup> Preamble of the ICESCR.

<sup>27</sup> Human Rights Dimension of COVID-19 response, available at <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response> (accessed on 24 September 2021).

<sup>28</sup> F Viljoen *International Human Rights Law in Africa* (2012) 12 & 17.

<sup>29</sup> D Cassel 'Does International Human Rights Law make a difference?' (2001) 2(1) *Chicago Journal of International Law* 124.

<sup>30</sup> Viljoen (note 28 above) 4.

<sup>31</sup> M A Baderin and M Ssenyonjo 'Development of International human rights law before and after the UDHR' (2016) *International Human Rights Law* 3.

<sup>32</sup> F Viljoen 'International human rights law: A short story' (2012) 12(1) *Journal of Humanitarian Medicine* 4.

<sup>33</sup> F Poscar 'Some thoughts on the universal declaration of human rights and the generations of human rights' (2015) 10(3) *Intercultural Human Rights* 44.

human rights if it becomes vital to protect the rights of others or group interests.<sup>34</sup> Valerio,<sup>35</sup> and Joseph,<sup>36</sup> concur, as they discuss the justification of States to implement COVID-19 measures under international human rights law.

Nyashanu focuses on how tensions over human rights evolved in South Africa because of the legal measures the Government took to flatten the COVID-19 curve. For example, some of the legal measures taken called for social distancing,<sup>37</sup> and self-isolation.<sup>38</sup> People living in informal settlements, however, faced considerable challenges because of social distancing and self-isolation due to space constraints and lack of basic services. Poor living conditions that these residents endure prior to the outbreak, exacerbated the situation.<sup>39</sup> Informal settlers often deal with issues including high population density and poor access to water and sanitation. As a result, it is deemed unrealistic for the Government to recommend hand washing and social isolation to curb the spread of the virus.<sup>40</sup>

Hartford and van der Berg show the tension between rights and Government measures in South Africa generated by the flattening of the COVID-19 curve in respect of children. Over 9.6 million children receive daily nutritious meals at school, however, when the legal measure to close schools in March 2020 was implemented, children were unable to get these nutritious meals.<sup>41</sup> According to the NIDS-CRAM report, 15% of the respondents from the broadly representative sample of South Africans said that at least once a week, a child in their home experienced hunger during this period.<sup>42</sup> With StatsSA estimating that between April and June 2020, 2.2 million jobs were lost,

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<sup>34</sup>A Lebret 'COVID-19 pandemic and derogation to human rights' (2020) 7(1) *Journal of Law and Biosciences* 1.

<sup>35</sup> C Valerio 'Human Rights and COVID-19 pandemic' (2020) 24(3) *JBRA Assisted Reproduction* 347.

<sup>36</sup> S Joseph 'International Human Rights Law and the response to COVID-19 pandemic' (2020) 11(2) *Journal of International Humanitarian Legal Studies* 268.

<sup>37</sup> Regulation 11(1) (a) (i), Government Notice No.R. 398, in *Government Gazette* No 43148 of 25 March 2020.

<sup>38</sup> Chapter 2, Regulation 7, Government Notice No.R.480, in *Government Gazette* No 43258 of 29 April 2020.

<sup>39</sup> M Nyashanu, P Simbanegavi and L Gibson 'Exploring the impact of COVID-19 pandemic lockdown on informal settlements in Tshwane Gauteng Province South Africa' (2020) 15(10) *Global Public Health* 1443.

<sup>40</sup> Nyashanu et al (note 39 above) 1444.

<sup>41</sup> D Hartford & T Fricker 'How COVID is changing the face of childhood in South Africa' (2020).

<sup>42</sup> S van der Berg, L Zuze and G Bridgman 'The impact of the coronavirus and lockdown on children's welfare in South Africa: evidence from NIDS-CRAM Wave 1' (2020) 3.



this has a direct impact on children.<sup>43</sup> Child hunger was found to be more prevalent in households where adults had lost their jobs and sources of income.<sup>44</sup> COVID-19 posed varied threats and experiences for different groups.<sup>45</sup> Living situations, financial instability, and a lack of specific safeguards that influence socio-economic rights, means that people of all ages and status may be susceptible to different measures surrounding COVID-19.<sup>46</sup>

The Vienna Declaration,<sup>47</sup> recognises that there are changes and events that take place constantly. One can presume that pandemics like COVID-19 fit under the purview of changes that the Vienna Declaration recognises, therefore, it is crucial to protect and encourage respect for fundamental freedoms and human rights under different contexts. The Vienna Declaration also supports the concept of equal rights and the right of peoples to self-determination to foster peace, democracy, justice, equality, development, and a better standard of living in any situation.<sup>48</sup>

Heyns and Brand show that the Constitution of the Republic of South Africa allows for the claiming and defending of basic needs in a variety of ways,<sup>49</sup> through an established and complex structure for safeguarding socio-economic rights.<sup>50</sup> The Constitution's preamble begins by acknowledging historical injustices before laying forth the country's objectives, thereafter, the Bill of Rights recognises a wide range of socio-economic rights alongside civil and political rights as human rights.<sup>51</sup> This is demonstrated by the court cases, which as shall be discussed later in this dissertation, dealt with the tension surrounding socio-economic rights, with a goal to strike a balance between the rights involved in COVID-19 litigations and Government

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<sup>43</sup> StatsSA, 'Quarterly Labour Force Survey' (2020) available at <http://www.statssa.gov.za/publications/P0211/P02114thQuarter2020.pdf> (accessed 16 December 2021).

<sup>44</sup> van der Berg et al (note 42 above) 15.

<sup>45</sup> I O Iwara, F Musvipwa, K E Amaechi and R Raselekoane 'COVID-19 lockdown socio-economic challenges faced by households in rural areas: A perspective from Vhembe district South Africa' (2020) 54(3) *Sociological Review* 762.

<sup>46</sup> Iwara et al., (note 45 above) 764.

<sup>47</sup> Article 6 of the Vienna Declaration.

<sup>48</sup> Article 6 of the Vienna Declaration.

<sup>49</sup> C Heyns and D Brand 'Introduction to socio-economic rights in South African Constitution' (1998) 2(2) *Law, Democracy and Development* 156.

<sup>50</sup> *Government of the Republic of South Africa v Grootboom and Others* (CCT 11/00) [2000] ZACC 19; 2001 (1) SA 46 2000 (11) BCLR 1169 (4 October 2000) para 20.

<sup>51</sup> Chapter 2 of the Constitution.

directives. For instance, the case of *Equal Education*,<sup>52</sup> dealt with the limitation to nutritious meals for children resulting from the closure of schools as directed by the legal measures of the government. The court intervened and determined that the MEC had violated its constitutional obligations and ordered that those students who met the requirements should receive daily nourishing meals through the National School Nutrition Program (NSNP),<sup>53</sup> which was established primarily to promote children's access to basic nutrition and their right to an education.<sup>54</sup> This study contributes to a further understanding of the protection of socio-economic rights during pandemics such as COVID-19 at the international, regional and national levels. It focuses on the need to safeguard and ensure socio-economic rights when implementing measures to protect citizens from public emergencies.

### 1.7. Research Methodology

According to Goddard and Melville, a research technique is a process that involves more than just collecting data. It can also be used to develop new knowledge or provide answers to existing problems that have not yet been solved.<sup>55</sup> In other words, it is a process of expanding the limits of current knowledge. To better understand the laws governing COVID-19 regulations and socio-economic rights and to make an argument for their more effective application, the study used a doctrinal legal research methodology.

The “black letter law” is another name for the doctrinal legal research approach. According to Kharel,<sup>56</sup> doctrinal legal research is a “research that provides a systematic assessment of legal problems within an adequate methodological framework.” The process enables an examination of a variety of legal topics, including principles, procedures, theories, comparative status, historical evolution, comparative status, judicial operation, and the administration of justice. Doctrinal legal research is a two-way process because it entails discovering the law's source as well as evaluating and analysing the language, hence, it covers more than just a succinct

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<sup>52</sup> *and Others v Minister of Basic Education* (22588/2020) ZAGPPHC 306; [2020] 4 All SA 102; 2021 (1) SA 198 (17 July 2020) at para 103.

<sup>53</sup> *Equal Education* (note 52 above) para 103.

<sup>54</sup> *Equal Education* (note 52 above) para 40.

<sup>55</sup> W Goddard and S Melville *Research Methodology: An Introduction* (2004).

<sup>56</sup> A Kharel *Doctrinal Legal Research* (2018) 1.



summation of the law.<sup>57</sup> Kharel argues further that doctrinal legal research focuses on verifying existing knowledge of relevant legal issues.<sup>58</sup>

The doctrinal research approach entails critical reviews of materials, such as case law, textbooks, journal articles, government reports, policy documents, and law reform documents.<sup>59</sup> The researcher, thus, deemed a doctrinal method appropriate to study and analyse data relating to the effects of COVID-19 regulations on socio-economic rights. The research employed this method to evaluate the logical coherence, consistency, and technical soundness of law and legal arguments in the legal approaches adopted to flatten the COVID-19 pandemic curve and address the implications of COVID-19 preventative measures on socio-economic rights in South Africa. In other words, to analyse evidence gathered from legal sources and case laws regarding the legal paradox involving socio-economic rights in South Africa in flattening the COVID-19 pandemic, the researcher employed a doctrinal analysis.

### **1.8. Ethical consideration**

There are no human participants in the study, hence, there are no ethical concerns. The researcher, on the other hand, avoided plagiarism and made sure that every source used was properly referenced.

### **1.9. Limitations to the study**

The study's research methodology has some limitations. Due to the research methodology employed, the study relied on both primary and secondary data obtained from library textbooks, websites, conference reports, and journal articles.

### **1.10. Overview of chapters**

The study is outlined as follows:

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<sup>57</sup> Kharel (note 56 above) 4-5.

<sup>58</sup> Kharel (note 56 above) 1.

<sup>59</sup> Kharel (note 56 above) 2.

## **Chapter 1- Introduction**

The purpose of the study is explained in this chapter, along with the research theme and the primary and secondary research issues and assumptions. Additionally, it offers a summary of the literature, a synopsis of the research methodology that will be used, and an explanation of the research structure.

## **Chapter 2- COVID-19 and international human rights law obligations**

In this chapter is examined what international human rights law is, how COVID-19 became a global pandemic, and how international COVID-19 response measures compare to state obligations under international human rights law.

## **Chapter 3- COVID-19 measures and tension of rights**

The origin of COVID-19 and its emergence in South Africa are briefly covered in this chapter. The chapter also covers the justifications provided by international human rights law and the South African Constitution for the state to implement COVID-19 measures. This justification leads to a discussion of the conflict between individual socio-economic rights and public health policies.

## **Chapter 4- Courts role in balancing tension between rights in COVID-19 litigation**

This chapter reviews case law to reveal the court's approaches for resolving the clash between government public health policies and human rights laws, as well as the core lessons learnt.

## **Chapter 5-Conclusion and Recommendation**

This chapter concludes by summarising the main findings, answering the research questions, and offering recommendations.

## CHAPTER 2

### COVID-19 AND INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS

#### 2.1. Introduction

This chapter discusses how COVID-19 became a global pandemic that impacted the entire world. The chapter goes on to define international human rights law, outlining the various layers of international human rights law, and discussing the obligations of states to protect human rights. The chapter also compares the COVID-19 measures with states' obligations with regard to socio-economic rights.

#### 2.2. Emergence of COVID as a global pandemic

The novel coronavirus, an outbreak of a pneumonia-like disease, of unknown origin was detected in Wuhan, China in December 2019.<sup>60</sup> COVID-19 is an illness which was linked to the Hunan Seafood Wholesale Market.<sup>61</sup> The highly contagious COVID-19 virus can spread through close contact and human droplets.<sup>62</sup> The virus is transmitted from one person to another when they are in close contact to an infected person who is coughing or sneezing.<sup>63</sup> Through mouth or nose inhalation, the disease can enter the human body.<sup>64</sup>

Almost 162 nations, including China, Italy, the United States of America (USA), France, Australia, and South Africa, announced strict measures to contain the COVID-19 pandemic.<sup>65</sup> Many affected nations banned international travels and mass gatherings to avoid transmission,<sup>66</sup> which had an adverse impact on socio-economic

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<sup>60</sup> S A Lone and A Ahmad 'COVID-19 pandemic: An African Perspective' (2020) 9(1) *Emerging Microbes and Infections* 1300.

<sup>61</sup> M Ciotti, M Ciccozzi, A Terrinari, WC Jiang, CB Wang & S Bernardini 'The COVID-19 pandemic' (2020) 57(6) *Critical Reviews in Clinical Laboratory Sciences* 365.

<sup>62</sup> I Chakraborty and P Maity 'COVID-19 outbreak: Migration efforts on society, global environment and prevention' (2020) *Science of the Total Environment* 2.

<sup>63</sup> M A Shereen, S Khan, A Kazmi, N Bashir and R Siddique 'COVID-19 infection: Emergence, transmission, and characteristics of human coronaviruses' (2020) 24 *Journal of Advanced Research* 91.

<sup>64</sup> M Peng 'Outbreak of COVID-19: An emerging global pandemic threat' (2020) 129 *Biomedicine & Pharmacotherapy* 2.

<sup>65</sup> J Nayak, M Mishra, B Naik, H Swapnarekha, K Cengiz and V Shanmuganathan 'An impact study of COVID-19 on six different industries: Automobile, energy and power, agriculture, education, travel and tourism and consumer electronics' (2022) 39(3) *Expert systems* 1-2.

<sup>66</sup> Lone & Ahmad (note 60 above) 1304.

activities of countries all over the world.<sup>67</sup> It was argued that the rapid transmissions of previous outbreaks, such as the Middle-East Respiratory Syndrome (MERS) and Severe Acute Respiratory Syndrome (SARS) infections, had been associated with international travels and mass gatherings at local and international levels.<sup>68</sup>

COVID-19 evolved into a global public health pandemic due to its extensive spread across nations.<sup>69</sup> More than 80,000 cases and approximately 3000 fatalities were officially reported in China as of 1 March 2020.<sup>70</sup> The pandemic's epicentre had moved to Europe by mid-March.<sup>71</sup> WHO declared it a pandemic on 11 March 2020, due to the COVID-19's global spread and the thousands of deaths brought on by it.<sup>72</sup> The world was made aware of the exceedingly dangerous threat posed by COVID-19 owing to its devastating effect, particularly in Italy, which was worse than in China, Iran and South Korea.<sup>73</sup>

The world has suffered greatly from this pandemic in terms of human rights violations, deaths, and economic turmoil.<sup>74</sup>

### 2.3. International human rights law

International human rights law is constituted mainly by the provisions of international human rights' treaties,<sup>75</sup> such as the ICESCR.<sup>76</sup> International human rights' law started with the adoption of the UDHR in 1948,<sup>77</sup> although it is a cornerstone of international human rights law, the UDHR is not a binding legal document.<sup>78</sup> Certain provisions of the UDHR, however, have become enforceable under customary international law.<sup>79</sup>

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<sup>67</sup> Nayak et al (note 65 above) 1.

<sup>68</sup> Shereen et al (note 63 above) 92.

<sup>69</sup> S O Abideen 'Coronavirus (COVID-19) and the survival of small and medium enterprises in Abeokuta, Ogun State Nigeria' (2020) 12(16) *European Journal of Business and Management* 47.

<sup>70</sup> Joseph (note 36 above) 252.

<sup>71</sup> R Lalaoui, S Bakour, D Raoult, P Verger, C Sokhna, C Devaux, B Pradines and J M Rolain 'What could explain the late emergence of COVID-19 in Africa?' (2020) 38 *New Microbes and New Infections* 881.

<sup>72</sup> Ciotti et al (note 61 above) 365.

<sup>73</sup> Nayak et al (note 65 above) 1.

<sup>74</sup> Ciotti et al (note 61 above) 365.

<sup>75</sup> Cassel (note 29 above) 124.

<sup>76</sup> Article 4 of the ICESCR.

<sup>77</sup> Baderin & Ssenyonjo (note 31 above) 3.

<sup>78</sup> Article 1 of the UDHR.

<sup>79</sup> A Agbor '70 years after the UDHR: A provocative reflection shaped by African experience' (2020) 23(1) *Potchefstroom Electronic Law Journal* 6.

One of the cornerstones of international human rights law is the idea that “all human beings are born free and equal in dignity and rights.”<sup>80</sup>

Beyond the national level, which is the innermost layer and the core of human rights protection, international human rights’ law has developed at three levels. The sub-regional, which brings together several nations in a geographically constrained region, is the first layer of international human rights law.<sup>81</sup> Regional states located in the Americas, Europe, and Africa make up the second layer.<sup>82</sup> The “Organisation for African Unity” (OAU), which adopted the African Charter in 1981, outlines both the duties of individuals and the rights of people and includes justiciable socio-economic rights.<sup>83</sup> In Africa, a human rights framework was adopted in 1963 under the auspice of the OAU which was eventually renamed the “African Union” in 2002. The African Union is the parent organisation, and all AU members are parties to the African Charter, including South Africa.<sup>84</sup>

The United Nations (UN) is in charge of the third layer, also referred to as the global level;<sup>85</sup> an organisation that has human rights’ promotion and protection as one of its goals is necessary at the global level.<sup>86</sup> The UN, established in 1945, served as such a vehicle since it was committed to maintaining international peace and security while simultaneously promoting respect for human rights.<sup>87</sup> Human rights protection under the UN derives either from the UN Charter or from human rights’ treaties. All UN members are subject to the UN Charter, but only those who have ratified a particular treaty are required to uphold the terms of that treaty.<sup>88</sup>

These layers of international human rights law state that “if one’s rights are not protected at the domestic level, the international system will take effect”. Therefore,

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<sup>80</sup> Article 1 of the UDHR (note 24 above).

<sup>81</sup> Viljoen (note 28 above) 9.

<sup>82</sup> Viljoen (note 28 above) 11-12.

<sup>83</sup> B Kioko ‘The right to intervention under the African Union’s Constitutive Act: From non-interference to non-intervention’ (2003) 85(852) *International Review of the Red Cross* 810.

<sup>84</sup> Viljoen (note 28 above) 12.

<sup>85</sup> A Rasche ‘A necessary supplement: What the United Nations Global Compact is and is not’ (2009) 48(4) *Business and Society* 519.

<sup>86</sup> D Otto ‘Rethinking universals: Opening transformative possibilities in international human rights law’ (1997) 18 *Australian YearBook of International Law* 1.

<sup>87</sup> N D White *Keeping the Peace: the United Nations and the maintenance of international peace and security* (1997) 3 & 6.

<sup>88</sup> C R Beitz ‘Human dignity in the theory of human rights: Nothing but a phrase?’ (2013) 41(3) *Philosophy and Public Affairs* 259.

either the global system or the regional system may offer protection.<sup>89</sup> The effectiveness of international human rights treaties is contingent on state ratification, domestication, and adherence to its provisions.<sup>90</sup>

## **2.4. States obligations under international human rights law and COVID-19 measures**

During the outbreak of COVID-19, many states were faced with a dilemma: whether to open and save the economy or implement a nation-wide lockdown and save lives.<sup>91</sup> States are required by international human rights law to take action to protect the human rights outlined in the ratified international human rights treaties and to restore them once they have been violated.<sup>92</sup> These positive steps are set out in the obligations which states are bound to respect.<sup>93</sup>

### **2.4.1. Duty of states to respect socio-economic rights**

States have an obligation to respect people's rights, which means they cannot impede how people or groups exercise their human rights. The state is prohibited from taking any action that could make it difficult for individuals to exercise their rights.<sup>94</sup> With regard to COVID-19, many states imposed strict measures, such as nation-wide lockdowns which impacted an already weak labour market, globally.<sup>95</sup> CESCR General Comment No.18 provides that the "right to work is necessary for the realisation of other human rights such as the right to food and is an indivisible aspect of human dignity."<sup>96</sup> CESCR General Comment No.18 further provides that "every

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<sup>89</sup> J Letnar Cernic 'Moving towards protecting human rights in global business supply chains' (2018) 35(2) *Boston University International Law Journal* 103.

<sup>90</sup> Viljoen (note 28 above) 9.

<sup>91</sup> E Mbunge, S Fashoto, B Akinnuwesi, C Gurajena and A S Metfula 'Challenges of social distancing and self-isolation during COVID-19 pandemic in Africa: A critical review' (2020) *SSRN*.

<sup>92</sup> D Bilchitz 'Socio-economic rights, economic crisis and legal doctrine' (2014) 12(3) *International Journal of Constitutional Law* 714.

<sup>93</sup> Bilchitz (note 92 above) 714.

<sup>94</sup> *Qwelane v South African Human Rights Commission and Another* (CCT 13/20) [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC) (31 July 2021) para 57.

<sup>95</sup> Z Yu, A Razzaq, A Rehman, A Shah, K Jameel and R S Mor 'Disruption in global supply chain and socio-economic shocks: A lesson from COVID-19 for sustainable production and consumption' (2020) 15 *Operations Management Research* 234.

<sup>96</sup> CESCR General Comment No.18: Right to work in accordance with Article 6 of the Covenant. Adopted 24 November 2005 para 2.

individual has the right to work so that he or she can live in dignity”.<sup>97</sup> About 94 percent of the world’s workers live in countries which implemented stay-at-home orders and closure of businesses during the COVID – 19 pandemic; for example, countries such as Iran, Italy and France implemented stay-at-home nation-wide policies which impacted on the right to work.<sup>98</sup>

Informal workers were vulnerable to the stay-at-home order.<sup>99</sup> The first month into the outbreak of COVID-19 it was revealed that informal workers’ earnings had declined by 60 percent, globally.<sup>100</sup> Lockdowns, social distancing, and stay-at-home orders were enforced by several states, which adversely impacted the right to freedom of movement, which is recognised and protected by the ICCPR General Comment No. 27.<sup>101</sup> In respect of domestic workers, there were over 67 million domestic workers worldwide, who relied on having to physically show up to work to earn a living.<sup>102</sup>

Increased underemployment, especially in the informal economy and in urban areas, as well as the decline in purchasing power, made it difficult for people to obtain sufficient food.<sup>103</sup> CESCR General Comment No.12 provides that “the right to food is linked to one’s right to life and dignity”.<sup>104</sup> According to the right to food, food must always be accessible, sufficient, and available to everyone without discrimination.<sup>105</sup> CESCR General Comment No.12 requires states “to refrain from any measures that would prevent access to adequate food”,<sup>106</sup> however, with several countries implementing strict measures ranging from nation-wide lockdowns and stay-at-home

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<sup>97</sup> CESCR General Comment No.18 (note 96 above) para 22.

<sup>98</sup> Abideen (note 69 above) 48.

<sup>99</sup> J C Tham ‘The COVID-19 crisis, labour rights and the role of the state’ (2020) 85 *Journal of Australian Political Economy* 73.

<sup>100</sup> United Nations ‘Policy Brief: The world of work and COVID-19’ 2020 available at [https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/genericdocument/wcms\\_748428.pdf](https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/genericdocument/wcms_748428.pdf) accessed 7 December 2022.

<sup>101</sup> ICCPR General Comment No.27, Article 12: Freedom of Movement, Adopted at the Sixty-seventh session of the Human Rights Committee, on 2 November 1999 para 4.

<sup>102</sup> Tham (note 99 above) 73.

<sup>103</sup> L Chiwona-Karlton, F Amuakwa-Mensah, C Wamala-Larsson, S Amuakwa-Mensah, A Abu Hatab, N Made, N K Taremwa, L Melyoki, L K Rutashobya, T Madonsela and M Lourens ‘COVID-19: from health crises to food security anxiety and policy implications’ (2021) 50(4) *Ambio* 795.

<sup>104</sup> Article 11(2) of the ICESCR, “the States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger...”

<sup>105</sup> CESCR General Comment No.12: Right to adequate food. Adopted at the Twentieth Session of the Committee of Economic, Social and Cultural Rights on 12 May 1999.

<sup>106</sup> CESCR General Comment No.12 (note 105 above) at para 15.



orders, these measures restricted mobility, thus resulting in loss of income, which threatened the right to food.<sup>107</sup>

Several African states suffered some level of food insecurity brought on by interruptions in the food supply chains, especially, in impoverished households and remote or rural communities.<sup>108</sup> Nearly one-fifth of Africa's population was undernourished prior to the COVID-19 outbreak, but the pandemic increased that number by doubling it from 113 million to 265 million, with 73 million of those people experiencing extreme hunger crisis.<sup>109</sup>

Food insecurity can be defined as “a condition resulting from limited or uncertain access to sufficient nutritious food, often resulting from a disruption to food system and supply chains”.<sup>110</sup> In the context of COVID-19, increased food insecurity was the result of severe shock to household income and the means to purchase food.<sup>111</sup> An individual or home is food insecure if they do not have access to sufficient nutritious food.<sup>112</sup> The consequence of declining food security under COVID-19 made it more difficult for African states to respect the right to food, as guaranteed by the UDHR.<sup>113</sup>

#### **2.4.2. Duty of states to protect socio-economic rights**

COVID-19 presented devastating effects world-wide, on all spheres of life including the universal closure of schools.<sup>114</sup> A state must enact legislation protecting human rights and take action that protects people when it is aware of threats to those rights or should have been aware of them.<sup>115</sup> It is necessary, for example, to consider the

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<sup>107</sup> Chiwona-Karlton et al (note 103 above) 794.

<sup>108</sup> A Barman, R Das and P K De 'Impact of COVID-19 in food supply chain: Disruptions and recovery strategy' (2021) 2 *Current Research in Behavioural Sciences* 1.

<sup>109</sup> Nayak et al (note 65 above) 14.

<sup>110</sup> J A Wolfson and C W Leung 'Food insecurity and COVID-19: Disparities in early effects for US adults' (2020) 12(6) *Nutrients* 1.

<sup>111</sup> C Arndt, R Davies, S Gabriel, L Harries, K Makrelov, S Robinson, S Levy, W Simbangehari, D van Seventer, and L Anderson 'COVID-19 lockdowns, income distribution and food security: An analysis for South Africa' (2020) 26 *Global Food Security* 2.

<sup>112</sup> CESCR General Comment No.12 (note 105 above) at para 15.

<sup>113</sup> Article 25 of the UDHR, (1) "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food..."

<sup>114</sup> L M L Lorente, A Arrabal and C Pulido-Montes 'The right to education and ICT during COVID-1: An international perspective' (2020) 12(21) *Sustainability* 4.

<sup>115</sup> W F Felice 'The viability of the United Nations approach to economic and social human rights in a globalised economy' (1999) 75(3) *International Affairs* 597.



impact that COVID-19 had on the right to education.<sup>116</sup> Before COVID-19, about 258 million children, who should be in school, globally were out of school.<sup>117</sup> COVID-19 exacerbated the situation, when states enacted non-pharmaceutical interventions of closing schools to curb the spread of the virus.<sup>118</sup> About 191 countries had closed educational institutions by April 2020.<sup>119</sup> Several primary, secondary schools, higher education boards as well as universities had taken strict measures of closing schools to avoid the transmission of COVID-19.<sup>120</sup>

In an effort to comply with Article 1 of People's Republic of China's Law on the Prevention and Treatment of Infectious Diseases,<sup>121</sup> nearly all of China's universities and colleges had closed by the end of January 2020.<sup>122</sup> In compliance with Article 1(h) of the Decree of the President of the Council of Ministers,<sup>123</sup> the government of Italy had closed schools as well as Universities by March 2020.<sup>124</sup> Hundreds of millions of children were forced to adapt to new ways of learning, with some not succeeding.<sup>125</sup> The closure of schools led to several countries shifting to online learning.<sup>126</sup> Access to

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<sup>116</sup> Article 26 of the UDHR, "(1) everyone has the right to education... (2) education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms..."

<sup>117</sup> 'The COVID-19 pandemic: Shocks to education and policy responses' (2020) available at <https://cdn.theewf.org/uploads/pdf/World-Bank-The-COVID-19-Pandemic-Shocks-to-Education-and-Policy-Responses.pdf> (accessed 09 December 2022).

<sup>118</sup> M Massaro, P Tamburro, M La Torre, F Dal Mas, R Thomas, L Cobiauchi and P Barach 'Non-pharmaceutical interventions and the infodemic on Twitter: Lessons learned from Italy during the COVID-19 pandemic' (2021) 45(4) *Journal of Medical Systems* 2.

<sup>119</sup> Lorente et al (note 114 above) 2-3.

<sup>120</sup> Nayak et al (note 65 above) 16.

<sup>121</sup> Article 1 of Law of the People's Republic of China on Prevention and Treatment of Infectious Diseases. Adopted at the 6<sup>th</sup> meeting of the standing Committee of the Seventh National People's Congress on 21 February 1989, revised at the 11<sup>th</sup> meeting of the standing Committee of the Tenth National People's Congress on 28 August 2022 and promulgated by Order No. 1 of the President of the People's Republic of China on 28 August 2004. "This Law is enacted in order to prevent, control and put an end to the outbreak and spread of infectious diseases and to ensure the health of the people and public sanitation."

<sup>122</sup> J Crawford, K Butler-Henderson, J Rudolph, B Malkwai, M Glowatz, R Burton, P Magni and S Lam 'COVID-19: 20 countries higher education intra-period digital pedagogy responses' (2020) 3(1) *Journal of Applied Learning and Teaching* 11.

<sup>123</sup> Article 1(h) of the Decree of the President of the Council of Ministers 8 March 2020 "the educational services for children are suspended as per in article 2 of the legislative decree 13 April 2017, n. 65, and the face-to-face teaching activities in schools of all levels, as well as the frequency of school and training activities higher education, including Universities and Higher Institutions".

<sup>124</sup> Nayak et al (note 65 above) 16.

<sup>125</sup> T Corlatean 'Risks, discrimination and opportunities for education during the times of COVID-19 pandemic' (2020) *Proceedings of the 17<sup>th</sup> Research Association for interdisciplinary studies conference* 40.

<sup>126</sup> J P Azevedo, A Hasan, D Goldemberg, K Geven and S A Iqbal 'Stimulating the potential impacts of COVID-19 school closures on schooling and learning outcomes: A set of global estimates' (2021) 36(1) *The World Bank Research Observer* 28.

online education varied; in nations with low levels of development, almost 86% of primary school students missed out on obtaining an education.<sup>127</sup> Kenya's Constitution guarantees the right to education.<sup>128</sup> In the context of COVID-19, only a small percentage of Kenya's 17 million children were able to access online education, however, their counterparts in the rural areas were unable to do so.<sup>129</sup> Similarly, 89 percent of children in Sub-Saharan Africa lack access to laptops or personal computers, and 82 percent lack internet connection.<sup>130</sup>

COVID-19 threatened access to food, mainly through closure of schools.<sup>131</sup> Schools, in some contexts are not only a place of learning for many students living in poverty, it is also a place wherein they are able to access nutritious meals.<sup>132</sup> Many children, globally, rely on school meals provided by the government.<sup>133</sup> Public meetings were prohibited under the Public Order (State curfew) Order 2020, which impacted on the right to education.<sup>134</sup> When public gatherings were prohibited and schools were closed this impacted children in Kenya who relied on nutritious meals they received at school, hence, these children experienced hunger.<sup>135</sup> When the first COVID-19 case was identified in Nigeria in late February 2020, the state promptly ordered all schools to be closed.<sup>136</sup> The Nigerian government relied on the Quarantine Act, 2004 and the COVID-19 Regulations 2020 which ordered citizens to stay at home, thus impacting on learners' right to education.<sup>137</sup> The order to stay-at-home meant that children were unable to go to school. Over 9 million students who had been receiving meals under

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<sup>127</sup> Corlatean (note 125 above) 40.

<sup>128</sup> Article 43(1) (f) of the Constitution of Kenya, adopted in 1963, Amended in 1999 'Everyone has the right to education'.

<sup>129</sup> A G Ngwacho 'COVID-19 pandemic impact on Kenyan education sector: Learner challenges and mitigations' (2020) 4(2) *Journal of Research Innovation and Implications in Education* 129 & 133.

<sup>130</sup> Ngwacho (note 129 above) 132.

<sup>131</sup> S Steimle, A Gassman-Pines, A D Johnson, C T Hines and R M Ryan 'Understanding patterns of food insecurity and family well-being amid the COVID-19 pandemic using daily surveys' (2021) 92(5) *Child Development* 783.

<sup>132</sup> W Van Lancker, and Z Parolin 'COVID-19, school closures, and child poverty: a social crisis in the making' (2020) 5(5) *The Lancet Public Health* 243.

<sup>133</sup> Steimle et al (note 131 above) 783.

<sup>134</sup> Article 4 of the Legal Notice No.36: The Public Order (State Curfew) Order 2020 "Under this Order, there shall be no public gatherings, processions or movement either alone or as a group during the period of the curfew".

<sup>135</sup> Ngwacho (note 129 above) 133.

<sup>136</sup> K A Abay, M Amare, L Tiberti, and K S Andam 'COVID-19-induced disruptions of school feeding services exacerbate food insecurity in Nigeria' (2021) 151(8) *The Journal of Nutrition* 2246.

<sup>137</sup> Article 1(2) of the Quarantine Act, 2004: COVID-19 Regulations 2020.

the National Home-Grown School Feeding Program (NGHSFP) were no longer receiving them as a result of school closures due to COVID-19 regulations.<sup>138</sup>

States must develop strategies to combat COVID-19 while still protecting the right to food security and education,<sup>139</sup> therefore, states should work to develop a long-term strategy for the management of any pandemic that would not rely on persistent restrictions or suspension of fundamental human rights, to prevent the limitations of human rights from becoming the new norm.

### 2.4.3. Duty of states to fulfil socio-economic rights

States must take positive steps to make it easier for people to exercise their fundamental human rights.<sup>140</sup> Everyone has the right to an adequate standard of living, which includes having access to adequate housing.<sup>141</sup> When states called for social isolation and self-isolation during the COVID-19 crisis, it worsened an already-existing dearth of adequate housing, which has been a long-standing and global concern.<sup>142</sup> The use of space altered due to the need for self-isolation and social distancing because COVID-19 measures to safeguard public health included the need for different spacing arrangements leading to the closure of workplaces and schools, as well as some prohibitions on the use of public space.<sup>143</sup>

CESCR General Comment No.15 provides that “water and sanitation are essential for living a dignified life”,<sup>144</sup> also according to Ojo, a prerequisite for the realisation of other rights.<sup>145</sup> Those living in disadvantaged communities without adequate water and

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<sup>138</sup> Abay et al (note 136 above) 2246.

<sup>139</sup> Lorente (note 114 above) 4.

<sup>140</sup> *African Commission on Human and Peoples' Rights: The social and economic rights action center and the Center for Economic and Social Rights v Nigeria Commission No.155/96* (27 May 2002) at para 61.

<sup>141</sup> Article 11(1) of the ICESCR “the States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including... housing”.

<sup>142</sup> C Quaglio, E Todella and I M Lami ‘Adequate housing and COVID-19: Assessing the potential for value creation through the project’ (2021) 13(19) *Sustainability* 3.

<sup>143</sup> Quaglio et al (note 142 above) 3.

<sup>144</sup> CESCR General Comment No 15, Articles 11 & 12: Right to Water. Adopted at the Twenty-ninth session of the Committee on Economic, Social and Cultural Rights (2003). Contained in Document E/C.12/2002/11 at para 1.

<sup>145</sup> T A Ojo ‘Human Rights to water access in South Africa: Challenges and critical concerns’ (2021)17 (2) *University of South Africa* 3.

sanitation, therefore, were at risk of being exposed to the virus.<sup>146</sup> Communities living in formal settings like shelters or informal settings like abandoned houses, for instance, do not always have access to basic hygienic facilities like showers; all of which could help to curb the spread of the virus.<sup>147</sup> In the Philippines, particularly the entire Luzon region, which is made up of vulnerable and poor communities, it wasn't always possible to access clean water sources, hygienic bathrooms, or other types of infrastructure to ensure such basic hygiene procedures.<sup>148</sup> The basic requirements for adequate housing include providing enough living space and essential utilities to help prevent viral exposure.<sup>149</sup> The failure of states to fulfil the right to adequate housing through the delivery of basic services, essentially makes it impossible for the urban poor communities or the homeless living in slums across cities, to maintain good hygiene.<sup>150</sup>

In terms of CESCR General Comment No.7 the obligation requires “States to adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures to fully realise the right to adequate housing”.<sup>151</sup> Several states put in place some measures to guarantee the right to adequate housing. During the lockdown, with the stay-at-home orders, states such as the USA, Italy, Spain, and Portugal, temporarily, suspended foreclosures and evictions.<sup>152</sup> Italy, Spain and Portugal further suspended or postponed rental payments for tenants who had lost part of their incomes.<sup>153</sup> Italy also increased rental subsidies to fulfil the right to adequate housing.<sup>154</sup>

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<sup>146</sup> C F Collantes ‘Unforgotten’ informal communities and the COVID-19 pandemic: Sitio San Roque under Metro Manila’s lockdown’ (2021) 14(3) *International Journal of Human Rights in Healthcare* 280.

<sup>147</sup> C Favas, F Checchi, and R J Waldman ‘Guidance for the prevention of COVID-19 infections among high-risk individuals in urban settings’ (2020) 20 *London School of Hygiene and Tropical Medicine* 8.

<sup>148</sup> Collantes (note 146 above) 285.

<sup>149</sup> Quaglio et al (note 142 above) 3.

<sup>150</sup> Collantes (note 146 above) 281.

<sup>151</sup> CESCR General Comment No.7: Right to adequate housing. Article 11(1): forced evictions. Adopted at the sixth session of the Committee on Economic, Social and Cultural Right on 20 May 1997 at para 8.

<sup>152</sup> E A Benfer and L F Wiley ‘Health justice strategies to combat COVID-19: Protecting vulnerable communities during a pandemic’ (2020) 10 *Health Affairs Blog*.

<sup>153</sup> G Accornero, M Harb, A F Magalhaes, F G Santos, G Semi, S Stein and S Tulumello ‘Stay home with a home: Report from a webinar on the right to housing in COVID-19 lockdown times’ (2020) 2 *Radical Housing Journal* 199.

<sup>154</sup> Accornero et al (note 153 above) 199.

## 2.5. Conclusion

The chapter has demonstrated that COVID-19 posed a significant threat to public health due to it being widespread across states and the number of fatalities recorded. States were required to combat COVID-19 under applicable human rights treaties including the ICCPR and the ICESCR. These obligations focused mainly on states' duty to respect, to protect and to fulfil human rights.

## CHAPTER 3

### COVID-19 MEASURES AND TENSION OF HUMAN RIGHTS IN SOUTH AFRICA

#### 3.1. Introduction

The emergence of COVID-19 in South Africa is covered in this chapter. The conflict between COVID-19 measures put in place to curb its spread and socio-economic rights in South Africa is also discussed.

#### 3.2. Emergence of COVID-19 in South Africa

On 29 February 2020, nine adult travellers arrived back in South Africa from a skiing vacation in Italy, where the COVID-19 pandemic was rife.<sup>155</sup> One traveller who experienced flu-like symptoms later tested positive for COVID-19,<sup>156</sup> which was reported on 5 March 2020.<sup>157</sup> The traveller's wife tested positive on 8 March 2020, despite having no symptoms. Seven out of the nine travellers tested positive for COVID-19, although five of them had no symptoms.<sup>158</sup> COVID-19 was first recorded in KwaZulu-Natal (KZN),<sup>159</sup> by mid-March of 2020, cases of rapid community transmission had been recorded throughout the entire country of South Africa.<sup>160</sup>

Given how deadly COVID-19 is, states were required to implement effective prevention, control, and treatment measures.<sup>161</sup> The South African government swiftly responded to the crisis by declaring a state of disaster on March 15, 2020.<sup>162</sup> The Disaster Management Act became applicable when COVID-19 was declared a national state of disaster since the Constitution does not grant the executive body the

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<sup>155</sup> Lalaoui et al (note 71 above) 881.

<sup>156</sup> Lalaoui et al (note 71 above) 881.

<sup>157</sup> A Broadbent, H Combrink and B Smart 'COVID-19 in South Africa' (2020) 2 *Global Epidemiology* 1.

<sup>158</sup> Lalaoui et al (note 71 above) 881.

<sup>159</sup> H Tegally, E Wilkinson, R R Lessells, J Giandharr, S Pillay, N Msomi, K Mlisana, J Bhiman, M Allam, A Ismail and S Engelbrecht 'Major new lineages of COVID-19 emerge and spread in South Africa during lockdown' (2020) *MedRxiv* 2.

<sup>160</sup> D Moonasar, A Pillay, E Leonard, R Naidoo, S Mngemane, W Ramkrishna, K Jamaloodien, L Lebeso, K Chetty, L Bamford, and G Tanna 'COVID-19: Lessons and experiences from South Africa's first surge' (2020) 6(2) *BMJ Global Health* 1.

<sup>161</sup> Article 12(2) (c) of the ICESCR "the prevention, treatment and control of epidemic, endemic, occupational and other diseases..."

<sup>162</sup> S M Garba, J M S Lubuma and B Tsanou 'Modelling the transmission dynamics of COVID-19 pandemic in South Africa' (2020) 328 *Mathematical Bioscience* 2.

authority to declare a state of disaster.<sup>163</sup> Initial constraints were reasonable (restrictions on bars and restaurants, tourism, and travel),<sup>164</sup> however, a complete lockdown was implemented as of 27 March 2020, imposing stay-at-home orders, social distancing, self-isolation, and suspension of economic and educational activities.<sup>165</sup>

The government's response was subsequently categorised by levels, with five (5) being the most severe.<sup>166</sup> Social distancing measures proved beneficial in reducing disease transmission,<sup>167</sup> however, these were not followed in some parts of South Africa, leading to an increase in infection rates from province to province.<sup>168</sup> For instance, funeral ceremonies in the province of Eastern Cape were the source of roughly 80 percent of all infections in that province.<sup>169</sup> Due to the failure to adhere to social distancing practices, the COVID-19 transmission rate increased in the Eastern Cape with over 900 people infected by 7 May 2020; most of the cases were linked to three funeral events.<sup>170</sup>

### 3.3. Measures taken by state and supportive rights

This section of the chapter discusses the state's legal basis for enacting measures based on both the international human rights law and the Constitution.

According to international human rights law,<sup>171</sup> and the Constitution of South Africa,<sup>172</sup> the country has positive obligations, "to take steps to prevent, treat and control pandemics and other diseases." Under international human rights law,<sup>173</sup> and the

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<sup>163</sup> C Staunton, C Swanepoel and M Labuschaigne 'Between a rock and a hard place: COVID-19 and South Africa's response' (2020) 7(1) *Journal of Law and Biosciences* 3.

<sup>164</sup> Government Gazette No.43105 on 18 March 2020, in terms of International Air Services Act, 1993 (Act No. 60 Of 1993).

<sup>165</sup> Regulation 11(1) (a) (i) (note 38 above).

<sup>166</sup> Broadbent et al. (note 157 above) 1.

<sup>167</sup> I F Jaja, M U Anyanwu, and C J Iwu Jaja 'Social distancing: how religion, culture and burial ceremony undermine the effort to curb COVID-19 in South Africa' (2020) 9(1) *Emerging microbes & infections* 1071.

<sup>168</sup> Jaja et al., (note 167 above) 1071.

<sup>169</sup> D Buonsenso, W Malorni, G L Sisti and U Moscato 'COVID-19 and religion: risks and opportunities' (2020) 7.

<sup>170</sup> Jaja et al., (note 167 above) 1071.

<sup>171</sup> Article 12(2)(c) of the ICESCR (note 161 above).

<sup>172</sup> Section 7(1) of the Constitution, "the state must respect, protect, promote and fulfil the rights in the Bill of Rights..."

<sup>173</sup> Article 4(1) of the ICCPR "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with



Constitution,<sup>174</sup> the country may restrict the exercise of most human rights when doing so is required to protect the interests of the public when their health is threatened. In contrast, the African Charter on Human and Peoples' Rights (African Charter) does not mention or contain any derogation provisions, although state parties may derogate from certain rights in times of emergency.<sup>175</sup>

The COVID-19 pandemic's scope and severity, as described above, clearly qualifies it as a public health threat.<sup>176</sup> Human rights law also acknowledges that restricting certain rights may be justified in cases of grave threats to the public's health and national emergencies if they have a legal justification that is strictly necessary, supported by scientific evidence, and is not applied arbitrarily or in a way that is discriminatory.<sup>177</sup>

The state imposed strict lockdown measures to prevent person-to-person infection in accordance with international human rights' law regarding protecting public health.<sup>178</sup> Measures taken, included the borders being closed; people were required to maintain a certain degree of social distance from one another; and the reasons for which one is allowed to leave home were heavily restricted.<sup>179</sup> Further restrictions included ceasing all business and other entities from operating during the duration of the lockdown.<sup>180</sup> The state also closed retail shops,<sup>181</sup> shopping malls, flea markets, restaurants, and hotels.<sup>182</sup> Schools and partial-care facilities were not exempted.<sup>183</sup> Schools were to be closed from Wednesday the 18<sup>th</sup> of March 2020, until after the Easter holidays, however, the nationwide lockdown was extended which meant schools remained closed.<sup>184</sup>

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their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

<sup>174</sup> Section 36(1) of the Constitution, "the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose".

<sup>175</sup> African Charter on Human and Peoples' Rights', available at <https://www.justice.gov.za/policy/african%20charter/africancharter.htm#intro> (accessed 2 March 2022).

<sup>176</sup> Valerio (note 35 above) 379

<sup>177</sup> Article 4(1) of the ICCPR.

<sup>178</sup> Joseph (note 36 above) 253.

<sup>179</sup> Joseph (note 36 above) 253.

<sup>180</sup> Regulation 11B (1) (b) (note 37 above) 6.

<sup>181</sup> Regulation 11B (1) (c) (note 37 above) 6.

<sup>182</sup> Regulation 118(4) (c) of DMA.

<sup>183</sup> Regulation 6, *Government Gazette* No 43232 NO.R. 465 on 16 April 2020 5.

<sup>184</sup> Regulation 6 (note 183 above) 5.



These measures limited individual socio-economic rights, although, they also worked to protect several other civil and political rights,<sup>185</sup> connected to social factors of health, like the right to dignity,<sup>186</sup> and the right to life,<sup>187</sup> as well as the protection of the general public's collective right to health as outlined in CESCR General Comment No. 14.<sup>188</sup>

In order to prevent, treat, and control pandemics like COVID-19, coercive measures may be justified under international human rights law and the Constitution of the Republic of South Africa. These, if applied harshly or uniformly without discretion, however, may backfire and undermine the effectiveness of the pandemic response as a whole.<sup>189</sup>

### 3.4. Clash between public health and individual socio-economic rights

Despite the socio-economic realities of the nation, the South African government implemented certain measures to preserve public health to prevent the spread of COVID-19.<sup>190</sup> The exercise of other human rights was impacted by some of the COVID-19 measures that were approved.<sup>191</sup> Any evaluation of whether these regulations were human-rights compliant, must therefore, consider the full range of the COVID-19 measures effects.

The state faced two options in its attempt to flatten the spread of the virus.<sup>192</sup> The state either had to put the economy first (protect individual socio-economic rights) or protect the public at large from exposure to the pandemic (protection of public health).<sup>193</sup>

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<sup>185</sup> A Spadaro 'COVID-19: Testing the limits of human rights' (2020) 11(2) *European Journal of Risk Regulation* 319.

<sup>186</sup> Article 1 of the UDHR, read together with Article 10 of the ICCPR "(1) all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person, and section 10 of the Constitution, 'everyone as inherent dignity and the right to have their dignity respected and protected'".

<sup>187</sup> Article 4(1) of the ICCPR, read together with section 11 of the Constitution "everyone has the right to life".

<sup>188</sup> CESCR General Comment NO.14: The right to the highest attainable standard of health (Article 12). Adopted at the Twenty-second session of the Committee on Economic, Social and Cultural Rights on 25 April-12 May 2000 para 1.

<sup>189</sup> L Jamieson and L van Blerk 'Responding to COVID-19 in South Africa-social solidarity and social assistance' (2022) 20(4) *Children's Geographies* 429.

<sup>190</sup> Section 27 of the DMA.

<sup>191</sup> Staunton et al., (note 163 above) 3.

<sup>192</sup> Valerio (note 35 above) 379.

<sup>193</sup> Staunton et al (note 163 above) 3.

### 3.4.1. COVID-19 restrictions on human rights and protection of public health

Over many years, there have been several attempts to prevent the spread of pandemics.<sup>194</sup> Starting in the 14th century, quarantine was implemented to prevent the Black Death, yellow fever, and other dangerous diseases by isolating infected people from the rest of society.<sup>195</sup> Similar methods were used during COVID-19.<sup>196</sup> Since the WHO designated COVID-19 a pandemic on 11 March 2020, severe restrictive measures were fully enforced worldwide;<sup>197</sup> South Africa followed suit on 15 March 2020.<sup>198</sup> In addition to the WHO's recommendations, the government through the health system, implemented a nation-wide lockdown and COVID-19 measures,<sup>199</sup> including travelling restrictions, closure of non-essential services and schools, social distancing and self-isolation to curb the spread of COVID-19, nationally.<sup>200</sup>

With COVID-19 being transmitted through human droplets and close contact,<sup>201</sup> the South African government responded quickly, by declaring a national disaster, through closing schools and early childhood development centres, and then instituting a strict lockdown that kept everyone inside their homes, save for essential workers.<sup>202</sup> South Africa, in contrast to other nations, banned the sale of cigarettes and alcohol.<sup>203</sup> When President Ramaphosa announced the lockdown, there were only 406 verified COVID-19 cases nationally.<sup>204</sup> The pandemic was never contained, despite the quick response and low numbers; the goal was just to curb the spread of the virus so that health workers and services would be prepared for any onslaught.<sup>205</sup> The initial hard lockdown appeared to have achieved its objectives of preventing South Africa's health system from becoming overworked and reducing deaths during the first wave.<sup>206</sup>

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<sup>194</sup> Karim & Kruger (note 5 above) 539.

<sup>195</sup> Karim & Kruger (note 5 above) 540.

<sup>196</sup> Ciotti et al. (note 61 above) 365.

<sup>197</sup> H Onyeaka, C K Anumudu, Z Al-Sharify, E Egele-Godswill and P Mbaegbu 'COVID-19 pandemic: A review of the global lockdown and its far-reaching effects' (2021) 104(2) *Science Progress* 2.

<sup>198</sup> Garba et al (note 162 above) 2.

<sup>199</sup> E Mbunge 'Effects of COVID-19 in South African health system and society: An explanatory study' (2020) 14(16) *Diabetes and Metabolic: Clinical Research and Reviews* 1809.

<sup>200</sup> Regulation 11B (1) (b) (note 37 above) 6.

<sup>201</sup> Chakraborty & Maity (note 62 above) 2.

<sup>202</sup> Jamieson and Van Blerk (note 189 above) 429.

<sup>203</sup> Regulation 45 of the DMA.

<sup>204</sup> Jamieson and Van Blerk (note 189 above) 429.

<sup>205</sup> E Durojaye 'Between a rock and a hard place: (Un) balancing the public health interventions and human rights protection in the COVID-19 era in South Africa' (2021) 26(2) *The International Journal of Human Rights* 333.

<sup>206</sup> S Joseph 'COVID 19 and human rights: Past, present and future' (2020) *Journal of International Humanitarian Legal Studies, Griffith University Law School Research Paper* 6.

These stringent COVID-19 regulations made it possible to provide for surge capacity while also freeing up hospital beds for COVID-19 patients.<sup>207</sup>

As highlighted in the preceding chapter, COVID-19 became a global pandemic because of international travels and mass gatherings,<sup>208</sup> therefore, one of the strict COVID-19 measures was to close schools and businesses, ban international travels as means of protecting public health.

These COVID-19 measures influenced a progressive decline in infection rates, but they also had an impact on the exercise of certain socio-economic rights. In an attempt to protect both individual socio-economic rights and public health, certain responsibilities must be maintained in order to control the instability and panic that the COVID-19 public health emergency had brought.<sup>209</sup> Following is a discussion that puts the human rights context in alignment with the COVID-19 measures.

#### **3.4.2. COVID-19 measures: Public health versus protection of individual socio-economic rights**

The State elected to implement a nation-wide lockdown which placed severe restrictions on human rights that were countervailing, although, some of them were not compliant with human rights.<sup>210</sup> Due to the COVID-19 measure, for example, of restricting the right to work, numerous businesses and companies had to lay off their employees resulting in operations either ceasing or closing as well as, financial losses.<sup>211</sup> The lockdown and the suspension of extensive economic activity are said to have resulted in between 2.2 and 2.8 million adults losing their jobs in the country from February to April 2020.<sup>212</sup> South Africa entered the COVID-19 pandemic with low levels of employment and a decade of poor job development, much behind the standards of the majority upper middle-income countries.<sup>213</sup>

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<sup>207</sup> Joseph (note 206 above) 6.

<sup>208</sup> Lone & Ahmad (note 60 above) 1304.

<sup>209</sup> White (note 87 above) 3.

<sup>210</sup> Joseph (note 36 above) 254.

<sup>211</sup> Futshane (note 12 above) 4.

<sup>212</sup> D Posel, A Oyenubi and U Kollamparambil 'Job loss and mental health during COVID-19 lockdown: Evidence from South Africa' (2021) 16(3) *PloS One* 2.

<sup>213</sup> T Köhler, H Bhorat, R Hill and B Stanwix 'COVID-19 and the labour market: Estimating the effects of South Africa's national lockdown' (2021) SA Future Economy, *University of the Witwatersrand, Johannesburg* 3.

When COVID-19 measures called for stay-home orders,<sup>214</sup> residents in informal settlements became economically vulnerable as most of them are informal workers who must physically show up to earn a daily wage.<sup>215</sup> For example, Beauty Ncube who resides in the informal settlement of Bekezela, in Johannesburg said “lockdown changed a lot of things for me. I was providing for my kids with the little money I’m getting, but now I’m starving.”<sup>216</sup> Waste reclaimers typically start their days before sunrise by walking to far-off suburbs to search through garbage bags. Once there, they find recyclable products that they can then sell for a modest profit. Workers such as Beauty do not earn a salary, they usually get about R70.00 a day. Luyanda Hlatshwayo, African Reclaimers Organisation (ARO) founding member said, “one day of no work burns the pockets of those in communities that live hand-to-mouth.”<sup>217</sup> While some of these restrictions have been crucial in curbing the virus’ spread, many of them have been unduly broad or have neglected to take into account the socio-economic rights of individuals who were already at risk of human rights violations.<sup>218</sup>

The prohibition preventing going to work, exacerbated all these aspects of poverty and inequality.<sup>219</sup> In the Quarterly Labour Force Survey, issued in February 2021, for the fourth quarter of 2020, StatsSA stated that black women continue to suffer the brunt of unemployment, with a rate of 38.5%.<sup>220</sup> The same Beauty Ncube who was cited earlier confirmed that due to the nationwide lockdown and COVID-19 regulations, she had been unable to work in her more than 20 years as a reclaimer.<sup>221</sup> Melanie Samson, a senior lecturer in human geography at Wits University, contends that the impact of excluding the country’s informal recycling community from its response to the virus was catastrophic.<sup>222</sup>

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<sup>214</sup> Regulation 11(1) (a) (i) (note 37 above).

<sup>215</sup> I Khambule ‘The effects of COVID-19 on South African informal economy: Limits and pitfalls of government’s response’ (2020) 34(1) *Loyola Journal of Social Sciences* 98 & 97.

<sup>216</sup>A Barford and S R Ahmad ‘A call for socially restorative circular economy: Waste pickers in the recycled plastic supply chain’ (2021) 1(2) *Circular Economy and Sustainability* 761-765.

<sup>217</sup> ‘Amid lockdown, South Africa’s waste pickers suffer the most’ *Aljazeera* 8 April 2020.

<sup>218</sup> Karim & Kruger (note 5 above) 536.

<sup>219</sup> Regulation 11A (note 37 above) 6.

<sup>220</sup> StatsSA (2020) Respondents losing jobs or business due to Coronavirus COVID-19 lockdown.

<sup>221</sup> Barford & Ahmad (note 216 above) 780-782.

<sup>222</sup> ‘COVID-19: Court decision is a heavy blow to waste-pickers’ hope’ *Ground Up* 15 April 2020.

The stay-at-home orders and prohibitions to go to work worsened the interconnected issues that come with unemployment.<sup>223</sup> Many South Africans are now scrambling to satisfy their basic food demands,<sup>224</sup> as a connection exists between the right to food and the right to work.<sup>225</sup> Employment is frequently the most common source of food.<sup>226</sup> When the COVID-19 measures prohibited citizens, except essential workers from going to work,<sup>227</sup> it had a direct impact on the right to earn an income and the right to food. The Eastern Cape, one of South Africa's poorest provinces, and KwaZulu-Natal, the country's second-most populated province, were found to be the most affected provinces in the country.<sup>228</sup>

The Centre for Social Development in Africa commissioned Ipsos to perform a survey and found that most adult South Africans concurred with the following statement: "Adults and children in my household often had to go hungry during the COVID-19 pandemic, as we did not have enough money for food." During Ipsos' field research between November 19 and 30 December 2020, it was discovered that more than 40 percent of South Africans were affected by hunger. Hunger afflicted both working (45 percent) and non-working (46 percent) South Africans in similar numbers.<sup>229</sup>

Considering how closely the right to food and the right to education are connected, COVID-19 measures created tension between these rights for children.<sup>230</sup> When the state ordered for schools to close,<sup>231</sup> this impacted over nine million children who received daily nutritious meals at school, causing them to face food insecurity.<sup>232</sup> During the countrywide lockdown, the NSNP was closed without contingency measures to feed the nine million economically-needy children.<sup>233</sup> Even though most of the economic activities have resumed following the downgrading of lockdown

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<sup>223</sup>South African Human Rights Commission 'Right to food' available at [https://www.sahrc.org.za/home/21/files/brochure\\_A3\\_English.pdf](https://www.sahrc.org.za/home/21/files/brochure_A3_English.pdf) (accessed 27 January 2022).

<sup>224</sup> (note 223 above).

<sup>225</sup> (note 223 above).

<sup>226</sup> L McIntyre 'Food security: more than a determinant of health' (2003) 24(3) *Policy Options-Montreal* 47.

<sup>227</sup> Regulation 11A (note 37 above) 6.

<sup>228</sup> Ipsos South Africa (2021), Almost half of South African households go hungry due to COVID-19.

<sup>229</sup> Ipsos South Africa (note 228 above).

<sup>230</sup> *Equal Education* (note 52 above) para 2.

<sup>231</sup> Regulation 4(3) (note 38 above)

<sup>232</sup> *Equal Education* (note 52 above) para 2.

<sup>233</sup> *Equal Education* (note 52 above) para 2.

restrictions to level 1, the prevalence of hunger increased by 2.6% in November/December 2020, before declining insignificantly in February/March 2021. This is despite the fact that the country had eased to level three (3) lockdown restrictions in July-August 2020. Between May-June 2020 and February-March 2021, there was a rather uneven reduction in hunger (5.6%), however, disfavours the poor.<sup>234</sup> During both periods, only the poorest quintile schools experienced an increase in the prevalence of hunger, but the burden of hunger decreased across all other income quintiles, hence, there were more obvious income-related hunger inequalities in the latter period.

Furthermore, in as far as it relates to the COVID-19 measure to close schools,<sup>235</sup> more than 13 million children in South Africa were affected by school closure because the measures to close schools exacerbated inequalities which were already present.<sup>236</sup> These inequalities presented themselves in this manner - the Department of Basic Education issued a directive that “learning be continued by providing workbooks and worksheets online”.<sup>237</sup> Most public schools in the informal settlements were unable to make the transition to technology-supported learning, in contrast to private schools and many public schools in suburban areas. Limited access to technology and information was a problem for many children who attended public schools in the informal settlements.<sup>238</sup> States, like South Africa, are required to make sure that any public health policies they implement are compatible with human rights obligations; in other words, adopting the minimum level of restrictions necessary to accomplish the appropriate public health objective while minimising their impact on individuals’ socio-economic rights.<sup>239</sup>

Pursuant to the above, Basic Education Minister, Angie Motshekga determined that schools could not stay closed.<sup>240</sup> The National Coronavirus Command Council,

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<sup>234</sup> NIDS-CRAM ‘Food insecurity and health outcomes during the coronavirus pandemic in South Africa: Wave 4’ available at <https://cramsurvey.org/wp-content/uploads/2021/05/11.-Van-der-Berg-S.-Patel-L.-Bridgman-G.-2021-Hunger-in-South-Africa-Results-from-Wave-4-of-NIDS-CRAM.pdf> (accessed 05 January 2022) 3.

<sup>235</sup> Regulation 4(3) (note 38 above)

<sup>236</sup> ‘750 000 South African children may have dropped out of school due to COVID-19 pandemic’ Global Citizen 9 July 2021.

<sup>237</sup> (note 236 above).

<sup>238</sup> (note 236 above).

<sup>239</sup> Karim & Kruger (note 5 above) 538.

<sup>240</sup> Regulation 4(3) (note 38 above).



therefore, authorised the Minister to allow only students in grades 7 and 12 to return to class,<sup>241</sup> however, there were requirements that schools must meet before they could reopen.<sup>242</sup> Schools were required to adhere to the basic health, safety, and social distancing requirements.<sup>243</sup> In KwaZulu-Natal, Mpumalanga, and Eastern Cape, research showed that these provinces had the most inadequate, in some instances non-existent water and sanitation facilities.<sup>244</sup> In Gauteng alone, more than 67 schools were unable to reopen in 2020, with 53 of the schools' reporting problems of water supply and sanitation.<sup>245</sup> The National Teachers' Union complained that it is primarily rural schools that were unable to meet these requirements, hence, they could not reopen and were left behind, academically.<sup>246</sup>

Quarantine and self-isolation were two other global measures implemented in order to flatten the COVID-19 curve.<sup>247</sup> For the duration of the lockdown in South Africa, "every person is confined to his or her place of residence..."<sup>248</sup> Furthermore, Chapter 2 of the COVID-19 measures defined "adequate space" as "not more than one person per square meter of floor space."<sup>249</sup> When COVID-19 measures called for quarantine, social distancing and self-isolation, this affected people living in informal settlements thus, undermining their socio-economic rights. Many homes in all of these settlements are backyard shacks with shared perimeter walls made of brick, zinc, and corrugated iron, sometimes known as "bungalows" or "hokkies".<sup>250</sup> Due to competition for space, homes in the informal settlements are built very close together and they only have very narrow access paths.<sup>251</sup> Many structures are too much within close proximity to comply with social distancing regulations and residents run the risk of being exposed to

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<sup>241</sup>Regulation 4(3) (note 38 above).

<sup>242</sup> 'Minister Angie Motshekga: State of readiness for the reopening of schools' (2020) available at <https://www.gov.za/speeches/minister-angie-motshekga-state-readiness-reopening-schools-7-jun-2020-0000> (accessed 4 October 2020).

<sup>243</sup>(note 242 above).

<sup>244</sup> M G Matseke 'Provision of water and sanitation during the COVID-19 crisis: Comparative case study in predominantly urban and predominantly rural provinces' (2020) 3(1) *Africa Journal of Public Sector Development and Governance* 90.

<sup>245</sup> 'No more delays as schools set to reopen' *Sunday Times* 7 June 2020.

<sup>246</sup> (note 242 above).

<sup>247</sup> Sifunda et al., (note 21 above) 30.

<sup>248</sup> Regulation 11B (1) (a) (i) (note 37 above) 6.

<sup>249</sup> Regulation 11A (note 37 above).

<sup>250</sup>J de Groot & C Lemanski 'COVID-19 responses: Infrastructure inequality and privileged capacity to transform everyday life in South Africa' (2021) 33(1) *International Institute for Environment and Development* 264.

<sup>251</sup> South African Human Rights Commission 'Response to Questionnaire: Informal Settlements and Human Rights' (2018) available at [Microsoft Word - Informal Settlements & Human Rights Final 21 May 2018.docx \(ohchr.org\)](#) (accessed 22 April 2021).

extreme temperatures if they stay inside. This is because non-brick materials enhance external temperatures.<sup>252</sup> How, therefore, in a non-traditional home where, eight to ten family members share a room, can one attain quarantine, social distance, and self-isolation? Physical distance and self-quarantine were impractical because of space restrictions and slum congestion.<sup>253</sup> In these circumstances, it was hard to spend five weeks of the lock-down period, at home without interacting socially with other households. The government's broad proposal demonstrated an absence of official awareness of the facts.<sup>254</sup>

In the *Grootboom* case,<sup>255</sup> although not decided during the pandemic, the SACC held that for government interventions to pass the reasonableness test that is relevant to the right to housing, they must be reasonable. The extent and scope of the right being denied must be considered in these interventions.<sup>256</sup> People whose needs are the most pressing and whose ability to enjoy all rights is subsequently jeopardised must not be neglected in actions taken to realise the right.<sup>257</sup>

Furthermore, CESCR General Comment No.7 provides that “the right to adequate housing should provide a degree of security of tenure that protects citizens from forced eviction, harassment, and other threats”.<sup>258</sup> Despite the fact that this right is prominently featured in both national and international law, more than a billion people worldwide do not have adequate housing.<sup>259</sup> Millions of people endure living conditions that put their lives or health in danger, often resulting from crowded slums and informal settlements, which violate their dignity and human rights.<sup>260</sup> Millions of people are evicted from their homes violently each year, and COVID-19 measures only served to intensify this tension.<sup>261</sup>

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<sup>252</sup> ‘Social Protection responses to the COVID-19 lockdown in South Africa’ *The Conversation* 6 April 2020.

<sup>253</sup> Jamieson & Van Blerk (note 189 above) 430

<sup>254</sup> (note 245 above).

<sup>255</sup> *Grootboom* (note 50 above) para 13.

<sup>256</sup> *Grootboom* (note 50 above) para 14.

<sup>257</sup> *Grootboom* (note 50 above) para 44.

<sup>258</sup> CESCR General Comment No.7 (note 151 above) at para 1.

<sup>259</sup> Fact Sheet 21/Rev.1 (2009) Office of the United Nations High Commissioner for Human Rights: The right to adequate housing.

<sup>260</sup> Fact Sheet No. 21 (note 259 above).

<sup>261</sup> Fact Sheet No.21 (note 259 above).



On 1 July 2020, a video surfaced showing a man being dragged out of a shack naked by the Anti-Land Invasion Unit, without a court order. In the ensuing court case, the applicant stated four *prima facie* rights, but the following two will be mentioned for the purpose of this study:<sup>262</sup>

- (a) “the requirements of section 26(3) of the Constitution which states that no-one may be evicted from their home or have their home demolished, without a court order made after considering all relevant circumstance. No legislation may permit arbitrary evictions;” and
- (b) “the provisions of Regulation 36 of the DMA Regulations which provide that a person may not be evicted from his/her land during the period of Alert level 3 period and that judicial discretion is required to exercise in the execution of eviction orders during the Alert level 3 period”.

Another case of eviction took place in the community of Hangberg on the 19<sup>th</sup> of June 2020, wherein a man was evicted, and his shack demolished by the City of Cape officials. The man argued that he could not go back to his mother’s house due to overcrowding.<sup>263</sup> The eviction and demolition were an unpleasant reflection of a failing to recognise our poor communities’ condition and the hardships they face. In the context of the pandemic, the demolition was inhumane, cruel, inconsiderate and a violation or misconstruing of the right to health.<sup>264</sup>

In respect of the right to water and sanitation, there are no regulations which specifically direct that water and sanitation should not be provided,<sup>265</sup> however, there are still issues with South Africa’s access to water and sanitation services. Quarantine, self-isolation, and other COVID-19 measures made it more challenging for people to acquire water and sanitation services, which was already a problem.<sup>266</sup> Communities in South Africa often use their grant money to obtain water, which is frequently of poor

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<sup>262</sup> *South African Human Rights Commission and Others v City of Cape Town and Others* (8631/2020) [2020] ZAWCHC 84; 2021 (2) SA 565 (WCC) (25 August 2020) at para 3.

<sup>263</sup> *Community of Hangberg and Another v City of Cape Town* (7837/2020) [2020] ZAWCHC 66 (15 July 2020) at para 3.

<sup>264</sup> *One South African Movement* (note 18 above) at para 10.

<sup>265</sup> Section 16(3) (note 38 above) 35.

<sup>266</sup> A Wilkinson, H Ali, J Bedford, S Boonyabanha, C Connolly, A Conteh, L Dean, F Decorte, B Dercon, S Dias and D Dodman ‘Local response in health emergencies: Key consideration for addressing the COVID-19 pandemic in informal urban settlements’ (2020) *Environment and Urbanization* 508.

quality, as they struggle with the triple COVID-19 challenges of poverty, unavailability of water, and unemployment.<sup>267</sup> The lack of standards for water, sanitation and hygiene defeats all the efforts to fight COVID-19.<sup>268</sup> According to WHO, the best accepted practice to flatten the curve of the virus is to maintain good hygiene, regular hand washing and use of safe and clean facilities,<sup>269</sup> however, despite this recommendation, around 25 percent of people worldwide do not have access to dependable water sources.<sup>270</sup>

Access to water in informal settlements is mostly determined by informal and other semi - structured or unstructured social and economic systems.<sup>271</sup> More than half of township and informal settlement dwellers live in such vulnerable conditions that access to basic water is impossible even during the best of times.<sup>272</sup> Since the lockdown started, a number of organisations - the Centre for Applied Legal Studies, the Centre for Environmental Rights, and the Legal Resources Centre - have repeatedly encouraged the Department of Water and Sanitation (DWS) to supply adequate water to these communities;<sup>273</sup> however, despite its importance for the realisation of other constitutional rights, the government is not gradually or otherwise executing this fundamental human right.<sup>274</sup> According to Melissa Fourie, Executive Director of Centre for Environmental Rights (CER), numerous letters sent by the South African Water Caucus (SAWC) to the Minister and local governments have gone unanswered.<sup>275</sup>

The State's actions undermine socio-economic rights because water security includes more than just having access to water.<sup>276</sup> In order for access to be realised, CESCR

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<sup>267</sup> Ojo (note 145 above) 3.

<sup>268</sup> Ojo (note 145 above) 3.

<sup>269</sup> WHO, Water, available at <https://www.afro.who.int/health-topics/water> (accessed 25 January 2022).

<sup>270</sup> L Bruce, COVID-19: Dirty water for sale in rural communities, available at <https://www.wits.ac.za/news/sources/cals-news/2020/covid-19-dirty-water-for-sale-in-rural-communities.html> (accessed on 21 December 2021).

<sup>271</sup> Socio-Economic Rights Institute of South Africa (2018), Informal Settlements and Human Rights in South Africa. Submission to the United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living.

<sup>272</sup> 'Water and sanitation in the face of COVID-19 in Cape Town's townships and informal settlements' *Plaas* April 2020.

<sup>273</sup> Bruce (note 270 above).

<sup>274</sup> (note 269 above).

<sup>275</sup> Bruce (note 270 above).

<sup>276</sup> B K Mishra, K Pankaj, S Chitresh, C Shamik, and G A Gautam 'Water Security in a changing environment: Concept, challenges, and solutions' (2021) 4(490) *Water* 1 & 10.

General Comment No. 15 stipulates that “water must not only be accessible but must be of a standard suitable for human consumption”.<sup>277</sup> Additionally, member states are required by the Committee on Economic, Social, and Cultural Rights (CESCR) to provide physically-accessible, reasonably-priced water for domestic and personal use.<sup>278</sup>

In as far as it relates to the right to sanitation, several households in the informal settlements share communal standpipes and toilets. COVID-19 regulations defined movement as “entering or leaving a place of residence...”<sup>279</sup> Several households in these informal settlements are required to share a toilet that is situated outside of their home,<sup>280</sup> therefore, these COVID-19 measures remain an epitome of how impractical social distancing is for such communities.

### 3.5. Conclusion

International human rights’ law and the Constitution of the Republic of South Africa can both limit some human rights in order to prevent, treat, and control pandemics and other diseases like COVID-19. The implementation of coercive measures during pandemics may be justified, but if they are applied severely or uniformly, they might undermine the efficiency of the pandemic response. To avoid the kind of challenges that the COVID-19 public health emergency has brought, peace and stability must be maintained while the country must also work to protect both socio-economic rights and the public’s health.

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<sup>277</sup> CESCR General Comment No.15 (note 144 above) para 1.

<sup>278</sup> Article 1 of ICESCR.

<sup>279</sup> Regulation 11A (note 37 above).

<sup>280</sup> (note 272 above).

## CHAPTER 4

### COURTS ROLE IN BALANCING TENSION BETWEEN RIGHTS IN COVID-19 LITIGATION

#### 4.1. Introduction

Several cases have been brought against the government after the national state of disaster was declared and stringent measures were put in place and many cases were either dismissed or settled. There are several other COVID-19 response components that involve additional rights; however, discussions below are limited to the pandemic-related case law.

#### 4.2. Role of courts in protecting human rights during pandemics

As the first instance in the protection of human rights, national courts and judges are crucial to the process of evaluating decisions involving the declaration of states of emergency and/or extraordinary measures impacting fundamental rights.<sup>281</sup> In times of turmoil like a national disaster, courts first and primary obligation should be to administer justice to individuals who seek it.<sup>282</sup> The SCA in *Esau* may have provided the finest response to the question of how the courts should exercise their authority and protect human rights in the event of a pandemic:<sup>283</sup> “The role of courts in times of upheaval such as a national disaster should first and foremost be a sacred duty to administrate justice to those who seek it”.<sup>284</sup> When constitutional rights have been violated, the Constitution gives courts the authority to impose a just and equitable judgment, including the awarding of constitutional damages.<sup>285</sup> In *Treatment Action Campaign*,<sup>286</sup> although not decided during COVID-19, the Court recognised that the government has competing obligations to realise socio-economic rights while also acknowledging the danger of pandemics”, holding

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<sup>281</sup> *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* (611/2020) [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) (28 January 2021) at para 4.

<sup>282</sup> *Esau* (note 281 above) para 4.

<sup>283</sup> *Esau* (note 281 above) para 4.

<sup>284</sup> *Esau* (note 281 above) para 4.

<sup>285</sup> Section 172(1) (a) of the Constitution.

<sup>286</sup> *Minister of Health & Others v Treatment Action Campaign & Others* (No 2) [2002] ZACC 15, 2002 (5) SA 721.

We are also conscious of the daunting problems confronting government because of the pandemic. And besides the pandemic, the state faces huge demands in relation to access to education, land, housing, health care, food, water, and social security. These are the socio-economic rights entrenched in the Constitution, and the state is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of them.<sup>287</sup>

This court case sheds light on the role of courts in striking a balance between individual socio-economic rights and protecting public health.

### 4.3. Striking a balance evolving from COVID-19 measures and rights

Courts are relevant during crisis such as a pandemic.<sup>288</sup> Pandemic-related litigation is often first addressed by local courts.<sup>289</sup> Any court in South Africa, thus, has the authority to decide on the legality, extent, or application of any emergency regulations.<sup>290</sup> The cases discussed below demonstrate the connections between public health and human rights; they emphasise the connection between socio-economic rights, such as the right to work, food, education, adequate housing, and water and sanitation with rights to public health. Essentially, when a disaster like the COVID-19 outbreak arises, structuring public health as a human rights priority allows courts to step in and substantively to evaluate the implications of the state's response in relation to human rights.<sup>291</sup>

This section of the chapter will discuss the role of South African courts in striking a balance between human rights and government measures evolving from COVID-19 litigation.

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<sup>287</sup> *Treatment Action Campaign* (note 286 above) para 99.

<sup>288</sup> F Caffagi and P Lamiceli 'Global pandemic and the role of courts' (2021) *Global Pandemic Network Journal* 5.

<sup>289</sup> Caffagi and Lamiceli (note 288 above) 3.

<sup>290</sup> Staunton et al., (note 163 above) 3.

<sup>291</sup> Staunton et al., (note 163 above) 3.

#### 4.3.1. Non-pharmaceutical measures versus right to work

The South African government enacted a number of non-pharmaceutical measures, such as banning the sale of tobacco and its associated goods, in an attempt to protect public health.<sup>292</sup> The government argued that this prohibition would aid in protecting public health through freeing up of hospital beds, since people would not likely get COVID-19 if they did not smoke.<sup>293</sup> The prohibition of the sale of tobacco and its associated goods, however, had a detrimental effect on the employment prospects of thousands of South Africans who work in the tobacco business.<sup>294</sup> With the hard lockdown already having caused the loss of about 2.2 to 2.8 million jobs,<sup>295</sup> further prohibition exacerbated other components such as poverty and inequality.<sup>296</sup> This was because the failure to lift the ban impacted informal retailers,<sup>297</sup> who rely on their right to work to earn an income to satisfy their other rights. These informal workers were disadvantaged as they must physically show up to work to earn a daily wage.<sup>298</sup> With a special focus on the country's estimated 200 commercial farmers, the tobacco sector sustains more than 800 jobs and more than 30 000 dependents, most of whom live in rural areas.<sup>299</sup> As a result of tobacco farmers being unable to sell their crops and pay their employees, it would result in job losses.<sup>300</sup>

The Minister of Co-operative Governance and Traditional Affairs claimed that regulation 45 was merely temporal and did not, therefore, infringe on the right to work,<sup>301</sup> however, this was clearly incorrect since states have an obligation to take actions that do not undermine the enjoyment of rights, whether temporal or otherwise.<sup>302</sup> The Constitutional Court in *Diamond Producers* held<sup>303</sup>

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<sup>292</sup>Regulation 45 of the DMA.

<sup>293</sup> *British American Tobacco South Africa (Pty) Ltd and Others v Minister of Co-operative Governance and Traditional Affairs and Others* (6118/2020) [2020] ZAWCHC 180; 2021 (7) BCLR 735 (WCC) (11 December 2020) at para 94.

<sup>294</sup> *BATSA* (note 293 above) para 32.

<sup>295</sup> Posel et al., (note 212 above) 2.

<sup>296</sup> Regulation 11A (note 37 above) 6.

<sup>297</sup> *BATSA* (note 293 above) para 32.

<sup>298</sup> Khambule (note 215) 95.

<sup>299</sup> *BATSA* (note 293 above) para 52.

<sup>300</sup> *BATSA* (note 293 above) para 53.

<sup>301</sup> *BATSA* (note 293 above) para 62.

<sup>302</sup> *South African Diamond Producers Organisation v Minister of Minerals and Energy* 2017 (6) SA 331 at para 68.

<sup>303</sup> *South African Diamond Producers Organisation* (note 302 above) para 68.

A law prohibiting certain persons from entering a specific trade, or providing that certain persons may no longer continue to practise that trade, would limit the choice element of section 22 of the Constitution of the Republic of South Africa.

The government was facing a national disaster which required urgent actions to be taken to protect public health, however, there is a need for states to contextualise the urgent actions against their constitutional obligations to secure individual socio-economic rights such as the right to work.<sup>304</sup>

#### **4.3.2. Prohibition of mass gatherings versus right to food**

In accordance with CESCR General Comment No.12, the right to food,<sup>305</sup> is directly linked to the individual's right to life and dignity as stated in ICCPR General Comment No.36.<sup>306</sup> Schools were suspended for a period of 12 weeks in an effort to flatten the curve of COVID-19 through mass gatherings.<sup>307</sup> The interconnection between the right to food and the right to education was significantly undermined by COVID-19.<sup>308</sup> Nine million school-age children were denied access to at least one healthy meal per day due to school closures, leaving many of them to learn remotely while hungry.<sup>309</sup> CESCR General Comment No.12 requires states to refrain from any measures that prevents access to food.<sup>310</sup> General Comment No. 19 of the UNCRC, which stipulates that nations should not take deliberate actions to regress economic, social, and cultural rights, supports this.<sup>311</sup> Regressive measures in times of economic crisis like COVID-19 should only be taken after considering all other possibilities and making sure that children, especially those in disadvantaged situations, are the last to be impacted.<sup>312</sup> The government implemented some remedial programmes following two

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<sup>304</sup> *BATSA* (note 293 above) para 212.

<sup>305</sup> CESCR General Comment No.12 (note 105 above) at para 15.

<sup>306</sup> ICCPR General Comment No.36: Article 6: Right to life. Adopted at the 124<sup>th</sup> session by the International Covenant on Civil and Political Rights on 8 October- 2 November 2018 at para 26.

<sup>307</sup> Regulation 6 (note 183 above) 5.

<sup>308</sup> *Equal Education* (note 52 above) para 2.

<sup>309</sup> *Equal Education* (note 52 above) para 20.

<sup>310</sup> CESCR General Comment No.12 (note 105 above) at para 15.

<sup>311</sup> UNCRC General Comment No.19: Public budgeting for the realisation of children's rights (Article 4) at para 1.

<sup>312</sup> *Equal Education* (note 52 above) para 57.



months of lockdown, however, there was no effective alternative to the NSNP for children.<sup>313</sup>

The court held that the suspension of the NSNP had a devastating effect on some nine million learners because overnight a reliable source of food/nutrition came to an end.<sup>314</sup> The court further held that the state remains responsible for providing families with other socio-economic rights to enable them to provide for their children.<sup>315</sup> This implies that the government has a direct obligation to make sure that children who don't have family care have access to fundamental socio-economic needs.<sup>316</sup>

The court ruled that the Minister and MECs were in breach of their constitutional duty,<sup>317</sup> and ordered that, without delay, the NSNP be implemented in such a manner that it provides a daily meal to all qualifying learners, to ensure the proper exercise of the rights of learners to education and to enhance their learning capacity, whether they are attending school or studying away from school as a result of the COVID-19 pandemic.<sup>318</sup>

#### **4.3.3. Social distancing versus right to adequate housing**

The right to housing is inadequate if its residents lack some “degree of tenure security”, which provides them with “legal protection against forced evictions and other forms of removals”, according to CESCR General Comment No.4 read with CESCR General Comment No.7.<sup>319</sup> On 13 July 2020 during level three (3) of COVID-19 lockdown, City officials in Cape Town demolished structures in Zwelethu.<sup>320</sup> Many residents had occupied the adjoining city-owned land in March 2020, after they were evicted from their rented shacks in the township in Mfuleni. These residents are desperately poor and unemployed and had occupied their previous backroom shacks out of desperation

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<sup>313</sup> *Equal Education* (note 52 above) para 24.

<sup>314</sup> *Equal Education* (note 52 above) para 34.

<sup>315</sup> Section 28(1)(c) of the Constitution provides for “a child’s right to basic nutrition” read together with section 27 (1) (b).

<sup>316</sup> Section 28 of the Constitution.

<sup>317</sup> *Equal Education* (note 52 above) para 34 & 82.

<sup>318</sup> *Equal Education* (note 52 above) para 103.3 -103.5.

<sup>319</sup> CESCR General Comment No.4: The right to adequate housing (Article 11) (1) of the Covenant). Adopted at the sixth session of the Committee of Economic, Social and Cultural Rights on 13 December 1991, read with CESCR General Comment No.7 (note 151 above) at para 9.

<sup>320</sup> SAHRC (note 262 above) para 26.



and not choice.<sup>321</sup> They constructed buildings in Zwelethu in an effort to comply with the COVID-19 measure to avoid sleeping on the streets and to prevent the spread of COVID-19 by isolating themselves within their homes and maintaining a social distance from others.<sup>322</sup> These eviction and demolitions were effected without a court order,<sup>323</sup> thus, undermining the COVID-19 measure to observe social distance, since residents were removed from shelters housing them. It was argued that the evictions and demolitions were effected notwithstanding provisions in Regulation 19 and 36(1) of the DMA,<sup>324</sup> which both suspended evictions and demolitions unless there was a court order, which was not the case here.<sup>325</sup>

From 9 to 11 April 2020, informal dwellings in Khayelitsha were also demolished and occupants were evicted.<sup>326</sup> Pursuant to the above, on 15 May 2020, evictions and demolitions continued at the informal settlement of Kommetjie, Ocean View.<sup>327</sup> These evictions and demolitions were also effected without approval or a court order.<sup>328</sup>

The court held that “thousands of vulnerable people will continue to be subjected to arbitrary demolitions and face the trauma of homelessness as long as evictions and demolitions without court orders continue.”<sup>329</sup> This generates tension in relation to national and international human rights which can only be enjoyed when one has shelter, and his/her a right to tenure security is not threatened by evictions and demolitions.<sup>330</sup>

The court granted an interdict, preventing thousands of vulnerable people from being homeless.<sup>331</sup> The court held that “the City’s concerns, which affected people’s ability to access adequate housing, should not supersede the national and international human right to adequate housing.”<sup>332</sup>

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<sup>321</sup> SAHRC (note 262 above) para 27.

<sup>322</sup> SAHRC (note 262 above) para 27.

<sup>323</sup> SAHRC (note 262 above) para 26.

<sup>324</sup> Regulation 19 and 36(1) of the DMA.

<sup>325</sup> SAHRC (note 262 above) para 9.

<sup>326</sup> SAHRC (note 262 above) para 10.

<sup>327</sup> SAHRC (note 262 above) para 24.

<sup>328</sup> SAHRC (note 262 above) para 24.

<sup>329</sup> SAHRC (note 262 above) para 57.

<sup>330</sup> SAHRC (note 262 above) para 57.

<sup>331</sup> SAHRC (note 262 above) para 58.

<sup>332</sup> SAHRC (note 262 above) para 58.

The City of Cape Town applied for leave to appeal the High Court's interim orders,<sup>333</sup> alleging that they only demolished houses which were not occupied.<sup>334</sup> Referring to section 172(1) (a) of the Constitution mentioned above, the court held that the relief was final and not an interim order.<sup>335</sup> The court argued that the City would not suffer grave injustice if the interim order was not set aside, unlike the thousands of people who would be left homeless if the order was set aside.<sup>336</sup>

In the *Hangberg* case, the court similarly attempted to strike a balance between competing rights.<sup>337</sup> Due to over-crowding at his mother's house, exacerbated by the call to social distance and self-isolate, the applicant erected his own structure at Hangberg Hout Bay.<sup>338</sup> On 19 June 2020, the applicant was evicted, and his structure was demolished.<sup>339</sup> The eviction and demolition took place without a court order, as the COVID-19 measures so states.<sup>340</sup> The executive must take actions that address the nation's needs and are grounded in the law and the Constitution's core values.<sup>341</sup> The court held that the eviction was illegal and in violation of the Constitution.<sup>342</sup>

The devastating effects of violating the socio-economic right to housing through evictions and demolitions, do not consider the provisions of national and international human rights law.<sup>343</sup> Evictions and demolitions carried out in the midst of fighting COVID-19, therefore, are inhuman and heartless.<sup>344</sup>

#### 4.3.4. Closure of schools versus right to education

The state's decision to temporarily close schools and universities had a significant impact on the right to education.<sup>345</sup> The academic calendar was impacted by the

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<sup>333</sup> *City of Cape Town v South African Human Rights Commission* (144/2021) [2021] ZASCA 182 (22 December 2021) at para 5.

<sup>334</sup> *City of Cape Town* (note 333 above) para 29.

<sup>335</sup> *City of Cape Town* (note 333 above) para 21.

<sup>336</sup> *City of Cape Town* (note 333 above) para 16.

<sup>337</sup> *Hangberg* (note 263 above) para 3.

<sup>338</sup> *Hangberg* (note 263 above) para 3.

<sup>339</sup> *Hangberg* (note 263 above) para 3.

<sup>340</sup> Regulation 19(3) and section 36(1) (4) of the DMA.

<sup>341</sup> *Esau* (note 281 above) para 5.

<sup>342</sup> *Hangberg* (note 263 above) para 4.

<sup>343</sup> *Hangberg* (note 263 above) para 10.

<sup>344</sup> *Hangberg* (note 263 above) para 10.

<sup>345</sup> *One South African Movement* (note 18 above) at para 18.

interruption of teaching and learning, which suggests future employment options for teachers may be limited.<sup>346</sup> In recognition of this, the Ministry of Education implemented strategies to ensure continuation of education.<sup>347</sup> These strategies included online learning – television curriculum programmes, zoom and Skype classes.<sup>348</sup> Millions of children in underprivileged areas who previously could not afford to send their children to regular schools did not benefit from the same strategies.<sup>349</sup>

The temporary closing of schools and tertiary institutions ended the teaching and learning for many children.<sup>350</sup> For example, the switch to virtual learning saw about 584 of students de-registering in one university immediately after the lockdown began, because they were unable to access virtual learning because they lacked the resources.<sup>351</sup>

When the Ministry of Education announced that schools and tertiaries were to re-open, the applicants in *One South African Movement*, prayed for the court to order the DBE not to reopen them.<sup>352</sup> The international human rights' law's obligation to protect, as outlined in CESCR General Comment No.13 requires "states to avoid measures that hinder or prevent the enjoyment of the right to education".<sup>353</sup> Requesting courts to direct the DBE not to reopen educational institutions contradicts the state's obligation set out in CESCR General Comment No.13 "to take measures that prevent third parties from interfering with the enjoyment of the right to education".<sup>354</sup> Since social and developmental requirements are satisfied in the school setting, the closure of schools violated the right to dignity and denied access to education.<sup>355</sup>

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<sup>346</sup> Mbunge (note 199 above) 1811.

<sup>347</sup> Mbunge (note 199 above) 1811.

<sup>348</sup> Mbunge (note 199 above) 1811.

<sup>349</sup> I Pillay 'The impact of inequality and COVID-19 on education and career planning for South African children of the rural and low socio-economic backgrounds' (2021) 3(1) *African Journal of Career Development* 5.

<sup>350</sup> Pillay (note 349 above) 5.

<sup>351</sup> Pillay (note 349 above) 5.

<sup>352</sup> *One South African Movement* (note 18 above) at para 155.

<sup>353</sup> CESCR General Comment No.13: Right to Education. Adopted at the twenty-first session of the Committee of Economic, Cultural and Social Rights on 8 December 1999 at para 46.

<sup>354</sup> CESCR General Comment No.13 (note 353 above) para 47.

<sup>355</sup> *One South African Movement* (note 18 above) at para 178.

The approach the courts adopt in interpreting the right to education should be influenced by the application of international human rights law.<sup>356</sup> The court found that school closures could not go on for the following reasons:

“Distance learning was not a viable option for public schools particularly those serving disadvantaged communities; closure of schools would impact parents who must go back to work; ongoing closure of schools would deepen inequalities between schools, and the loss of a school year would over burden and compromise the school system.”<sup>357</sup>

For these reasons, the court decided that “the applicants request for the complete exclusion of the school community from returning to classes,<sup>358</sup> would have the same effect of infringing the right to education.”<sup>359</sup>

#### 4.3.5. Public health versus right to water and sanitation

CESCR General Comment No.15 provides “that access to sufficient water and decent sanitation is a basic human right which should be universally enjoyed”.<sup>360</sup> The Constitution of the Republic of South Africa guarantees “everyone the right to access sufficient water and sanitation”.<sup>361</sup> International human rights law in terms of CESCR General Comment No.15,<sup>362</sup> and the Constitution obligate the state “to provide access to water and sanitation”.<sup>363</sup> To fight the spread of COVID-19, WHO emphasised on frequent hand-washing with soap and water.<sup>364</sup> The key strategies used in South Africa to curb the spread of the virus was the provision of water and sanitation services.<sup>365</sup> The Minister of Human Settlements, Water and Sanitation acknowledged how urgent it was to provide basic sanitation and water services.<sup>366</sup> The National Disaster Water

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<sup>356</sup> *One South African Movement* (note 18 above) at para 178.

<sup>357</sup> *One South African Movement* (note 18 above) at para 175.

<sup>358</sup> *One South African Movement* (note 18 above) at para 199.

<sup>359</sup> *One South African Movement* (note 18 above) at para 200.

<sup>360</sup> CESCR General Comment No.15 (note 144 above).

<sup>361</sup> Section 27(1) (b) of the Constitution.

<sup>362</sup> CESCR General Comment No.15 (note 144 above).

<sup>363</sup> *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* (CCT 157/20) [2021] ZACC 45 (7 December 2021) para 4.

<sup>364</sup> (note 269 above).

<sup>365</sup> B Zindi and E Shava ‘COVID-19 and the attainment of Sustainable Development Goal 6: clean water and sanitation in South Africa’ (2022) 3 *Journal of Local Government Research and Innovation* 4.

<sup>366</sup> Regulation 7(1) Government Notice (note 7 above) 5.

Command Centre was formed by the Minister,<sup>367</sup> to coordinate actions for anybody the Minister authorised to do so in this regard; these included water services authorities, water boards, irrigation boards, watershed management organisations, and water-users associations.<sup>368</sup>

The Minister coordinated the urgent delivery of water tanks, water vehicles, and sanitisers to communities with limited water supplies.<sup>369</sup> The intervention was impressive, however, due to South Africa's lack of access to water, the implementation was inadequate considering the extent of the need and it being relatively costly.<sup>370</sup>

Water tanks and tankers were made available and distributed in numerous provinces, however, some problems were encountered.<sup>371</sup> One issue with the delivery and distribution of water tanks and tankers, for instance, was distribution delays.<sup>372</sup> According to the Minister, the reason for the delay was that a tank needed to be put on a platform for maximum performance. Municipalities were responsible for constructing the platforms,<sup>373</sup> but because regulations prohibited stores from operating,<sup>374</sup> municipalities could not get the cement and bricks they required to put and fix the tanks, thus, further generating tension with the right to access water.<sup>375</sup>

Several South Africans living in informal settlements were in danger of contracting COVID-19 due to the burden placed on the water supply systems of many urban municipalities.<sup>376</sup> For example, some villages in Limpopo Province revealed that they never received water and sanitation disaster relief facilities.<sup>377</sup> When the Municipalities failed to provide fundamental services, the right to water and sanitation was violated.

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<sup>367</sup> Regulation 5(1) & (2) Government Notice (note 7 above) 6.

<sup>368</sup> (note 272 above).

<sup>369</sup> 'Water and Sanitation delivers water tankers to Limpopo during COVID-19 lockdown' (2020) available at <https://www.gov.za/speeches/water-and-sanitation-delivers-water-tankers-limpopo-during-coronavirus-covid-19-lockdown-2> (accessed 5 February 2022).

<sup>370</sup> TIPS 'A case for water and sanitation in South Africa post-lockdown economic recovery stimulus package' (2020) available at

[https://www.tips.org.za/images/TIPS\\_Policy\\_Brief\\_A\\_case\\_for\\_water\\_and\\_in\\_South\\_Africans\\_post\\_lockdown\\_stpdf.pdf](https://www.tips.org.za/images/TIPS_Policy_Brief_A_case_for_water_and_in_South_Africans_post_lockdown_stpdf.pdf) (accessed 4 February 2022).

<sup>371</sup> Zindi and Shava (note 365 above) 6.

<sup>372</sup> (note 370 above).

<sup>373</sup> Zindi and Shava (note 365 above) 6.

<sup>374</sup> Regulation 11A (note 37 above)

<sup>375</sup> Matseke (note 244 above) 98.

<sup>376</sup> Zindi and Shava (note 365 above) 2.

<sup>377</sup> (note 369 above).

Instead, residents had to buy water from those with boreholes, queuing for water at shared standpipes making social distancing a challenge.<sup>378</sup> In Eastern Cape, the water tanks provided were empty since they were only filled the day they were delivered.<sup>379</sup> Communities were being forced to step into the service gap created by local government.<sup>380</sup>

South Africa recognises the right to water and sanitation, however, there has been a startling dearth of legal rights advocacy in that area, with just one court case making it all the way to the Constitutional Court.<sup>381</sup> This is so because the Constitutional Court ruled that “the state does not have to supply everyone with sufficient water upon request in order for everyone to have access to sufficient water.”<sup>382</sup> The Constitutional Court ruled that “the Constitution of the Republic of South Africa merely compels the state to implement reasonable legislation and other measures gradually and within its resources to realise the right to obtain sufficient water.”<sup>383</sup> The government therefore complied with its constitutional obligations in light of the Constitutional Court’s ruling and the actions it took during COVID-19 because the court determined that “the Constitution does not compel the government to be held to an unachievable level of perfection.”<sup>384</sup>

#### 4.4. Conclusion

This chapter highlighted that courts have the same obligation in times of crisis as they do in times of peace. The cases discussed in this chapter provided evidence on how human rights and public health are interlinked. The ability for courts to substantively evaluate the human rights implications of the state’s response and intervene more strongly in public health emergencies is made possible by framing public health as a human rights priority during times of crisis, like the COVID-19 pandemic.

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<sup>378</sup> Zindi and Shava (note 365 above) 6.

<sup>379</sup> Zindi and Shava (note 365 above) 6.

<sup>380</sup> T Masiangoako, K Khunou and A Potter ‘Fighting for water in South Africa: Public participation, water rights claiming and strengthening governance’ (2022) 5(1) *H2Open Journal* 98.

<sup>381</sup> *Mazibuko & Others v City of Johannesburg & Others* (CCT 39/09) [2009] ZACC 28 para 1.

<sup>382</sup> *Mazibuko* (note 381 above) para 50.

<sup>383</sup> *Mazibuko* (note 381 above) para 50.

<sup>384</sup> *Mazibuko* (note 381 above) para 161.

## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

#### 5.1. Introduction

The previous chapters have provided the background of the study, literature review and critical interpretation of Acts, guidelines and initiatives that ensure that human rights are observed. As stated in Chapter One, the COVID-19 problem was triggered by a virus which was discovered in Wuhan, China, in 2019. The official name of this virus is COVID-19 which the WHO classified as a global pandemic. This came with restrictions that affected the socio-economic rights of people in countries' pursuit of promoting and protecting human right to life. It is based on this pursuit that the socio-economic rights of people were affected, including people in South Africa which the study is situated.

The main research question of this study is: "What are the implications of the legal approaches taken to address the COVID-19 pandemic on socio-economic rights in South Africa?"

Conclusions and recommendations from the study are presented in this chapter. First, conclusions will be made evaluating how the study had answered each research question; the recommendations of the study will come after.

#### 5.2. Conclusions

Following Chapter 1 which sets out the background of the dissertation, Chapter 2 focused on nations' obligations during pandemics under international human rights law and the evolution of COVID-19 as a global pandemic. In the discussions, it was established that several states implemented stringent measures to flatten the curve of the virus as a result of the uniqueness of COVID-19. These strict measures included banning international travel and prohibiting mass gatherings. On 11 March 2020, the WHO declared the virus a global pandemic after it had spread and killed thousands of



people worldwide. In respect of international human rights law, classifying a global pandemic was first adopted by the UDHR, which holds that “all human beings are born free and equal in dignity and rights”. Three layers of international human rights law stipulate that “if one’s rights are not protected at the domestic level, international systems come into force.”

States are obligated to respect, to protect, and to fulfil human rights in order to safeguard them. In the context of COVID-19, countries such as Iran, Italy and France imposed strict measures such as stay-at-home measures which impacted on the right to work. For example, the first month into the outbreak of COVID-19 it was revealed that informal workers’ earnings had declined by 60 percent, globally. In Africa, various countries experienced an increase in food insecurity, with almost 265 million experiencing acute hunger crisis. The right to education was negatively impacted in countries such as Kenya, wherein schools in rural areas were unable to access online learning.

From the above, it showed that states can limit human rights to address pandemics such as COVID-19. In order to fulfil their obligations under international human rights law, states must take socio-economic rights into account while responding to global public health emergencies.

Chapter 3 answered the research question: “How have legal measures taken by the Government in flattening the COVID curve generated tension between rights in South Africa?” A group of nine people who had just returned from Italy, where COVID-19 was rife, led to the discovery of the COVID-19 outbreak in South Africa on 29 February 2020. The South African government immediately adopted stringent measures, including orders to stay at home, social distancing, self-isolation, suspension of economic activity, bans on mass meetings, and travel restrictions when going abroad.

In terms of the ICESCR, and the Constitution of the Republic of South Africa, South Africa was justified in implementing strict measures to prevent, treat and control the pandemic. Some of these limitations generated a clash between public health and socio-economic rights. With COVID-19 being transmitted through human droplets and close contact, implementing strict measures aided in flattening the curve of the

pandemic. Between February and April 2020, the first hard lockdown resulted in job losses of between 2.2 and 2.8 million, despite the fact that it seemed to meet the goals of preventing the health system from becoming overburdened. Stay-at-home orders impacted informal workers who had to physically show up to work to earn a living, thus impacting on their food security. KZN and Eastern Cape, were reported as the provinces that was the most affected by hunger.

In respect of child food security, the closure of schools impacted on this right. When schools were ordered to close, the nine million children who relied on NSNP were affected since the NSNP was closed without contingency measures to feed the affected children. Furthermore, the closure of schools impacted more than 13 million children and exacerbated inequalities between schools because when online learning was introduced, many children in public schools in informal settlements, were faced with limited access to technology. The COVID-19 measure to stay at home and isolate oneself also had an impact on the right to adequate housing. These measures did not consider the living conditions of people in informal settlements who live very close together and have narrow access paths. Their house structures are often constructed of zinc, which exposes them to harsh temperatures if they stay at home and self-isolate. Furthermore, the right to adequate housing was impacted by an increase of evictions and demolitions, effected without court orders. COVID-19 measures prohibited evictions and demolitions without court orders, although, various cases were reported where these were effected by City officials who failed to recognise the living conditions and hardships that poor communities face.

In respect to the right to water and sanitation, COVID-19 measures did not limit this right. Access to water and sanitation in South Africa, however, remained a problem during COVID-19, although the best accepted practice to flatten the curve required regular hand-washing and maintenance of good hygiene. Various provinces in South Africa received water tanks, however, government failed to regularly fill up the water tanks. Having regard to the preceding discussions, it is clear that, in accordance with the ICESCR and the Constitution of the Republic of South Africa, public health measures were required to flatten the curve of the virus, however, these measures should have been implemented, as a complement to socio-economic rights.

The role of courts in balancing the tension between rights in COVID-19 litigation against government measures is covered in Chapter 4. When asked - “What is the role of the courts in circumstances such as these?”- the SCA in *Esau* responded best with “the role of courts in times of upheaval such as a national disaster should first and foremost be a sacred duty to administer justice to those who seek it.” This response may be the best explanation of “how the courts should play their role and the role of human rights during a pandemic.” “In times of crisis as much as in times of peace, the courts have the same obligation.”

In respect to the right to work, in *BATSA*, court held that “the right to choose a trade includes the right to practice such trade, and a law that prevents someone from doing so, limits the person’s rights”. It further held that the COVID-19 measure imposed by regulation 45 against the right to work created more harm. The court ordered that the regulation that prohibited the sale of tobacco, e-cigarettes during COVID-19 was not consistent with the constitution, and that the prohibition be lifted.

With respect to the right to food for children, *Equal Education* held that “the state remains responsible to provide families with other socio-economic rights to enable them to provide for their children”. This implies that “the state has a direct obligation to provide for the basic socio-economic needs of children who are not cared for by families.” The state has a duty to give those children the protection and rights outlined in section 28 of the Constitution. The court held that “the suspension of the NSNP has had a devastating effect on some nine million learners because overnight a reliable source of food/nutrition came to an end”. The court ordered that “the Minister and MECs were in breach of their constitutional duty, and that without delay, they are to ensure that the NSNP is implemented in such a manner that it provides a daily meal to all qualifying learners, to ensure the proper exercise of the rights of learners to education and to enhance their learning capacity, whether they are attending school or studying away from school because of the COVID-19 pandemic”.

*SAHRC*, dealt with right to adequate housing when the court held that “while evictions and demolitions without court orders continue, thousands of vulnerable people will continue to be subjected to arbitrary demolitions and face the irreparable harm of homelessness”. This generates tension for national and international human rights which can only be enjoyed when one has shelter, and his/her a right to tenure security

is not threatened by evictions and demolitions. The court, therefore granted an interdict, preventing thousands of vulnerable people from being homeless. The court held that “the national and international human right to adequate housing should take precedence over the City’s concerns, which impact the right to access adequate housing”.

*One South African Movement* dealt with the right to education. The court ruled that “closure of schools could not continue because distance learning was not a viable option for public schools serving disadvantaged communities”. For that reason, the court held that “the relief sought by the applicants for total exclusion of the school community from returning to school, would have the same effect of infringing the right to education”.

In relation to the right to water and sanitation, the cornerstone of water and sanitation litigation was addressed in a case in the Constitutional Court, although, it was not decided during the COVID-19 lockdown. In the case of *Mazibuko*, the Constitutional Court held that “the Constitution of the Republic of South Africa only requires state to take reasonable legislative and other measures, progressively and within state’s available resources to realise the right of access to sufficient water”. It does not call for the government to be held to an unrealistically high level of excellence. Since the state is not being held responsible for providing essential human rights services, it is not unexpected that there would be a dearth of legal rights advocacy, with only one court action reaching the Constitutional Court.

### **5.3. Recommendations**

The following recommendations would serve as measures that might be taken to recover from COVID-19 regulations and ensure that people living in South Africa have the right to work, food, adequate housing, social security, education, water, and sanitation.

- 5.3.1. The international human rights treaties that South Africa ratified should be maintained and implemented.
- 5.3.2. Recognise socio-economic rights when addressing pandemics.

- 5.3.3. All employees, irrespective of their position, should be covered by South Africa's Unemployment Insurance Fund.
- 5.3.4. Utilise the COVID-19 recovery funds to build more public housing and upgrade existing facilities in accordance with the need for justice.
- 5.3.5. Increase social grants to at least meet the minimum level required for food.
- 5.3.6. Make the necessary financial and technical investments to guarantee that everyone's right to a free, public education is protected during pandemics.
- 5.3.7. Government should take advantage of opportunities coming from the shift to a circular economy by investing in water and sanitation. A circular approach can yield economic gains that can be used to build and maintain sanitation infrastructure, as well as significant social and environmental benefits.

#### **5.4. Concluding remarks**

All human beings have to enjoy human rights which are universal. When addressing a threat to the public's health, socio-economic rights must be recognised and protected. The findings of this study revealed that the use of coercive measures to prevent, treat, and control pandemics like COVID-19 may be justified under both international human rights law and the South African Constitution. The effectiveness of the pandemic's response may be compromised if these restrictions are applied severely or uniformly. The study's conclusions and recommendations could be helpful in making sure that socio-economic rights are recognised and better protected when responding to pandemics in South Africa.

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