

CHAPTER 1

4th ECONOMIC AND SOCIAL RIGHTS REPORT

1. JUDICIAL ENFORCEMENT OF ECONOMIC AND SOCIAL RIGHTS

The South African Bill of Rights of the Constitution¹ makes provision for legally enforceable economic and social rights such as the right to education,² the right to housing,³ the right to health care, food, water, social security⁴ and the right to a clean environment.⁵ One of the issues which have been debated since the democratic

¹ The Constitution of the Republic of the Republic of South Africa, Act, No. 108 of 1996.

² Section 29(1) provides:

- “(1) Everyone has the right—
 - (a) to a basic education, including adult basic education, and
 - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public education institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—
 - (a) equity;
 - (b) practicability; and
 - (c) the need to redress the results of past racially discriminatory laws and practices.
- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—
 - (a) do not discriminate on the basis of race;
 - (b) are registered with the state; and
 - (c) maintain standards that are of no inferior to standards as comparable public educational institutions.”

³ Section 26 provides:

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

⁴ Section 27 provides:

- “(1) Everyone has the right to have access to—
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.”

⁵ Section 24 provides:

- “Everyone has the right-
 - (a) to an environment that is not harmful to their health or wellbeing; and

dispensation was whether economic and social rights are legally enforceable. That debate was put to rest by the Constitutional Court in the *First Certification*⁶ judgement which stated:

It is true that the inclusion of [economic and social] rights may result in courts making orders, which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications...The fact that [economic and social] rights will almost inevitably give rise to such implications does not seem to be a bar to their justifiability. At the very minimum, [economic and social] rights can negatively be protected from improper invasions.⁷

On at least four occasions,⁸ the Constitutional Court pronounced on the judicial enforcement of economic and social rights. In *Grootboom*⁹ the Court emphasised the position adopted in the *First Certification* case that economic and social rights cannot exist only on paper. The Court affirmed the interconnectedness and indivisibility of [economic and social] rights with civil and political rights, that “[a]ffording economic and social rights to all people enables them to enjoy the other rights in Chapter 2” of the Constitution.¹⁰ The justiciability of economic and social rights was also reiterated in the case, *Minister of Health & Others v Treatment Action Campaign and Others* (1).¹¹

Both these cases affirm that South Africa has got a duty to observe both its constitutional and international obligations¹² with regard to economic and social rights. In fact, as will be demonstrated below, the *Grootboom* judgment provided a useful model of how to approach remedies on economic and social rights. In this case, the respondents (390 adults and 510 children), who were living in deplorable conditions in an informal settlement around the Cape Metropolitan area, were evicted from low-cost housing land that they had occupied illegally. They were eventually evicted and left homeless. They then applied to the High Court for an order requiring the government to provide them with alternative accommodation until such time that they could obtain adequate housing or shelter. They based their action on section 26 of the Constitution, which imposes an obligation upon the State to take reasonable legislative and other measures to ensure the progressive realisation of the right of

(b) to have an environment protected, for the benefit of present and future generations, through reasonable legislative and other measures”

⁶ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (10) BCLR 1169 (CC).

⁷ *Ibid*, paras 77-78.

⁸ *Soobramoney v Minister of Health, Kwa-Zulu-Natal* 1997(12) BCLR 1696(CC); *Government of the Republic of South Africa & Others v Grootboom & Others* 2000(11) BCLR 1169 (CC); *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1169 (CC); *Minister of Health & Others v Treatment Action Campaign & Others* (1) 2002 (10) BCLR 1033 (CC).

⁹ *Ibid*, para 20. For more discussions on the *Grootboom* case see (17) *South African Journal on Human Rights* 2001 *1 et seq.*

¹⁰ *Ibid*, para 23.

¹¹ *Op. cit.*, para 23.

¹² South Africa signed the International Covenant on Economic, Social and Cultural Rights on 3, October 1994.

access to adequate housing within its available resources; and section 28(1)(c) of the Constitution which provides that children have the right to shelter. The High Court ordered the government provide the applicants with basic shelter. The case was then taken on appeal to the Constitutional Court.

In a unanimous judgment per Justice Yacoob, it was noted that the Constitution obliges the State to act positively to ameliorate the plight of the hundreds of thousands of people living in deplorable conditions throughout the country. Accordingly, the State must provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The Court emphasised that neither section 26 nor section 28(1)(c) gave any of the respondents the right to claim shelter from the State immediately. However, the programme in force in the area of the Cape Metropolitan Council at the time the application was launched, fell short of the obligations imposed upon the State by section 26. Although the overall housing programme implemented by the State since 1994 had resulted in a significant number of homes being built, it failed to provide for any form of temporary relief to those in desperate need, those with no roof over their heads, or those living in crisis conditions.

Another landmark case that added substance to the realisation of economic and social rights, as already pointed out above, was the *Treatment Action Campaign* cases. This case involved the South African AIDS activist group, the Treatment Action Campaign (TAC) and the government. In September 1999, the TAC pressured the government to accelerate the programme for the prevention of intrapartum transmission of HIV. The Minister of Health said that this could not be done because there were concerns about the safety and efficacy of Nevirapine. Following the 13th International AIDS Conference in Durban, in August 2000, the Minister announced that Nevirapine would still not be made generally available. Instead, two pilot sites would be established in each province for further research and the use of Nevirapine would be confined to those sites. This, despite the fact that Nevirapine had been registered in 1998 by the Medicines Control Council (MCC), a specialist body created by the Medicines and Related Substances Control Act 101 of 1965 to determine the safety of drugs before being made available in South Africa.

The Minister insisted that the government was concerned about the safety and efficacy of Nevirapine, thus requiring continuation of government's research programme. According to the Department of Health, the trials were needed to address issues including the potential for drug resistance to Nevirapine use, possible complications linked to breast feeding and the need for proper counselling facilities. This was so notwithstanding the recommendation by the World Health Organisation that Nevirapine be administered to the HIV-positive mother and infant at the time of birth in order to combat HIV.

A study commissioned by the Department of Health and obtained by TAC revealed that a national programme of providing Nevirapine for pregnant women would save 14 000 babies at a cost of US \$10.5 million or just US \$750 per child. TAC decided to take legal action to pressure the government to roll out a national programme to

distribute an antiretroviral drug called Nevirapine to help reduce the number of South African children born with HIV.¹³

The main issues in this case were, firstly, whether the government was entitled to refuse to make Nevirapine, which is a registered drug, available to pregnant women who have HIV and who give birth in the public sector, in order to prevent or reduce the risk of transmission of HIV to their infants, where in the judgment of the attending medical practitioner this is medically indicated. Secondly, whether the government was obliged, as a matter of law, to implement and set out clear timeframes for a national programme to prevent mother-to-child transmission of HIV, including voluntary counselling and testing, antiretroviral therapy, and the option of using formula milk for feeding.

In a unanimous judgment, the Constitutional Court issued a declaration to the effect that:

- the policy for reducing the risk of mother-to-child transmission of HIV as previously formulated and implemented by the government fell short of compliance;
- sections 27(1) and (2) of the Constitution required the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV;
- the programme should be realised progressively within the government's available resources and had to include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission; and
- making appropriate treatment available to them for such purposes.

The Court ordered the government to remove the restrictions preventing Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that were not research training sites, and to permit and facilitate the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.

2. OBLIGATIONS OF THE STATE

Section 7(2) of the Constitution imposes four different types of obligations on the State with regard to the provision of the Bill of Rights.¹⁴ The obligations to respect, protect, promote and fulfil. Section 7(2) has two components to it, the positive and negative aspects. The duty to respect is negative in nature, whereas the other three duties require positive action from the State. Failure to comply with any of these obligations with regard to any of the rights enshrined in the Bill of Rights will constitute a violation of those particular rights. The obligation to respect requires the

¹³ See, <http://www.aegis.com/news/irin/2001/IR010830.html>.

¹⁴ Section 8(1) of the Constitution expressly states, "the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

State to refrain from interfering with the enjoyment of economic, social and cultural rights.¹⁵ For example, the right to housing would be violated if the State engages in arbitrary forced evictions.¹⁶ The obligation to protect requires the State to prevent violations of such rights by third parties. The failure to ensure that third parties conform with the standards set in the Constitution by adopting relevant legislation and the provision of effective remedies to protect beneficiaries of the protected rights will amount to a breach of this obligation. The obligation to promote enjoins the State to create a conducive atmosphere in which people can be able to exercise their rights and freedoms by promoting tolerance and raising awareness of the rights. The obligation to fulfil requires the State to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights.¹⁷ The obligation to fulfil is inextricably intertwined with the obligation to promote, but needs more positive action from the State.

Each of the above obligations, contain elements of the obligation of conduct and obligation of result.¹⁸ The obligation of conduct requires action reasonably calculated to realise the enjoyment of a particular right. The obligation of result requires the State to achieve specific targets to satisfy a detailed substantive framework established by both the Constitution and the international community. The State, however, enjoys a margin of appreciation in selecting the means for implementing their respective obligations. Hence, in the *Grootboom* judgment, the Court acknowledged that there is a wide range of possible measures that the State can adopt, and that it is not for the Court to prescribe the measures that the State should adopt, as long as the means selected would realise the enjoyment of a particular right.¹⁹ What will then follow, according to the Court will be to assess the appropriateness of the adopted measures. While the UN Committee on Economic, Social and Cultural Rights indicated that it is incumbent upon a State to justify the appropriateness of the means it has chosen under the circumstances²⁰, the *Grootboom* judgment held that reasonableness will be used as a yardstick to assess the appropriateness of the measures adopted by government.²¹

A violation of the government's obligation will only occur if it pursues, by action²² or omission,²³ a policy or practice, which deliberately contravenes or ignores its

¹⁵ *Economic, Social and Cultural Rights, A Compilation of Essential Documents*, “Maastricht Guidelines on Violations of Economic, Social and Cultural Rights”, International Commission of Jurists, 1997, para 6, p. 82-3.

¹⁶ Section 26(3) categorically states:

No one may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances. No legislation may permit arbitrary evictions.

¹⁷ *Economic, Social and Cultural Rights, A Compilation of Essential Documents*, *op. cit.*, para 6.

¹⁸ *Ibid*, para 7, p. 83.

¹⁹ *Grootboom*, *op. cit.* para 41.

²⁰ General Comment, No. 3, UN Committee on Economic, Social and Cultural Rights, 1990, para 4.

²¹ *Ibid*.

²² *Economic, Social and Cultural Rights, A Compilation of Essential Documents*, “Maastricht Guidelines on Violations of Economic, Social and Cultural Rights”, *op. cit.*, para 14, provides that:

"Violations of economic, social and cultural rights can occur through the direct action of States or other entities insufficiently regulated by States. Examples of such violations include:

(a) The formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed;

constitutional and international obligations, or fails to achieve the required standard. A good example will be *Grootboom* where the government was found to have in place, a laudable nation-wide housing programme, which, however, failed to provide relief for those in peril and thus fell short of the obligations imposed by section 26 of the Constitution.²⁴

It is, however, crucial to appreciate that economic and social rights are not absolute, but are qualified rights.²⁵ The reason they are considered to be programmatic rights is because they were never designed to be achieved immediately in general. Their fulfilment generally depends on the country's available resources. The extent of the State's obligation with regard to economic and social rights is defined by three key elements: the obligation to "take reasonable legislative and other measures"; "to achieve the progressive realisation" of the right; and "within available resources." The Limburg Principles on the Implementation of the International Covenant on

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- (b) The active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination;
 - (c) The active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights;
 - (d) The adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups;
 - (e) The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed;
 - (f) The calculated obstruction of, or halt to, the progressive realisation of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure;
 - (g) The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone."

²³ *Ibid*, para 15 provides:

"Violations of economic, social, cultural rights can also occur through the omission or failure of States to take necessary measures stemming from legal obligations. Examples of such violations include:

- (a) The failure to take appropriate steps as required under the Covenant;
- (b) The failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant;
- (c) The failure to enforce legislation or put into effect policies designed to implement provisions of the Covenant;
- (d) The failure to regulate activities of individuals or groups so as to prevent them from violating economic, social and cultural rights;
- (e) The failure to utilise the maximum of available resources towards the full realisation of the Covenant;
- (f) The failure to monitor the realisation of economic, social and cultural rights, including the development and application of criteria and indicators for assessing compliance;
- (g) The failure to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right guaranteed by the Covenant;
- (h) The failure to implement without delay a right which is required by the Covenant to provide immediately;
- (i) The failure to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;
- (j) The failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into a liberal or multilateral agreements with other States, international organisations or multinational corporations."

²⁴ *Grootboom*, *op. cit.*, para 65-66.

²⁵ *TAC*, *op. cit.*, para 23 and *Ibid*, para 38.

Economic, Social and Cultural Rights;²⁶ the Maastricht Guidelines on Violation of Economic, Social and Cultural Rights;²⁷ and the General Comment on UN Committee on Economic, Social and Cultural Rights provide a helpful interpretation for understanding the nature of the State's obligations with respect to its economic and social rights obligations. In the *Grootboom* judgment, the Constitutional Court held that the general comments of the UN Committee on Economic, Social and Cultural Rights²⁸ on the nature of States parties obligation in terms of Article 2(1) of the Covenant on Economic, Social and Cultural Rights, "progressive realisation" in particular, is in harmony with the context in which the phrase is used in the South African Constitution.²⁹ For that reason, there is no need "not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived." In fact, section 39³⁰ of the Constitution obliges a court to consider international law as a tool to interpretation of the Bill of Rights. In *Makwanyane*³¹ Chaskalson P (as he then was), in the context of section 35(1) of the interim Constitution said:³²

International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provision of [the Bill of Rights] .³³

In its interpretation, the Constitutional Court in *Grootboom* also relied on the general comments of the UN Committee on Economic, Social and Cultural Rights for interpreting the obligatory nature of the State in the context of the International Covenant on Economic, Social and Cultural Rights.

The issue of the nature and scope of State parties' obligation in the context of Article 2 of the Covenant on Economic, Social and Cultural Rights (Covenant) was addressed by the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 3. What emerged from its interpretation is that State parties are

²⁶ *Economic, Social and Cultural Rights, A Compilation of Essential Documents*, International, The Limburg Principles on the Implementation of the International Covenant on Economic, Social & Cultural Rights, International Commission of Jurists, November, 1997.

²⁷ *Economic, Social and Cultural Rights, A Compilation of Essential Documents*, "Maastricht Guidelines on Violations of Economic, Social and Cultural Right, *op. cit.*

²⁸ General Comment No. 3, *op. cit.*

²⁹ *Grootboom*, *op. cit.*, para 45.

³⁰ Section 39 which deals with the interpretation of the Bill of Rights provides:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum -
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law"

³¹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

³² Act, No. 200, of 1993.

³³ *Makwanyane*, *op.cit.*, para 35.

accountable to both the international community and their own subjects for non-compliance with their economic and social rights obligations. As already indicated, relevant in this report is Article 2(1) of the International Covenant on Economic, Social and Cultural Rights which provides:

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

Interpretative principles relating to Article 2(1) of the Covenant

To take steps

In terms of section 7 of the Constitution, the state has to take steps "not only to respect the various rights, but also to protect, promote and fulfil them."³⁴ As [economic and social] rights are programmatic rights, the State has an obligation to begin immediately to take steps towards the full realisation of the [economic and social] rights contained in the Bill of Rights. As already pointed out above, the State must use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights in order to fulfil their constitutional obligations.³⁵ According to *Grootboom*, the sufficiency of the steps taken by the government will be assessed against the standard of reasonableness.

The Constitutional Court in *Grootboom* stressed the importance of the national government in ensuring that laws, policies, programmes and strategies are put in place to meet the State's socio-economic obligations. Falling squarely on the national government is an equitable allocation of national revenue to the provinces and local government in order to implement the adopted measure.³⁶ Since legislative measures alone do not constitute compliance, it has to be followed by appropriate, well directed policies and programmes to be implemented by the executive.

For example, the greatest challenge facing the delivery of services to the vulnerable members of the society more often than not, lies not so much with government policies and other measures, but the implementation of such policies. This was confirmed by the recent *Report of the Committee of Inquiry into a Comprehensive System of Social Security in South Africa* ("Taylor Report") established by the government in 2000 to investigate social security in South Africa. The report, first published in March 2002 recommends a comprehensive social security package to address income as an integral component of the social security system in South

³⁴Pierre De Vos, "Grootboom, The Rights of Access to Housing and Substantive Equality as Contextual Fairness", *SAJHR*, Vol. 17, 2001 at 261.

³⁵ *Economic, Social and Cultural Rights, A Compilation of Essential Documents*, "Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights", International Commission of Jurists, 1997, para 17, p. 67.

³⁶ Liebenberg S, "The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa," in *SAJHR*, Vol. 17, 2001 at 246-7.

Africa. The Committee *of Inquiry into a Comprehensive System of Social Security in South Africa* observing that delivery of social services remains a major problem in the promotion and enforcement of economic and social rights, stated:

The Committee finds that Government programmes to address deprivation in health, education, housing, land, basic services such as access to water and sanitation, electricity and access to credit are well conceived and potentially well targeted. The barriers of access especially in regard to the poor remains administrative and institutional.³⁷

These policies and programmes must in addition, be reasonable in their conception and their implementation. The national government has to ensure that it allocates responsibilities and tasks to different spheres of government, appropriate financial and human resources to ensure that the measures adopted are implemented.³⁸ In determining whether measures adopted are reasonable, one has to consider them in their social, economic and historical context.³⁹ The Constitutional Court in *Soobramoney* described the context in which the Bill of Rights was to be interpreted:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration have a hollow ring.⁴⁰

The measures must in addition, be co-ordinated; comprehensive; and coherent, balanced and flexible, and make appropriate provision for short, medium and long term needs.

The whole package should be directed towards the progressive realisation of the right. According to the UN Committee, such steps should be deliberate, concrete and targeted.⁴¹

Making provision for effective remedies, including where appropriate, judicial measures, is another necessity.⁴² Such remedies should not only be accessible, but

³⁷ *Transforming the Present – Protecting the Future, Consolidated Report*, Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa, March 2002, Chapter 5, p. 55.

³⁸ *Grootboom, op. cit.*, para 40, 68.

³⁹ *Grootboom, Ibid*, para 25 and *TAC (I), op. cit.*, para 24

⁴⁰ *Soobramoney, op. cit.*, para 8.

⁴¹ General Comment No. 3, 1990, *op. cit.*, para 2.

⁴² *Limburg Principles, op. cit.*, para 19.

should be affordable, timely and effective.⁴³ In this regard, the UN Committee on Economic, Social and Cultural Rights stated that:

[t]he adoption of a rigid classification of economic, social and cultural rights which puts them . . . beyond the reach of the courts would . . . be arbitrary and incompatible with the principle that the two sets of human rights [civil and political rights and economic, social and cultural rights] are indivisible and interdependent, [and] would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.⁴⁴

To achieve progressively the full realisation of the rights

The use of the phrase "progressive realisation" indicates that it was never envisaged that the full realisation of all economic, social and cultural rights would be achieved within a short period of time. According to the general comments of the UN Committee this serves as a "flexibility device, reflecting the realities of the real world and the difficulties involved for any country".⁴⁵ Secondly, the obligation to progressively achieve the full realisation of the rights, requires the State to move as expeditiously as possible towards the realisation of the rights.⁴⁶ The State can never, however, defer indefinitely efforts to ensure full realisation. On the contrary, the State has an obligation to begin immediately to take steps to fulfil their constitutional obligations.⁴⁷ Accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined, and where possible, lowered overtime.⁴⁸ Justice Yacoob cited with approval the analysis of the phrase "progressive realisation" taken from Article 2(1) of the Covenant on Economic, Social and Cultural Rights in the context of the rights pertaining to housing by the UN Committee on Economic, Social and Cultural Rights:

Nevertheless, the fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring the full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'etre*, of the Covenant which is to establish clear obligations for State parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration

⁴³ General Comment No. 9, UN Committee on Economic, Social and Cultural Rights, E/C. 12/1998/24 para 9.

⁴⁴ *Ibid*, para 10.

⁴⁵ *Ibid*, para 10.

⁴⁶ *Ibid*, see also *Grootboom, op. cit.*, para 46.

⁴⁷ *Ibid*.

⁴⁸ *Grootboom, op. cit.*, para 45.

and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.⁴⁹

For that reason, the progressive realisation of economic and social rights must, firstly, occur within a comprehensive, coherent and co-ordinated framework.⁵⁰ The Constitutional Court in *Grootboom* categorically stated that even though the measures adopted may be statistically successful, if they fail to ensure the progressive realisation of those most desperate, then the programme cannot pass a constitutional muster.⁵¹ Secondly, the obligation of progressive achievement exists independently of the increase in resources, it requires effective use of resources available. The 'effective use of the resources available' means that the State would bear the burden of justifying any retrogressive measures arising from either under spending, ineptness of the government officials entrusted with the implementation of a particular programmes as well as other factors. Finally, accessibility to social services has to be progressively facilitated by examining, reviewing and lowering legal, administrative, operational and financial hurdles overtime to ensure access by a wide range of people.⁵²

To the maximum of its available resources

The State is enjoined, regardless of its level of economic development, to observe its socio-economic obligation. However the obligation does not require the State to do more than its available resources permit.⁵³ This was confirmed by Chaskalson P in *Soobramoney*:

What is apparent from these provisions is that the obligations imposed on the State by [sections] 26 and 27 in regard to access to housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demand on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.⁵⁴

Although the Constitutional Court in *Grootboom* failed to give a clear indication of how it would assess the availability of resources,⁵⁵ Justice Yacoob, however, stated that although:

I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise

⁴⁹General Comment No. 3, 1990, *op. cit.*, para 9.

⁵⁰*Grootboom*, *op. cit.*, para 38 - 41.

⁵¹*Ibid*, para 43-4.

⁵²*Ibid*, para 45.

⁵³*Ibid*, para 46.

⁵⁴*Soobramoney*, *op. cit.*, para 11.

⁵⁵Liebenberg, *op. cit.*, at 253.

these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.⁵⁶

According to the UN Committee on Economic, Social and Cultural Rights, violation will occur should the State fail to satisfy "a minimum core obligation". In its general comments, the UN Committee on Economic, Social and Cultural Rights pointed out that it is incumbent upon every State party to ensure the satisfaction of, at the very least, minimum essentials of each of the economic and social rights. It is, however, crucial to note that although minimum core obligation is recognised in international law, the Constitutional Court did not define what the minimum core obligation entails. The Court reasoned that it could not determine with sufficient particularity what minimum core content entails due to the complexity of the task of determining a minimum core obligation for the progressive realisation of the right without having the requisite information on the needs and the opportunities for the enjoyment of that particular right. The Court based its decision on the fact that the Committee developed the concept of minimum core over many years of examining reports by reporting States and the Court does not have such a comparable information.⁵⁷ Although in the *Treatment Action Campaign*, the Constitutional Court held that minimum core includes at least the minimum decencies of life consistent with human dignity, it however, unequivocally acknowledged that it is not easy to define minimum core obligation.⁵⁸ The Constitutional Court went on to qualify this statement by holding that:

Although Yacoob J indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the State are reasonable, the [economic and social] rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core was thus treated as possibly being relevant to reasonableness under section 26(2), and not as a self-standing rights conferred on everyone under section 26(1) [footnotes omitted].⁵⁹

This was premised on the fact that the State has a wide range of possible measures that it could adopt to meet its obligations,⁶⁰ all that is expected of the State, is that it act reasonably to provide access to the economic and social rights in question, on a progressive basis.⁶¹

3. THE MONITORING PROCESS

⁵⁶ *Grootboom*, *op. cit.*, para 24.

⁵⁷ *Ibid*, para 32.

⁵⁸ *TAC*, *op. cit.*, para 26.

⁵⁹ *Ibid*, para 34.

⁶⁰ Note that there are other avenues that the State can utilise to determine the contents of the minimum core obligation for each right in line with section 234 of the Constitution which provides:

“In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.”

⁶¹ *Ibid*, para 35.

In order to ensure that economic and social rights in the South African Bill of Rights are realised, the Constitution has provided the South African Human Rights Commission (SAHRC) with the mandate to monitor and assess the observance of these rights and report to the National Assembly. This report is pursuant to this mandate of the South African Human Rights Commission to monitor and assess the observance of economic and social rights in South Africa as provided for by section 184(1)⁶² and (3)⁶³ of the Constitution of the Republic of South Africa, Act 108, 1996. The report covers two financial years, 2000/2001 and 2001/2002, and represent the fourth and fifth economic and social rights monitoring cycle of the Commission.⁶⁴

In order to properly execute its constitutional mandate, the Commission developed a set of questionnaires (commonly referred to as the “Protocols”) in its first reporting cycle.⁶⁵ These protocols were designed to provide the Commission with information on policy, legislative, budgetary and other measures adopted during the reporting period in order to realise the economic and social rights stipulated in the Constitution.⁶⁶ The Protocols have since been refined to include questions on areas such as vulnerable groups; problems experienced by organs of State in giving effect to economic and social rights and measures undertaken to address such problems; National Action Plan for the Promotion and Protection of Human Rights; indicators; and budgetary allocations.

The Protocols initially focused only on the national and provincial spheres of government, but in this reporting cycle, the Commission has included Metropolitan Councils and Parastatals. While the Protocol took a maximalist approach in soliciting information from national and provincial tiers of government, a minimalist approach was adopted when dealing with Metropolitan Councils and Parastatals. The questions posed to Metros and Parastatals required information on their broad understanding of their Constitutional obligations in terms of section 7(2) and Schedules 4 and 5 of the Constitution respectively.

There are at least two reasons why in the previous reports the Commission did not cover Metropolitan Councils and Parastatals, even though they are covered as “state organs” in terms of section 239,⁶⁷ and their responsibilities spelt out in Schedules 4

⁶² Section 184(1) provides:

“The Human Rights Commission must -

- (a) promote respect for human rights and a culture of human rights;
- (b) promote the protection, development and attainment of human rights; and
- (c) monitor and assess the observance of human rights in the Republic.”

⁶³ Subsection 3 states that:

“Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.”

⁶⁴ The Commission Economic and Social Rights Reports has always been behind with a year, this is an attempt by the Commission to try and catch-up.

⁶⁵ “Economic & Social Rights Report 1997-1998,” *SAHRC Vols. 1-VI*, 1999.

⁶⁶ Section 7(2) of the Constitution provides:

“The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

⁶⁷ Section 239 defines an ‘organ of state’ as including:

- (i) any state department or administration in national, provincial and local government;

and 5 of the Constitution. Firstly, an attempt to cover local sphere of government in the first economic and social rights report was made, but failed due to poor response to the Commissions's Protocols. Lastly, the Commission's limited resources also made it impossible to cover the entire sphere of local government and Parastatals. The limited resources have also made it impossible again to cover the entire sphere of local government, hence the decision to extend coverage to the Metropolitan Councils only.

The Protocols.

Through its Research & Documentation Department, the Commission began distributing the first batch of protocols to all the relevant national Departments in early February 2002. In early March, the Eastern Cape, Free State, Gauteng and KwaZulu-Natal provinces received their sets of protocols followed by Mpumalanga, Northern Cape, Limpopo, North West and the Western Cape. The Metropolitan Councils and Parastatals began receiving protocols from 7-20 March 2002. The proposed due date for the submission of reports (responses to the Protocols) by government departments was 30 April 2002, but only few meet the deadline. Extensions were granted following appeals made to the Commission. Further extensions were granted until 30 June 2002 upon request.⁶⁸ The following Tables indicate the status of the responses by the different organs of states, including the Parastatals to the Protocols of the Commission.

-
- (ii) functionary or institution exercising power or perforating a function in terms of the Constitution; or
 - (iii) exercising a public power or performing a public function in terms of any legislation. Therefore, an organ of state performing a public function must fulfil, respect and promote [economic and social] rights by adopting appropriate means tailored towards the progressive realisation of [economic and social] rights in the Bill of Rights.

⁶⁸ These included the National Department of Labour, Social Development; Social Services & Population Development (Free State), Social Development (KZN), Education, Agriculture and Economic Affairs, Social Services & Population Development (WC). These submitted their Protocols in mid July 2002.

Responses to Protocols 2002

Table 1 Dates of receipt of responses from national government departments

National Departments	Date Received
Correctional Services	29/04/02
Land Affairs	02/05/02
Environmental Affairs and Tourism	30/04/02
Agriculture	29/05/02
Housing	31/05/02
Minerals and Energy	03/07/02
Finance	06/05/02
Health	22/05/02
Education	11/06/02
Water Affairs and Forestry	03/06/02
Labour	23/07/02
Provincial and Local Government	09/07/02
Social Development	16/07/02

Table 2 EASTERN CAPE DEPARTMENTS

Department	Date Received
Social Development	15/05/02
Agriculture	03/05/02
Housing and Local Government	03/07/02
Finance	31/05/02
Education	31/05/02
Health	01/07/02
Social Development	18/07/02

Table 3 FREE STATE DEPARTMENTS

Department	Date Received
Health	02/05/02
Finance	02/05/02
Social Development	30/04/02
Agriculture	24/06/02
Tourism, Environmental and Economic Affairs	04/06/02
Local Government and Housing	03/05/02
Education	14/05/02
Social Development	03/07/02

Table 4 GAUTENG DEPARTMENTS

Department	Date Received
Housing	13/05/02
Health	13/05/02
Finance and Economic Affairs	14/05/02
Agriculture, Conservation, Environment and Land Affairs	30/05/02
Education	31/05/02
Social Services and Population Development	09/07/02
Development Planning and Local Government	03/06/02

Table 5 KZN DEPARTMENTS

Department	Date Received
Finance	18/03/02
Agriculture and Environment	30/04/02
Education	02/05/02
Traditional and Local Government	30/04/02
Housing	06/06/02
Health	06/06/02
Social Development	09/07/02

Table 6 MPUMALANGA DEPARTMENTS

Department	Date Received
Agriculture, Conservation and Environment	26/04/02
Education	02/06/02
Health	21/06/02
Local Government, Traffic Control and Traffic Safety	04/06/02
Finance	01/07/02
Housing and Administration	23/05/02
Social Services and Population Development	05/08/02

Table 7 NORTHERN CAPE DEPARTMENTS

Department	Date Received
Agriculture, Conservation and Environment	29/04/02
Health	04/06/02
Local Government and Housing	21/05/02
Education	17/05/02
Social Services and Population Development	28/06/02
Finance	22/05/02

Table 8 LIMPOPO DEPARTMENTS

Department	Date Received
Agriculture	02/05/02
Health and Welfare	03/05/02
Local Government and Housing	29/05/02
Education	01/07/02
Finance, Economic Affairs and Tourism	23/05/02

Table 9 NORTH WEST DEPARTMENTS

Department	Date Received
Finance	30/04/02
Health	31/05/02
Education	03/06/02
Developmental Local Government and Housing	10/06/02
Agriculture, Conservation and Environment	06/06/02
Social Services and Population Development	16 /08 /02

Table 10 WESTERN CAPE DEPARTMENTS

Department	Date Received
Development Planning, Local Government and Housing	29/04/02
Finance	02/05/02
Environmental and Cultural Affairs	14/06/02
Education	09/07/02
Agriculture and Economic Affairs	05/07/02
Health	17/05/02
Social Services and Population Development	24/07/02

Table 11 PARASTATALS

Organ of State	Date Received
Land bank	02/05/02
Council for Scientific and Industrial Research	03/05/02
Medical Control Council	09/07/02
SA Council for Social Service Professions	05/05/02
National Education Financial Aid Scheme	07/06/02
Umgengi Water	14/06/02
National Housing Finance Corporation	21/05/02
Agriculture Research Council	07/06/02
Rand Water	28/06/02

Table 12 METROS

Organ of State	Date Received
Greater JHB Metropolitan Council	01/07/02
Greater Tshwane	03/06/02
Durban Metro	12/07/02
Cape Town Metro	02/09/02
Nelson Mandela Metro	19/07/02
Ekurhuleni Metro	09/08/02

Difficulties and Challenges

At the outset, the Commission wishes to emphasise that in executing its mandate in terms of section 184(3), it is performing a *constitutional duty*, and not a *political function*. The Commission has reiterated in previous reports that its mandate is to assess whether legislative, policy and programmatic measures adopted by organs of State are reasonable, that the programmes and projects are comprehensive and cater for vulnerable groups and ensure that the responsibilities of the three spheres of government have been clearly spelt out.

The challenge facing the Commission is how to mainstream the reporting process in order to properly assess the progressive realisation of economic and social rights by State organs. This reporting process has been difficult because of:

- Lack of understanding of constitutional obligations by government departments;
- Lack of adequate information management systems in most government departments;
- Insufficient and sometimes incorrect information provided by many organs of State to the Commission;

- Late responses to the Protocols by some government departments;
- Lack of adequate resources for the Commission which affects the effectiveness and quality of its economic and social rights Report monitoring process.

These are the same difficulties the Commission had experienced with the previous three reporting cycles.

In an attempt to address these and other related challenges, the Commission through its Research and Documentation Department continues to revise its protocols and request suggestions from relevant departments on how to improve its reporting and monitoring process. Workshops on economic and social rights were also conducted for government officials and relevant civil society organisations. The Commission will continue to address all these challenges.

4. THE STRUCTURE OF THE REPORT

The report follows the structure of the 3rd Economic and Social Report to a large extent, though there are few changes, which the Commission introduced in order to improve its reporting process.

The rest of the report is as follows:

1. Various chapters dealing with different economic and social rights. Each of these chapters consists of the following sub-sections:
 - 1.1 Policy Measures
 - 1.2 Legislative and other Measures.
 - 1.3 Budgetary Measures
 - 1.4 Indicators (including those from the National Action Plan for Human Rights)
 - 1.5 Critique
 - 1.6 Recommendations
 - 1.7 Conclusion

The changes on additional sections in the report are information on administrative actions, maladministration and/or/corruption and human rights indicators.⁶⁹ Human rights indicators were included in the Protocols as a tool to measure qualitative and

⁶⁹ Human rights indicators are a powerful tool in human rights advocacy and in building "a culture of accountability" for human rights. Indicators are critical in enabling people and organisations from grassroots activists and civil society to governments and the United Nations to identify human rights violations, to assess progress, and to hold critical actors to account. These indicators can be used to make better policies and monitoring progress; identify unintended impact of laws, policies and practices; identify which factors have an impact on the realisation of rights; reveal whether the obligations of these rights are being met; give early warning of potential violations, prompt preventive action; enhance social consensus on difficult trade-offs to be made in the face of resource constraints; as well as to expose issues that had been neglected or silenced. http://hdr.undp.org/reports/global/2000/en/pdf/hdr_2000_ch5.pdf. See also, Henry Steiner & Phillip Alston, *International Human Rights in Context – Law, Politics, Morals*, Oxford University Press, 2001 at 316-317; Maria Green, "What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement" *Human Rights Quarterly*, Vol. 23, 2001 at 1063.

quantitative changes in a given situation by using statistical information. However, human rights indicators do not always reflect the human condition due to the lack of reliable information or the use of inappropriate indicators.

The sub-section in the Protocols which requires government departments to respond on issues of maladministration and/or corruption is related in some way to the sub-section on administrative action. Even though the Constitution provides for other structures to deal with corruption of public officials such as the Public Protector⁷⁰ and the Public Service Commission,⁷¹ corruption and/ mal-administration at all levels affects the delivery of social services and thus impacts on the Commission's reporting and monitoring process.

⁷⁰ See section 182 of the Constitution.

⁷¹ Section 196 of the Constitution.

ABBREVIATIONS

MCC	Medicines Control Council
TAC	Treatment Action Campaign and Others