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**A critical analysis of the South African government's management and  
response to Covid-19 in the context of its constitutional commitments  
to its citizens based on the Social Contract Theory**

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This research proposal is submitted in pursuance of the requirements for  
the degree of Master of Laws

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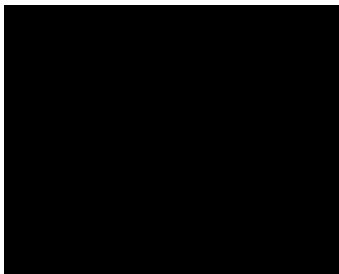
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## ACRONYMS

AIDS	Acquired immunodeficiency syndrome
COGTA	Department of Cooperative Governance and Traditional Affairs
COVID-19	Coronavirus Disease 2019
DMA	Disaster Management Act, 2002
HIV	Human immunodeficiency virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHR	International Health Regulations (2005)
MAC	Ministerial Advisory Committee
NCCC	National Coronavirus Command Council
NCD	Non-communicable diseases
NIDS-CRAM	National Income Dynamics Study-Coronavirus Rapid Mobile Survey
NSNP	National Schools Nutrition Programme
PPE	Personal protective equipment
SA	South Africa
SANDF	South African National Defence Force
SAPS	South African Police Force
SARS-CoV-2	Severe Acute Respiratory Syndrome Coronavirus 2
TB	Tuberculosis
WHO	World Health Organisation

### KEYWORDS:

Constitution of the Republic of South Africa; Coronavirus; Covid-19; Government; Pandemic; Rights; Social Contract Theory; Syndemics

## **ABSTRACT**

Despite the South African Constitution having been promulgated to redress the injustices of the Apartheid regime by entrenching access to socio-economic rights, the government has failed in its responsibility to fulfil such rights. Such failings have been highlighted and heightened since the outbreak of the SARS-CoV-2 or Covid-19 where large portions of the South African population have been unable to comply with basic non-pharmaceutical measures. This is largely due to the inadequacies in access to water and sanitation, food and nutrition, healthcare and adequate forms of education. A syndemic approach to the fulfilment of socio-economic and other rights, as well as public health emergencies may avoid such shortfalls. This is due to the approach considering more than just the biological factors. A syndemic would also consider socioeconomic concerns, looking at socio-behavioural issues, the physical environment, socio-marginalisation issues and government policies. The South African government should take their responsibility of realising socio-economic rights and other human rights as stipulated in the Constitution, seriously, and accordingly adequately respond to ongoing public health concerns such as the human immunodeficiency virus and tuberculosis epidemics and any future public health outbreaks.

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# CHAPTER ONE

## REALISING HUMAN RIGHTS IN THE CONTEXT OF SOCIAL CONTRACTS, THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, AND THE COVID-19 PANDEMIC RESPONSE: AN INTRODUCTION

### 1.1 Background

In December 2019, the first reported cases of SARS-CoV-2 or Covid-19 emerged from Wuhan, China.<sup>1</sup> Initially thought to be an outbreak that would be contained within South-East Asia, Covid-19 spread to various parts of the world, proving to be a virus that was highly transmittable. Monitoring and tracking of the virus were undertaken by the World Health Organisation (WHO), regional health bodies, as well as national health ministries. On 11 March 2020, the WHO declared the Covid-19 outbreaks to be pandemic, thereby confirming that the disease had reached the status of being a health emergency of international concern, having spread across multiple countries and continents, resulting in more people being infected and more lives being claimed.<sup>2</sup>

Despite many parts of the world reporting serious outbreaks of Covid-19 during early 2020 in their respective countries, South Africa only detected its first case in March 2020, with the first case being officially reported on 5 March 2020.<sup>3</sup> This was beneficial to government as it provided them with the opportunity to evaluate and learn from the responses of countries already seriously affected by the

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<sup>1</sup> 'Investigate the origins of COVID-19' available at <https://science.sciencemag.org/content/372/6543/694>., accessed on 19 May 2021.

<sup>2</sup> 'Pandemics' available at <https://www.webmd.com/cold-and-flu/what-are-epidemics-pandemics-outbreaks>, accessed on 19 May 2021.

<sup>3</sup> 'First case of Covid-19 Coronavirus reported in South Africa', available at <https://www.nicd.ac.za/first-case-of-covid-19-coronavirus-reported-in-sa/#:~:text=FIRST%20CASE%20OF%20COVID%2D19%20CORONAVIRUS%20REPORTED%20IN%20SA,-5%20March%20%2C%202020&text=This%20morning%2C%20Thursday%20March%205,to%20Italy%20with%20his%20wife>., accessed on 19 May 2021.

pandemic, and to develop a South African-informed response that could build on the strengths observed in other countries, and avoid the weaknesses noted, whilst being cognisant of the South African context and social dynamics. The first step taken by the South African government in their pandemic response was to declare a national state of disaster as provided for in the Disaster Management Act, 2003 (DMA).<sup>4</sup> This declaration was made by President Cyril Ramaphosa on 15 March 2020,<sup>5</sup> with regulations to manage the pandemic being developed, issued, and implemented by the Department of Cooperative Governance and Traditional Affairs (COGTA).<sup>6</sup> The impact of this step was to limit, but not derogate, the rights of those living within the South African borders, to manage the outbreak, and to prevent an escalation of any sort.<sup>7</sup> Such regulations have been modified through the course of the pandemic, with the amendments being dependant on the escalation or de-escalation of the preventative measures.<sup>8</sup> Resulting from the implementation of these regulations, all South Africans were requested to socially distance themselves from one another, with those presenting symptoms required to self-isolate and get tested for the virus.<sup>9</sup>

A week later however and in line with other foreign responses, the President escalated the government's pandemic response by placing the country under lockdown.<sup>10</sup> A lockdown is defined as the imposition of stringent restrictions on travel, social interaction, and access to public spaces.<sup>11</sup> The lockdown response implemented by the South African government was premised on a 5-tiered structure, with Alert Level 5 constituting the most extreme and limiting stage. Having given South

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<sup>4</sup> C Stauton, C Swanepoel, M Labuschaigne 'Between a rock and a hard place: Covid-19 and South Africa's response' (2020) 7(1) *Journal of Law and the Biosciences* 4.

<sup>5</sup> Ibid 4.

<sup>6</sup> GN 657 of GG 43148, 25/03/2020; 3.

<sup>7</sup> Stauton (note 4 above, 4); Sections 3-8 of the GN 657 of GG 43148, 25/03/2020; 6-9.

<sup>8</sup> The range of lockdown regulations may be accessed via <https://www.gov.za/covid-19/resources/regulations-and-guidelines-coronavirus-covid-19#regulations>.

<sup>9</sup> Section 4(1)(a)-(c) of the GN 657 of GG 43148, 25/03/2020; 6.

<sup>10</sup> Stauton (note 4 above, 5).

<sup>11</sup> 'Covid-19: 'Lockdown' declared Collins Dictionary word of the year' available at <https://www.bbc.com/news/uk-54878910>, accessed on 19 May 2021.

Africans three working days within which to prepare themselves, the country entered an Alert Level 5 or 'hard lockdown' at midnight on 26 March 2020. The impact of this lockdown meant that South Africans and all others within its borders did not have freedom of assembly and movement,<sup>12</sup> save for emergency situations and to access necessities such as food and medical treatment. Places of work, learning, and recreation came to a halt with only frontline workers and those involved in rendering health care services and necessary retail services being allowed to attend work. Only certain items could be sold at retail stores, with grocery stores being limited to selling only what was regulated as prudent, such as human and animal food and medical and hospital supplies.<sup>13</sup>

The implementation of such measures was unprecedented in democratic South Africa. Whilst many attempted to comply, the reality of such an extreme response was stark, given the socio-economic dynamics of the country. Despite measures such as social distancing, isolation, testing, quarantine, and lockdown being implemented globally in an effort to limit the spread of notifiable communicable diseases (NCDs), the success of such measures in South Africa would vary depending on the socio-economic positioning of persons. This was due to a large portion of the population fighting a daily struggle of rising unemployment, poor access to water and sanitation, and informal housing systems that provided nothing more than shelter.<sup>14</sup> In such circumstances, the success of the aforementioned measures would be inhibited due to a lack of the necessary amenities and the inability of impoverished South Africans to afford same. With clean running water not being accessible to an estimated three million South Africans,<sup>15</sup> regular hand-sanitising would be unlikely.<sup>16</sup> Social distancing, self-isolation

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<sup>12</sup> Stauton (note 4 above, 5).

<sup>13</sup> 'Here are all the goods which shops will be allowed to sell during South Africa's coronavirus lockdown' available at <https://businesstech.co.za/news/business/384929/here-are-all-the-goods-which-shops-will-be-allowed-to-sell-during-south-africas-coronavirus-lockdown/>, accessed on 6 December 2021.

<sup>14</sup> Stauton (note 4 above, 3).

<sup>15</sup> '5 Facts about access to clean water in South Africa' available at <https://borgenproject.org/clean-water-in-south-africa/>, accessed on 6 December 2021.

<sup>16</sup> Stauton (note 4 above, 3).

and quarantine were even more difficult given that many South Africans lived and functioned within cramped conditions, whilst an estimated 200 000 were homeless.<sup>17</sup>

The socio-economic strain under which many South Africans found themselves also negatively impacted their ability to access healthcare. With under 20 percent of the population accessing private medical aid, the majority of South Africans relied on an already over-burdened and under-resourced public healthcare sector.<sup>18</sup> The implication of this situation during a pandemic contributed to the threat of the public healthcare sector collapsing in the event of an uncontrolled surge in Covid-19 infections. Public healthcare was not just under-resourced in terms of staff but also in respect of appropriate leadership and management, competencies, and knowledge.<sup>19</sup> Poor administration of public healthcare facilities, accusations of maladministration, and a general lack of effective management, in the face of the practical implications of the pandemic, were also the proverbial nail in the coffin for a sector already burdened by the never-ending demands posed by a national tuberculosis (TB) and human immunodeficiency virus (HIV) epidemic, which included TB/HIV co-infections, as well as the challenges faced in accessing and adhering to the corresponding treatment regimes.<sup>20</sup>

Apart from the abovementioned socio-economic constraints, criticism was raised over the lockdown regulations and people's perceptions that certain, if not all the regulations, conflicted with their constitutional rights. This was the claim of Reyno De Beer, the Liberty Fighters Network, and Hola Bon Renaissance Foundation in the *De Beer case*,<sup>21</sup> where the North Gauteng High Court was asked to find all lockdown regulations to be unconstitutional and invalid. The High Court found in De Beer's favour, providing that certain regulations were irrational and not connected to the state's objective of

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<sup>17</sup> Ibid 3.

<sup>18</sup> Ibid 2.

<sup>19</sup> Ibid 2.

<sup>20</sup> Ibid 2.

<sup>21</sup> *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184; 2020 (11) BCLR 1349 (GP).

inhibiting the infection rate and the spread of the virus.<sup>22</sup> The High Court did not provide a closed list as to which specific regulations it found irrational but did provide examples, such as comparing the absolute ban on hairdressers, to be irrational against the ongoing functionality of the minibus taxis industry, despite the close proximity commuters experience in the latter.<sup>23</sup> On appeal to the Supreme Court of Appeal (SCA) in July 2021,<sup>24</sup> the ruling of the High Court was set aside by a full bench. It was found that the rationality test had not been applied properly and the alleged irrational restrictions were far too general to declare any if all lockdown regulations invalid.<sup>25</sup>

Despite the SCA ruling, the *De Beer* case highlighted the disbelief of some that government could unilaterally implement such measures.<sup>26</sup> This disbelief may have arisen from other concerns raised, such as the contention that the decision to limit people's rights was done without public deliberation or community engagement, thereby mimicking the state of emergencies brought about by former South African president P.W. Botha during the 1980s.<sup>27</sup> During such declarations, Botha was permitted to rule by decree, restrict the movement of citizens and detain persons without trial.<sup>28</sup> The states of emergencies also allowed for the government of the day to legitimately use the police and defence

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<sup>22</sup> 'A cautionary (constitutional) tale: *De Beer v Minister of Corporate Governance and Traditional Affairs*' available at <https://www.lexology.com/library/detail.aspx?g=7c9304a0-56b1-482c-845a-c78623da6803>, accessed on 18 May 2021.

<sup>23</sup> Ibid.

<sup>24</sup> *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another* (538/2020) [2021] ZASCA 95; [2021] 3 All SA 723 (SCA).

<sup>25</sup> 'SCA slams 'scurrilous' comments made by LFN president over lockdown case, refers matter to NDPP' available at <https://www.news24.com/news24/southafrica/news/sca-slams-scurrilous-comments-made-by-lfn-president-over-lockdown-case-refers-matter-to-ndpp-20210702>, accessed on 6 December 2021.

<sup>26</sup> 'Judgment reserved on bid to end lockdown regulations' available at <https://www.iol.co.za/pretoria-news/news/judgment-reserved-on-bid-to-end-lockdown-regulations-f0da826d-f085-461e-81bb-1b35c8b0a805#:~:text=Pretoria%E2%80%93Judgment%20has%20been%20reserved,Zuma%20in%20contempt%20of%20court>, accessed on 17 May 2021.

<sup>27</sup> Stauton (note 4 above, 4).

<sup>28</sup> Ibid 4.

forces so as to violently suppress opposition to apartheid.<sup>29</sup> Apartheid was a pre-democratic South African government policy which allowed for the racial segregation of South Africans and for economic and political discrimination against persons classified by race as African, Coloured, or Indian.<sup>30</sup> People who were subjected to the adversities of the state of emergency or who were aware of the implications thereof, may have feared certain hardships becoming a reality once again. Placing a further cloud over government's lockdown response was the opposition to government's decision to criminalise non-compliance with lockdown regulations. Government has been accused by scholars<sup>31</sup> and South Africans of prominence, such as former judge of the Constitutional Court, Edwin Cameron,<sup>32</sup> and Mark Heywood, a prominent HIV/Aids activist,<sup>33</sup> of taking a militarised approach. Such an approach is not looked upon favourably by them, especially given the questionable conduct of the South African Police Services (SAPS) and the South African National Defence Force (SANDF) during the early days of the lockdown.<sup>34</sup> During such time, it was reported that rubber bullets had been fired into crowds of shoppers in a Johannesburg supermarket, as they did not follow social distancing measures, whilst others were accused of transgressing Covid-19 protocols and were subjected to demeaning punishments of squats and push-ups.<sup>35</sup> The height of brutality by the SANDF arose when soldiers beat Colins Khosa to death for the transgression of partaking in alcohol, a banned substance during the Level 5 lockdown that prevailed at that time.<sup>36</sup>

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<sup>29</sup> 'State of Emergency-1985' available at <https://www.sahistory.org.za/article/state-emergency-1985>, accessed on 6 December 2021.

<sup>30</sup> 'Apartheid' available at <https://www.britannica.com/topic/apartheid>, accessed on 7 December 2021.

<sup>31</sup> Staunton (note 4 above, 3).

<sup>32</sup> E Cameron 'To enforce the Covid lockdown, did we wage a war on the people of South Africa?' (6 March 2021) available at <https://www.news24.com/news24/columnists/guestcolumn/edwin-cameron-to-enforce-the-covid-lockdown-did-we-wage-a-war-on-the-people-of-south-africa-20210306>, accessed on 24 September 2021.

<sup>33</sup> C Reichel 'One year later: Covid-19, human rights, and the rule of law in South Africa' (13 April 2021) available at <https://blog.petrieflom.law.harvard.edu/2021/04/13/human-rights-rule-of-law-south-africa-covid/>, accessed on 24 September 2021.

<sup>34</sup> C Staunton, C Swanepoel, M Labuschaigne 'Between a rock and a hard place: Covid-19 and South Africa's response' (2020) 7(1) *Journal of Law and the Biosciences* 8.

<sup>35</sup> Cameron (note 31 above).

<sup>36</sup> Ibid.

As the country developed the healthcare capacity necessary to respond to an increase in infections and hospitalisations, the government adjusted its response to Covid-19 from Level 5 to Level 4.<sup>37</sup> Gradually, the lockdown levels were deescalated.<sup>38</sup> The economy could reopen, children were allowed to return to school, albeit in a different manner as to what they were accustomed to, and a new sense of normality was being developed.

Prior to Covid-19, the WHO identified, as part of the International Health Regulations (IHR),<sup>39</sup> that countries should ready themselves for public health emergencies by developing and enhancing capacity for prevention, detection, and response of same. The measures taken by the South African government in response to Covid-19 may thereby be viewed as responses in line with such directive. For a constitutionally sovereign nation such as South Africa, however, such a position may be inadequate. The Constitution of the Republic of South Africa (the Constitution) is a document which provides a social contract between the South African government and its citizens. This social contract includes the Bill of Rights,<sup>40</sup> which details all human rights to which South African citizens are entitled. Of particular relevance to the Covid-19 pandemic are the socio-economic rights of access to healthcare,<sup>41</sup> food and water,<sup>42</sup> and housing,<sup>43</sup> to which government is expected to take reasonable measures to progressively realise these constitutional rights for their citizens. These rights contain tangible socioeconomic provisions that government should have developed, including the necessary infrastructure for South Africans to successfully implement the necessary Covid-19 preventative measures.<sup>44</sup> However, as discussed above, constitutional rights may also be limited during a declared national state of disaster, meaning that the constitutional rights of citizens may be restricted, depending

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<sup>37</sup> 'SA to move from level 5 lockdown to level 4' available at <https://www.sanews.gov.za/south-africa/sa-move-level-5-lockdown-level-4>, accessed on 7 December 2021.

<sup>38</sup> See table illustrating the changes in lockdown levels enclosed herewith marked as Appendix A.

<sup>39</sup> International Health Regulations (2005).

<sup>40</sup> Chapter 2 of the Constitution of the Republic of South Africa, 1996.

<sup>41</sup> Section 27(1)(a) of the Constitution of the Republic of South Africa, 1996.

<sup>42</sup> Section 27(1)(b) of the Constitution of the Republic of South Africa, 1996.

<sup>43</sup> Section 26(1) of the Constitution of the Republic of South Africa, 1996.

<sup>44</sup> Sections 26(2) and 27(2) of the Constitution of the Republic of South Africa, 1996.



on the measures needed in that situation. Accordingly, the South African government must balance the restrictions imposed on human rights in accordance with the regulations issued in terms of the Disaster Management Act and the protection of human rights to which South African citizens are entitled to in terms of the Constitution.

In late 2020, Horton proposed that certain countries should rather approach the Covid-19 pandemic as a syndemic, instead of a pandemic.<sup>45</sup> Developed by Merrill Singer, an American medical anthropologist, a syndemic occurs where two or more diseases or health-related concerns, interact within an ecosystem of social, biological, and political determinants that have the potential to exacerbate a person or population's susceptibility to harm. According to Horton, a syndemic approach would entail responses to the outbreak that will focus not only on the traditional norms that construct pandemic preparedness, management and responses, but that will also incorporate other biological and sociological constructs that directly and indirectly impact that specific country's citizens.<sup>46</sup> If this approach were followed and implemented in South Africa, it may have facilitated a more holistic approach to outbreak preparedness, taking into consideration socio-economic and health challenges, including the vast impact of HIV and TB, including the issues highlighted above. Considering that community engagement is one of the important measures introduced by a syndemic approach, the consequences of such an approach may have been less restrictive or more accommodating. Taking the unique socio-economic situation of most South Africans into account, such an approach may have thereby resulted in better citizen co-operation and possibly a better pandemic response outcome. If a syndemic approach were to be taken by the South African government moving forward, it may facilitate them fulfilling their socio-economic duties to their citizens. As aforementioned, if the Constitution is to be seen as the social contract between government and South Africans and others, government's contractual duties rest in part in the socio-economic rights set out in the Bill of Rights. By responding to public health emergencies by more than just working towards the provision of healthcare and medical responses, and by relating to the provision of water and food as part of the necessary response, the South African government may thereby be able to fulfil their social contract to their citizens.

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<sup>45</sup> R Horton 'Offline: Covid-19 is not a pandemic' (2020) 369 *The Lancet* 874.

<sup>46</sup> Ibid 874.

This dissertation will critically analyse the South African government's management and response to Covid-19 in the context of its constitutional commitments to its citizens based on the Social Contract Theory. In addition, my research will investigate to what extent a syndemic approach to pandemic management and response would have positively changed current pandemic responses in South Africa and be valuable in respect of future pandemics.

## **1.2 The South African pandemic context**

South Africa, like the rest of the world, has not faced a pandemic on the scale currently presented by the various Covid-19 outbreaks. Despite experiences with previous national outbreaks such as listeriosis,<sup>47</sup> the country's preparedness for a pandemic has been limited to the annual influenza outbreaks and speaks largely to the constructs of prevention, detection, and response, provided for by the WHO in its Joint External Evaluation (JEE) Tool.<sup>48</sup> However, these constructs do not take into consideration the socio-economic challenges faced by individual citizens in the context of different countries into account. Within the context of South Africa, chronic issues such as HIV, TB, poverty, unemployment, limited access to quality municipal services, and an overburdened and under resourced public healthcare sector pose serious and uniquely South African challenges to the management of a pandemic such as Covid-19.

The objective of this dissertation is to assess the performance of the South African government in responding to the Covid-19 pandemic, which performance will be measured against the government's constitutional obligations and their social contract with the citizens of the Republic of South Africa. This will also be considered taking the concept of syndemic or synergistic epidemic management into account as a method of determining governmental constitutional responsibilities.

In undertaking this dissertation, several issues have been considered and discussed. Firstly, the Social Contract Theory has been discussed, with the constitutional basis for the social contract between the

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<sup>47</sup> 'Listeriosis – South Africa' available at <https://www.who.int/csr/don/28-march-2018-listeriosis-south-africa/en/>, accessed on 19 May 2021.

<sup>48</sup> World Health Organisation 'Joint External Evaluation Tool – International Health Regulations (2005)' (2016) *IHR (2005) Monitoring and Evaluation Framework* 6-68.

Republic of South Africa, as represented by its government, and its citizens being put forward. Secondly, the obligations placed on government by virtue of the Constitution as the social contract have been identified, with particular focus on the socio-economic rights provided for in same.<sup>49</sup> Thirdly, a critical analysis has been undertaken on whether the South African government fulfilled these constitutional obligations during the Covid-19 pandemic. Consideration has also been given to the government-imposed Covid-19 regulations which have sought to manage the pandemic and the socio-economic and health interests of its citizens. Such analysis has been undertaken in context of the Social Contract Theory. Finally, recommendations have been made regarding how government may better manage ongoing and future healthcare crises, with context being given to the Social Contract Theory and the syndemic approach.

### **1.3 Research Methodology**

Research for this dissertation was desk-based. It was based on a focus on the Constitution, legislation, case law, journal articles, published government reports on the management of the COVID-19 pandemic, newspaper articles and textbooks, as listed in the reference list to this dissertation. A considerable portion of the dissertation involved the interpretation and analysis of Chapter 2 of the Constitution, the Bill of Rights, which analysis was supported by relevant supporting material as identified in the footnotes and listed in the reference list. In addition, a foundational understanding of the Social Contract Theory and its application to existing South African legislation was used to effectively articulate the arguments put forward in this dissertation.

### **1.4 Literature Review**

A University of Pretoria repository publication discussed the relationship between John Rawls' Social Contract Theory and a constitutional system of governance.<sup>50</sup> Social Contract Theory refers to a situation in which state authority is legitimised through the consent for such governance by those who are to be governed. The theory provides that where individuals voluntarily surrender their freedoms to

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<sup>49</sup> Sections 26, 27 and 29 of the Constitution of the Republic of South Africa.

<sup>50</sup> University of Pretoria Repository 'Chapter 3: Theories and Developments guiding Constitutional Democracy' at 69 available at <https://repository.up.ac.za/bitstream/handle/2263/28459/03chapter3.pdf?sequence=4&isAllowed=y>, accessed on 29 January 2021.

form a collective of persons who will all be offered protection by a single governing institution; such agreement is a social contract.<sup>51</sup> The publication states that in such a form of governance, members of society abandon their individual rights to form and abide by a collection of laws.<sup>52</sup> This collection of laws would then constitute the society's constitution in which the rights and duties of all parties would be established. The fulfilment of these rights would rest upon an appointed grouping of persons, known today as the government, who would in turn have to meet these obligations without contradiction to the spirit and values of the constitution.<sup>53</sup> The publication further provided that Social Contract Theory was evident in the development of the South African Constitution, with reference having been made to the preamble of same, the structure and nature of which is said to encompass the said theory. The given preamble recognises that the Constitution represents the rights of individuals who have come together so as to form a collective membership of persons.<sup>54</sup> Such is expressed in its opening words of the preamble, as well as in what is provided for therein, namely:

*“We, the people of South Africa, recognise the injustices of our past ... believe that South Africa belongs to all who live in it, united in our diversity, we therefore, through our freely elected representatives, adopt the Constitution as the supreme law of the Republic so as to...”<sup>55</sup>*

The publication thereby provides that the preamble of the South African Constitution has adopted the Social Contract Theory, by recognising the collective of not just South African citizens, but everyone else who also resides in the country as well. It further explains the application of the Social Contract Theory in a South African context, making the relevance of the Constitution and its impact on those it serves, clear.<sup>56</sup>

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<sup>51</sup> Ibid 72.

<sup>52</sup> Ibid 87.

<sup>53</sup> Ibid 88.

<sup>54</sup> Ibid 90.

<sup>55</sup> Preamble of the Constitution of the Republic of South Africa.

<sup>56</sup> University of Pretoria (note 50 above, 90).

The Bill of Rights, as contained in Chapter 2 of the Constitution, provides the South African context against which the Social Contract Theory and the issues raised regarding the country's Covid-19 responses may be assessed. During my analysis of the South African government's Covid-19 response, I shall focus on specific constitutional rights, detailing the content and implementation thereof. Government's response will thereby be assessed in light of the obligations placed on it by virtue of these rights. Particular attention will be paid to the socioeconomic rights afforded to South Africans and others, namely the right to access healthcare, food and water, and housing, and the right to education. Socioeconomic rights are of particular importance given that they provide the basic amenities which allow for a decent standard of living and which also protect peoples' rights to dignity and freedom. In this context, such rights are important considering that certain amenities such as adequate housing and access to sufficient amounts of clean water are necessary to enable people to participate in the preventative measures of social distancing and regular hand sanitising respectively.

Horton suggests that the Covid-19 pandemic should be approached as a syndemic, instead of a pandemic.<sup>57</sup> Horton referred to a syndemic by identifying its origins in the 1990s with the American medical anthropologist, Merrill Singer.<sup>58</sup> Horton accordingly defined a syndemic as a phenomenon in which focus is not limited to the disease outbreak exclusively, but also focusses on the biological, social, economic, and related interactions between the outbreak conditions, the government, and its citizens, and to what extent these interactions would make citizens more or less susceptible to certain health outcomes.<sup>59</sup> A more recent discussion by Singer provided that a syndemic approach would allow for an integrated response to understanding and treating diseases, thereby reorientating public health and clinical medicine away from a narrow, individualised approach.<sup>60</sup> Horton went on to state that in certain populations, two categories of diseases were in play during an outbreak, namely, Covid-19 and non-communicable diseases (NCDs). It was suggested that the interaction between these two diseases or groups thereof, highlighted inequality and socio-economic challenges, which in turn would deepen the ill effects of both diseases, namely, the vulnerabilities of low-income workers, older

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<sup>57</sup> Horton (note 45 above, 874).

<sup>58</sup> Ibid 874.

<sup>59</sup> Ibid 874.

<sup>60</sup> Ibid 874.

persons, and marginalised ethnic communities.<sup>61</sup> Based on this, Horton concluded that the Covid-19 pandemic should be treated as a syndemic, to the extent that treatment should not solely be focussed on Covid-19, but also on addressing NCDs and issues which exacerbate these diseases such as unemployment and poverty, which also influence access to health care services and related treatment. Horton also argued that to develop an adequate syndemic response, the social origins of the diseases in question, as well as an understanding of the vulnerable populations, must be considered.<sup>62</sup> Horton's article is of importance as it suggests that disease outbreaks cannot be looked at in isolation and that consideration must be given to the context in which the outbreak exists. This would be of critical importance for countries such as South Africa, where the prevalence and impact of NCDs on the healthcare sector and population are demanding. Horton's suggestion has been criticised by Mendenhall, for creating the impression that Covid-19 is a syndemic across all regions and countries. It was thereby suggested that the concept of Covid-19 being a syndemic be subject to a disclaimer that identifies its application to only certain countries or situations and not all and sundry.<sup>63</sup> As was cited by Mendenhall in the critique, in countries such as the United States of America, Covid-19 mortality and morbidity may be associated with historic issues of systemic racism in the country as well as political failings. Such dynamics may not however be present in other countries.<sup>64</sup>

The suggestion put forward by Horton is bolstered by an earlier discussion by Irons in which she discussed the history of epidemics in the context of Western countries versus that of their counterparts.<sup>65</sup> Irons highlighted that prior to the Covid-19 pandemic, colonised and developing countries bore the burden of epidemics, not the West or former colonisers.<sup>66</sup> To Irons, the fact that developing or colonised countries were epicentres of the virus indicated that the vulnerability of persons, resulting from their existing underlying health conditions and compromised immune systems

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<sup>61</sup> Ibid 874.

<sup>62</sup> Ibid 874.

<sup>63</sup> E Mendenhall 'The Covid-19 syndemic is not global: Context matters' (2020) 369 *The Lancet* 1731.

<sup>64</sup> *Ibid* 1731.

<sup>65</sup> R Irons 'Pandemic...or syndemic? Reframing Covid-19 disease burden and 'underlying health conditions' (2020) 28 *Social Anthropology/Anthropologie Sociale* 286.

<sup>66</sup> *Ibid* 286.

contributed to the severity or spread of pandemics. She proposed that, given these factors, the Covid-19 pandemic must be reframed as a syndemic as opposed to a pandemic. This notion was supported by the contention that such an approach would allow for responses to be better crafted to also take the existing health circumstances of a country's citizens into account.<sup>67</sup> Iron's suggestion was brief and did not break down the dynamics of a syndemic and how exactly it must be determined. Whilst highlighting an important aspect of why the Covid-19 pandemic must be considered and approached as a syndemic, her discussion failed to acknowledge the social, political, and economic challenges that may be faced by both the West and all other countries and how these dynamics interact with healthcare crises.

Building on Horton and Iron's discussions of Covid-19's relationship with and impact on NCDs, Yadav et al. agreed that for persons living with NCDs, Covid-19 was a syndemic to the extent that Covid-19 crowded and weakened already overburdened and under resourced healthcare systems and debilitated economies.<sup>68</sup> Yadav et al. further argued that because a pandemic may ordinarily be intensified by the socio-ecological and biological factors that adds to and influences the pandemic situation, the Covid-19 pandemic must accordingly also be considered and approached in the context of a syndemic due to issues of overcrowding, lack of access to healthcare services and an increase in cases of psychiatric illnesses, suicide and depression, as well as social determinants of health such as social inequality and poverty. Such factors are relevant within the context of South Africa, given ongoing circumstances such as crowded informal settlements,<sup>69</sup> which are counterintuitive to social distancing measures, and obstructions in gaining access to healthcare owing to income-related health inequalities such as race, hunger and income.<sup>70</sup> Yadav et al. in turn defined Covid-19 as a synergistic pandemic in which pre-existing medical conditions, combined with socio-economic and political

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<sup>67</sup> Ibid.

<sup>68</sup> UN Yadav, B Rayamajhee, SK Mistry, SS Parsekar, SK Mishra 'A syndemic perspective on the management of non-communicable diseases amid the Covid-19 pandemic in low- and middle-income countries' (2020) 8 *Frontiers in Public Health* 1.

<sup>69</sup> M Nyashanu, P Simbanegani, L Gibson 'Exploring the impact of Covid-19 pandemic lockdown on informal settlement in Tshwane Gauteng Province, South Africa' (2020) 15(10) *Global Public Health* 1449.

<sup>70</sup> M Loveday, H Cox, D Evans et al 'Opportunities from a new disease for an old threat: Extending Covid-19 efforts to address tuberculosis in South Africa' (2020) 110(2) *SAMJ* 1161.

factors, interact with the virus only to produce an aggravated situation for those with NCDs.<sup>71</sup> They continue to provide a valuable framework which entities trying to address similar situations may use.<sup>72</sup> This framework identifies the factors of the biological and socioecological interface respectively, and provides for the possible syndemic outcomes should these factors interact.<sup>73</sup> Yadav et al provides that biological factors include health concerns of NCDs, Covid-19, mental health, co-infection, antimicrobial resistance, frailty, and malnutrition.<sup>74</sup> They further provide that socioecological factors include socio-marginalisation issues, the physical environment, socio-behavioural issues, and government policies.<sup>75</sup> According to Yadav et al, should an interaction between these interfaces occur this would constitute a syndemic with the potential outcomes for individuals including poor self-management of their NCDs, a poor quality of life, increased mortality, and suicide.<sup>76</sup> Such a framework would be important in arguing that Covid-19 is a syndemic in South Africa, particularly given the complication that NCDs play amongst the given population.

Stauton et al. provides a foundational piece on the assessment of the South African response to Covid-19.<sup>77</sup> Upon the emergence of the virus in the country, President Ramaphosa and his government declared a state of disaster in South Africa. Staunton et al. highlighted the seminal differences between a state of disaster and a state of emergency, a distinction that by their own acknowledgment, was crucial given the country's history. Importantly, the authors draw attention to the realities of the South African public health sector, highlighting its inadequacies and pitfalls, particularly in light of NCDs such as HIV and TB. This was done to illustrate the strain under which the sector was in and the challenges that would be faced with the additional burden of the virus. In addition, they also discussed the complexities and difficulties of traditional public health measures within the South African socio-economic context and the fact that measures such as regular hand sanitising and social distancing are

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<sup>71</sup> Yadav (note 68 above, 2).

<sup>72</sup> Ibid 3.

<sup>73</sup> See an illustration of this framework enclosed herewith marked as Appendix B.

<sup>74</sup> Yadav (note 68 above, 3).

<sup>75</sup> Ibid 3.

<sup>76</sup> Ibid 3.

<sup>77</sup> Stauton (note 4 above).



near impossible in communities that have no access to water and sanitation, or adequate housing. Similarly, quarantining and isolation would be far-fetched in such environments given the lack of sufficient living space to practice social distancing and the lack of amenities so as exercise regular sanitising of person and property. The discussion by Stauton et al. elucidates that healthcare crises are not standalone issues that may be resolved solely by rendering the relevant healthcare and medical solutions. Rather, the aforementioned concerns give credence to Horton's suggestion that Covid-19 is a syndemic, rather than just a pandemic. This is evident through the authors' discussion of the complexities of implementing preventative Covid-19 measures within contexts in South Africa where basic amenities are lacking or inadequate. Such discussion also gives credence to Mendenhall's point that Covid-19 as a syndemic is not global but may exist such within specific contexts, such as the above socioeconomic dynamics that are prevalent in South Africa.

Buthelezi echoed the argument put forth by Staunton et al. by noting that heightened food poverty and gender-based violence, state-induced violence owing to the deployment of the SANDF, as well as the inability of compliance with non-medical measures because of inadequate housing and sanitation.<sup>78</sup> Attention was also brought by Buthelezi to gaps in a united response by government, stating that the isolation of Parliament in the Executive's decisions, as well as the ongoing issue of corruption, this time within the context of procurement of personal protective equipment (PPE).<sup>79</sup> Buthelezi also mentioned the positive outcomes of government's response, such as the favourable partnership between government and businesses through the Solidarity Fund, as well as government's increased communication with its people.<sup>80</sup> The Solidarity Fund was established on 23 March 2020, just prior to the commencement of the Level 5 lockdown, as a response to the Covid-19 outbreak. Whilst working alongside government, it is an independent entity which seeks funding from the general public, civil society, the private and public sectors so as to assist humanitarian relief efforts to support the national Covid-19 response and to render aid in the fight against the virus.<sup>81</sup> A critical point raised by Buthelezi was the recognition that government was obligated to respond to the Covid-19 threat by virtue of the

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<sup>78</sup> M Buthelezi 'South Africa, Covid-19 and the Social Contract', available at <https://pari.org.za/south-africa-covid-19-social-contract/>, accessed on 1 February 2021.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> 'Who we are' available at <https://solidarityfund.co.za/about/>, accessed on 7 December 2021.

social contract it held with its citizens.<sup>82</sup> I thus recognise the concept of government being obligated to fulfil the collective rights of citizens who have entrusted the institution with the protection of their rights. Buthelezi argued that despite the pros and cons of the South African Covid-19 response, democracy continued to thrive, albeit for the middle to upper classes, but not as greatly for the impoverished.<sup>83</sup> He explained that the impoverished have been grossly marginalised despite the democratic era, resulting in the Covid-19 pandemic to be approached not just as a health emergency that requires a public health response, but also as a measure by which to address hunger that is experienced by many poor people in South Africa, and as an effort to build a more inclusive economy that eradicates inequality.<sup>84</sup> Like Stauton et al., Buthelezi also highlighted that a more holistic approach is required to address the numerous shortfalls in government's constitutional obligations and which have become glaring during the Covid-19 pandemic. A syndemic approach would also be a reasonable solution to the concerns raised by Buthelezi. This highlights the research questions of my dissertation, whether the South African government honoured its constitutional social contract between itself and its citizens, during their response to and the management of the Covid-19 pandemic.<sup>85</sup>

## 1.5 Conclusion

The South African government's response to Covid-19 in the country could not be one which was isolated simply to medically resolving a public health emergency. Rather, recognition of the various tiers of impact Covid-19 would have on South African society was crucial and demanded that the government provided a response that was comprehensive and that would fulfil its constitutional obligations. In the chapters to follow, I will build on the findings of those discussed above by assessing whether the South African government satisfied its constitutional obligations to its people in its response and management of the Covid-19 pandemic. In Chapter Two, I will discuss the Social Contract Theory and its relevance to the South African context within the frame of the South African Constitution. In Chapter Three, discussion will be had on the government's constitutional obligations, with particular focus on those rights which have been relevant to the Covid-19 pandemic, whilst

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<sup>82</sup> Buthelezi (note 78 above).

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

Chapter Four will then consider government's Covid-19 response and the extent to which the rights discussed in the chapter prior, were satisfied. Finally, Chapter Five will provide a conclusion to the research questions, as well as recommendations. The central recommendation shall consider the appropriateness of government considering events such Covid-19 to be treated as a syndemic, rather than a pandemic.

## CHAPTER TWO

### THE SOCIAL CONTRACT THEORY AND THE CONSTITUTIONAL SYSTEM OF GOVERNANCE

#### 2.1 Introduction

Since the advent of democracy in 1994, South Africa has been a constitutionally sovereign nation, placing the Constitution as the supreme law of the land. The creation and promulgation of the Constitution was a response to the need to form a state that redressed the issues of a tumultuous and suppressive past and that provided growth for a country, cognisant of its limitations.

States are formed through varying philosophical theories such as the divine right theory, natural right theory, and conflict theory.<sup>86</sup> South Africa and its democracy are rooted in the Social Contract Theory. Loewe et al. define a social contract as the number of formal and informal agreements undertaken between societies and their sovereign (be it a government or other actor in a position of power) that determine their rights and duties to one another.<sup>87</sup> Within the context of South Africa, the written social contract between government and civilians is the Constitution.<sup>88</sup> Numerous similar uncoded contracts have come to be over the course of democracy, be it via how South Africans' vote, to instances of implicit consent such as the protests and outspokenness of South Africans over corrupt governance and the subsequent removal of former President Jacob Zuma.

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<sup>86</sup> University of Pretoria Repository 'Chapter 3: Theories and Developments guiding Constitutional Democracy' at 70 available at <https://repository.up.ac.za/bitstream/handle/2263/28459/03chapter3.pdf?sequence=4&isAllowed=y>, accessed on 29 January 2021.

<sup>87</sup> M Loewe, T Zintl and A Houdret 'The social contract as a tool of analysis: Introduction to the special issue on "Framing the evolution of new social contracts in Middle Eastern and North African countries"' 2020 *World Development* 2.

<sup>88</sup> University of Pretoria (note 1 above; 90).

## 2.2 Background to the Social Contract Theory

Social Contract Theory was first proposed by the 17<sup>th</sup> century English philosopher, Thomas Hobbes. He suggested that in its original and primitive state, humankind was at war with each other (*bellum omnium contra omnes*). This original state, otherwise known as the state of nature,<sup>89</sup> was described as “nasty, brutish and short”<sup>90</sup> with the human reflex being aimed at fending for oneself and eliminating anyone or anything that contradicted survival. Hobbes believed that humans realised the unsustainability of ongoing warfare and resolved it by entering into contracts with one another to regulate their relationships and interactions. At the heart of the contract was the recognition of a single supreme leader and his or her authority and ability to legislate and counter the lawlessness of the original state. Based on the above, Hobbes concluded that law and morality are responses to our fear of what we could inflict upon one another. The social contract is thereby the mechanism by which individuals protect themselves from one another, as well as from the state and vice versa, with the intention ultimately being to bring about law and order.<sup>91</sup>

The theory was further worked on by other theorists such as the Briton, John Locke<sup>92</sup> and Jean-Jacques Rousseau, the Swiss thinker.<sup>93</sup> John Rawls, the 20<sup>th</sup> century American philosopher developed the theory further in his book, *The Theory of Justice*, where he wrote that humans sought social contracts to make life tolerable and that the product of such undertakings was morality. Rawls identified society to be a communal arrangement or effort, aimed at advancing the good of all members of society. He identified the inequalities experienced by people, owing to their birth, natural endowments, and historical circumstances, as being unfair. He felt that in light of morality, the history and biology resulting in a person’s unequal situation should be ignored and treated as arbitrary. Rather, a more equal society should be sought by redressing the elements that lead to inequality in the first place. Rawls further believed that all vital economic goods and services should be distributed equitably amongst all persons, save where the inequitable distribution should be to the advantage of all. He

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<sup>89</sup> J Neidleman ‘The Social Contract Theory in a Global Context’ 2012 *E-International Relations* 2.

<sup>90</sup> K Moodley *Medical Ethics, law and human rights* (2017) 33.

<sup>91</sup> Ibid 33.

<sup>92</sup> University of Pretoria (note 1 above, 77).

<sup>93</sup> Ibid 81.

proposed that the distribution of such goods and services should be determined via social contracts, whereby all parties to such contracts must contribute equally. Practically, this may be exercised via a constitution and the responsibilities it espouses on both a state and its citizens. To ensure that the contract operated such, Rawls provided that a thought experiment would need to be carried out. Such an experiment involves all persons relevant to the distribution, being placed behind a veil of ignorance where their identity, position in society, physical attributes and so forth would not be known to one another. They would also not know what the outcome of their participation in the experiment would be. The participants would then need to work together so as to determine how the essential goods and services would be distributed equally amongst them. Rawls believed that this approach would force all participants to work just as hard for one another as they did themselves. The motivation would be to assist one another irrespective of one's position, thereby maximising on everyone's essential needs.<sup>94</sup>

### 2.3 Governance and social contracts

In his book, *Leviathan*, Hobbes likened governments to Leviathans, providing that just like the mythological sea monster that devoured ships, so too did governments create powerful states by absorbing individuals into themselves so as to impose order. Using biblical concepts, Hobbes thereby likened the concept of an ideal sovereign state to a Leviathan, with the ships it devoured denoting the citizens of that state which would form part and parcel of its being. Hobbes thereby provided that government was an overarching function, one that he believed required a king as the sovereign to provide resolute and consistent political authority. Despite founding the concept of social contracts, Hobbes believed that such agreements should exist only between ordinary persons and not between ordinary persons and their sovereign. He furthered this by providing that in order to be a part of that state, ordinary persons must surrender their rights to the sovereign, such that the sovereign is absolute and that revolt against them be impossible.<sup>95</sup>

Hobbes' stance on governance and the social contract was not widely supported, mainly because Europe was entering its Age of Enlightenment. This period was characterised by people moving away

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<sup>94</sup> Moodley (note 5 above; 34).

<sup>95</sup> 'Hobbes, Locke, Montesquieu and Rousseau on Government' available at <https://www.crf-usa.org/bill-of-rights-in-action/bria-20-2-c-hobbes-locke-montesquieu-and-rousseau-on-government.html>, accessed on 10 July 2021.

from absolute monarchies, owing to a growing dissatisfaction amongst ordinary persons by such dictatorial structures. Known as enlightenment thinkers, persons such as John Locke and Jean-Jacques Rousseau took on a different approach to the position of the ordinary person. Instead of focussing on the human condition in relation to religion and the afterlife, they focussed on improving the human condition whilst one was still alive. Value was given to natural rights of life, liberty, and property, as well as to concepts of reason, religious tolerance, and science. Amidst this, they all developed theories where governance was performed by some, if not all persons, and not a monarch.<sup>96</sup>

Whilst agreeing with Hobbes on the notion of a state of nature, John Locke disagreed on Hobbes' position regarding natural rights and the operation of social contracts. Rather, Locke propagated the idea of a social contract between both ordinary persons and between ordinary persons and their 'sovereign'. He further provided that natural rights were inalienable which would limit the powers of a government. Should a government infringe natural rights, the social contract between society and themselves would be breached, thereby empowering society to revolt and establish a new accountable government.<sup>97</sup> Locke thereby focussed on the social contract not simply being an agreement between strata of persons but rather a construct that operated both vertically and horizontally. He also affirmed the accountability of a government and the respect that the entity would need to render to a person's natural rights.

Whilst also promoting the concept of a social contract, Jean-Jacques Rousseau believed that the social contract was often a manipulative tool, used by the wealthier strata to suppress ordinary persons. In his publication, *The Social Contract*, Rousseau thereby hypothesised that given the inalienability of natural rights, the purpose of a social contract should be to empower ordinary persons to maintain these rights. He provided that persons should enter social contracts as a whole community, such that they surrender their rights to one another and not merely to a sovereign. He premised this on the notion that all persons were sovereign and should be able to exercise their general will and promulgate laws for a public good. Promoting the context of a civil state, Rousseau thereby provided that should persons elect to be a part of a state, that they were entering into a social contract in which they enjoyed both

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<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

rights and duties.<sup>98</sup> Rousseau also believed that social contracts were premised on consensus. In terms of governance, he related this consensus to be in the form of general will whereby persons reach consensus by placing their collective interest over their individual interest.<sup>99</sup> This sentiment has often been put forth in constitutions with the simple wording of ‘We the people...’.<sup>100</sup> In his works, Rousseau not only recognised the relationship between governance and social contract but also that manipulation could arise in the relationship. His work is thereby a warning to those bound by social contracts to remain vigilant to ensure that all parties to the contract are satisfied, and not just a select few.

## **2.4 Social contracts in reality**

Social contracts are generally approached with a level of ambivalence. They are viewed as the equilibrium required between governments and their affiliates, and the rest of society. It has further been argued that social contracts constitute semi-informal entities that seek to make the interactions between the state and society more predictable and politics more stable. Their sustainability is dependent on their providing acceptable norms and rules for government and other agents with regards to their conduct. Practically, social contracts do not wipe out conflicts in politics and segments of society. Instead, they provide a lawful structure within which conflict can be resolved to the extent that the interaction is non-violent and far more predictable and thus manageable.<sup>101</sup>

The effectiveness of a social contract is predicated on three elements: 1) substance; 2) scope; and 3) temporal dimension. Substance refers to the deliverables that are to be exchanged between government and society. This may be elucidated via a written contract in which the rights and obligations of the parties are provided for, albeit to a limited extent. For substance to be generated, boundaries to the relationship will need to be defined. This may be done via the constant interaction of the parties and the organic determination of what behaviour will be tolerated by either side. Whilst the true working

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<sup>98</sup> Ibid.

<sup>99</sup> Neidleman (note 4 above; 1).

<sup>100</sup> Preamble of the Constitution of the Republic of South Africa, 1996.

<sup>101</sup> Loewe (note 2 above; 3).



of the social contract may not be codified, it may be determinable by assessing the interaction and on whom the delivery of performance rests. According to Loewe et al. governments have three obligations in respect of deliverables: 1) protection of its citizens; 2) the provision of basic services to its citizens; and 3) the participation of all citizens in political decision-making across all levels. These obligations give rise to the core functions of the state, namely, authority, legitimacy, and capacity. When governments satisfy all three core functions, they garner legitimacy in the eyes of their citizens, watchdogs, and other interested parties. This in turn, allows for them not to have to resort to repression tactics to achieve or maintain power and control. Whilst government thereby bears the responsibility to fulfil society's right to deliverables, society is in turn required to conform with the rule of the government and to display a level of loyalty to such rule. The obligation thereby placed on society in response to their receipt of deliverables is to accept government and its status. This illustrates the critical component of social contract – the compliance of citizens. If citizens are to reject the performance rendered by a government, they are in essence rejecting that government, thereby collapsing the social contract that required such performance. Without such contract, the government in question will on the face of it, not be able to exist.<sup>102</sup>

Society typically comprises of several groupings, many of which are formed based on socio-economic dimensions, historic practices, and political lines. This results in the scope of a social contract varying depending on the involved parties. Governments may thereby enter several different social contracts so as to appease a greater goal. Governments may also do this to address the varying levels of power that exist between different groupings, resulting in not every group being a direct participant to a social contract. Conversely, stronger groups may be able to negotiate a social contract that is primarily beneficial to them. As such, the scope of a social contract may accommodate all parties to the contract or just a portion thereof, and it is likely that the most influential parties will be those at the forefront of the social contract.<sup>103</sup>

The temporal dimension of a social contract is largely dynamic. Social contracts are not set-in stone and will have to be renegotiated or replaced, either in part or as a whole. These changes may be

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<sup>102</sup> Loewe (note 2 above; 6).

<sup>103</sup> Loewe (note 2 above; 5).

attributed to several reasons. Firstly, the distribution of power is relative. How a government holds onto power is dependent on several factors, both internal and external to their control. This results in the balance of power shifting ever so often and society and government having to reassess how their dynamic plays out. Secondly, a social contract can be rendered void owing to a party not performing. As mentioned earlier, if a government fails to provide deliverables to a community, it may not survive. Similarly, if society does not adequately recognise and legitimise a government, they may lose ground in a social contract owing to the repression response of that government. Finally, a social contract may need to be amended due to it no longer meeting the expectations of the other parties. Ultimately however, the renegotiation of a social contract can lead to improvements and benefits for all involved. It may present a situation where no party loses but where one party simply renegotiates the terms of the contract to their increased benefit.<sup>104</sup>

In reality therefore, social contracts do not always function to the ideals set out by Rawls. Contrary to the thinking behind his thought experiment, social contracts are dependent on recognising the differences between persons and using those differences as the ground upon which the contractual relationship is developed. In particular, the provision of basic services as the substance of a social contract will be allotted based on the requirements of the grouping in need, rather than a distribution policy which is not responsive to the issues being faced by same but seemingly benefits all and sundry. This further does not tie in with Rawls' belief that the inequitable distribution of essential goods and services be condoned when to the benefit of all. For such to work, deadlines for such inequality will need to be determined, with strategies in place to appease those disaffected by such practices. Case in point would be existing healthcare policies in South Africa, particularly in terms of HIV and TB. Antiretroviral treatment (ART) for HIV was initially stymied in the 2000s owing to the then President and Health Minister not believing in the efficacy of same or the extent of the HIV problem. It is estimated that 330 000 South Africans lost their lives as a result of the delay and inability to access ARTs, thereby exacerbating their HIV status to that of full-blown and uncontrolled Acquired

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<sup>104</sup> Loewe (note 2 above; 6).

Immunodeficiency Syndrome (AIDS). Similarly, with TB, the number of persons suffering and succumbing to the illness continues to grow due to ineffective response and support systems<sup>105</sup>.

The social contract is thereby a working contract which must be heeded to. Social contracts are also dependant on the environment in which they are set to operate – their goals and thereby a government’s range of deliverables will depend on that country’s advancements and drawbacks. In practice, a social contract may not approach all deliverables equitably, with certain deliverables being given prominence over another.<sup>106</sup> Social contracts are thereby working agreements predicated on the rights of a society and a government’s ability to do justice to same.

## **2.5 The relationship between a constitutional system of governance and the Social Contract Theory**

### *2.5.1 A constitutional system of governance*

A constitutional system of governance is thereby a situation in which the citizens of a state have agreed to forsake the individual rights they held in the state of nature, so as to be bound and protected to a collection of laws<sup>107</sup>. These laws form the basic law of the state and comprise of rights, obligations, and other critical issues to create a constitution of sorts. For this body of law to be operative, agents will be appointed and delegated specific tasks to ensure the functionality of a government structure. By virtue of this, government will be responsible for fulfilling and maintaining the rights of citizens, whilst also ensuring that they do not act in a manner which is contrary to their constitutional obligations. The social contract theory is thereby evident in a constitutional system of governance as the formation of a constitution reflects an agreement between the state and its citizens to abide and fulfil their rights and responsibilities lest they be in breach of same. The existence and operation of

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<sup>105</sup> K Cullinan ‘Mbeki still believes his own AIDS propaganda.’ (2016) available at <https://health-e.org.za/2016/03/07/mbeki-letter-believes-aids-denialism/>, accessed on 5 July 2021.

<sup>106</sup> Loewe (note 2 above; 8).

<sup>107</sup> University of Pretoria (note 1 above, 87).

such a system of governance is thereby the attempt to fulfil citizens' aspirations, hopes and desires to progress away from the state of nature and satisfy the basic premise of the social contract.<sup>108</sup>

Whilst a social contract may refer to principles of just and fair governance or bodies of positive law,<sup>109</sup> within the realm of a constitutional system of governance, a constitution is the social contract at play. A constitution is defined as a body of laws and principles which establish how a state or society is to be governed. In the decades succeeding the consequences of World War II and in response to several countries being liberated from colonisation, constitutional democracy grew to become a viable option by which to establish an equitable social contract between citizens and those elected to lead them. In this modern era, a constitution thereby stands as a symbol of self-government and as the antithesis to much of human history in which societies were ruled by oligarchies and monarchies. This reflects the initial growth of the social contract theory which emerged due to the despondence experienced by ordinary persons and intellectuals in feudal Europe. Further to this, constitutions have been deemed to be a master plan for an egalitarian and settled society thereby carrying through the essence of Hobbes's belief that the social contract would resolve the deficiencies and anarchy posed by the state of nature. The operation of a constitution as a mechanism by which to improve social order is evident in various instances. The post-war 1949 German constitution, *The Basic Law*, is deemed to be one such instance, given that its values are objective and powerful enough to influence not just the legal system but also the German social order. More recently the 2008 promulgation of the Ecuadorian Constitution provided for a range of social rights and promoted the concept of affirmative action as a solution to situations of inequality.<sup>110</sup> This illustrates the use of a constitution to correct states of nature that are unequal and inequitable so as to realise a society, that as Rawls' provided, is more tolerable.

### 2.5.2 *Constitutional democracies in relation to the social contract*

Contemporary constitutional democracies are often built on complicated histories, with their response being to create a government that can rebuff any complications if they were to arise in the future. In addition, the populations they serve are now far larger and far more diverse than previously existed.

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<sup>108</sup> Ibid 88.

<sup>109</sup> AL Allen 'Social Contract Theory in American Case Law' 1999 *Penn Law: Legal Scholarship Repository* 26.

<sup>110</sup> M Loughlin 'The contemporary crisis of constitutional democracies' (2019) 39(2) *Oxford Journal of Legal Studies* 440.

For such a constitutional democracy to function, government must be formed through regulated electoral processes. Institutions must be established to ensure that such elections are free and fair and that citizens' rights to freedom of expression, association, and speech are maintained. Such functionality is supported by a constitution that is codified and that provides for checks and balances via the mechanism of the separation of powers doctrine<sup>111</sup>. In addition to this, the constitutional democracy must be underpinned by specific social conditions. These conditions include having political parties which merge diverse perspectives into a common will, an active civil society, and a culture which is tolerant of diverse thought, and which acknowledges the need for power to be restrained.<sup>112</sup>

### 2.5.3 *The Constitution of the Republic of South Africa as a social contract*

The Constitution of the Republic of South Africa<sup>113</sup> was crafted in response to South Africa's history of systemic racial oppression and rule, which was both unpredictable and arbitrary. The Constitution sought to be the mechanism which corrected the repressive state of nature that South Africans, particularly of colour, found themselves under during Apartheid. It sought to undo the ill-effects of institutionalised colonial influences, as well as turn the tide on the abusive nature of a parliamentary sovereign system of governance<sup>114</sup>. Owing to this progressive stance and its ability to shape the country into a just and equal society by way of constitutionally guided measures, the Constitution is transformative.<sup>115</sup> As provided for by Karl Klare, a transformative constitution is an ongoing endeavour of enactment, interpretation, and enforcement within the context of the state of nature from which the constitution has emerged. The aim of the transformation must be to correct the country's power relationships and social and political entities to achieve an egalitarian, participatory, and

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<sup>111</sup> Ibid 438.

<sup>112</sup> Ibid 439.

<sup>113</sup> The Constitution of the Republic of South Africa, 1996.

<sup>114</sup> D Davis 'Twenty years of Constitutional Democracy: A Preliminary Reflection' (2016) 60(1) *NYLS Law Review* 42.

<sup>115</sup> Ibid 41.

democratic equation. Klare also provided that such must be achieved through expansive social and non-violent political means, all of which are anchored in law.<sup>116</sup>

It may thereby be seen that the Constitution exists as the social contract between South Africans and a democratic government. It is the document that carried across constitutional principles developed during the Multi-Party Negotiating Process (MPNP), so as to relieve South Africans from the oppressive state of nature in which they existed. It may further be argued that the MPNP and its predecessor, the Convention for a Democratic South Africa (CODESA),<sup>117</sup> were the practical exercise of Rawls' Thought Experiment, albeit without a veil of ignorance, executed with the aim to determine what was required for a just and equal society. The preamble of the Constitution starts with the phrase, 'We, the People of South Africa...' which denotes the intention of inclusiveness and importantly the recognition of the will of the people,<sup>118</sup> a concept propagated by Rousseau in his discussion of the social contract theory. His desire for a social contract to be built on consensus was also provided for in the development of the Constitution, given that it was a consultative and participatory process, whereby the Constitutional Assembly invited public commentary and feedback.<sup>119</sup>

Constitutional democracy in South Africa is built upon four basic principles namely, constitutionalism, rule of law, democracy and accountability, and the separation of powers.<sup>120</sup> These principles are important as they carry the essence of the social contract theory whilst providing the structure of a constitutional order. The overarching and first principle is that of constitutionalism. Constitutionalism refers to the theory of constitutional law, in that it prescribes what constitutional law, and a constitution should do, rather than simply describing those roles. The form of constitutionalism provided for in South Africa provides that the Constitution must structure as well as limit state power. In other words,

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<sup>116</sup> KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146, 150.

<sup>117</sup> 'The Drafting and Acceptance of the Constitution' available at <https://www.sahistory.org.za/article/drafting-and-acceptance-constitution>, accessed on 7 July 2021.

<sup>118</sup> R Adams 'South Africa's social contract: the Economic Freedom Fighters and the rise of a new constituent power?' (2018) 50(3) *Acta Academia* 109.

<sup>119</sup> *Ibid* 109.

<sup>120</sup> I Currie and J de Waal *The Bill of Rights Handbook* 6 ed (2014) 7.

the Constitution must provide the state with sufficient power to govern but at the same time limit such power so as to prevent the violation of the law or the rights of citizens.<sup>121</sup>

Constitutionalism as practised in South Africa thereby seeks to protect the interests of society by providing governance that is justifiably limited in its capacity, in order to avoid arbitrary rule in any form. The principle of limitation is engaged by the Constitution to achieve this and operates in two ways. Firstly, the Constitution limits the range of powers awarded to organs of state, thereby restricting their level of competence. Secondly, it stipulates the procedures that must be followed by these organs of state within their range of competence.<sup>122</sup> The effect of these measures is that certain organs of state may only exercise certain forms of power and that this may in turn only occur if certain processes are complied with. A relevant example of such limitation is with regards to Chapter 2 of the Constitution, the Bill of Rights, in that the state not only bears the onus of upholding citizens' fundamental rights but that they must also avoid acting in a manner that could violate same.<sup>123</sup>

The limitation of state power is promoted and supported in South Africa by other legal principles such as constitutional supremacy, justiciability, and entrenchment. Constitutional supremacy provides that the Constitution is binding on all branches of the state and is the highest law in the country, such that no entity or act is greater than the Constitution and its provisions.<sup>124</sup> Justiciability refers to the judiciary's ability to enforce laws, an aspect which is crucial as it empowers the courts to enforce the provisions of the Constitution and thereby uphold the supremacy of same.<sup>125</sup> Entrenchment further supports the supremacy of the Constitution by providing that Parliament in its capacity as the legislature cannot amend the Constitution without specific procedures being complied with and without the support of specific majorities.<sup>126</sup> Constitutionalism is a clear illustration of social contract

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<sup>121</sup> Ibid 8.

<sup>122</sup> Ibid 8.

<sup>123</sup> Section 7(2) of the Constitution of the Republic of South Africa, 1996.

<sup>124</sup> Section 2 of the Constitution of the Republic of South Africa, 1996.

<sup>125</sup> Currie and De Waal (note 35 above; 9).

<sup>126</sup> Section 74 of the Constitution of the Republic of South Africa, 1996.

theory. It provides the governance structure required by the social contract between South Africans and their elected officials and simultaneously confines the power of such officials and entities. The latter aspect is crucial as it is an indication that the contract – the Constitution – is determined not to allow citizens to fall back into a state of nature as experienced previously during Apartheid or as has been witnessed in other geographies. It further upholds the importance of the social contract through principles of constitutional supremacy, justiciability, and entrenchment thereby highlighting its importance to the society it serves. Finally, constitutionalism upholds natural rights just as Locke and Rousseau did in that by upholding constitutional supremacy, it upholds the human rights afforded to all South Africans by way of the Bill of Rights.

Constitutionalism is supported by a further basic principle, namely the rule of law. A vital principle to the application of democracy, the rule of law demands that all state institutions act in accordance with the law. Practically, this provides two things: firstly, it states that all organs of state are equal to all other persons and are thereby expected to obey the law;<sup>127</sup> secondly, it provides that the state cannot exercise power over another person unless they have been mandated by law to do so. Any attempt to flout this would be contrary to a constitutional democracy and would render the situation lawless.<sup>128</sup> The rule of law supports the notion of the Constitution being a social contract by placing the fulfilment of citizens' rights as the responsibility of government. By acknowledging that no organ of state is greater than any other person, it reflects on how the Social Contract Theory emerged – as a solution to flatten the hierarchy amongst classes and between those in power and those meant to be subservient. The rule of law makes the provisions of the Constitution accessible to those it serves by ensuring that those executing it do not think of themselves or their actions as superior to all others.

Apart from being basic constitutional principles, democracy, and accountability also support the Social Contract Theory. As illustrated in the American and French Revolutions, democracy, and accountability demand that states not be formed due to a person or institution having a divine right of rule over another. Rather, it provides that states may only be legitimately formed where it stems from the consent given by those it governs. The principle thereby provides that consent, rather than power,

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<sup>127</sup> Currie and De Waal (note 35 above; 10).

<sup>128</sup> Ibid 11.



defines a democratic system of governance as well as the relationship between that government and its citizens.<sup>129</sup> This issue of consent reiterates the sentiment of Rousseau and his belief in the will of the people being carried forth in a social contract. In so far as democracy is carried forth in the Constitution, it is not explicitly defined but is recognised and rendered respect by several provisions therein.<sup>130</sup> Most importantly, the Constitution provides that any law or conduct inconsistent with the principle of democracy be declared invalid thereby promoting the importance of this element being satisfied.<sup>131</sup> The Constitution further provides that for democracy to occur, government must respond to the will of the people and thereby be open, responsive, and accountable. It is suggested that this leads to a healthy version of democracy where governance is by explanation and not by force. As provided for by Etienne Mureinik, democracy and accountability promote a ‘culture of justification’<sup>132</sup> and force the constitutional order to create a community ‘built on persuasion, not coercion’.<sup>133</sup> Accountability goes hand in hand with democracy and same is required by the Constitution, which demands it through provisions such as the right to access information<sup>134</sup> and the right to just administrative action.<sup>135</sup>

Finally, the Constitution is also built on the Doctrine of Separation of Powers and the checks and balances required to ensure that the different organs of state fulfil their duties. The Doctrine requires the functions of government to be classified as either judicial, legislative, or executive and thereafter to be performed by those respective branches of government. The importance of this doctrine to the Social Contract Theory lies in its purpose which is simply to prevent the excessive concentration of

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<sup>129</sup> Ibid 14..

<sup>130</sup> The Preamble, sections 1, 7, 36, 39, 57, 59, 61, 70, 72, 116, 118, 152, 160, 195, 234, 236 and Chapter 9 of the Constitution of the Republic of South Africa, 1996.

<sup>131</sup> Section 2 of the Constitution of the Republic of South Africa, 1996 and *President of the Republic of South Africa v United Democratic Movement* 2003 (1) SA 472 (CC) [26].

<sup>132</sup> E Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10(1) *SAJHR* 32 cf I Currie and J de Waal *The Bill of Rights Handbook* 6 ed (2014) 17.

<sup>133</sup> Ibid 17.

<sup>134</sup> Section 32 of the Constitution of the Republic of South Africa, 1996.

<sup>135</sup> Section 35 of the Constitution of the Republic of South Africa, 1996.

power within a single person or entity. This thereby achieves the premise of Social Contract Theory which is to move away from a hierarchal structure of governance where citizens are oppressed and to ensure the accountability of those tasked in the social contract with the capacity to govern. The Constitution further supports the theory by virtue of numerous checks and balances that have been stipulated therein, all of which are intended to ensure that the various organs of state maintain and respect their limited power and do not attempt to supersede the rule of law.

## 2.6 Conclusion

In his work, *Representative Government*, the utilitarian proponent, John Stuart Mills provided that a constitutional democracy comprises of persons united amongst themselves by common sympathies. By this, he referred to areas of concern and improvement that stem from people's birth, race, language, and community, as well as a common history.<sup>136</sup> It is evident from South Africa's history that the Constitution emerged as an agreement premised on the common sympathies experienced by the previously oppressed and the desire to remedy such hurt and prevent it from reoccurring.

The Constitution thereby stands as a social contract between all South Africans and government, in which both parties carry differing rights and responsibilities to fulfil such agreement. It bears the characteristics of a social contract in its scope, substance, and temporality. The Constitution speaks not just to a particular stratum of South African society but to all and sundry. Whilst government and its branches are addressed and mandated directly by the Constitution, citizens are afforded rights, the application of which is subjective. The Constitution is codified and provides for the core functions of the state, thereby providing the substance required. Finally, events of the past few years have shown us the temporal nature of the Constitution, with several amendments already having been affected and several contentious ones being debated.<sup>137</sup> Further to this, the Constitution has been crafted on principles to ensure that it is effective and lives up to the virtues of a social contract. By promoting and entrenching the rule of law, democracy, and accountability the need for distinct branches of

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<sup>136</sup> Loughlin (note 25 above; 439).

<sup>137</sup> 'Expropriation of land without compensation – where are we?' available at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Agri/agriculture-aquaculture-and-fishing-sector-alert-24-march-expropriation-of-land-without-compensation-where-are-we.html>, accessed on 7 July 2021.

government and several other measures, the Constitution strives to give substance to the trust that South Africans have placed in the democratic dispensation.

Whilst the proponents of the Social Contract Theory may take issue with the operation of the Constitution, principles of constitutional supremacy and the practical use of the Constitution in our courts<sup>138</sup> show the functionality of the Constitution as being the epicentre of democratic South Africa's growth. It is on this basis that in the chapter to follow, discussion will be undertaken on the South African government's Covid-19 response and how its response has fared in light of its constitutional obligations, based on the social contract theory.

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<sup>138</sup> *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another* (538/2020) [2021] ZASCA 95 (1 July 2021).

## CHAPTER THREE

# THE CONSTITUTIONAL OBLIGATIONS IMPOSED UPON GOVERNMENT DURING THE COVID-19 PANDEMIC

### 3.1 Introduction

Premised on the notion that the Constitution is a social contract between the South African government and its citizens, the Constitution provides the duties and responsibilities that government is obligated to fulfil. Given the country's history of apartheid and the ramifications thereof, the Constitutional Assembly sought to create a constitution that both addressed and redressed such effects. Whilst the Constitution is made up of fourteen chapters and several schedules, the three most pertinent components to this discussion are the Preamble, Chapter 1, and Chapter 2.

The Preamble, alongside the founding provisions of Chapter 1, cement the position of the Constitution as a social contract between the democratic dispensation and all South Africans. The supremacy of the Constitution is provided for by both components,<sup>1</sup> with Chapter 1 providing that any law or conduct contrary to the Constitution be deemed invalid.<sup>2</sup> The preamble provides that the Constitution seeks to free the potential of all citizens, whilst also improving their quality of life.<sup>3</sup> Such demand is supported by Chapter 1 which indicates that all constitutional obligations must be fulfilled.<sup>4</sup> It is clear from these provisions that constitutional obligations are to be treated with the utmost respect and are not to be faulted on. Whilst such obligations are not placed squarely at the feet of government, it may be understood that given the nature of a social contract, that government is tasked with ensuring the fulfilment of same.

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<sup>1</sup> Preamble of the Constitution of the Republic of South Africa.

<sup>2</sup> Section 2 of the Constitution of the Republic of South Africa.

<sup>3</sup> Preamble of the Constitution of the Republic of South Africa.

<sup>4</sup> Section 2 of the Constitution of the Republic of South Africa.

Government's constitutional obligations are perhaps best articulated in Chapter 2 of the Constitution, The Bill of Rights. Here, the rights of citizens are established, as well as the rules surrounding its application, interpretation, and limitations. The Bill of Rights is identified as democracy's cornerstone in South Africa,<sup>5</sup> with it being applicable to all law and all arms of government and organs of state.<sup>6</sup> The state is accordingly tasked with respecting; protecting; promoting and fulfilling the rights contained therein.<sup>7</sup> This thereby cements government's constitutional obligations, given that they are responsible for satisfying the promises made to citizens in such social contract.

Whilst the Bill of Rights comprises of twenty-seven different rights, rights affected by the Covid-19 pandemic and the ensuing response by government, will be discussed below. Particular focus will be given to the socio-economic rights of access to housing, healthcare and water and sanitation. Discussion will also be had on other pertinent rights such as the accountability rights, the right to freedom and security of persons and the right to education. This discussion will focus not just on what the right enables but also what the obligations stemming from same entails.

### **3.2 The South African Government's Response to the outbreak of Covid-19 in the country**

On 5 March 2020, the Department of Health confirmed the detection of the first case of Covid-19 in South Africa.<sup>8</sup> Within a number of days, the rate of infection started to grow and on 15 March 2020 President Cyril Ramaphosa held his first 'family meeting' to address to the country. The President indicated that government had established the Ministerial Advisory Committee (MAC), comprising of medical scientists and specialists; epidemiologists and any other persons deemed relevant to forming a response to the outbreak. MAC's response was based on epidemiological trends in respect of Covid-19 infections, the healthcare system's capacity to respond to such trends as well as any other factor

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<sup>5</sup> Section 7(1) of the Constitution of the Republic of South Africa.

<sup>6</sup> Section 8(1) of the Constitution of the Republic of South Africa.

<sup>7</sup> Section 7(2) of the Constitution of the Republic of South Africa.

<sup>8</sup> 'TIMELINE: A year of Covid-19 in SA' *IOL* (5 March 2021) available at <https://www.iol.co.za/news/timeline-a-year-of-covid-19-in-sa-6fde1c4f-8624-462f-abda-1f05eb8a6617>, accessed on 26 July 2021.

that could influence the infection, hospitalisation and mortality rates.<sup>9</sup> Further to this, government had formed a National Command Council Committee (NCCC), with ministers from the various departments coming together with the President to consider the advice of the MAC and make decisions for the country accordingly.<sup>10</sup> In his address, the President announced a state of disaster in terms of the Disaster Management Act (DMA) and further informed the country that various regulations, aimed at enforcing, supporting, and managing the pandemic, had been and shall be published in the Government Gazette during the course of the pandemic. At this point in time, there were only 61 confirmed cases of Covid-19 in the country, with no fatalities.<sup>11</sup> Whilst South Africans were still able to continue their lives normally, government provided that social distancing be heeded between persons to inhibit the spread of the virus. Consequently, schools, businesses, and other entities had to rethink their *modus operandi* to respond adequately to what was still an unquantified threat.

On 23 March 2020, however, the President addressed the country again and made an announcement that many other foreign leaders made that week in respect of their own countries – South Africa was being placed under an Alert Level 5<sup>12</sup> or a so-called ‘hard’ lockdown. Effective from midnight on 26 March 2020, all persons were to reside in their homes, with movement outside of this being prohibited for a period of three weeks. All places of education, work, recreation, cultural, and religious purposes were closed. Retailers were only allowed to trade in consumable necessities and if a person were to

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<sup>9</sup> ‘About alert system’ available at <https://www.gov.za/covid-19/about/about-alert-system>, accessed on 26 July 2021.

<sup>10</sup> ‘EXPLAINER | What exactly is the National Coronavirus Command Council?’ *News24* (13 May 2020) available at <https://www.news24.com/news24/SouthAfrica/News/explainer-what-exactly-is-the-national-coronavirus-command-council-20200513>, access on 15 August 2021.

<sup>11</sup> C Stauton, C Swanepoel, M Labuschaigne ‘Between a rock and a hard place: Covid-19 and South Africa’s response’ (2020) 7(1) *Journal of Law and the Biosciences* 2.

<sup>12</sup> ‘Alert Level 5 may be enforced by government where the prevalence of Covid-19 in the country is high and where the requisite health system readiness is low’, available at <https://www.gov.za/covid-19/about/about-alert-system>, accessed on 6 September 2021.

leave their home for purpose other than shopping or for medical care, they required a permit to justify their movement. Only essential or frontline workers were allowed to leave home for work purposes.<sup>13</sup>

The state of disaster was announced and managed in terms of the DMA which provided that the initial state of disaster would run for a period of three months<sup>14</sup> with the possibility of extensions on a monthly basis thereafter.<sup>15</sup> A state of disaster is defined as a progressive or sudden, localised or widespread, natural or human-induced occurrence, the effects of which threaten to disrupt the life of a community, to cause injury, disease or death, or to cause damage to property, infrastructure or the environment.<sup>16</sup> The DMA empowers the appropriate minister – in this case the Minister of Co-operative Governance and Traditional Affairs – to respond to such threat by limiting certain rights and freedoms throughout the country via the promulgation of regulations. The rights to be limited may not be non-derogable rights, which include the right to life and the rights of children.<sup>17</sup> The Constitutional Court is entitled to find such a state of disaster invalid, where the regulations are found to be infringing the rights to human dignity, freedom of trade, occupation and profession, freedom of movement, and access to healthcare, food and water, and where such limitation cannot be justified in terms of the Limitations Clause.<sup>18</sup>

A state of disaster differs greatly from a state of emergency which is declared in the event of the need to restore peace and order, such as when the threat of war, invasion, disorder, or general insurrection

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<sup>13</sup> 'Disaster Management Act: Regulations to address, prevent and combat the spread of Coronavirus COVID-19: Amendment' available at <https://www.gov.za/documents/disaster-management-act-regulations-address-prevent-and-combat-spread-coronavirus-covid-19>, accessed on 26 July 2021.

<sup>14</sup> Section 27(5)(a) of the Disaster Management Act, 2002.

<sup>15</sup> Section 27(5)(c) of the Disaster Management Act, 2002.

<sup>16</sup> Section 1 of the Disaster Management Act, 2002.

<sup>17</sup> Table of Non-Derogable Rights as provided for in Section 37(5)(c) of the Constitution, of the Republic of South Africa, 1996.

<sup>18</sup> 'Covid-19: State of Disaster in South Africa', available at <https://verfassungsblog.de/covid-19-state-of-disaster-in-south-africa/>, accessed on 7 September 2021.

is present.<sup>19</sup> In the case of an infectious disease causing a pandemic, the health emergency casts a much greater net of harm and damages, hence the declaration of a state of disaster, as opposed to a state of emergency. Such is provided for in the DMA's definition of a disaster, as provided for above. Further to this, the event must be of a magnitude which exceeds the abilities of persons affected by the disaster to respond adequately using their own resources. It is evident from the characteristics of the virus itself and the ensuing pandemic, that Covid-19 has been both sudden and progressive and has evidently caused wide-spread disease, injury, and death.<sup>20</sup>

The five-tiered Covid-19 alert system engaged in by government is a risk-adjustable approach, aimed at managing government's response based on the rate of infection being experienced over a period of time. The overall aim of this system is to facilitate the gradual easing of lockdown restrictions and to return the country to a state of normality. Whilst Alert Level 1 denotes a low level of transmission with high healthcare readiness, Alert Level 5 indicates a high level of transmission with a low level of readiness by the healthcare sector.<sup>21</sup> Based on the high levels of infection and evidence of strained healthcare systems in other countries, the South African government decided to implement the highest level of lockdown strategy at its optimum to avert uncontrolled infection rates and to provide government with time to adequately enable and empower its healthcare system. The lockdown measure was a key measure in the response to containing the spread of Covid-19 and was supported by other key measures such as social distancing, quarantining, isolating, and testing. Such measures were not foreign to the South African legislative arena, with such measures having been formulated and authorised through the Regulations Relating to the Surveillance and Control of Notifiable Medical Conditions,<sup>22</sup> which was gazetted in 2017 in terms of the National Health Act.<sup>23</sup> Support for this also

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<sup>19</sup> C Stauton (Note 11 above; 4).

<sup>20</sup> As at 14h00 on 6 September 2021, almost 219 million people globally had tested positive for Covid-19, with over 4,5 million of those cases resulting in death. In South Africa on the same date, 2,8 million people had tested positive for Covid-19 with a total of over 83 000 deaths.

<sup>21</sup> 'About alert system' available at <https://www.gov.za/covid-19/about/about-alert-system>, accessed on 26 July 2021.

<sup>22</sup> C Stauton (Note 11 above; 6).

<sup>23</sup> Act 61 of 2003..



stemmed from the WHO recommendations<sup>24</sup> and are still ongoing practices in different parts of the world, owing to the various waves of the pandemic.<sup>25</sup>

Whilst government's response is supported by foreign compatriots and international bodies recommending same, the reality faced by ordinary citizens leaves the response wanting. At the time of the country entering into a state of disaster and hard lockdown, numerous socio-economic concerns had already festered and metastasised. With less than twenty percent of the population registered for private medical aid, an already ailing public healthcare sector faced the grim prospect of being overwhelmed in the event of high infection rates.<sup>26</sup> In addition to preparing for a surge in COVID-19 positive patients, government had to do so with a poorly administered and under-resourced public healthcare system. Areas of deficiencies included a lack of, or poor management and leadership skills, as well as dearth in knowledgeable, skilled, and competent personnel.<sup>27</sup> Further to this, the system faced the ongoing burden and challenge posed by TB, HIV, and TB/HIV co-infections with this being exacerbated due to patients being fearful of accessing their treatments owing to fear of the pandemic or due to lockdown restrictions.<sup>28</sup> It has been provided that owing to the pandemic, the numerous gains made against TB were eliminated. Due to the measures taken to prevent the spread of Covid-19, countries most heavily burdened with TB cases, such as South Africa, reported a steep decline in the diagnosis and treatment of TB. As such, measures taken to eliminate a centuries old healthcare threat were diminished owing to Covid-19 and its own dynamics.<sup>29</sup> This situation is further exacerbated by

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<sup>24</sup> 'Coronavirus disease 2019 (COVID-19) Situation Report 72' available at <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200401-sitrep-72-covid-19.pdf>, accessed on 6 September 2021.

<sup>25</sup> C Stauton (Note 11 above; 6).

<sup>26</sup> Ibid 2.

<sup>27</sup> Ibid 2.

<sup>28</sup> Ibid 2.

<sup>29</sup> '12 Months of COVID-19 Eliminated 12 Years of Progress in the Global Fight Against Tuberculosis' available at <http://www.stoptb.org/covid19.asp>, accessed on 7 September 2021.

both HIV<sup>30</sup> and TB being co-morbidities, thereby potentially complicating the outcomes of a Covid-19 patient who suffers with either or both conditions.<sup>31</sup>

The living conditions of many South Africans were also of concern, owing to government not implementing long-term solutions, such as access to running water and a better resourced public healthcare system, to the concerns faced. Whereas measures such as mask wearing, regular handwashing, sanitising, social-distancing, quarantine, and isolation were promoted as effective to combatting the spread of Covid-19,<sup>32</sup> this was, and continues to be near impossible for many South Africans to implement. Many cannot afford the costs of purchasing masks and hand sanitisers and already face limited, if not no access to appropriate levels of water and sanitation services. Further to this, the concept of quarantining in the event of exposure is near impossible for many South Africans who share a limited amount of living space with several others.<sup>33</sup>

Apart from the concerns over existing inadequacies in service delivery and citizens' ability to cope in the face of a pandemic, many South Africans also took issue with the concept of government imposing a state of disaster, a lockdown, and the effects thereof on them<sup>34</sup>. Many feared the extreme limitation on their freedom of movement, as imposed by the Alert Level 5 lockdown. Others took issue with government not undertaking public consultations and community engagement initiatives, both of

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<sup>30</sup> 'What to Know About HIV and COVID-19' available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/hiv.html>, accessed on 7 September 2021.

<sup>31</sup> 'Tuberculosis and COVID-19' available at <https://www.who.int/teams/global-tuberculosis-programme/covid-19>, accessed on 7 September 2021.

<sup>32</sup> 'Coronavirus disease (COVID-19)' available at [https://www.who.int/health-topics/coronavirus#tab=tab\\_2](https://www.who.int/health-topics/coronavirus#tab=tab_2), accessed on 15 August 2021.

<sup>33</sup> C Stauton (Note 11 above; 3).

<sup>34</sup> See *De Beer & Others v Minister of Cooperative Governance and Traditional Affairs* (538/2020) [2021] ZASCA 95; [2021] 3 All SA 723 (SCA); *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* (5807/2020) [2020] ZAWCHC 56; 2020 (11) BCLR 1371 (WCC); *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* (21688/2020) [2020] ZAGPPHC 311.

which may be construed to be a requirement of the DMA,<sup>35</sup> prior to making such a decision. Government's decision to criminalise the non-compliance with lockdown regulations drew the ire of many who felt that it resembled a militarised response that had the potential to result in the infringement of human rights.<sup>36</sup>

### **3.3 The constitutional obligations of the South African government**

The Constitution provided for democratic South Africa's formal adoption of human rights. Given the dynamics of the country at the time of negotiating and attaining democracy, the Constitutional Assembly sought to afford all citizens these rights whilst ensuring that government was not disproportionately burdened in fulfilling same. The rights afforded to South Africans are thereby carefully worded to ensure maximum protection to citizens without leaving the state in a position of bankruptcy in trying to fulfil such rights. These steps allowed for a measured social contract to come into effect, with government being given time to fulfil certain rights, rather than being unduly pressured early in its tenure.

The question is whether government exercised the latitude provided to it appropriately, or whether the room given to it was abused, thereby breaching their social contract with South African citizens. Pertinent to this dissertation is the question of whether government fulfilled its constitutional obligations in its response to the Covid-19 pandemic. Prior to considering its fulfilment, however, one must consider what exactly these constitutional obligations are. The discussion below considers government's constitutional obligations towards its citizens, as provided for in the Bill of Rights,<sup>37</sup> with particular focus on socio-economic rights.

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<sup>35</sup> Section 6(1)(a)(ii) of the Disaster Management Act, 2002.

<sup>36</sup> C Stauton (Note 11 above; 3).

<sup>37</sup> Chapter 2 of the Constitution of the Republic of South Africa, 1996.

### 3.3.1 Socio-economic rights

Whereas a conventional bill of rights tends to focus on civil and political rights, or ‘first-generation’ rights, such as the right to equality, property, and freedom of speech, modern versions also provide sufficient focus on socio-economic or ‘second-generation’ rights. These developments resulted from the growing recognition of the relationship between basic social conditions and the fulfilment of human rights.<sup>38</sup>

Socio-economic rights oblige the state to undertake all necessary measures, within reasonable limitations, so as to provide a basic set of social benefits for all members of society. These social goods include education, food, water, shelter, healthcare, housing, and access to land. For a constitution to achieve its mandate as transformative, the inclusion of socio-economic rights is crucial to the realisation of the aforementioned fundamental rights. As noted by Moseneke DCJ, the provision of socio-economic rights in the Constitution is a formal acknowledgment of the worrying levels of material inequality, previous discrimination and poverty experienced in the country.<sup>39</sup> The inclusion of such rights thereby aims to enable the socio-economically disadvantaged to not only achieve such rights, but also enjoy equality, dignity, and freedom.<sup>40</sup>

The Bill of Rights has encompassed socio-economic rights via section 26 which deals with the right to access housing,<sup>41</sup> and section 27 which deals with the right to access healthcare services, sufficient food and water, and social security.<sup>42</sup> A striking characteristic of these rights is that they are visible socio-economic rights that are afforded to everyone. These rights not only oblige the state to provide such services, but also protect the state from providing same arbitrarily. It is crucial to note that the realisation of socio-economic rights are not simply granted in an unfettered manner to citizens. Rather, citizens are provided with ‘access to’ these rights, and not the substance of the right. Further to this,

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<sup>38</sup> I Currie and J de Waal *The Bill of Rights Handbook* 6 ed (2014) 564.

<sup>39</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) [124].

<sup>40</sup> Currie and De Waal (Note 38 above, 564).

<sup>41</sup> Section 26 of the Constitution of the Republic of South Africa, 1996.

<sup>42</sup> Section 27 of the Constitution of the Republic of South Africa, 1996.

the state is required to undertake reasonable legislative and other measures to fulfil these rights, but with the *proviso* that this should only happen within the state's available resources, and that the realisation of these rights does not materialise immediately, but in a progressive manner. Unlike the given sections, other socio-economic rights provided for in the Bill of Rights are not as explicit. Rather, other socio-economic rights, such as education,<sup>43</sup> may be found within other rights and are not directly qualified by references to reasonable measures, progressive realisation, or resource constraints, as is provided for in sections 26(2) and 27(2) respectively.<sup>44</sup>

### *3.3.1.1 Negative obligations imposed on government*

Socio-economic rights differ from other rights in that they impose both negative and positive obligations upon the state.<sup>45</sup> This contrasts with civil and political rights which generally impose negative obligations on the state. Negative obligations refer to the state having a duty not to interfere with the execution or exercise of a constitutional right. In terms of socio-economic rights, this means that the state cannot conduct themselves in a manner that has the effect of denying individuals their pre-existing rights,<sup>46</sup> or from using available resources to satisfy their socio-economic requirements. Practically, it translates to negative protection being given to citizens via the judiciary, whereby the courts can interdict the state from acting in a manner that directly violates their socio-economic rights by taking retrogressive measures which are deliberate.<sup>47</sup> Often, the courts are approached in this light so as to dispute evictions and electricity, or water disconnections.<sup>48</sup>

It must be acknowledged that negative obligations on the state may, however, still be stymied by the inadequate availability of state resources. The fulfilment of socio-economic rights may also be disallowed where it is restricted by section 36 of the Constitution, constituting the so-called limitations

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<sup>43</sup> Section 29(1) of the Constitution of the Republic of South Africa, 1996.

<sup>44</sup> Currie and De Waal (Note 38 above, 565).

<sup>45</sup> Ibid 564.

<sup>46</sup> Foundation for Human Rights. *Socio-economic Rights – Progressive Realisation?* (2016) 323.

<sup>47</sup> United Nations Committee on Economic, Social and Cultural Rights, General Comment 3 (1990) 'The Nature of States Parties Obligations' (1994) para 9.

<sup>48</sup> Currie and De Waal (Note 38 above, 568).

clause.<sup>49</sup> Any limitation as contemplated in this section would occur where law or conduct is in conflict with the socio-economic rights to the extent that the two rights must be weighed against one another to determine which should be given preference. A two-stage limitations test is used to aid this process. Firstly, the scope of the rights will have to be analysed to determine if the law, commission, or omission constitutes a breach of the right. If so, the second stage of the test involves the court to considering whether such a breach is reasonable and justifiable in terms of the limitations clause.<sup>50</sup> Socio-economic rights have been tested using this test and created judicial precedents. In *Grootboom*,<sup>51</sup> the conduct of the local authority in undertaking the applicant's eviction earlier than anticipated and in destroying their property was deemed to be a violation of the state's negative obligation set out in section 26(1) of the Constitution. In *Juma Masjid Primary School*,<sup>52</sup> an application to evict a public schooling operation was considered by the Constitutional Court (CC). The CC found that whilst the applicant, the owner of the property, did not have a positive obligation to uphold the students' right to education, they did bear a negative obligation to desist from any conduct that would diminish the students' enjoyment of such right. Negative obligations are deemed to be the minimum level of justiciability for such rights and are thereby supported as an effective mechanism by which to realise socio-economic rights.<sup>53</sup>

### 3.3.1.2 Positive obligations imposed on government

Contrary to negative obligations, positive obligations contained in the Bill of Rights refer to obligations which the state is expected to undertake to fulfil the rights of citizens. The influence of positive obligations in respect of socio-economic rights comes from international sources of law, which must be considered when interpreting the Bill of Rights.<sup>54</sup> The first source to be considered is the International Covenant of Economic, Social and Cultural Rights (ICESCR) which was ratified by

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<sup>49</sup> Section 36 of the Constitution of the Republic of South Africa, 1996.

<sup>50</sup> Currie and De Waal (Note 38 above, 569).

<sup>51</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) [88].

<sup>52</sup> *Governing Body of the Juma Masjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC) [45].

<sup>53</sup> Currie and De Waal (Note 38 above, 568).

<sup>54</sup> Section 39(1)(b) of the Constitution of the Republic of South Africa, 1996.

South Africa in 2015<sup>55</sup> and which recognises the use of both positive and negative obligations. Deemed to be the most important international instrument in respect of socio-economic rights, it provides a range of substantive rights. These include the right to mental and physical health, to social security, to education and an adequate standard of living, interpreted to include elements such as housing, food, and clothing. By virtue of the ICESCR, member states are obliged within their available resources, to implement measures to progressively achieve the complete realisation of all socio-economic rights. This must be achieved via all appropriate means, including that of legislative measures. Regionally, South Africa is also a member state of the African Charter on Human and Peoples' Rights. The Charter has both entrenched socio-economic rights and aims to further develop these rights via judicial precedent.<sup>56</sup> This is an important instrument as it provides for the interpretation of socio-economic rights within the context of the African continent as well as its regional dynamics.<sup>57</sup>

Over time, the exercise of socio-economic rights globally has led to the development of several principles. Firstly, a state must, within its power, act expeditiously to satisfy its obligations to the attainment of socio-economic rights, even though the full realisation of this may take time. In the event of this being disputed, the state bears the onus of proving that they are making progress.<sup>58</sup> Secondly, whilst a government has latitude to determine what an appropriate measure is, they must be able to justify the appropriateness of their adopted measures to the United Nations Committee on Economic, Social and Cultural Rights (CESCR) when called upon to do so.<sup>59</sup> Further, a government cannot deny

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<sup>55</sup> 'International Covenant on Economic, Social and Cultural Rights (ICESCR)' available at [https://dullahomarinstitute.org.za/socio-economic-rights/international-covenant-on-economic-social-and-cultural-rights-icescr#:~:text=South%20Africa%20ratified%20the%20International,\(ICESCR\)%20in%20January%202015.&text=Since%20the%20announcement%20in%20October,the%20events%20that%20have%20unfolded](https://dullahomarinstitute.org.za/socio-economic-rights/international-covenant-on-economic-social-and-cultural-rights-icescr#:~:text=South%20Africa%20ratified%20the%20International,(ICESCR)%20in%20January%202015.&text=Since%20the%20announcement%20in%20October,the%20events%20that%20have%20unfolded), accessed on 29 July 2021.

<sup>56</sup> *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria Communication* No. 155/96 [60].

<sup>57</sup> Currie and De Waal (Note 38 above, 573).

<sup>58</sup> Committee on Economic, Social and Cultural Rights, General Comment 4 'The Right to Adequate Housing (Art 11 (1) of the Covenant)' (1994) para 11.

<sup>59</sup> United Nations (note 47 above, para 4).

its citizens the fulfilment of their socio-economic rights on the grounds of resource scarcity.<sup>60</sup> If such a situation were to arise, the relevant government would need to prove that their resources are evidentially inadequate to fulfil their minimum obligations. They will however still be expected to strive towards the greatest degree of fulfilment of the rights.<sup>61</sup> Finally, a government cannot excuse itself from the fulfilment of socio-economic rights due to their unwillingness to do so. This also means that a government cannot suspend their obligations as and when they please.<sup>62</sup> What these principles provide for is that socio-economic rights involve an ongoing commitment by any government. A government bound by international law must strive to fulfil these rights irrespective of the situation at hand so as to avoid falling in breach of their obligations. For a country like South Africa which is bound to interpret the Bill of Rights in context of international law, this means that this standard of socio-economic rights is one that must be respected and must form the basis of any action taken by the government.<sup>63</sup>

The implementation of these international standards of positive obligations into South African law is provided for by sections 26(2) and 27(2) of the Constitution respectively. This subsection provides the internal criteria that must be met by the state for it to prove that it has fulfilled its positive obligations in respect of these substantive rights. The extent of the state's positive obligations towards the fulfilment of socio-economic rights was tested in the *Grootboom* case<sup>64</sup> which focussed on the duties provided for in s26(2). It provided that the section qualifies the right of citizens to have access to adequate housing and as such should be fulfilled by the state taking reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right. It further

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<sup>60</sup> Ibid para 10.

<sup>61</sup> Ibid para 10.

<sup>62</sup> Ibid para 11.

<sup>63</sup> Currie and De Waal (Note 38 above, 572).

<sup>64</sup> Grootboom (note 51 above).



provided that the right of access in subsection 1 must be read in conjunction with subsection 2.<sup>65</sup> This approach was confirmed and extended to s27 in the *TAC* case.<sup>66</sup>

The *Grootboom* case thereby adapted the elements of s26(2), and inadvertently s27(2), to create a measurement by which the state's fulfilment of socio-economic rights may be assessed by the courts. In essence, three questions must be considered. Firstly, consideration must be given to whether the state has taken reasonable legislative and other measures to fulfil the socio-economic right in question. If so, the courts must then consider whether this has been done in such a way to allow for the progressive realisation of the right. Finally, it must be assessed whether such realisation occurred within the available resources of the state.<sup>67</sup> In determining reasonable legislative and other measures, the courts require elucidation from the state about the measures undertaken to fulfil the given socio-economic right, as well as an account from same on their progress in implementing such measures.<sup>68</sup> The court may request such information from the state, given that socio-economic rights are a part of their social contract in terms of which they are obliged to achieve certain developmental goals. In determining the reasonableness of a measure, the courts do not have to agree with the state's rationale behind the measure. Rather, the courts will determine the success of a measure from a utilitarian perspective to the extent that a measure will be deemed fair if most people would agree to it. All determinations of reasonableness in terms of s26(2) and s27(2), are undertaken from a subjective, content-sensitive position.<sup>69</sup>

The test for reasonableness has been developed through precedent, with the *Grootboom* case setting the basis for instruction. In *Grootboom*, the CC provided that reasonableness requires the development, adoption, and implementation of comprehensive measures to realise socio-economic rights. In this manner, the court was avoiding the exclusion of those most in need of protection in respect of such

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<sup>65</sup> Currie and De Waal (Note 38 above, 574).

<sup>66</sup> *Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 (CC) [38].

<sup>67</sup> Currie and De Waal (Note 38 above, 574).

<sup>68</sup> *Grootboom* (Note 51 above) [42].

<sup>69</sup> Currie and De Waal (Note 38 above, 575).

rights<sup>70</sup>. In this particular case, it was found that the state had not implemented reasonable measures by the time of the application for constitutional relief and the CC thereby found that the state violated s26(2). Despite government having furnished the court with several justification regarding their measures, in the *TAC* case, the court found government's policy on the prevention of mother-to-child transmission of HIV inadequate and thereby unreasonable.<sup>71</sup>

Based on this and other precedents, the courts have developed their own criteria for assessing the reasonableness of programmes undertaken by government to realise socio-economic rights.<sup>72</sup> For such programmes to be reasonable, they must be capable of facilitating and realising the given right, it must be coherent, comprehensive, and co-ordinated. Further to this, they must be balanced and flexible, they must provide appropriately for short to long term needs and they must be reasonably conceived and implemented. Such programmes must also make use of the appropriate human and financial resources, they must be transparent, their workings made public, and they must provide for the short-term delivery of rights for those whose needs are most pressing and who are living in circumstances which are not tolerable.<sup>73</sup> These criteria have been applied by the courts in several cases, including the *Khosa*<sup>74</sup> and *Mazibuko*<sup>75</sup> cases.

Progressive realisation refers to the steps taken by the state to achieve the fulfilment of socio-economic rights. This has been interpreted to mean that such rights must gradually be made accessible, and that all operational, financial, administrative, and legal challenges must be dealt with accordingly.<sup>76</sup> Further

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<sup>70</sup> *Grootboom* (Note 51 above) [99].

<sup>71</sup> *TAC* (note 66 above) [38].

<sup>72</sup> Currie and De Waal (Note 38 above, 578).

<sup>73</sup> Currie and De Waal (Note 38 above, 578).

<sup>74</sup> *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) [46] – [47].

<sup>75</sup> *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

<sup>76</sup> *Grootboom* (Note 51 above) [45].

to this, it refers to the state not having to realise such rights immediately,<sup>77</sup> but that the range of benefactors of the rights widens over time.<sup>78</sup> This has also been interpreted in respect of its boundaries. Whilst demands may be placed upon the state for the fulfilment of any socio-economic right, these rights will not necessarily be fulfilled if the resources required are lacking, or where an obligation is not qualified.<sup>79</sup> It has also been provided, that demands cannot be placed arbitrarily on the state to continuously work towards the realisation of socio-economic rights,<sup>80</sup> but that it does call upon government to review its policies at regular intervals to achieve this goal.<sup>81</sup> The effect of the space awarded to the state by the qualification is that it enforces the need to realise socio-economic rights, but in a manner that is manageable and pragmatic in respect of the state's resources. It thereby allows government time to plan and facilitate the fulfilment of rights in a manner most appropriate to the situation at large.

As noted above, the realisation of socio-economic rights is dependent on the availability of resources. This means that in the event of a lack of resources impeding the fulfilment of a socio-economic right, such impediment would be found to be unreasonable, particularly where government cannot justify such inadequacies. The state is not however expected to do more than their available resources permit,<sup>82</sup> if they can justify the reason behind their apportionment schemes. In order to make a proper assessment as to the availability of resources and thereby reasonableness, the courts may scrutinise the budgeting and decision-making processes of the relevant government departments.<sup>83</sup> Despite assessing same, the courts have been loathed to define what a minimum core obligation may be in respect of socio-economic rights and rather choose to deal with it subjectively on a case-to-case basis.<sup>84</sup> A

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<sup>77</sup> Committee on Economic, Social and Cultural Rights, General Comment 4 'The Right to Adequate Housing (Art 11 (1) of the Covenant)' (1994) para 8.

<sup>78</sup> *Grootboom* (note 51 above) [45].

<sup>79</sup> *Soobramoney v Minister of Health (Kwazulu Natal)* 1998 (1) SA 765 (CC).

<sup>80</sup> Committee on Economic, Social and Cultural Rights (note 77 above) [8].

<sup>81</sup> Currie and De Waal (Note 38 above, 584).

<sup>82</sup> *Grootboom* (note 51 above) [46].

<sup>83</sup> *Ibid* [46].

<sup>84</sup> Currie and De Waal (Note 38 above, 582/3).

minimum core obligation has, however, been stipulated in the General Comments of the ICESCR which recommend the same approach in the context of water, which is discussed below in more detail.<sup>85</sup>

In the case of *Mazibuko*,<sup>86</sup> the workings of the positive obligations levied by socio-economic rights were surmised. It was noted that such rights will be enforced by the judiciary so that in the event that the state fails to take reasonable steps for its fulfilment, the courts will require the state to correct the situation by implementing the necessary measures. If the state's measures are unreasonable, the courts may request for same to be reviewed, to ensure that the state's measures meet the standard of reasonableness. It was further provided that a measure may be deemed unreasonable where it does not help those most in need and that where the state's attempts to realise such rights has been unreasonable, due to some limitation or exclusion, that it be removed.<sup>87</sup>

### 3.3.2 *A consideration of the substantive and jurisprudential principles of socio-economic rights*

Whilst the Bill of Rights provides South Africans with specific rights, these rights do not operate independently of one another. Rather, they often rely on the jurisprudence developed in respect of each right, as well as the support of other rights to bolster their own standing in specific situations. This was illustrated in several cases, including the *TAC*,<sup>88</sup> *Dladla*,<sup>89</sup> *Nokotyana*,<sup>90</sup> and *Beja*<sup>91</sup> cases. In the

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<sup>85</sup> Foundation for Human Rights. *Socio-economic Rights – Progressive Realisation?* (2016) 323.

<sup>86</sup> Currie and De Waal (Note 38 above, 584).

<sup>87</sup> Ibid 584.

<sup>88</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075.

<sup>89</sup> *Dladla and Another v City of Johannesburg and Others* (CCT124/16) [2017] ZACC 42; 2018 (2) BCLR 119 (CC); 2018 (2) SA 327 (CC).

<sup>90</sup> *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* (CCT 31/09) [2009] ZACC 33; 2010 (4) BCLR 312 (CC).

<sup>91</sup> *Beja and Others v Premier of the Western Cape and Others* (21332/10) [2011] ZAWCHC 97; [2011] 3 All SA 401 (WCC); 2011 (10) BCLR 1077 (WCC).

discussion to follow, the substantive and jurisprudential principles of rights relevant to government's Covid-19 response will be discussed, with particular focus on socio-economic rights.

### *3.3.2.1 The right to access healthcare*

South Africans have the constitutional right to access healthcare<sup>92</sup>, inclusive of the right to reproductive healthcare,<sup>93</sup> and the right not to be refused emergency healthcare.<sup>94</sup> This is fostered, not only by its primary section, section 27, but also via other constitutional rights.<sup>95</sup> This includes the right to an environment which is not harmful to a person's health or well-being,<sup>96</sup> as well as the right to protect one's bodily and psychological integrity, which includes the right to make decisions about reproduction, and to security in, and control over one's body.<sup>97</sup> It is supported by international law, particularly General Comment No. 14 of the CESCR<sup>98</sup> which provides the principles necessary for the fulfilment of socio-economic rights namely, availability, accessibility, acceptability and quality. The CESCR has also provided the minimum standards for these rights, all of which are non-derogable. Based on these standards, the state must ensure essential primary healthcare, the equitable distribution of all health facilities, goods and services, and the provision of essential drugs as defined by the WHO.<sup>99</sup> States must further ensure the right to access healthcare in a manner which is not discriminatory and adopt and implement a national public health strategy plan that is relevant to the epidemiologically identified needs of that country.<sup>100</sup>

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<sup>92</sup> Section 27(1)(a) of the Constitution of the Republic of South Africa.

<sup>93</sup> Section 27(1)(a) of the Constitution of the Republic of South Africa.

<sup>94</sup> Section 27(3) of the Constitution of the Republic of South Africa.

<sup>95</sup> See Sections 24(a) and 28(1)(c) of the Constitution of the Republic of South Africa as examples thereof.

<sup>96</sup> Section 24(a) of the Constitution of the Republic of South Africa.

<sup>97</sup> Section 12(2) of the Constitution of the Republic of South Africa.

<sup>98</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, available at <https://www.refworld.org/docid/4538838d0.html>, accessed 6 September 2021.

<sup>99</sup> Foundation for Human Rights (note 81 above, 391).

<sup>100</sup> Ibid 391.

The right to access healthcare has been supported in South Africa through legislative means, with over a dozen statutes, policies and plans being developed and promulgated since 1994. This right has also been under considerable discussion in the courts, with particular focus on the state's duty to fulfil this right within the ambit of reasonable measures and available resources.<sup>101</sup> It has been recognised that s27(1) does not translate to the state having a duty to provide all resources at once to benefactors. It also recognised that with limited resources at its disposal, the state must allocate available resources to address the greater needs of society, rather than the specific needs of particular individuals.<sup>102</sup> Access to healthcare has often been a point of contention in the courts, with several cases debating access to affordable and essential medication against the right of pharmacies and pharmaceutical companies to earn.<sup>103</sup> It has been found that the right to access healthcare includes the right to access medication and that, whilst this right faces limitations, such limitations may not amount to the denial of access and thereby the right.<sup>104</sup> Further jurisprudential developments have enforced the need for medication to be accessible, in particular, to marginalised groupings so that they are not deprived of the ability to access life-saving drugs.<sup>105</sup>

### 3.3.2.2 *The right to access housing*

According to section 26(1) of the Constitution<sup>106</sup>, citizens are afforded the right to access adequate housing, something that has been interpreted to refer to more than just bricks and mortar.<sup>107</sup> Rather, it refers to the availability of land, the rendering of appropriate services necessary for habitation such as water and sewage removal, and the facilitation of building services. It has thereby been held that for this right to be met, the state has a duty to ensure that there is land upon which to build, that building

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<sup>101</sup> Soobramoney (note 79 above) [28].

<sup>102</sup> Section 27 (Aids Law Project) *Health and Democracy* (2007) 36.

<sup>103</sup> *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241.

<sup>104</sup> *Minister of Health, et al. v. New Clicks South Africa (Pty.) Ltd.* [2005] ZACC 14; 2006 (8) BCLR 872 (CC); 2006 (2) SA 311 (CC).

<sup>105</sup> Ibid.

<sup>106</sup> The right to housing is provided for in Section 26 of the Constitution of the Republic of South Africa, 1996.

<sup>107</sup> *Grootboom* (note 51 above) [35].

and relevant services are in place and that, if formal housing is to be provided, it constitutes a dwelling. As provided for in the discussion on positive obligations, the right is a qualified right, as is stipulated in s26(2).

The state's negative and positive duties in respect of rendering access to housing has been developed and debated in the courts. It has been held that the state's negative duty may only be limited by the limitations clause and is not subject to the qualifications provided for in s26(2).<sup>108</sup> It has also been provided that where a person is deprived of pre-existing access to housing (or any other socio-economic right) that such deprivation constituted a *prima facie* breach of the right, with the burden shifting to the state to justify the breach of this right in terms of the limitations clause.<sup>109</sup> Issues of eviction have also developed this right, with other cases providing that part of the state's positive duties in terms of s26(2) was to meaningfully engage with citizens prior to enforcing any sort of action.<sup>110</sup> Other cases have provided the state with greater margins of discretion with regards to policy choices,<sup>111</sup> whilst many have penalised government for acting unreasonably in failing to deal with housing and property concerns.<sup>112</sup>

### 3.3.2.3 *The right to access water and sanitation*

Section 27(1)(b) provides South Africans with the right to water.<sup>113</sup> This has been interpreted to include not just the provision of sufficient water but also the provision of sanitation.<sup>114</sup> The acknowledgment of this right is in-keeping with international law, particularly that of the United

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<sup>108</sup> *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) [31-34].

<sup>109</sup> Foundation for Human Rights. *Socio-economic Rights – Progressive Realisation?* (2016) 45.

<sup>110</sup> *Ibid* 50.

<sup>111</sup> *Ibid* 51.

<sup>112</sup> RJ Goldstone 'A South African Perspective on Social and Economic Rights' (2006) 13(2) *Human Rights Brief* 6.

<sup>113</sup> Section 27(1)(b) of the Constitution of the Republic of South Africa, 1996.

<sup>114</sup> Foundation for Human Rights (note 109 above, 267).

Nations (UN).<sup>115</sup> The UN has through its varying bodies resolved that access to clean and safe drinking water and to sanitation is fundamental to the complete enjoyment of life for all human beings. Globally, the right to water is seen as an immediate obligation.<sup>116</sup> To fulfil this, it has been understood that all essential levels of the right must be satisfied, as well as any parallel and ongoing duties to maximise the usage of available resources that may assist such realisation. General Comment 15 of the ICESCR<sup>117</sup> gives weight to the right to water by stipulating what the minimum core content for the right is. It provides that everyone must have equitable and safe physical, economic and non-discriminatory access to the minimum essential amount of water, as is required for personal and domestic use. Further to this, it promotes the adoption of measures for the realisation of the right amongst the most disadvantaged and marginalised groups, as well as all other priority groups.<sup>118</sup>

The CESCR recognised sanitation as integral to several other rights, including health, housing, dignity and privacy.<sup>119</sup> It has also noted that state parties have a duty to progressively extend safe sanitation services to deprived urban and rural areas to appease the needs of women and children.<sup>120</sup> In South Africa, the right to sanitation has been tested in the courts with demands for it being made via rights other than s27(1)(b).<sup>121</sup> It has been argued that access to sanitation was a part of the right to adequate housing, as provided for in s26(1) and also provided for the maintenance of a persons' right to dignity, as provided for in s10 of the Constitution.<sup>122</sup> The link between sanitation and the right to dignity,

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<sup>115</sup> Statement on the Human Right to Sanitation of the United Nations (UN) Committee on Economic, Social and Cultural Rights c/f Foundation for Human Rights. Socio-economic Rights – Progressive Realisation? (2016) 267.

<sup>116</sup> Foundation for Human Rights (note 109 above, 322).

<sup>117</sup> Committee on Economic, Social and Cultural Rights, General Comment 15 'The Right to Adequate Water (Arts. 11 and 12 (of the Covenant))' (2003) para 13-16.

<sup>118</sup> Foundation for Human Rights (note 109 above, 323).

<sup>119</sup> Ibid para 11.

<sup>120</sup> Ibid para 16.

<sup>121</sup> See *Beja and Others v Premier of the Western Cape and Others* (21332/10) [2011] ZAWCHC 97; [2011] 3 All SA 401 (WCC); 2011 (10) BCLR 1077 (WCC); *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* (CCT 31/09) [2009] ZACC 33; 2010 (4) BCLR 312 (CC).

<sup>122</sup> *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* (CCT 31/09) [2009] ZACC 33; 2010 (4) BCLR 312 (CC).



freedom and security of person, privacy, environment, housing and healthcare, as provided for in the Constitution have also been recognised by judicial precedent.<sup>123</sup>

#### 3.3.2.4 *The right to education*

Education<sup>124</sup> is perceived to be a hybrid right, built upon the dimensions of both socio-economics and civil and political elements. As a socio-economic right such as the right to education, rests with the state, whilst its civil and political dimensions are evident in its offering of freedom of choice of educational and language.<sup>125</sup> The duality of this right has been supported by the Constitutional Court which confirmed that it has established positive and negative obligations on the state. The positive obligation is deemed to be the state's duty to provide people with basic education, whilst the negative obligation rests in the state's responsibility to ensure that an individual's enjoyment of this right is not to be interfered with.<sup>126</sup> Contained in section 29 of the Constitution, the right to education differs for the visible socio-economic rights contained in sections 26 and 27 as it does not contain the qualifying requirements provided for in sections 26(2) and 27(2). This has been interpreted to mean that the right is immediately realisable and that such right may only be limited by the limitations clause.<sup>127</sup>

According to case law, the right to education may be described as an empowerment right, one whose fulfilment is a precondition for the existence and enjoyment of other rights. Education is thereby perceived to be the vehicle upon which socially and economically marginalised persons can remove themselves from situations of poverty and meaningfully participate in their communities. It has further been provided that the fulfilment of this right extends to non-practical levels of enjoyment, such that an education capacitates people to enjoy the rewards and joys of human existence.<sup>128</sup>

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<sup>123</sup> *Beja and Others v Premier of the Western Cape and Others* (21332/10) [2011] ZAWCHC 97; [2011] 3 All SA 401 (WCC); 2011 (10) BCLR 1077 (WCC).

<sup>124</sup> Section 29 of the Constitution of the Republic of South Africa, 1996.

<sup>125</sup> Foundation for Human Rights (note 109 above, 89).

<sup>126</sup> *In re School Education Bill of 1995 (Gauteng)* 1996 (4) BCLR 537 (CC) [9].

<sup>127</sup> Foundation for Human Rights (note 109 above, 98).

<sup>128</sup> *Ibid* 89.

### 3.3.3 *A consideration of other applicable constitutional rights*

#### 3.3.3.1 *Accountability rights*

Apart from the various mechanisms contained in the Constitution to maintain democracy in the country, provision was also made therein for the regulation of state conduct at a general level. The Constitution provides that all public administrations must be accountable, and that the principle of transparency be achieved via the provision of accessible, timeous, and accurate information to the public.<sup>129</sup> The element of transparency is provided for in section 32 of the Bill of Rights,<sup>130</sup> namely the right to access information. According to this right all persons have the right to access any information held by the state, or any other person where such information is required for the exercise or protection of any of their rights. The right has been perceived to lead to greater openness and accountability, particularly in respect of public officials who due to the right are deemed to be more likely to respond to peoples' needs, implement laws and policies properly and take greater care when exercising their roles.<sup>131</sup>

The effects of section 32 are supported by the right to just administrative action, provided for in section 33 of the Bill of Rights.<sup>132</sup> Supporting the need for accountability, this section provides for administrative action that is lawful, reasonable, and procedurally fair. It also provides a person with the right to be given written reasons where their rights have been negatively affected by administrative action.<sup>133</sup> Both rights have been embedded in legislation<sup>134</sup> and have been tested in the courts, with judgments recognising the duty of public service providers to comply with the requirement of procedural fairness promoted directly by legislation and indirectly by the accountability rights.<sup>135</sup>

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<sup>129</sup> Section 195 of the Constitution of the Republic of South Africa, 1996.

<sup>130</sup> Section 32 of the Constitution of the Republic of South Africa, 1996.

<sup>131</sup> Section 27 (Aids Law Project) *Health and Democracy* (2007) 50.

<sup>132</sup> Section 33 of the Constitution of the Republic of South Africa, 1996.

<sup>133</sup> Section 27 (Aids Law Project) *Health and Democracy* (2007) 48.

<sup>134</sup> The Promotion of Access to Information Act, 2000 and the Promotion of Administrative Justice Act, 2000.

<sup>135</sup> Foundation for Human Rights (note 109 above, 54).

### 3.3.3.2 Other rights

The Covid-19 response also had an indirect effect on several other rights contained in the Bill of Rights. The following is a breakdown of those rights and their relevant principles. The manner in which the government response impacted these rights, as well as the legal challenges that were raised in the belief that these rights were infringed by such response will be discussed in the following chapter.

The right to equality<sup>136</sup> provides that all persons are equal before the law and that everyone has the right to equal protection and benefits of the law. Equality also refers to the full and equal enjoyment of all human rights and freedoms and to the fact that no person may be unfairly discriminated against on the grounds listed in the Constitution. Accordingly, it may be deduced that upon the implementation of any government response, the interests of all persons must be taken into consideration and balanced in a manner that is reasonable and justifiable.

Recognition is also given to the inherent dignity of all persons and the need to respect and protect same<sup>137</sup> with several cases having raised the argument in support of the fulfilment of other rights.<sup>138</sup> The right to life<sup>139</sup> enjoys the highest form of constitutional protection with almost no legal limitations.

The Constitution also provides for freedom and security of person, to the extent that no person may be deprived of their freedom arbitrarily or without a just cause. The right goes onto provide that all persons be free of all forms for violence, be it from private or public sources, and enforces the right of everyone to bodily and psychological integrity.<sup>140</sup>

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<sup>136</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

<sup>137</sup> Section 10 of the Constitution of the Republic of South Africa, 1996.

<sup>138</sup> For example, the cases cited in notes 71 and 72 above (*Nokotyana* and *Beja*).

<sup>139</sup> Section 11 of the Constitution of the Republic of South Africa, 1996.

<sup>140</sup> Section 12 of the Constitution of the Republic of South Africa, 1996.

All persons are also provided with the right to freedom of movement,<sup>141</sup> the right to choose their trade, occupation or profession freely,<sup>142</sup> and the right to an environment that is not harmful to their health and wellbeing.<sup>143</sup>

### **3.4 Conclusion**

Within the understanding that the Constitution forms the social contract between the South African government and its people, it may thereby be understood that the rights afforded therein equate to the list of contractual terms and conditions that rest on government's shoulders. Within the purview of the Covid-19 pandemic, an array of these rights has come into focus. As may be seen, socio-economic rights are dominant in this discussion, because their fulfilment, or lack thereof, paves the way for an analysis of government's response to the pandemic. When considering socio-economic rights, it is not simply about their substantive offerings, but rather the qualifications that accompany same. These qualifications have laid out the parameters within which the judicial development of these rights may occur, as illustrated in the case law discussed. Many of these judicial precedents have highlighted the supporting role that other constitutional rights play in the fulfilment of a specific right and thereby also drew these rights into the discussion about government's constitutional obligations.

The discussion in the following chapter about government's constitutional obligations and the fulfilment thereof, will involve an analysis of how government has fared in the context of their management of the COVID-19 pandemic in South Africa. In light of the above discussed socio-economic rights, and in the context of the concerns raised by civil bodies, citizens and others, consideration will be given to both government's positive and negative obligations and the question of whether the government has ultimately upheld their social contract with its people will be addressed.

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<sup>141</sup> Section 21 of the Constitution of the Republic of South Africa, 1996.

<sup>142</sup> Section 22 of the Constitution of the Republic of South Africa, 1996.

<sup>143</sup> Section 24(a) of the Constitution of the Republic of South Africa, 1996.

## CHAPTER FOUR

# A CRITICAL ANALYSIS OF THE SOUTH AFRICAN GOVERNMENT'S FULFILLMENT OF ITS CONSTITUTIONAL OBLIGATIONS DURING THE COVID-19 PANDEMIC

### 4.1 Introduction

The Constitution and in particular, the Bill of Rights, were developed and promulgated to avoid the atrocities of apartheid occurring again. It sought to develop a democratic South Africa in which all persons are equal and where human rights are at the forefront of every action. It has been voiced that, whilst the Constitution is well rooted in human rights, it severely marginalised the poor, serving only the middle classes and the wealthy properly.<sup>1</sup> Such allegations are extremely worrying in the context of the Constitution being the social contract between government and the country's citizens. It suggests that this contract falls short of its agreement, potentially only serving those who are less dependent on government for their protection and livelihood.

In the discussion that follows, an analysis of how the obligations of the State as contemplated in the Constitution have been adhered to by government during the Covid-19 pandemic will be undertaken. I shall consider the dynamics facing South Africans and government at the start of the pandemic, focussing on specific and overlapping issues of healthcare, water and sanitation, housing, food and nutrition, and education. I shall also discuss the legal challenges to government's Covid-19 response and the position of South Africa in its fight against the virus 21 months into its pandemic response.

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<sup>1</sup> M Buthelezi 'South Africa, Covid-19 and the Social Contract', available at <https://pari.org.za/south-africa-covid-19-social-contract/>, accessed on 1 February 2021.

## 4.2. The position of South Africa at the start of the Covid-19 pandemic

### 4.2.1 The South African dynamic

Upon the emergence of the first Covid-19 positive case recorded in the country in early March 2020,<sup>2</sup> and the subsequent implementation of a national lockdown,<sup>3</sup> South Africa was already facing a myriad of socio-economic challenges, amongst others. The country was now the second largest economy in Africa,<sup>4</sup> a travesty given that it was once the largest on the continent and the darling of the world. Much of this could be attributed to the economy's slow growth rate of only 1,5 percent *per annum* in the five years preceding the pandemic,<sup>5</sup> with a continuously increasing unemployment rate which was tinkering just below 30 percent at the start of the lockdown.<sup>6</sup> Much of this could be attributed to the ongoing recession as well as severe water and electricity shortages experienced across the country.<sup>7</sup> As a result, rating agencies Moody Fitch and S&P downgraded the investment rating of the country to that of 'junk status', confirming the extent of the economy's poor performance and health which swayed many investors away from the country.<sup>8</sup> Another contributing factor to South Africa's stagnant economy was the endemic corruption across government, as has been evidenced by the testimonies given at the ongoing 'Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State', also known as the Zondo Commission.<sup>9</sup> This commission, which began its work in August 2018, was tasked with investigating

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<sup>2</sup> 'TIMELINE: A year of Covid-19 in SA' *IOL* 5 March 2021, available at <https://www.iol.co.za/news/timeline-a-year-of-covid-19-in-sa-6fde1c4f-8624-462f-abda-1f05eb8a6617>, accessed on 26 July 2021.

<sup>3</sup> Appendix A.

<sup>4</sup> Amnesty International 'Failing to learn the lessons? The impact of Covid-19 on a broken and unequal education system' (2021) available at <https://www.amnesty.org/en/documents/afr53/3344/2021/en/>, accessed on 9 September 2021.

<sup>5</sup> Ibid 9.

<sup>6</sup> Ibid 9.

<sup>7</sup> Ibid 9.

<sup>8</sup> Ibid 9.

<sup>9</sup> 'Judicial Commission of Inquiry Into Allegations of State Capture (Call for evidence/information)' available at <https://pmg.org.za/call-for-comment/694/>, accessed on 1 December 2021.

maladministration and corruption in state enterprises, and because of the extent of the investigations, its work was extended from October 2021 for a further three months.<sup>10</sup>

Apart from the economic challenges, South Africa was, and still is identified as an upper-middle income country.<sup>11</sup> It is, however, widely acknowledged that South Africans live in parallel universes, with a minority of the population enjoying first world lifestyles, whilst the majority of the population is still suffering from various socio-economic deprivations. In 2015, the World Bank estimated that the richest 10 percent of the South African population possessed approximately 71 percent of the wealth, whilst the bottom 60 percent of the population held just 7 percent.<sup>12</sup> Further to this, the patterns of discrimination started through apartheid continue to hold grip on the country's previously disadvantaged population groups. Nearly 50 percent of the African population lives below the country's poverty line, as compared to just one percent of the White population.<sup>13</sup> Owing to these contrasts, South Africa has been cited as one of the most unequal countries in the world.<sup>14</sup>

As per WHO guidelines,<sup>15</sup> and globally accepted public health measures implemented to prevent the transmission of Covid-19, South Africa also promoted the wearing of masks, frequent handwashing and sanitising, and social distancing to combat the spread of the virus. These measures were often unachievable for many given the state of resources in the country. It has been found that over half of

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<sup>10</sup> 'High Court grants Zondo Commissions a three-month extension' (29 September 2021) available at <https://mg.co.za/news/2021-09-29-zondo-fifth-extension/>, accessed on 1 October 2021.

<sup>11</sup> S van der Berg and L Patel 'Covid-19 pandemic has triggered a rise in hunger in South Africa' (21 July 2021) available at <https://theconversation.com/covid-19-pandemic-has-triggered-a-rise-in-hunger-in-south-africa-164581#:~:text=Our%20research%20appeared%20as%20a,Africa%20due%20to%20the%20pandemic.>, accessed on 9 September 2021.

<sup>12</sup> Amnesty International (note 4 above, 9).

<sup>13</sup> Ibid 9.

<sup>14</sup> 'The World Bank in South Africa: Overview' available at <https://www.worldbank.org/en/country/southafrica/overview#1>, accessed on 1 December 2021.

<sup>15</sup> <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>, accessed on 2 October 2021.

the country's population do not have access to clean water,<sup>16</sup> thereby making the measure of frequent handwashing near impossible. Further to this, water supply is not always reliable or adequate in rural areas and informal settlements.<sup>17</sup> Proper social distancing was also impossible to achieve in the small and generally overcrowded informal houses in townships and informal settlements.<sup>18</sup> Apart from transmission concerns, the treatment of Covid-19 within the South African healthcare sector was also of concern due to a precarious and divided public healthcare system, which was already heavily burdened with long standing and continuous HIV and TB epidemics.<sup>19</sup>

The South African government's ability to respond to the pandemic was thus severely constrained by socio-economic conditions that already existed prior to the onset of the Covid-19 pandemic, many of which resulted from existing and ongoing bad governance practices. Apart from these concerns, early problems in government's response also arose from continuous service delivery protests,<sup>20</sup> all of which highlighted voids in government's fulfilment of its duties, even prior to the pandemic. Despite the investigations conducted by the Zondo Commission and the existence of a new and accountable government under the leadership of President Ramaphosa, corruption still reared its head through the early days of the pandemic, with allegations of tender fraud emerging in the process of procuring PPE for state facilities, as well as in the emergency procurement of water tankers to service areas that did not have access to such resources.<sup>21</sup> In these conditions the national lockdown has been criticised as a so-called 'middle-class measure', and that it has no relevance to low-income households, daily earners, and the unemployed.<sup>22</sup>

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<sup>16</sup> Amnesty International (note 4 above, 9).

<sup>17</sup> M Buthelezi (Note 1 above).

<sup>18</sup> Ibid.

<sup>19</sup> E Cameron 'To enforce the Covid lockdown, did we wage a war on the people of South Africa?' *News24* 6 March 2021, available at <https://www.news24.com/news24/columnists/guestcolumn/edwin-cameron-to-enforce-the-covid-lockdown-did-we-wage-a-war-on-the-people-of-south-africa-20210306>, accessed on 24 September 2021.

<sup>20</sup> M Buthelezi (Note 1 above).

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.



#### 4.2.2 *The South African Government's response considering the country's socio-economic dynamics*

Amidst the Ramaphosa-led government trying to resuscitate a country crippled by the alleged misconduct of its predecessor, the Covid-19 pandemic forced them to adjust their focus and provide quick and decisive leadership.<sup>23</sup> The Ministerial Advisory Committee (MAC) was established and comprised of the Minister of Health, leading epidemiologists, immunologists, and other health experts.<sup>24</sup> Government, alongside the MAC sought to achieve a balance between responding effectively to a public health emergency, whilst attempting to keep economic activity afloat to maintain livelihoods.<sup>25</sup> Quick decisions had to be made in an effort to 'flatten the curve', whilst also allowing government enough time to develop sufficient capacity in public healthcare services before the next wave of Covid-19-related hospitalisations.<sup>26</sup> This included increasing the preparedness of health facilities and healthcare practitioners, setting up dedicated Covid-19 wards in designated hospitals, increasing intensive care units, and acquiring PPE in greater volume.<sup>27</sup>

The initial actions taken by President Ramaphosa, his government and the MAC were widely commended. The President was seen to have provided good leadership in those early days and it is postulated that this integrity<sup>28</sup> facilitated the willingness of many to allow a limitation of their rights, in the interest of public health and the greater good.<sup>29</sup> The President was also supported as a result of his decision to manage the pandemic based on solid medical and scientific advice and evidence, and in accordance with international guidelines. This was a marked departure from the actions of former president Thabo Mbeki, who during his tenure faced the challenges of an uninhibited HIV/Aids

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<sup>23</sup> E Cameron (note 19 above).

<sup>24</sup> M Buthelezi (Note 1 above).

<sup>25</sup> M Buthelezi (Note 1 above).

<sup>26</sup> M van Staden 'Constitutional rights and their limitations: A critical appraisal of the Covid-19 lockdown in South Africa' (2020) 20 *African Human Rights Law Journal* 493.

<sup>27</sup> M Buthelezi (Note 1 above).

<sup>28</sup> E Cameron (Note 19 above).

<sup>29</sup> C Reichel 'One year later: Covid-19, human rights, and the rule of law in South Africa' (13 April 2021) available at <https://blog.petrieflom.law.harvard.edu/2021/04/13/human-rights-rule-of-law-south-africa-covid/>, accessed on 24 September 2021.

epidemic but chose to rather refute the science behind it which negatively affected the availability of effective treatments, ultimately leading to untold suffering and death for those suffering from HIV/Aids.<sup>30</sup>

However, the government has also been criticised for engaging in unconstitutional conduct or waging a war on its people through its use of negative, often brutal, and even fatal methods of enforcing the Covid-19 measures. Former judge of the Constitutional Court, Justice Edwin Cameron expressed his frustration with government's decision to deploy law enforcement and defence forces rather than to increase the number of healthcare workers at the frontline. He also found that choosing to criminalise activities that contradicted preventative measures to be excessive and that energy should rather have been placed in improving social security provisions.<sup>31</sup> According to Cameron, such conduct was symptomatic of government's approach of framing vulnerable population groups in the country, such as cross-border migrants and sex workers, as problematic. He thereby implied that the threat to the country's job opportunities, security, values and now health, came not from such individuals and that government was incorrect in its approach.<sup>32</sup>

Covid-19 magnified existing fault lines in South African society, which fault lines grew more significant as the pandemic progressed. These fault lines included issues of inequality, the constant indignity suffered by many by virtue of poverty, inadequate municipal services, poor quality housing, difficulties in accessing affordable healthcare services and the ongoing fear and stresses that people who live in these conditions as a result of their constitutional human rights not being realised by government endure. This situation is intensified by ongoing issues of poverty, mass incarceration, alcoholism, corruption, and the high incidence of gender-based violence.<sup>33</sup> Those most intensely affected by the magnification of these issues have been those already severely affected by historical dispossession and injustice. The anticipated changes promised by the new democracy in South Africa and the promulgation of the Constitution unfortunately did not seem to have redressed the above-

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<sup>30</sup> E Cameron (Note 19 above).

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> E Cameron (note 19 above).

described socio-economic challenges.<sup>34</sup> Rather, the pre-existing issues, together with the pandemic, and government's pandemic management measures only seemed to spark the unrest South Africa faced in July 2021. Whilst the cause of the unrest is still to be confirmed by the South African Human Rights Commission, the eight-day long period of unrest involved violence which resulted in more than 300 lives being lost,<sup>35</sup> extreme looting, and extensive damage to property, estimated to cost the country more than R35 billion.<sup>36</sup>

#### **4.3. An analysis of the fulfilment of constitutional rights by the South African government during the Covid-19 pandemic**

The following discussion will consider the impact of the South African government's response to the Covid-19 pandemic by assessing its effects on certain selected socio-economic rights. Other rights, such as the right to life and the right to dignity shall inadvertently also be assessed through this discussion. As mentioned above, the government has been criticised for acting unconstitutionally by using excessive force to enforce the limitation of rights, with such measures not being considered to be in line with the general limitations as contemplated in section 36 of the Constitution.<sup>37</sup> The following discussion will use these contentious points of criticism as elected points of assessment.

##### *4.3.1 The right of access to healthcare*

In South Africa, healthcare is offered via a two-tier system through either the private or public healthcare sector, both of which are operated in parallel to one another. This system is highly unequal owing to a number of factors. The private sector caters for just over a quarter of the South African

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<sup>34</sup> Ibid.

<sup>35</sup> 'SAHRC to probe July unrest that claimed more than 300 lives and cost SA billions' *News24* 29 October 2021, available at <https://www.news24.com/news24/southafrica/news/sahrc-to-probe-july-unrest-that-claimed-more-than-300-lives-and-cost-sa-billions-20211029>, accessed on 30 November 2021.

<sup>36</sup> 'That bout of unrest may cost SA only about R35 billion, by the latest estimate' *Business Insider* 27 July 2021, available at <https://www.businessinsider.co.za/sa-unrest-cost-estimates-now-vary-from-r30-billion-to-r50-billion-2021-7>, accessed on 30 November 2021.

<sup>37</sup> C Reichel (Note 29 above)..

population and is largely funded through individual contributions made to medical aid schemes.<sup>38</sup> Conversely, the public sector, which can provide free health care, caters for over 70 percent of the population, owing to most South Africans being unable to afford the exorbitant costs of private healthcare. Unfortunately, the state funded public healthcare system is completely overburdened and under resourced as a result of this distribution imbalance.<sup>39</sup> Access to healthcare is consequently further dividing the rich from the poor, embedding deep inequalities in the existing system.<sup>40</sup>

#### 4.3.1.1. *How Covid-19 measures has complicated access to healthcare*

In response to the Covid-19 outbreak, government immediately declared and implemented a state of disaster,<sup>41</sup> with different lockdown levels being implemented in terms of regulations issued in terms of the DMA. Alert Level 5 was enforced from 27 March 2020 and was a drastic measure whereby all movement was curtailed to prevent the spread of Covid-19 in an effort to save lives.<sup>42</sup> This alert level was lifted slightly and downgraded to Alert Level 4 from 1 to 31 May 2020, allowing limited movement of persons, whilst still aiming to limit community transmission and outbreaks.<sup>43</sup> The aim of these measures were to allow government sufficient time to develop better healthcare capacity to adequately respond to the pandemic in general, including subsequent waves of infections. These measures facilitated easier management of the first wave, particularly in comparison to the second, and third wave,<sup>44</sup> as movement of persons was limited and the spread of the virus was inhibited as a result, consequently preventing the healthcare sector from being overwhelmed. This so-called hard lockdown resulted however in many being unable to access healthcare as required, for several reasons.

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<sup>38</sup> R Rensburg 'Healthcare in South Africa: how inequity is contributing to inefficiency' (7 July 2021) available at <https://www.wits.ac.za/news/latest-news/opinion/2021/2021-07/healthcare-in-south-africa-how-inequity-is-contributing-to-inefficiency.html>, accessed on 9 September 2021.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Section 27(5)(a) of the Disaster Management Act, 2002.

<sup>42</sup> 'About alert system' available at <https://www.gov.za/covid-19/about/about-alert-system>, accessed on 30 November 2021.

<sup>43</sup> Ibid.

<sup>44</sup> See table on first, second and third waves enclosed herewith marked as Appendix B.

Firstly, Alert Level 5 restricted movement of persons. If a person wanted or needed to move out of their homes, they would need a permit authorising them to do so, or would need to have sound reasons, such as shopping for necessities or accessing healthcare. Whilst the latter was allowed, many were afraid to do so because of the fact that restrictions on movement were being strictly, and often violently, enforced by the SAPS and the SANDF, using methods such as roadblocks and patrols.<sup>45</sup> Fear for security forces were particularly exacerbated after the death of Colins Khosa,<sup>46</sup> who was allegedly killed as a result of being assaulted, tortured and then murdered by members of the SANDF.<sup>47</sup> The second reason was due to the overlap between Covid-19 symptoms and other respiratory tract illnesses such as respiratory TB. TB and Covid-19 share common symptoms and many persons with undiagnosed TB sought diagnosis and treatment<sup>48</sup> for some much later than necessary. Such delays were attributed to fears of getting infected with Covid-19 at a hospital or other medical facility whilst seeking TB diagnosis and treatment, or of suffering possible stigma in the event that a third party confused their symptoms with that of Covid-19.<sup>49</sup> Thirdly, many people did not access healthcare services due to fear and worry. Many were concerned about the potential of contracting Covid-19 within a healthcare facility and were also equally concerned about the risk of exposure to the virus whilst moving to and around the facility.<sup>50</sup> Fear of police brutality when leaving one's home was also a reason for not accessing healthcare services.<sup>51</sup> People found accessing healthcare difficult due to limited and less reliable sources of public transport during the lockdown, as well as increased family

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<sup>45</sup> M Loveday, H Cox, D Evans et al 'Opportunities from a new disease for an old threat: Extending Covid-19 efforts to address tuberculosis in South Africa' (2020) 110(2) *SAMJ* 1161.

<sup>46</sup> M Buthelezi (Note 1 above).

<sup>47</sup> *Khosa and Others v Minister of Defence and Military Veterans and Others* (21512/2020) [2020] ZAGPPHC 147; 2020 (7) BCLR 816 (GP); [2020] 3 All SA 190 (GP); [2020] 8 BLLR 801 (GP); 2020 (5) SA 490 (GP); 2020 (2) SACR 461.

<sup>48</sup> T Togun, B Kampmann, NG Stoker, M Lipman 'Anticipating the impact of the Covid-19 pandemic on TB patients and TB control programmes' (2020) 19(1) *Ann Clin Microbiol Antimicrob* 21.

<sup>49</sup> M Loveday et al (Note 45 above, 1161).

<sup>50</sup> 'South Africans continued to receive ART during Covid-19 lockdown, but HIV testing and starting ART were impeded' available at <https://www.aidsmap.com/news/feb-2021/south-africans-continued-receive-art-during-covid-19-lockdown-hiv-testing-and>, accessed on 9 September 2021.

<sup>51</sup> Ibid 1161.

responsibilities such as looking after children who usually went to school or day-care facilities.<sup>52</sup> Finally, transport was also a concern because of an increasing inability to afford same as a result of lost income brought about by lockdown regulations. According to the National Income Dynamics Study-Coronavirus Rapid Mobile Survey (NIDS-CRAM) study,<sup>53</sup> 23 percent of study participants who needed healthcare could not access these services for the above reasons.<sup>54</sup>

Apart from the direct implications of lockdown, its effects have also complicated access to healthcare, which effects have been far more damaging for the poor than it was for the wealthier. The poor have been disproportionately disadvantaged based on income-related health inequalities (IRHI) being exacerbated by the pandemic. IRHI are now six times higher than in 2017, with it being found that women are more adversely affected than men due to the lockdown and its economic disruptions.<sup>55</sup> The complexities of IRHI on healthcare can be elaborated on in respect of three indicators – race, hunger, and income. With regards to race, Black South Africans are among the worst affected<sup>56</sup> and have borne the brunt of an unequal healthcare system amid the pandemic. This may be attributed to patterns of segregation that still exist in healthcare. Despite the deliberate desegregation of healthcare in 1988, spending is still largely dictated along racial lines. For example, spending in former White provinces is estimated to be at R1 172-00 per capita, whilst in formerly Black areas it is R55-00 per capita.<sup>57</sup> There is also a disproportionate amount of money spent on healthcare infrastructure in large metropolitan areas, resulting in under-investment in primary healthcare services which serve 80

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<sup>52</sup> M Loveday et al (Note 45 above, 1161).

<sup>53</sup> The NIDS-CRAM study is a nationally representative panel survey which was undertaken with 7000 South Africans, between May 2020 and July 2021. It has provided rapid data on key issues of unemployment, household income, child hunger and access to government grants, within the context of the Covid-19 pandemic.

<sup>54</sup> M Loveday et al (Note 45 above, 1161).

<sup>55</sup> N Spaul 'The NIDS-CRAM team. Synthesis report: NIDS-CRAM wave 2' 2020 *c/f* CO Nwosu and A Oyenubi 'Income-related health inequalities associated with the coronavirus pandemic in South Africa: A decomposition analysis' 2021 *International Journal for Equity in Health* 9.

<sup>56</sup> JE Ataguba and D McIntyre 'Paying for and receiving benefits from health services in South Africa: is the health system equitable? Health policy planning' 2012 *c/f* CO Nwosu and A Oyenubi 'Income-related health inequalities associated with the coronavirus pandemic in South Africa: A decomposition analysis' 2021 *International Journal for Equity in Health* 9.

<sup>57</sup> R Rensburg (Note 38 above).

percent of the population.<sup>58</sup> Given the earlier mentioned economic inequalities faced by Black South Africans, many will not be able to access private healthcare either. Only 16 percent of the South African population are allegedly members of medical aid schemes with only 10 percent of these members being Black. This stands in stark contrast to 73 percent of members being White.<sup>59</sup> It is thus evident that Black South Africans are largely dependent on an under-resourced and overburdened public healthcare system. The reality is that these citizens will have to turn to the public healthcare system for diagnosis, treatment, and potential hospitalisation if infected with Covid-19. If the public sector is overwhelmed by a wave of new infections, it may further negatively impact patients' ability to access healthcare services or treatments. Black South Africans infected with Covid-19 may accordingly not be able to receive the medical assistance they require due to a myriad of socio-economic factors that collectively limit their choices in healthcare.

Hunger, an extreme form of nutrition and food insecurity, may also predispose a person to poor personal health outcomes. A positive causation between poor health and hunger has been confirmed, as well as the fact that hunger is suffered disproportionately by the poor.<sup>60</sup> Covid-19 has increased hunger and food insecurity, especially amongst the poor, as confirmed by the NIDS-CRAM study that found that 11 percent of households surveyed had gone hungry in during the lockdown, an increase of 4 percent from their previous study in 2019.<sup>61</sup> This increase was disappointing after a nearly twenty-year decline in hunger levels in South Africa. However, the study also found that hunger levels gradually decreased as the lockdown levels eased and economic activity returned to normal. The decline in hunger levels, despite lockdown, were also attributed to governmental, non-governmental, and civil society food support measures given to communities in need.<sup>62</sup>

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<sup>58</sup> R Rensburg (Note 38 above).

<sup>59</sup> Statistics South Africa 'Statistics South Africa: General Household Survey' 2018 *c/f* CO Nwosu and A Oyenubi 'Income-related health inequalities associated with the coronavirus pandemic in South Africa: A decomposition analysis' 2021 *International Journal for Equity in Health* 9.

<sup>60</sup> CO Nwosu and A Oyenubi 'Income-related health inequalities associated with the coronavirus pandemic in South Africa: A decomposition analysis' 2021 *International Journal for Equity in Health* 9.

<sup>61</sup> S van der Berg and L Patel (Note 11 above).

<sup>62</sup> *Ibid.*

Despite such turnarounds, the correlation between hunger and IRHI from Covid-19 were none the more evident than during the unrest in July 2020. Whilst predicated on political dynamics, some of the acts of destruction and criminality were partially attributed to people being hungry.<sup>63</sup> The cessation of all forms of emergency assistance grants by government in April 2021 infuriated grant dependents, many of whom already battled to make ends meet with existing social grants which are far below inflation, with food relief programmes also declining. Hunger was also exacerbated as a result of the inactivation of the National School Nutrition Programme (NSNP),<sup>64</sup> which was suspended at the start of lockdown and which was only reimplemented in July 2020.<sup>65</sup> Finally, the lack of economic activity and participation due to the lockdown restrictions and the wide range of sectors which were not allowed to operate resulting in job losses, added to the already high unemployment rate and to food and nutrition insecurity.<sup>66</sup> The general vulnerability to these insecurities in South Africa indicates that policies aimed at protecting citizens against such insecurities<sup>67</sup> offer inadequate protection to the poor and vulnerable against hunger, especially when events such as the Covid-19 pandemic add more strain to this delicate situation.<sup>68</sup> The pervasive relationship between hunger and the poor also suggests that the constitutional human rights-based approach to such security, where the right to food<sup>69</sup> is intimately

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<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> *Equal Education and Others v Minister of Basic Education and Others* (22588/2020) [2020] ZAGPPHC 306; ‘Court orders the department of basic education to urgently feed 9 million hungry children’ *Daily Maverick* 17 July 2021, available at <https://www.dailymaverick.co.za/article/2020-07-17-court-order-the-department-of-basic-education-to-urgently-feed-9-million-hungry-children/>, accessed on 14 October 2021.

<sup>66</sup> Nwosu (note 60 above, 9).

<sup>67</sup> For example, the National Food and Nutrition Security Plan (2017), the Agricultural Policy Action Plan (2015), and the National Policy of Food and Nutrition Security (2014).

<sup>68</sup> Nwosu (note 60 above, 9).

<sup>69</sup> Section 27(1)(b) of the Constitution of the Republic of South Africa.



linked to the right to life<sup>70</sup> and the right to dignity,<sup>71</sup> was undermined by the way in which the government managed the Covid-19 pandemic.<sup>72</sup>

Health is negatively impacted by the lack of, or inadequacy of income. Low-income earners were eight times more likely to lose their jobs between February 2020 and April 2020, than that of their high-income counterparts.<sup>73</sup> This would not only worsen income inequality but also contribute to worsening health outcomes among the poor, due to further limiting the ability of the poor to satisfy their basic needs for medication and food. This is confirmed by the finding that the lack of gainful employment is closely associated with poor health.<sup>74</sup>

#### *4.3.1.2. The impact of Covid-19 measures on healthcare and specific illnesses and conditions*

##### *4.3.1.2.1 Routine health services*

Covid-19 and the measures implemented by the South African government to manage this pandemic have greatly impacted various aspects of healthcare administration and health management. Routine Health Services (RHS) suffered unintended negative consequences, as it has largely been deprioritised during the pandemic. This has been particularly evident in rural South Africa, with marked decreases in routine health visits for childcare, adult ambulatory clinic utilisation, sustained visitations for HIV, child health immunisations, and growth monitoring.<sup>75</sup> Because of the demands of the pandemic, resources and healthcare professionals have been diverted away from RHS towards Covid-19 management.<sup>76</sup> Depending on infection rates, hospitals have at times reduced the daily number of outpatients in order to decrease the likelihood of nosocomial transmission of the virus. This has

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<sup>70</sup> Section 11 of the Constitution of the Republic of South Africa.

<sup>71</sup> Section 10 of the Constitution of the Republic of South Africa.

<sup>72</sup> Nwosu (note 60 above, 9).

<sup>73</sup> Nwosu (note 60 above, 10).

<sup>74</sup> Nwosu (note 60 above, 10).

<sup>75</sup> MJ Siedner, JD Kraemer, MJ Meyer et al 'Access to primary healthcare during lockdown measures for Covid-19 in rural South Africa: an interrupted time series analysis' (2020) 10 *BMJ* 6.

<sup>76</sup> M Loveday et al (Note 45 above, 1162).

inadvertently led to the reprioritisation of ongoing health programmes, such as TB, thereby impairing gains made over extended periods of time<sup>77</sup> and delaying diagnosis and treatment.<sup>78</sup> The lack of RHS may also result in the delayed diagnosis of co-morbidities and inadequate retention in care, such that patients have greater susceptibility to Covid-19.<sup>79</sup>

#### 4.3.1.2.2 Tuberculosis (TB)

In respect of health management, the pandemic has also greatly affected illnesses which have heavily burdened the South African healthcare system for decades preceding the Covid-19 pandemic. People suffering from TB are a particularly vulnerable population who have borne the brunt of the pandemic.<sup>80</sup> As discussed above, the lockdown has increased poverty and worsened other social indicators of health, thereby adding to the already negative impact on people suffering from TB, including their households.<sup>81</sup> The restriction of movement has further resulted in people who live in overcrowded spaces or informal settlements spending increased amounts of time indoors, potentially with poor ventilation and greater exposure to indoor air pollution. Such an environment is likely to have accelerated the transmission of both Covid-19 and TB given that in such circumstances social distancing is simply not possible, that masks would not be worn inside one's home, and in the case of informal settlements, hand hygiene may be poor due to limited access to water.<sup>82</sup>

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<sup>77</sup> M Loveday et al (Note 45 above, 1162).

<sup>78</sup> 'Resource reprioritisation amid competing health risks for TB and Covid-19' available at <https://theunion.org/news/resource-reprioritisation-amid-competing-health-risks-for-tb-and-covid-19>, accessed on 9 September 2021.

<sup>79</sup> K Dooley, R Chaisson 'Tuberculosis and diabetes mellitus: Convergence of two epidemics' (2009) *Lancet Infect Dis* c/f M Loveday, H Cox, D Evans et al 'Opportunities from a new disease for an old threat: Extending Covid-19 efforts to address tuberculosis in South Africa' (2020) 110(2) *SAMJ* 1161.

<sup>80</sup> J Grange, A Story and A Zumla 'Tuberculosis in disadvantaged groups' (2001) *Curr Opin Pulm Med* 16-164 c/f M Loveday, H Cox, D Evans et al 'Opportunities from a new disease for an old threat: Extending Covid-19 efforts to address tuberculosis in South Africa' (2020) 110(2) *SAMJ* 1161.

<sup>81</sup> N Spaull, C Ardington, I Bassier et al 'NIDS-CRAM Synthesis Report Wave 1: Overview and findings' (2020) c/f M Loveday, H Cox, D Evans et al 'Opportunities from a new disease for an old threat: Extending Covid-19 efforts to address tuberculosis in South Africa' (2020) 110(2) *SAMJ* 1161.

<sup>82</sup> M Loveday et al (Note 45 above, 1161).

TB patients are also economically vulnerable and would be particularly susceptible to the negative economic effects of lockdown.<sup>83</sup> It was found that in the first three months of lockdown, employment decreased by 18 percent, with much of these job losses being suffered by the already disadvantaged, which would include people with TB.<sup>84</sup> Further to this, prior to Covid-19, multi-drug resistant TB (MDR-TB) would often result in patients losing their source of income from the time of diagnosis. Such persons would then be entitled to specific disability grants which would often end up being their only source of income. However, due to the prioritisation of Covid-19 related grants, applications for MDR-TB related grants have been side-lined and not processed accordingly.<sup>85</sup> This has further been stymied by those doctors appointed to clinically assess the eligibility of a patient for such a grant not being available at the relevant healthcare facility, due to their being deployed elsewhere as a result of the pandemic.<sup>86</sup>

Active TB case finding, diagnosis and prevention services have also been stymied by the pandemic. The reprioritisation of routine healthcare services has been an immediate problem,<sup>87</sup> with TB testing having been reduced by more than 50 percent during Lockdown Level 5. The delayed diagnosis of TB, alongside a reduction in access to preventative TB therapies and the reprioritisation of TB contact tracing also contributed to increased levels of infectiousness and increased risks of transmission. These delays are also exacerbated by the misdiagnosis of the illness due to the overlap in symptoms between

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<sup>83</sup> N Foster, A Vassal, S Cleary et al 'The economic burden of TB diagnosis and treatment in South Africa' (2015) *Soc Sci Med* c/f M Loveday, H Cox, D Evans et al 'Opportunities from a new disease for an old threat: Extending Covid-19 efforts to address tuberculosis in South Africa' (2020) 110(2) *SAMJ* 1161.

<sup>84</sup> N Spaul, C Ardington, I Bassier et al 'NIDS-CRAM Synthesis Report Wave 1: Overview and findings' (2020) c/f M Loveday, H Cox, D Evans et al 'Opportunities from a new disease for an old threat: Extending Covid-19 efforts to address tuberculosis in South Africa' (2020) 110(2) *SAMJ* 1161.

<sup>85</sup> M Loveday et al (Note 45 above, 1161).

<sup>86</sup> Ibid 1161.

<sup>87</sup> SA Madhi, GE Gray, N Ismail et al 'Covid-19 lockdowns in low- and middle-income countries: Success against COVID-19 at the price of greater costs' (2020) *S Afr Med J* 724-726 c/f M Loveday, H Cox, D Evans et al 'Opportunities from a new disease for an old threat: Extending Covid-19 efforts to address tuberculosis in South Africa' (2020) 110(2) *SAMJ* 1161.

TB and Covid-19. As such, it has been found that patients displaying such symptoms have been directed to undergo Covid-19 tests and to isolate, as opposed to undergo TB testing, with the latter only been examined for when the symptoms persist.<sup>88</sup>

Sustained care for TB patients has also been negatively impacted by the Covid-19 pandemic. A serious consequence of a break in any TB treatment regime is a significant reduction in favourable TB treatment outcomes. This may in turn add to the development of drug resistance.<sup>89</sup> A method of TB treatment, Directly Observed Treatment (DOT), has been compromised by the pandemic in that relevant patients do not have access to medicine or the support required to enable them to take their medication effectively at home, as a result of these support programmes being suspended during the pandemic.<sup>90</sup> Sustained medical care has also been compromised by the reprioritisation of TB wards in favour of patients suffering from Covid-19 infections. As a result of this, TB patients may not be hospitalised or may be discharged too early, whilst treatment at home may not always be possible due to a lack of support networks, either within the home, or the community.<sup>91</sup>

Finally, TB poses a very real threat of co-infection with Covid-19. If such were to occur, it poses an increased risk of both getting infected with Covid-19 as well as increased mortality for the patient, including an increased risk in post-TB lung damage, mortality, and morbidity issues.<sup>92</sup>

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<sup>88</sup> M Loveday et al (Note 45 above, 1162).

<sup>89</sup> Ibid 1162.

<sup>90</sup> Ibid 1162.

<sup>91</sup> K Cleary 'Covid-19: Lockdown takes a heavy toll on SA's B response' (21 May 2021) *c/f* M Loveday et al (Note 45 above, 1162).

<sup>92</sup> Bhekisisa Centre for Health Journalism 'Why TB and HIV deaths may increase during Covid-19' (9 June 2020) *c/f* M Loveday, H Cox, D Evans et al 'Opportunities from a new disease for an old threat: Extending Covid-19 efforts to address tuberculosis in South Africa' (2020) 110(2) *SAMJ* 1161.

#### 4.3.1.2.2 Human Immunodeficiency Virus (HIV)

HIV testing and access to antiretroviral treatment (ARTs) were negatively impacted upon by the pandemic and ensuing lockdowns, but appears to have recovered once the lockdown levels de-escalated.<sup>93</sup> With regards to HIV testing, it was found in April 2020, a month into the hard lockdown, that testing had decreased by almost 50 percent, but stabilised again to over 80 percent of pre-lockdown levels by July 2020.<sup>94</sup> Similarly, in the first week of lockdown, commencement of ART decreased by 46 percent and reached 75 percent of pre-lockdown levels by mid-June 2020. Collection of ART medicines performed differently, in that there was an increase in collection in the time period between the first reported case of Covid-19 in the country and lockdown commencing.<sup>95</sup> There was also a suggestion that people tried to stock up on their ART medication prior to the lockdown, as evidenced by an increase in the number of scheduled consultations and collections in the time between the first confirmed case of Covid-19 in South Africa and the ensuing lockdown. Whilst the number of collections did decrease for a period of time and missed collections were noted, collection numbers stabilised by July 2020.<sup>96</sup>

Several reasons have been attributed as to why HIV testing, and the start of ARTs were impacted upon by lockdown. In part, it may be due to the diversion of almost 30 000 healthcare workers away from HIV testing towards Covid-19 symptom screening. Such redeployment may have led to fewer referrals to clinics for testing and the commencement of treatment.<sup>97</sup> Another potential reason is that persons who had not already started ARTs may have been discouraged from doing so, due to their fear of visiting a healthcare facility where a person could potentially contract Covid-19. Discouragement may also have come from the restrictions to movement and increased transport costs, the latter of which

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<sup>93</sup> 'South Africans continued to receive ART during Covid-19 lockdown, but HIV testing and starting ART were impeded' available at <https://www.aidsmap.com/news/feb-2021/south-africans-continued-receive-art-during-covid-19-lockdown-hiv-testing-and>, accessed on 9 September 2021.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

may have been challenging if a person is also suffering decreased income as a result of reduced economic activity.<sup>98</sup>

#### *4.3.2 The right to access housing and the right to access sufficient water*

As mentioned above, a key challenge faced by many South Africans at the start of the Covid-19 pandemic and government's response was their limited ability to follow the various mandated and suggested preventative measures. Social distancing and frequent handwashing were simply impossible for many, given difficult living conditions in South African informal settlements, or in areas which are not adequately supplied with municipal services such as clean running water.

##### *4.3.2.1 The state of housing in South Africa*

In 2017, Statistics South Africa reported that of the almost 15 million South African households, over 12 percent constituted informal housing,<sup>99</sup> with over 2 700 informal settlements that have developed across the country.<sup>100</sup> Further to this, 1,3 million households lacked access to piped water. Sanitation was also reported as a point of concern, with only 8 million households having access to a flush toilet, whilst almost 300 000 still used bucket toilets, and more than 748 000 households had no toilet at all. Whilst a dominant part of the ruling party's electoral promises in 1994 entailed the provision of housing for all, since that point in time, only 3.3 million low-cost homes have been built, which has left a backlog of 2.1 million houses that remain to be developed.<sup>101</sup>

Whilst informal settlements were not foreign to South Africa pre-1994 and were a product of the apartheid system, these settlements grew rapidly in the democratic era. Such growth has been attributed to administrative confusion, the absence of clear housing policies and institutional restructuring. This situation was further compounded by a myriad of other factors such as a rapidly growing population,

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<sup>98</sup> Ibid.

<sup>99</sup> NK Marutlulle 'A critical analysis of housing inadequacy in South Africa and its ramifications' (2021) 9(1) *Africa's Public Service Delivery and Performance Review* 2.

<sup>100</sup> 'Informal settlements' available at <https://pmg.org.za/page/Informal%20Settlements>, accessed on 15 October 2021.

<sup>101</sup> NK Marutlulle (Note 99 above, 2).

urbanisation and migration, systemic corruption, economic variables, the unavailability of land and housing shortages.<sup>102</sup>

An informal settlement is by its nature and definition meant to be a temporary abode.<sup>103</sup> Given the slow provision of housing to those who qualify, many of these settlements have become permanent out of necessity with entire ecosystems existing within them. In 2004, the Mbeki-government sought to improve and upgrade the nature of informal settlements, with the aim to eradicate the concept of informal settlements by 2014.<sup>104</sup> However, slow delivery of adequate housing inhibited the effectiveness of this plan.<sup>105</sup> Informal settlements have as a consequence become an integral source of housing in South Africa, that often provide accommodation for a large number of persons living within a small space.<sup>106</sup>

Despite the crucial role that informal settlements play in providing shelter to millions, they are characterised by the lack of social service and poor infrastructure.<sup>107</sup> This is clear from the insufficient access that dwellers of informal settlements have to basic sanitation and water supply, as well as solid waste accumulation due to waste services not being rendered to many of these areas.<sup>108</sup> Inadequate access to such municipal services is exacerbated by intense population density to the extent that any existing infrastructure is completely overwhelmed and quickly deteriorates.<sup>109</sup>

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<sup>102</sup> NK Marutlulle (Note 99 above, 4-8).

<sup>103</sup> M Nyashanu, P Simbanegani, L Gibson 'Exploring the impact of Covid-19 pandemic lockdown on informal settlement in Tshwane Gauteng Province, South Africa' (2020) 15(10) *Global Public Health* 1449.

<sup>104</sup> Ibid p1444.

<sup>105</sup> Ibid p1444.

<sup>106</sup> Ibid p1444.

<sup>107</sup> Ibid 1449.

<sup>108</sup> NK Marutlulle (Note 99 above, 10).

<sup>109</sup> M Nyashanu (Note 103 above, 1447).

Viewing informal settlements as a product of housing inadequacy and the lack of fulfilment of section 26 of the Constitution, it is clear that the ramifications of this are far reaching. A major concern are the health challenges posed by housing inadequacy, particularly in environments such as informal settlements.<sup>110</sup> A healthy home may be defined as one of sound structure that is free of hazards. It is also one which allows for personal hygiene and an environment conducive for privacy. The ability of a home to be healthy will largely be predicated on the local environment and the dynamics therein.<sup>111</sup> Inadequate housing impacts negatively on the health of its inhabitants. The direct effects of inadequate housing may be caused by material housing conditions that impact one's physical health, relating to the effect that associated social conditions have on a person's well-being and mental health. The indirect impact of inadequate housing relates to the limited ability to access services and the impact this may have on a person's socio-economic status.<sup>112</sup>

Given these effects, it is clear that inadequate housing poses a serious public health threat. It has the potential to exacerbate the spread of infectious diseases, intensify problems produced by social disruptions and despair, and may facilitate lifestyle related illnesses.<sup>113</sup> Within the context of informal settlements, the transmission of infectious diseases is the greatest concern. With insufficient space to facilitate social distancing, government's lockdown measures often resulted in large groups of people forced to simultaneously co-existing within a very limited or small area. These inhabitants were then at an increased risk of transmitting or getting infected by Covid-19, including a multitude of other infectious diseases,<sup>114</sup> considering the ongoing TB epidemic. The transmission of infectious diseases is also aggravated by the sheer nature of the abode, which regardless of being physically small, may not be built to facilitate proper ventilation.<sup>115</sup> Apart from transmission concerns, inadequate housing and informal settlements often do not provide ideal environments for the ill to recover well, and in

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<sup>110</sup> NK Marutlulle (Note 99 above, 9).

<sup>111</sup> NK Marutlulle (Note 99 above, 9).

<sup>112</sup> NK Marutlulle (Note 99 above, 10).

<sup>113</sup> NK Marutlulle (Note 99 above, 11).

<sup>114</sup> M Nyashanu (Note 103 above, 1449).

<sup>115</sup> 'Roadmap to improve and ensure good indoor ventilation in the context of COVID-19' (1 March 2021), available at <https://www.who.int/publications/i/item/9789240021280>, accessed on 15 October 2021.



addition may be attributed to difficulties in accessing healthcare services, given that healthcare facilities are often absent from these areas, are under resourced, or situated very far from these informal settlements.<sup>116</sup> Existing healthcare facilities may also be overburdened as a result of the proliferation of illnesses in these circumstances. A pandemic, in these circumstances thus places extraordinary strain on already vulnerable populations who do not have the infrastructure to address such health challenges, or even implement the pandemic management measures ordered by the government.<sup>117</sup>

#### *4.3.2.2 The state of access to water and sanitation*

Prior to Covid-19, it was reported that 5.5 million households in South Africa did not have access to safe and reliable drinking water.<sup>118</sup> This was attributed to poor infrastructure management, as well as a lack of investment in water services.<sup>119</sup> Municipalities were rendered dysfunctional by mismanagement and corruption, resulting in water often not being delivered to the residents as required.<sup>120</sup> Being a water-scarce country, many parts of South Africa also face regular and severe droughts,<sup>121</sup> with low water levels in dams nationally being of grave concern for several years prior to the pandemic. Such a situation was complicated further by the ongoing lack of service delivery, including proper water and sanitation services to informal settlements.<sup>122</sup> Prior to, and during the pandemic, concerns around sanitation have been raised constantly. It has been reported that sanitation

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<sup>116</sup> M Nyashanu (Note 103 above, 1449).

<sup>117</sup> Ibid 1449.

<sup>118</sup> Amnesty International ‘South Africa 2020’ (2021) available at <https://www.amnesty.org/en/location/africa/southern-africa/south-africa/report-south-africa/>, accessed on 13 October 2021.

<sup>119</sup> Ibid.

<sup>120</sup> L Bruce ‘Covid-19: Dirty water for sale in rural communities’ (17 September 2021) available at <https://www.wits.ac.za/news/sources/cals-news/2020/covid-19-dirty-water-for-sale-in-rural-communities.html>, accessed on 9 September 2021.

<sup>121</sup> Ibid.

<sup>122</sup> NK Marutlulle (Note 103 above, 11).

has and continues to be inadequate, with pipes to toilets often breaking and remaining in disrepair.<sup>123</sup> This results in raw sewage ending up in streets and peoples' homes,<sup>124</sup> creating a situation not befitting the standard of a healthy home and environment, as discussed above.

Recognising the need for frequent handwashing to prevent the transmission of Covid-19, government hurried to remedy the pre-pandemic water situation. The Department of Water and Sanitation (DWS) arranged for thousands of water tankers to be dispersed nationally to communities in need of clean water and where shortages were experienced.<sup>125</sup> Typically, these areas included informal settlements, rural areas, and public spaces that were not adequately equipped with water facilities. The measures by DWS were soon stymied by a lack of clear planning as to which areas required attention and resulted in the slow provision of such resources and infrastructure. Where water infrastructure was provided, it was often vandalised by water tanker providers to ensure that the government will again call upon them to deliver these services and ensure their financial gain.<sup>126</sup> The supply of water to residents through existing infrastructure was further inhibited by short-sighted decisions by municipalities, which chose to cut people's access to water due to outstanding payments.<sup>127</sup> Municipalities proved to be a huge stumbling block in government's measures to provide water, often because they lacked transparency and accountability, and were rooted in corrupt procurement practices in respect of the delivery of water.<sup>128</sup>

Poor provision of water in the early days of Covid-19 compounded existing problems surrounding access to water and associated health risks. Research has shown that owing to a lack of service delivery,

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<sup>123</sup> Environmental Monitoring Group 'Communities and access to water – Covid-19 changes everything, but will access stay the same?' (24 August 2021) available at <https://www.emg.org.za/blog-about/communities-and-water-covid19-changes-everything-but-will-access-stay-the-same>, accessed on 9 September 2021.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> L Bruce (Note 120 above).

many already disadvantaged persons had to resort to other means to access water.<sup>129</sup> Such measures included persons carrying heavy buckets of water for long distances, which often impacted the person's health in other ways, negating the preventative measure of accessing water in an effort to combat an infectious disease such as Covid-19. Other measures included people relying on rainfall, thereby leaving them dependant on erratic weather patterns, especially during a drought, so as to satiate their thirst and implement the measure of handwashing. Further to this, many people risked breaking lockdown regulations and facing penalties or even physical violence, by travelling to neighbouring villages to access water. It has been noted that despite these risks, the water accessed was still not always fit for consumption.<sup>130</sup>

### *4.3.3 The right to education*

#### *4.3.3.1 The state of education prior to Covid-19*

The South African education system is estimated to be the largest system in the country, with nearly 26 000 schools, 400 000 teachers and nearly 13 million learners.<sup>131</sup> Despite these impressive numbers, not all parties are equal. As with other socio-economic services, education is also a highly divided and unequal system.<sup>132</sup> Twenty-seven years into democracy, a South African learner's experience of education is still largely dependent on demographics such as race, their family's financial status, and where they were born.<sup>133</sup> It has been stated that the extent of socio-economic deprivation is so widespread, that almost three quarters of the teacher population work at schools where over 30 percent of the learners are socioeconomically disadvantaged.<sup>134</sup>

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<sup>129</sup> Amnesty International (note 118 above).

<sup>130</sup> Ibid.

<sup>131</sup> M Sterne 'The true state of South Africa's schools' Mail and Guardian Online 3 October 2021, available at <https://mg.co.za/education/2021-10-03-the-true-state-of-our-schools/#:~:text=South%20Africa%20has%20one%20of,are%20poorly%20funded%2C%20dysfunctional%20schools.,> accessed on 13 October 2021.

<sup>132</sup> Amnesty International (Note 4 above, 16).

<sup>133</sup> Ibid 15.

<sup>134</sup> Ibid 15.

According to research undertaken prior to the Covid-19 pandemic, the education system is largely in a perilous state due to the facilities offered within the public education system.<sup>135</sup> Many schools lack proper infrastructure and basic facilities. School buildings have often been erected prior to, or during apartheid, with little or no maintenance being done to them during the democratic era, since 1994. Given the age of these buildings, many were built with hazardous materials such as asbestos,<sup>136</sup> with no measures having been taken by the current government to rectify this serious health hazard. Sanitation in many of these schools is often deficit of hygienic standards, with some schools still making use of pit latrines.<sup>137</sup> Further to this, public schools often do not have sufficient space for the number of learners enrolled to such an extent that classes are overcrowded.<sup>138</sup> This has the effect of creating physical difficulties as well as learning difficulties due to the imbalanced ratio between learners and teachers. These schools are generally also under resourced.<sup>139</sup> In 2018, the Department of Basic Education (DBE) reported, that based on an assessment of almost 23 500 schools, 20 071 did not have a laboratory, 18 019 did not have a library, and almost 17 000 did not have internet access.<sup>140</sup> In addition to this, 239 schools did not have access to electricity, whilst 37 lacked sanitation facilities.<sup>141</sup> Finally, it was also proven that public schools are susceptible to the South African culture of crime and proved to be easy targets for burglaries and vandalism because they lack basic security.<sup>142</sup>

The challenges faced by the public education system paints a dismal picture of the fulfilment of learner's right to education. Rather, these issues impact negatively on learners' ability to exercise and

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<sup>135</sup> Ibid 15-18.

<sup>136</sup> Ibid 15.

<sup>137</sup> In September 2021, a five-year old child in Kwazulu-Natal died after having fallen into a pit latrine at her day-care centre – '5-year-old found dead in a pit latrine toilet' *IOL* 7 September 2021, available at <https://www.iol.co.za/mercury/news/5-year-old-found-dead-in-a-pit-latrine-toilet-20ce1e0a-d395-4d21-9ac9-45c1ce1f1743>, accessed on 30 November 2021.

<sup>138</sup> Amnesty International (Note 4 above, 15).

<sup>139</sup> Ibid 15.

<sup>140</sup> M Sterne (Note 131 above).

<sup>141</sup> Ibid.

<sup>142</sup> Amnesty International (Note 4 above, 15).

enjoyment of this right. It also infringes on other rights of learners, such as their right to access water and sanitation, and their right to privacy and dignity.<sup>143</sup>

#### *4.3.3.2 The impact of Covid-19 on education in South Africa*

Given the severe socio-economic inequalities in the education system, the impact of school closures due to Covid-19, and lockdowns would have been hardest felt by schools with pre-existing socio-economic concerns.<sup>144</sup> Learners from poorer communities who did not have access to the internet and computers prior to lockdown, would have had little to no prospects of continuing education via online learning.<sup>145</sup> This may have also been compounded in households where parents or caregivers were not in a position to home-school children because they themselves may not be educated or have very limited capacity in this regard.<sup>146</sup> Whilst government had previously sought to ensure that 90 percent of all South Africans have internet access by 2020, that target was evidently not met by the time that the first lockdown was announced, with it being reported that only 22 percent of households possessed a computer, whilst only 10 percent had internet access.<sup>147</sup> This has been further complicated by electricity load shedding, which not only inhibits learners from accessing computers and the internet but makes basic learning, particularly during exams, trying.<sup>148</sup>

Online learning was as a result of this, a challenge for many South African public-school learners during lockdown and the school closures. By early August 2020, pupils lost on average between 30-59 school days.<sup>149</sup> Once schools reopened, learners were still not able to attend school on a daily basis owing to the rotation policies being implemented to manage learner numbers in an effort to still

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<sup>143</sup> Ibid 15.

<sup>144</sup> Ibid 17.

<sup>145</sup> Ibid 17.

<sup>146</sup> Ibid 17.

<sup>147</sup> Ibid 17.

<sup>148</sup> ‘Ongoing load shedding negatively impacts pupils’ exam preparations, say education bodies’ *News24* 9 November 2021, available at <https://www.news24.com/witness/news/kzn/ongoing-load-shedding-negatively-impacts-pupils-exam-preparations-say-education-bodies-20211109>, accessed on 30 November 2021.

<sup>149</sup> Amnesty International (Note 4 above, 19).

maintain adequate social distancing.<sup>150</sup> The impact of this was felt more severely by poorer schools and their learners,<sup>151</sup> whose dependence on face-to-face learning was challenged by the Covid-19 lockdown. From July 2021, it was reported that 750 000 learners had dropped out of the education system.<sup>152</sup> Many of these learners came from impoverished homes, often within rural or informal settings.<sup>153</sup> Such households were often not in a position to pay either school fees, or indirect education costs such as transport costs, resulting in learners having to leave school.<sup>154</sup> A portion of learners are also believed to have not returned to school because of parents' concerns regarding the safety of their children in schools, given the threat of the pandemic and infection.<sup>155</sup>

School closures, because of lockdown, also impacted on the nutrition and food security of learners. Prior to lockdown approximately 2.5 million children regularly went hungry, with a third of children under the age of 5 dying from severe malnourishment.<sup>156</sup> For 9 million eligible learners, the National School Nutrition Programme (NSNP) offered them the only staple meal for the day. The closure of schools due to the Alert Level 5 lockdown prevented access to such meals, thereby increasing hunger.<sup>157</sup> This issue was litigated upon in an attempt to compel government to reinstate the NSNP, even throughout lockdown.<sup>158</sup> The programme was reinstated, with the judge stating that to starve a child was contrary to their right to dignity and a statement on the morality of society. The reinstatement was with immediate effect in July 2020, such that meals were to be offered to learners irrespective of

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<sup>150</sup> Ibid 19.

<sup>151</sup> Ibid 19.

<sup>152</sup> 'Learners in South Africa up to one school year behind where they should be' available at <https://www.unicef.org/press-releases/learners-south-africa-one-school-year-behind-where-they-should-be>, accessed on 10 October 2021.

<sup>153</sup> Ibid.

<sup>154</sup> Amnesty International (Note 4 above, 19).

<sup>155</sup> Ibid 19.

<sup>156</sup> Ibid 14.

<sup>157</sup> Ibid 14.

<sup>158</sup> *Equal Education and Others v Minister of Basic Education and Others* (22588/2020) [2020] ZAGPPHC 306.

whether they were accessing their schools or undertaking remote learning.<sup>159</sup> According to the Wave 4 NIDS-CRAM education report, during the period in which schooling was not in-person, at least 55 NSNP feeding days were lost. It was estimated that this extended to more than 130 days once the rotational attendance of school commenced.<sup>160</sup> The Wave 5 NIDS-CRAM education report has since provided that whilst the NSNP was reinstated, since April 2021, approximately 1,5 million learners nationally were still not receiving their meals. This has been attributed to meals being prepared but not being collected because of non-attendance of school out of fear for contracting or transmitting Covid-19.<sup>161</sup> It was provided that efforts have been made by the DBE to make the meals as accessible as possible for collection, however the Department has provided that it cannot attempt to deliver meals to non-attending students due to same not being feasible. It has been provided that meal vouchers are being considered, possibly for the 2022 school year.<sup>162</sup>

The constraints and challenges faced by impoverished learners are a stark difference from that of their wealthier peers. Despite lockdown and the ensuing school closures, learners from wealthier homes or better circumstances, have been able to access and enjoy blended learning approaches.<sup>163</sup> It has been shown that over 80 percent of private school learners had the privilege of undisturbed learning from home, because of their ability to access relevant online platforms. This contrasts with over 67 percent of public-school learners who had to rely on television, radio, textbooks, and school-issued worksheets to maintain some level of continued learning.<sup>164</sup>

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<sup>159</sup> ‘Court orders the department of basic education to urgently feed 9 million hungry children’ *Daily Maverick* 17 July 2021, available at <https://www.dailymaverick.co.za/article/2020-07-17-court-order-the-department-of-basic-education-to-urgently-feed-9-million-hungry-children/> - accessed on 14 October 2021.

<sup>160</sup> D Shepard and N Mohohlwane ‘The Impact of Covid-19 in education – more than a year of disruption’ 2021 *Wave 5 NIDS-CRAM Report 11* 32.

<sup>161</sup> Ibid 32.

<sup>162</sup> Ibid 33.

<sup>163</sup> Amnesty International (Note 4 above, 18).

<sup>164</sup> Ibid 18.

Teacher retention has also been severely impacted by Covid-19 infections.<sup>165</sup> By the end of June 2020, 98 teachers nationally had been infected with the virus.<sup>166</sup> By the end of that year, a total of 1 493 teachers had died, a portion of which was attributed directly to Covid-19 infections.<sup>167</sup> A further 300 teachers had lost their lives by the end of the second wave in early 2021.<sup>168</sup>

#### *4.3.3.3 Government's handling of education through Covid-19*

The impact of Covid-19 on education and learners have been extensive and severe, with widespread socio-economic ramifications. Given the position of education as a human right, it has been provided that it would have been prudent for government to take a human rights-centred approach in responding to their education obligations during lockdowns. It is proposed that had such an approach been taken, government's obligations may have included three core aspects.<sup>169</sup> Firstly, measures would have been taken to accommodate as many learners as possible to continue their learning activities via some platform of online or remote learning. This would have been critical for learners coming from resource poor backgrounds and would involve the provision of equipment, data, and a steady and reliable supply of electricity. It would also involve upskilling teachers to better manage the revised, on-line, and later on, hybrid classrooms. Secondly, government would have needed to undertake crucial infrastructure maintenance and upgrades to provide a safe learning environment for teachers, learners, and the community in which they function. Finally, government would have needed to ensure that a system was developed that could facilitate the sufficient provision of appropriate PPE for teachers and learners.<sup>170</sup>

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<sup>165</sup> Ibid 20.

<sup>166</sup> Ibid 11.

<sup>167</sup> Ibid 11.

<sup>168</sup> Ibid 11.

<sup>169</sup> Ibid 34.

<sup>170</sup> Ibid 34.



Government has seemingly not followed any of these approaches,<sup>171</sup> thereby exacerbating pre-existing socio-economic and other failings in the education system. The DBE failed to enable or facilitate blended learning. Despite developing teacher guidelines for safe learning environments and methods of remote teaching, these guidelines were not supported by any training measures,<sup>172</sup> or resources.<sup>173</sup> Learners and schools often did not have access to the internet, thereby impairing blended learning.<sup>174</sup> Whilst the DBE attempted to support remote learning via the South African Broadcasting Services' (SABC) television and radio medium, through a program known as Covid-19 Learner Support, this too was largely insufficient. This may be attributed to it being run only for pre-schoolers and learners from Grades 10-12, thereby ignoring learners of other grades. It was also insufficient because these programmes only ran for one and a half hours a day and could not possibly provide an appropriate and adequate replacement for the lost face-to-face interaction or cover any prescribed curriculum.<sup>175</sup>

Government's attempts to provide safe learning environments were also lacking. The initial proposed date for the reopening of schools was protested by teacher trade unions and school governing bodies who accused government of not providing sufficient resources in impoverished and other schools to mitigate the risk of Covid-19 transmission.<sup>176</sup> Government's failings came from infrastructure shortages and safety measures failing to take into consideration water, sanitation, and hygiene factors.<sup>177</sup> Government's promoted measures also lacked proper planning and implementation of social distancing, to the extent that class sizes were still too large and contrary to Covid-19 good practices. A massive failure came in the form of government's inability to consistently distribute PPE across the nine provinces. This was attributed to the provincial DBEs not engaging in the appropriate processes to determine the PPE needs of the provinces and their regions, and not engaging in existing

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<sup>171</sup> Ibid 24.

<sup>172</sup> Ibid 25.

<sup>173</sup> Ibid 25.

<sup>174</sup> Ibid 25.

<sup>175</sup> Ibid 25.

<sup>176</sup> Ibid 24.

<sup>177</sup> Ibid 25.

systems to accurately determine the correct number of registered learners and teachers.<sup>178</sup> These failings translated into many positive Covid-19 cases within schools within a number of days of their re-opening, such that numerous schools were forced to close again on account of these Covid-19 cluster outbreaks.<sup>179</sup>

The failure of government to mitigate the impact of Covid-19 on education also stems from their diversion of vital resources away from education infrastructure. Despite the poor conditions of the public education system prior to Covid-19, government did not invest the required funds into this ailing infrastructure.<sup>180</sup> This omission is aligned with the decline in government expenditure on infrastructure in the years preceding the pandemic, particularly in respect of education-aligned infrastructure.<sup>181</sup> To assist Covid-19 relief, government diverted R2 billion away from the Education Infrastructure Grant, which was aimed at improving the infrastructure of education facilities. This diversion has since been partially reversed, with the funds now focussing on replacing the country's remaining 143 mud schools and improving the sanitation of over 3 100 schools.<sup>182</sup> However, these endeavours are medium-term projects, the improvements of which will only likely be reached in the future. These timeframes do not take into account the urgency of Covid-19 and its dire impact on the public education system.

#### *4.3.4 Legal challenges to government's Covid-19 response*

Whilst many South Africans accepted government's implementation of lockdown to curtail the rapid transmission of Covid-19, some found the regulations to be counterproductive. Government has faced a variety of legal challenges to their lockdown approach, several of which will be discussed below.

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<sup>178</sup> Ibid 26.

<sup>179</sup> Ibid 26.

<sup>180</sup> Ibid 32.

<sup>181</sup> Ibid 32.

<sup>182</sup> Ibid 33.

4.3.4.1. *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others*

Collins Khosa was killed early in the initial hard lockdown, allegedly at the hands of the SANDF.<sup>183</sup> The Khosa family did not challenge the lockdown itself but rather the brutality it facilitated,<sup>184</sup> potentially infringing peoples' rights to dignity,<sup>185</sup> life,<sup>186</sup> and freedom of security of person.<sup>187</sup> The presiding judge ruled that lockdown regulations must not infringe on peoples' constitutional rights, and if such infringements were to occur, it must be the least restrictive imposition on the public.<sup>188</sup> The court ruled that even in a state of emergency, all persons in South Africa, are entitled to various constitutional rights and that security services must still comply with the Constitution, domestic laws and applicable international laws.<sup>189</sup>

As an *obiter* remark, the judge also discussed the impact that hard lockdown measures would have on the country in general. He cited the potential for massive unemployment and the possibility that South Africans would not be able to provide for their families any longer. Such commentary is supported by convictions that the civil unrest experienced in July 2021 was the product of growing unemployment and hunger in the country.<sup>190</sup>

4.3.4.2. *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs*

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<sup>183</sup> *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others* (21512/2020) [2020] ZAGPPHC 147; 2020 (7) BCLR 816 (GP); [2020] 3 All SA 190 (GP); [2020] 8 BLLR 801 (GP); 2020 (5) SA 490 (GP); 2020 (2) SACR 461.

<sup>184</sup> *Khosa* (Note 183 above, para 24 and 34).

<sup>185</sup> Section 10 of the Constitution of the Republic of South Africa.

<sup>186</sup> Section 11 of the Constitution of the Republic of South Africa.

<sup>187</sup> Section 12(1) of the Constitution of the Republic of South Africa.

<sup>188</sup> *Khosa* (Note 183 above, para 7).

<sup>189</sup> *Khosa* (Note 183 above, paras 24 and 142).

<sup>190</sup> Van der Berg (note 11 above).

Civil society organisations brought an urgent application,<sup>191</sup> seeking in part to have the state of disaster declaration, and its accompanying regulations, set aside.<sup>192</sup> De Beer and his fellow applicants argued that the disaster declaration was an irrational response to the threat posed by Covid-19 and the number of deaths caused by it at that point in time.<sup>193</sup> Davis J concurred with the applicants that some of the lockdown regulations were both distressing and irrational,<sup>194</sup> but found that the declaration of a state of disaster was in fact rational.<sup>195</sup> The Court referred to government's response to Covid-19 as paternalistic rather than a constitutionally-justifiable measure.<sup>196</sup> The Minister of Cooperative Governance and Traditional Affairs (COGTA) was subsequently ordered to take remedial action, to amend or to review the regulations,<sup>197</sup> but responded by appealing the judgment in the Supreme Court of Appeals (SCA). When heard by the SCA, the judgment of the preceding High Court was dismissed, with the SCA finding that the court had struck down regulations that were not pleaded or challenged.<sup>198</sup>

#### 4.3.4.3. *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others*

In this matter, private citizens challenged the justification for the existence of the National Coronavirus Command Council (NCCC).<sup>199</sup> They sought to have the Council and its decisions declared

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<sup>191</sup> *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184; 2020 (11) BCLR 1349 (GP).

<sup>192</sup> Ibid paras 1 and 3.

<sup>193</sup> Ibid para 4.12.

<sup>194</sup> Ibid paras 7.14 -7.15.

<sup>195</sup> Ibid para 9.1.

<sup>196</sup> Ibid paras 4.127.18.

<sup>197</sup> Ibid para 10.3.

<sup>198</sup> 'SCA slams 'scurrilous' comments made by LFN president over lockdown case, refers matter to NDPP' *News24* 2 July 2021, available at

<https://www.news24.com/news24/southafrica/news/sca-slams-scurrilous-comments-made-by-lfn-president-over-lockdown-case-refers-matter-to-ndpp-20210702>, accessed on 16 October 2021.

<sup>199</sup> *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* (5807/2020) [2020] ZAWCHC 56; 2020 (11) BCLR 1371 (WCC).

unconstitutional and inconsistent with the DMA.<sup>200</sup> They also sought for specific regulations of the DMA to be declared unconstitutional.<sup>201</sup> The Court rejected these contentions, finding that the parties to the NCCC acted within their ambit of power and that it was lawful and compliant with the Constitution.<sup>202</sup>

On an *obiter* basis, the court did mention that the restriction on the movement of goods and services resulting from the lockdown was a limitation on human dignity.<sup>203</sup> They also reaffirmed the sentiment of the court in the *Barkhuizen* case<sup>204</sup> that stated that human dignity and freedom are inextricably linked.

#### 4.3.4.4. *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another (FITA)*

A portion of the tobacco industry challenged the regulations prohibiting the sale of cigarettes during certain level of lockdown.<sup>205</sup> They argued that the objective of preventing healthcare facilities from being overwhelmed could have been achieved through less restrictive means. The court rejected same, providing that the applicants had not considered better or less restrictive means, simply what was rational.<sup>206</sup> The court also provided that they were satisfied that the COGTA minister had considered all relevant medical literature when developing the given regulation.<sup>207</sup>

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<sup>200</sup> Ibid paras 1.1 -1.2.

<sup>201</sup> Ibid para 1.3.

<sup>202</sup> Ibid para 253.

<sup>203</sup> Ibid para 45.

<sup>204</sup> *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) [175].

<sup>205</sup> *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* (21688/2020) [2020] ZAGPPHC 311.

<sup>206</sup> Ibid para 50.

<sup>207</sup> Ibid paras 51-53.

#### 4.3.4.5. *Mohamed and Others v President of the Republic of South Africa and Others*<sup>208</sup>

Being devout Muslims, Mohamed and others contested regulations made under the DMA which they found inhibited them from exercising their religious life and which also limited their rights to freedom of association, liberty, and dignity. They alleged that daily prayers were an important practice in Islam and that the regulations criminalised such activity, thereby placing them in a difficult position between respecting the law and respecting their religion. The applicants argued that the situation not only brings into question their right to association, but also their right to practice their religion, freedom of movement, freedom of association, general freedom, right to dignity, and right to life.<sup>209</sup>

The state argued that these rights were reasonably and justifiably limited in terms of section 36 of the Constitution. They requested the court to strike a balance between the extreme danger posed by Covid-19 and the applicants' rights to freedom of movement and assembly. The Court found that the limitations on these rights imposed by the said regulations were reasonable and justifiable in terms of section 36. They noted that the pandemic could have a devastating impact on the public and that in the spirit of *ubuntu*,<sup>210</sup> all persons had to make certain sacrifices to curtail the spread of the disease. The court as a result limited the right to religion in favour of public health and safety, deeming the DMA and its regulations to be important and necessary in preventing the spread of Covid-19.<sup>211</sup>

#### 4.4 South Africa twenty-months into the Covid-19 pandemic

As South Africans ready themselves for the end of 2021, it also brings with it over 600 days of lockdown and living with a pandemic. In the time that South Africans have been knowingly exposed to Covid-19, much has been done and much has been lost. Of crucial discussion at this juncture is when will the lockdown end and how will that be given effect to. Attempting to achieve herd immunity

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<sup>208</sup> *Mohamed and Others v President of the Republic of South Africa and Others* (21402/20) [2020] ZAGPPHC 120; [2020] 2 All SA 844 (GP); 2020 (7) BCLR 865 (GP); 2020 (5) SA 553 (GP).

<sup>209</sup> E Durojaye, RD Nanima 'From Muhammed and others to De Beer and Others: striking the balance between public health measures and human rights during the Covid-19 era in South Africa' (2020) 47(1) *Commonwealth Law Bulletin* 185.

<sup>210</sup> *Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC) [37].

<sup>211</sup> E Durojaye (Note 209 above, 186).

may be one such measure, thereby putting pressure on government to vaccinate as many people as possible in the shortest period of time. As discussed above, government has been successful in working with scientists and medical advisors to develop its responses and although often challenged by persons concerned about their rights, the courts have often been able to show the merit, reasonableness, and justification behind government's decisions. Government now has to focus on redefining a new normal for South Africans post Covid-19, by gradually removing imposed restrictions. The following is a discussion of government's current challenges, namely ensuring the efficiency of their vaccination rollout and tackling the country's other epidemic, corruption.

#### *4.4.1 A possible fourth wave and the vaccine rollout*

South Africa exited its third and most intense wave of Covid-19 infections<sup>212</sup> in late September 2021.<sup>213</sup> Despite recent changes, a fourth wave is looming. On 25 November 2021, it was announced that South African-based scientists had investigated and identified a new variant of SARS-CoV-2. The variant was detected in Pretoria, South Africa and has been attributed to the sharp increase in infections in the Gauteng province.<sup>214</sup> The WHO has since named the variant Omicron.<sup>215</sup> It was announced that a better understanding of the variant may only be available by mid-December 2021, but irrespective of this new variant, a fourth wave of Covid-19 infections are expected in South Africa.<sup>216</sup>

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<sup>212</sup> See tabulated details of the different Covid-19 infection waves enclosed and marked as Appendix B.

<sup>213</sup> 'South Africa's third wave of Covid-19 is over – with level 1 lockdown expected soon' *BusinessTech* 27 September 2021, available at <https://businesstech.co.za/news/trending/524058/south-africas-third-wave-of-covid-19-is-over-with-level-1-lockdown-expected-soon/>, accessed on 15 October 2021.

<sup>214</sup> 'How South African scientists discovered the troubling omicron variant' *BusinessTech* 30 November 2021, available at <https://businesstech.co.za/news/trending/542844/how-south-african-scientists-discovered-the-troubling-omicron-variant/>, accessed on 1 December 2021.

<sup>215</sup> 'Update on Omicron' available at <https://www.who.int/news/item/28-11-2021-update-on-omicron>, accessed on 1 December 2021.

<sup>216</sup> *Ibid.*

Despite the detection of Omicron, the South African government has not altered the lockdown levels. Rather, the President has called for an intensification of vaccination efforts.<sup>217</sup> South Africans have accordingly been urged by the Department of Health (DoH) to get vaccinated,<sup>218</sup> as facilitated by the Covid-19 vaccination rollout programme, as a matter of urgency to avoid another demanding wave of infections, hospitalisations, and fatalities. By 28 November 2021, the DoH had fully vaccinated 14 million South Africans against Covid-19, with almost 36 percent of the adult population being inoculated.<sup>219</sup> The single dose Pfizer vaccine has been rolled out to minors between the ages of twelve and seventeen since 20 October 2021.<sup>220</sup> In terms of the Children's Act, this age group of minors will be able to receive their vaccinations without their parent or guardian's consent.<sup>221</sup>

The Covid-19 vaccination rollout programme in South Africa started early in 2021 and has faced a number of setbacks. The original vaccine doses secured from the global Covax facility did not arrive until late June 2021, with only 1,4 million of the promised 12 million doses being delivered.<sup>222</sup> Despite receiving delivery of 1,5 million doses of the AstraZeneca vaccine in February 2021, these vaccines could not be administered due to concerns that it was not efficacious enough against the then rampant Beta variant.<sup>223</sup> With pressure on government to have frontline healthcare workers vaccinated as matter of urgency, and to get the vaccination programme started, arrangements were made for the Johnson and Johnson (J&J) one-dose vaccine to be used. Whilst not part of the initial rollout programme, this vaccine was administered as part of the open label Sisonke clinical trial,<sup>224</sup> which was already

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<sup>217</sup> 'Health Department brief on SA's response to Omicron variant and looming fourth wave' *IOL* 29 November 2021, available at <https://www.iol.co.za/news/watch-live-health-department-brief-on-sas-response-to-omicron-variant-and-looming-fourth-wave-e4e06f51-95bf-42f5-820b-378032f424b0>, accessed on 1 December 2021.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

<sup>220</sup> 'COVID-19 vaccine rollout expanded to include 12-17 year-olds' *ENCA* 15 October 2021, available at <https://www.enca.com/news/covid-19-vaccine-eligibility-expanded-include-12-17-year-olds>, accessed on 15 October 2021.

<sup>221</sup> S129(2) of the Children's Act, 2005.

<sup>222</sup> B Wadvalla 'How South Africa is dragging its vaccine rollout back from the brink' (2021) 374 *BMJ* 1.

<sup>223</sup> Ibid 1.

<sup>224</sup> Ibid 1.



underway in the country. By mid-April, after almost 300 000 doses of the J&J vaccine had been administered to frontline healthcare workers, the study was halted due to a few cases in which a rare blood clot developed in some recipients.<sup>225</sup> South Africa followed the same precautionary measures as implemented by other countries and paused the use of this vaccine for two weeks. Further administration of the J&J vaccine was obstructed again in June 2021 when two million vials had to be destroyed because of high-profile contamination at a source in the United States of America. The civil unrest experienced in Kwazulu-Natal and Gauteng in July 2021 also hampered the administration of Covid-19 vaccines, with almost 100 public and private vaccination sites being looted and damaged.<sup>226</sup> It is estimated that 47 000 doses of either the Pfizer or J&J vaccine were stolen during this time.<sup>227</sup> Vaccination sites were subsequently closed in the affected areas, thereby preventing persons wanting to access vaccinations from being able to do so. Difficulties in the management of personnel safety working at vaccination sites during the civil unrest, which led to road closures and lack of public transport, including in the Western Cape, where taxi violence forced many to stay away from work, further obstructed the national vaccination programme.<sup>228</sup>

The vaccination rollout was open to the public in late April 2021. Initially, only persons over the age of 60 years were able to receive the vaccine, but the programme soon opened up in stages to the remaining adult age groups. By the end of August 2021, all adults were able to receive the vaccine at either a public or private vaccination site. Adults were able to receive either the two-dose Pfizer vaccine, with doses being administered six-weeks apart from each other, or the one-dose J&J vaccine. Other vaccine options were expected to become available to South Africa by the end of 2021, with the application for registration of vaccines such as Novovax and CoronoVac at different stages of their approval process with the South African Health Products Regulatory Authority (SAHPRA).<sup>229</sup>

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<sup>225</sup> Ibid 1.

<sup>226</sup> Ibid 1.

<sup>227</sup> Ibid 1.

<sup>228</sup> M Gieske 'The struggles and hope in South Africa's Covid-19 vaccine rollout' (11 August 2021) available at <https://www.one.org/africa/blog/covid19-vaccine-rollout-south-africa/>, accessed on 1 October 2021.

<sup>229</sup> B Wadvalla (Note 222 above, 1).

The DoH introduced a system of weekly televised updates regarding the vaccination rollout, Covid-19 infections, and all other related subject matters to keep the public informed on the measures being taken by government to combat the transmission of the virus and to potentially avert a damaging fourth wave. They also instituted ‘Vooma Vaccination Weekends’ aimed at speeding up the vaccination uptake by citizens and others in the country in an effort to meet the national target of 70 percent of all adults being vaccinated with at least one dose by Christmas 2021.<sup>230</sup>

Despite government’s measures to ensure that there is no shortfall of supply of vaccines and various initiatives to educate people on the accessibility to and reliability of the vaccines, the uptake of vaccines has been slow. Fake news and general public apathy towards vaccinations has stymied government reaching earlier national vaccine goals. Many people do not trust the production of the vaccines or question how vaccines could have been developed in such a short space of time. Young adults are largely apathetic to taking the vaccine due to their belief that Covid-19 does not really affect them. Appeals continue to be made by government, civil bodies and ordinary citizens to the public to get vaccinated to avoid a fourth wave of infections and to allow government to start working towards a lockdown exit strategy.

#### *4.4.2 Corruption during the Covid-19 pandemic*

As discussed earlier in this chapter, corruption has been a malaise which has eaten at the growth of South Africa. Despite the ongoing work of the Zondo Commission and President Ramaphosa’s promises of reforms to combat corruption, corrupt practices have still managed to run rife, even during the Covid-19 pandemic, particularly in respect of PPE procurement.<sup>231</sup> It has been reported that between April 2020 and June 2021, R14,8 billion of government’s total Covid-19 expenditure of R138 billion was under investigation by the Special Investigations Unit (SIU) due to suspected irregular

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<sup>230</sup> ‘Vooma vaccinations: The race to beat the fourth wave of Covid-19 and avert 20,000 to 30,000 deaths’ (13 October 2021) available at <https://sacoronavirus.co.za/2021/10/13/vooma-vaccinations-the-race-to-beat-the-fourth-wave-of-covid-19-and-avert-20000-to-30000-deaths/#:~:text=With%20a%20fourth%20wave%20likely,deaths%20predicted%20in%20this%20wave,> accessed on 15 October 2021.

<sup>231</sup> M Buthelezi (Note 1 above).

practices.<sup>232</sup> At the same time, more than 4 300 contracts to more than 2 400 service providers have been or are under investigation. Similarly, over 200 cases have been referred to the National Prosecuting Authority (NPA) for criminal investigation by the SIU.<sup>233</sup>

Previous corrupt practices have also returned to haunt government officials, at times threatening the stability of government's Covid-19 response. In June 2021, after having steered South Africa's Covid-19 response, the then Minister of Health, Dr Zweli Mkhize was placed on special leave. This occurred as the SIU undertook an investigation into allegations of corruption by Mkhize in the awarding of a multi-million-rand tender to Digital Vibes, during his tenure as Treasurer-General of the African National Congress (ANC). Mkhize was subsequently replaced in an acting capacity by fellow minister, Mmamoloko Kubayi-Ngubane,<sup>234</sup> and then by his deputy, Dr Joe Phaahla, who is currently the health minister. The DoH was shaken further in September 2021, when several high-ranking officials were officially suspended after the publishing of the SIU's report on the same scandal which detailed their involvement therein.<sup>235</sup> For a government department key to government's Covid-19 response, such happenings were a stark reminder of corruption's well rooted nature in this country and how it prevents government from fulfilling its constitutional obligations.

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<sup>232</sup> 'Covid-19 corruption tops R14-billion but to bust criminals we need to drastically boost prosecution services and courts' *Daily Maverick* 21 September 2021, available at <https://www.dailymaverick.co.za/article/2021-09-21-covid-19-corruption-tops-r14-billion-but-to-bust-criminals-we-need-to-drastically-boost-prosecution-services-and-courts/>, accessed on 15 October 2021.

<sup>233</sup> Ibid.

<sup>234</sup> 'Zweli Mkhize placed on special leave, Kubayi-Ngubane to act as South Africa's health minister' *News24* 8 June 2021, available at <https://www.news24.com/citypress/news/zweli-mkhize-placed-on-special-leave-kubayi-ngubane-to-act-as-south-africas-health-minister-20210608>, accessed on 16 October 2021.

<sup>235</sup> 'Health department suspends officials over Digital Vibes contract' *Mail and Guardian Online* 30 September 2021, available at <https://mg.co.za/news/2021-09-30-health-department-suspends-officials-over-digital-vibes-contract/>, accessed on 16 October 2021.

#### **4.5 Has the South African government fulfilled its constitutional obligations in context of the Covid-19 pandemic?**

It is evident from the above discussions that the South African government did respond to the threat that Covid-19 posed to the country and its citizens. Not only had they had sufficient time to monitor the conduct of other nations, but they also drew from the difficult lessons learnt by those countries. Appropriate mechanisms in the form of the DMA and its provision for regulations and the NCCC indicated the intention of government to respond holistically to the challenges posed by the pandemic. As noted earlier, credence was given to science, and government sought the counsel from an array of appropriate and learned individuals and institutions. South Africans were offered a firm response to the invisible threat of Covid-19 and were given reasonably clear direction as to what the battle ahead would involve.

It is thereby government's substantive and legally obligated response to Covid-19 and the implications that it had for South Africans that is in question. As has been discussed, the decision to place the country in a hard lockdown was an extreme move for a country already battling a myriad of deep-seated issues. It has been crucial to consider the impact of government's response largely in light of the country's socio-economic dynamics to adequately assess the fulfilment of its constitutional obligations. Such assessment will also be done with the assumption that given the potential of death, resulting from a Covid-19 infection, that at the very least government's response to Covid-19 was motivated by the need to uphold all persons' right to life<sup>236</sup> as entrenched in the Constitution.

Given that there was no known effective and available treatment for Covid-19, nor was there a cure, the prudent starting point for any responsive measure was the promotion of preventative measures, such as handwashing and social distancing. On a larger scale, prevention involved immediately isolating people from one another to mitigate the chances of virus transmission. For this to occur efficiently, people needed to have access to clean running water and adequate living spaces. They also needed housing with proper ventilation and sanitation services. To continue life without working and earning an income also required people having sufficient access to food. If these resources were consistently accessible and available across South Africa, government would have satisfied their

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<sup>236</sup> Section 11 of the Constitution of the Republic of South Africa.

constitutional obligations in respect of sections 26 and 27 respectively, namely the right to access housing and access to healthcare services, sufficient food and water, and social security.

As illustrated above, this was unfortunately not the scenario that has played out in South Africa. Rather, millions of South Africans, particularly the impoverished, still battle to access to healthcare, water, sanitation, and education – ultimately their rights as embedded in sections 26 and 27 of the Constitution. Whereas the government, post-1994, ought to fulfil their promises for access to housing, electricity and access to clean running water for all, they have fallen short. With millions still residing in informal settlements or in rural environments that have not been empowered through basic urban amenities, the probability of these populations successfully combatting the transmission of Covid-19 is threadbare. Such inadequacies bolster public health threats and provide a buoyant breeding ground for transmission. Whilst government undertook measures to provide water to identified areas via water tankers, the provision of same was not sufficient to quell existing problems and resolve the pressing issue of fighting the pandemic. Further to this, there was little government could do at the eleventh hour to resolve the housing issue, thereby preventing millions of South Africans from exercising the preventative measure of social distancing. At the heart of this shortfall is government's inactivity in fulfilling these rights over the past decade or two. Whilst given ample opportunity to progressively realise these constitutionally mandated rights and do so within available resources, government has failed to do so. Whether this is due to rampant corruption, pure mismanagement, indifference to the plight of the impoverished South African, or a combination of sorts, is not clear. What is evident, however, is that government's pre-Covid-19 failures to fulfil these constitutional obligations have become clear during the Covid-19 pandemic and as a result further disabled government to effectively respond to and manage the needs and concerns of its citizens during the Covid-19 pandemic.

Government's lethargy in adequately attending to socio-economic rights is also evident in its provision of access to healthcare. As noted, a large discrepancy exists between the public and private healthcare sectors, with the former carrying the largest patient load whilst also being extremely under-resourced with a lack of sufficiently skilled personnel. This chasm is again attributable to government and their failure to remove the barriers that prevent many South Africans from accessing private healthcare services. In other words, as a result of government's failure to address income-related health inequities, they have not empowered citizens to move away from their dependence on the public healthcare sector. Government has thereby burdened themselves due to their own failings. The inequities of race, hunger

and income were highly prevalent prior to Covid-19 and have only been exacerbated by the economic effects of the lockdown measure instituted to limit infections during the pandemic. Black South Africans continued to face the impact of health inequities to such an extent that their ability to access healthcare is limited by virtue of their socio-economic disposition. This is exacerbated by continuing income disparities and hunger levels that have only been worsened by the pandemic.

Access to healthcare has also not been achieved by virtue of resources not being easily accessible, particularly those who live in informal settlements or rural areas. In such instances, healthcare is often not in easy reach, with patients having to travel great distances in order to get such assistance. By allowing such settlements to become permanent, the onus was on government to ensure that amenities such as healthcare were made available within accessible range to the dwellers thereof. Failure in this regard necessarily equates to government's failure to progressively realise access to healthcare for these citizens.

Where government has perhaps succeeded is in their healthcare response to Covid-19. By diverting resources towards Covid-19 testing, diagnosis and treatment, government developed much needed capacity. Further to this, by redirecting human resources towards the Covid-19 response, based on lessons learned from their management of epidemics such as TB and HIV, government ensured that human resources are applied as effectively as possible to the situation at hand. Government also developed capacity by commissioning the conversion of large areas as field hospitals, thereby readying itself for any potential overflow of the public healthcare sector. Contrary to this though, it may be argued that the diversion of resources away from programmes such as TB and HIV management was unfair to those in need of same. The quandary thereby begs the question as to which healthcare dynamic could be limited. Given the nature of Covid-19, it may be argued that the right to healthcare in that instance was more pressing, particularly given that no treatment for same existed whereas TB and HIV has known methods of treatment. Conversely, it may be argued that by limiting a person's ability to access their chronic treatment due to a lack of medical resources, that these persons may in turn become seriously ill. Such illnesses may constitute an emergency for which treatment cannot be denied, possibly resulting in such a person requiring treatment that may be far more extensive and dependent on scarce medical resources than those that were initially denied to him or her. It is suggested that the right of persons to access non-Covid-19 related healthcare may be reasonably and justifiably limited as a result of the global effort to stem the spread of Covid-19. This limitation may

however not apply in respect of the delays imposed on MDR-TB patients, whose grant applications were delayed because of Covid-19 related applications. It may also not excuse shortfalls in government's response to the decades-long fight against illnesses such as TB and HIV. Had such illnesses being handled with the same level of urgency that Covid-19 has been responded to, the burden of these illnesses on citizens and government may not have been as demanding.

The right to education has also been widely affected by government's Covid-19 response. As has been discussed, learners who were least affected by the response of school closures and the corresponding concept of remote learning, are those who are least dependant on government. In other words, learners who come from financially stable households and/or with guardians who are able to support their learning, have tended to fare better than those learners whose learning was dependent on government-aided resources. Government's failure to adequately support remote and blended learning within the public education system may be attributed to their failure to develop and maintain the given system. The diversion of funds away from education infrastructure towards other Covid-19 measures worsens this still. Government has subsequently deprived learners of their right to education as a result of pre-existing inadequacies in the public education system which government has not remedied. By failing to attend to these issues, as well as corresponding socio-economic rights such as access to sufficient food and water, government failed to fulfil their constitutional obligation in term of education, even prior to facing the effects of the Covid-19 pandemic. These failures have been magnified by the pandemic due to government's inability to enable and facilitate a certain level of learning and teaching, needed across all levels of basic education, as well as to enforce the safety measures needed to return teachers and learners to face-to-face learning. Allegations of corruption have also continued to hamper any pandemic-induced efforts.

Through my research I thus conclude that the South African government has failed to meet its constitutional obligations towards its citizens. I further argue that this failure has occurred, not due to their formal Covid-19 responses, but rather due to the many failings which existed prior to the Covid-19 pandemic. Having exerted little effort to progressively realise these constitutional rights, government allowed its citizens to continue to live with public healthcare systems and municipal service delivery infrastructures that were in disarray and deteriorating daily. Despite government's timeous response to the pandemic and the applause it has received from notable quarters, this response

has been diminished by government's larger failings.<sup>237</sup> Covid-19 is the salt to these unresolved wounds and has exposed the vast range of inadequacies and inequalities that government has failed to address previously.

In respect of other constitutional obligations, many of which have been raised in legal challenges, the courts have varied in their findings to government's response and fulfilment of its constitutional obligations. Judgments such as in the *Mohammed* case have illustrated a nod of approval from the judiciary towards government's response. Rights to religion and freedom of movement were seen to be reasonably and justifiably limited against the greater need to maintain each and every single person's right to life, illustrating how the need to save lives dominated the need for a response. Other cases such as the *Esau*, and *FITA* cases entailed a systematic analysis of government's response and their thinking behind it. In both cases, the court has offered support to government's measures, thereby strengthening government's cause.

At the same time however, the courts have used their platform to comment on concerns regarding lockdown. Cases like the *Khosa* case highlighted the impact of lockdown on the economy, particularly in respect of the average South African. Other cases such as the *Esau* case made note of the relationship between dignity and freedom, thereby finding the restriction on the movement of goods and services to be an infringement of one's dignity.

The *Khosa* case, alongside several others that have been brought as a result of lockdown brutality, is probably the starkest failing of government in respect of non-socioeconomic rights. Whilst many measures were needed to be taken by government to ensure compliance with lockdown measures, the excessive use of force exercised on persons such as Collins Khosa cannot be justified. Khosa's individual right to life cannot be reasonably and justifiably limited simply to protect the right to life of the collective population. Alternative measures could have been taken by the SANDF in these matters, with the measures used being unreasonable and unjustifiable. Similarly, it is positioned that whilst

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<sup>237</sup> 'Coronavirus in SA: WHO boss praises South Africa's response to Covid-19 pandemic' *IOL* 1 April 2020, available at <https://www.iol.co.za/news/politics/coronavirus-in-sa-who-boss-praises-south-africas-response-to-covid-19-pandemic-45923836>, accessed on 16 October 2021.



several rights may (on paper) be reasonably and justifiably limited by section 36 of the Constitution, it does not necessarily translate into practical experiences. It is suggested that whilst government's response to restrict freedom of movement and thereby restrict other rights such as the right to dignity may seem appropriate in light of the pandemic, greater efforts should be made to avoid such limitations occurring.

#### 4.6 Conclusion

Covid-19 has been an unprecedented pandemic and one which forced governments globally to respond in ways not previously envisaged. The South African government responded to the public health threat in a manner not unusual to that of its peers. I conclude that whilst government acted swiftly and with the intention of saving lives, they largely failed to meet their constitutional obligations. Whilst the response has allowed for time to build capacity, to curb infections and save lives, it has also come at a great cost for many South Africans. Economic hardships from their responses were further exacerbated as a result of the already weak position the country was in prior to Covid-19. This position may largely have been avoided had government met its constitutional obligations timeously and not allowed for the malignancy of lack of service delivery to fester. Such failings may in time dwarf the successes of the response as even in a world 'post Covid-19', South Africans, particularly the impoverished, may continue to battle the ramifications thereof for generations to come.

In the chapter to follow, I will consider whether, in the context of the Social Contract Theory, the South African government has adhered to their agreement with their citizens. I shall focus on the lessons the South African government has learnt during their response and management of the Covid-19 pandemic. I shall also pay attention to their successes however particular attention will be given to how the country may better prepare itself for any future public health threats or emergencies. I shall conclude with recommendations on how this may be achieved and will build on the notion that going forward, government needs syndemic preparedness rather than simply pandemic preparedness.

## CHAPTER FIVE

# RECOMMENDATIONS FOR IMPROVED GOVERNMENTAL MANAGEMENT OF HEALTHCARE EMERGENCIES

### 5.1 Introduction

This dissertation has been based on the Covid-19 pandemic and its ongoing and unfolding impact on South Africa. Even though South Africa has been battling the TB and HIV/Aids epidemics for several decades, the challenges posed by Covid-19 have been largely unprecedented and have continuously posed new challenges to the country's *modus operandi*. Whilst the stringent measures the South African government took to limit the initial spread of the COVID-19 virus were initially accepted by most South African citizens as a logical measure to an unknown enemy, lockdown fatigue and opposition to governmental decisions soon set in. Concerns relating to freedom of movement and security of person, as impacted by lockdown regulations and its consequences were soon raised.<sup>238</sup> Others noted that measures taken by government in response to the Covid-19 pandemic, such as the rushed deployment of water tankers to areas which did not previously have access to running water,<sup>239</sup> and the hurried attempts to upscale an ailing public healthcare sector,<sup>240</sup> could have been avoided had government developed capacity for same<sup>241</sup> during the preceding administrations of Mandela, Mbeki,

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<sup>238</sup> *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184; 2020 (11) BCLR 1349 (GP).

<sup>239</sup> M Buthelezi 'South Africa, Covid-19 and the Social Contract', available at <https://pari.org.za/south-africa-covid-19-social-contract/>, accessed on 1 February 2021.

<sup>240</sup> Ibid.

<sup>241</sup> See also Amnesty International 'Failing to learn the lessons? The impact of Covid-19 on a broken and unequal education system' (2021) available at <https://www.amnesty.org/en/documents/afr53/3344/2021/en/>, accessed on 9 September 2021; CO Nwosu and A Oyenubi 'Income-related health inequalities associated with the coronavirus pandemic in South Africa: A decomposition analysis' 2021 *International Journal for Equity in Health*; R Rensburg 'Healthcare in South Africa: how inequity is contributing to inefficiency' (7 July 2021) available at <https://www.wits.ac.za/news/latest-news/opinion/2021/2021-07/healthcare-in-south-africa-how-inequity-is-contributing-to-inefficiency.html>, accessed on 9 September 2021; C, Stauton, C, Swanepoel, M, Labuschaigne 'Between a rock and a hard place: Covid-19 and South Africa's response' (2020) 7(1) *Journal of Law and the Biosciences* 1-12; S van der Berg and L Patel 'Covid-19 pandemic

Motlanthe, and Zuma in the democratic era.<sup>242</sup> As noted in Chapter 4, infrastructural capacity was lagging in the public healthcare sector,<sup>243</sup> public education,<sup>244</sup> and the provision of access to housing,<sup>245</sup> and adequate water and sanitation.<sup>246</sup>

This dissertation accordingly investigated whether the South African government's response to the Covid-19 pandemic was in keeping with its constitutional obligations to its citizens as premised on the Social Contract Theory and in consideration of the thesis that a syndemic approach to the pandemic may have been a more appropriate response to the COVID-19 pandemic in South Africa. I subsequently studied the Social Contract Theory in the context of the country's Constitution which establishes the social contract between government and its citizens, and which contained the constitutional obligations which the government had to fulfil. Apart from a discussion on the Social Contract Theory itself, I also focussed on the Bill of Rights in the Constitution,<sup>247</sup> and more specifically the socio-economic rights afforded to South African citizens.

## 5.2 Conclusion

In this dissertation, the Social Contract Theory was used to interpret the constitutional relationship of duty that exists between the South African government and its citizens. The Constitution<sup>248</sup> was

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has triggered a rise in hunger in South Africa' (21 July 2021) available at <https://theconversation.com/covid-19-pandemic-has-triggered-a-rise-in-hunger-in-south-africa-164581#:~:text=Our%20research%20appeared%20as%20a,Africa%20due%20to%20the%20pandemic.>, accessed on 9 September 2021.

<sup>242</sup> The mentioned Presidents served in the following terms: Nelson Mandela (1994-1999); Thabo Mbeki (1999-2004; 2004-2008, when he was recalled by his party, the African National Congress (ANC)); Kgalema Motlanthe (2008-2009); Jacob Zuma (2009-2018, when he was recalled by his party, the ANC).

<sup>243</sup> See Chapter 4, para 4.3.1.

<sup>244</sup> Ibid para 4.3.3.

<sup>245</sup> Ibid para 4.3.2.

<sup>246</sup> Ibid para 4.3.2.2.

<sup>247</sup> Chapter 2 of the Constitution of the Republic of South Africa.

<sup>248</sup> The Constitution of the Republic of South Africa.

identified as the social contract that was written and enacted after the fall of the apartheid regime and is often used to redress the wrongs of the past, protect basic human rights of all South African citizens, and build a better future for all South Africans. Some of government's constitutional obligations towards its citizens are set out in the Bill of Rights, and I have given specific attention to government's obligations that stemmed from the socio-economic rights in the Bill of Rights. In light of the Covid-19 pandemic, the central question of this dissertation was whether the South African government had fulfilled its constitutional obligations in its response to the pandemic. Put differently, the dissertation assessed whether government satisfied the social contract between itself and its citizens.

John Rawls stated that a social contract should exist to develop a more equitable society by redressing the elements that lead to the inequality in the first place.<sup>249</sup> Further to this, John Locke and Jean-Jacques Rousseau opined that the social contract should focus on improving the human condition whilst the human is still alive, as opposed to being a better person so as to attain a promising afterlife.<sup>250</sup> In other words, it was suggested that the social contract be used to achieve a better standard of living as a mortal being, rather than living piously so as to attain greater virtues upon death. Modern interpretations of the social contract have stated that this contract must be one of substance to obligate a government into actively protecting its citizens and rendering basic services.<sup>251</sup> These interpretations support the notion that a government's role within its social contract with its citizens is one of being a provider. These notions also speak aptly to the role that the Constitution plays in establishing and maintaining democracy, by holding government responsible for fulfilling and maintaining citizens' rights.<sup>252</sup>

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<sup>249</sup> University of Pretoria Repository 'Chapter 3: Theories and Developments guiding Constitutional Democracy' at 70 available at <https://repository.up.ac.za/bitstream/handle/2263/28459/03chapter3.pdf?sequence=4&isAllowed=y>, accessed on 29 January 2021.

<sup>250</sup> K Moodley *Medical Ethics, law and human rights* (2017) 35.

<sup>251</sup> M Loewe, T Zintl and A Houdret 'The social contract as a tool of analysis: Introduction to the special issue on "Framing the evolution of new social contracts in Middle Eastern and North African countries"' 2020 *World Development* 6.

<sup>252</sup> University of Pretoria Repository 'Chapter 3: Theories and Developments guiding Constitutional Democracy' at 88 available at <https://repository.up.ac.za/bitstream/handle/2263/28459/03chapter3.pdf?sequence=4&isAllowed=y>, accessed on 29 January 2021.

After discussing in this dissertation, the Social Contract Theory and its relevance to South Africa, the position of South Africa's Constitution, the position of the constitutional socio-economic rights at the time of the Covid-19 outbreak and the response of the South African government to the outbreak, I conclude that the government has failed to fulfil its constitutional obligations and has consequently breached its social contract with its citizens. On a superficial level, government's response complied with international recommendations and good practices, and as discussed in this dissertation,<sup>253</sup> was initially largely supported and appreciated by South Africans. However, on assessment of what is required to prevent the transmission of the virus and the impact of the measures taken, it is evident that several measures were inadequate whilst their consequences turned pre-existing governmental shortcomings into catastrophes.<sup>254</sup>

The first factor that played a major role in the outcome of the Covid-19 pandemic is the lack of infrastructure in South Africa. It has been illustrated in the course of this dissertation<sup>255</sup> that government has largely failed to maintain the infrastructure they inherited from the apartheid regime and that insubstantial efforts have been undertaken to develop new infrastructure. Such is evident in the discussion that existing schooling infrastructure has not been maintained or upgraded,<sup>256</sup> whilst informal housing settlements continue to expand and house generations of persons despite its temporary nature and characteristics that are contradictory to public health.<sup>257</sup> As such, South Africa was exposed to managing a public health emergency with an already depleted public healthcare sector, given the lack of personnel able to offer healthcare responses, the lack of skilled management at a facilities level to guide public health interventions, and the lack of resources such as ward capacity and ventilators. South African citizens were thereby left vulnerable to the serious consequences of the virus owing to a sheer lack of human and physical resources and skillsets. The public healthcare sector should not have been in such disarray given the existence of the decades-old TB and HIV epidemics in the country, as lessons should have been learnt on how best to prevent and manage communicable

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<sup>253</sup> See Chapter 4, para. 4.2.2.

<sup>254</sup> See Chapter 4, para 4.3.

<sup>255</sup> Ibid.

<sup>256</sup> See Chapter 4, para 4.3.3.1.

<sup>257</sup> Ibid para 4.3.2.1.

diseases. Such lessons were seemingly not learnt, nor was sufficient infrastructure in the form of healthcare personnel and equipment developed or maintained. Lack of infrastructure has also been evident in the inability of millions of South Africans to take preventative measures to avoid contracting Covid-19.<sup>258</sup> Housing shortages, crowded households, limited or complete lack of accessibility to proper water and sanitation services were realities faced by many South African citizens, particularly those living in informal settlements. As such, measures such as social distancing and regular handwashing were unrealistic to many. Already disadvantaged persons were thereby exposed to the virus unwittingly, by virtue of either not having the means to exercise such measures or by possibly having to use communal resources, which exposed persons to one another and the virus unnecessarily. By not being able to afford its citizens the ability to avoid contracting the virus and to get the standard of care needed in the event of infection, the South African government failed to fulfil its constitutional obligations, at least in this context, to provide access to healthcare, water, sanitation, and housing. I find that failures like these are unethical and constitute a breach of the social contract. Sections 26 and 27 of the Constitution, as discussed in Chapter 3,<sup>259</sup> were both crafted to provide South Africans with the ability to access socio-economic rights. Despite such rights, government's obligations in terms of the social contract – the Constitution – did not provide them with absolute obligations. As provided for in *Soobramoney*, demands for the fulfilment of any socio-economic right may be placed upon government, however these rights will not necessarily be fulfilled if the resources required are lacking,

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<sup>258</sup> Amnesty International 'Failing to learn the lessons? The impact of Covid-19 on a broken and unequal education system' (2021) available at <https://www.amnesty.org/en/documents/afr53/3344/2021/en/>, accessed on 9 September 2021; CO Nwosu and A Oyenubi 'Income-related health inequalities associated with the coronavirus pandemic in South Africa: A decomposition analysis' 2021 *International Journal for Equity in Health*; R Rensburg 'Healthcare in South Africa: how inequity is contributing to inefficiency' (7 July 2021) available at <https://www.wits.ac.za/news/latest-news/opinion/2021/2021-07/healthcare-in-south-africa-how-inequity-is-contributing-to-inefficiency.html>, accessed on 9 September 2021; C, Stauton, C, Swanepoel, M, Labuschaigne 'Between a rock and a hard place: Covid-19 and South Africa's response' (2020) 7(1) *Journal of Law and the Biosciences* 1-12; S van der Berg and L Patel 'Covid-19 pandemic has triggered a rise in hunger in South Africa' (21 July 2021) available at <https://theconversation.com/covid-19-pandemic-has-triggered-a-rise-in-hunger-in-south-africa-164581#:~:text=Our%20research%20appeared%20as%20a,Africa%20due%20to%20the%20pandemic.,> accessed on 9 September 2021; NK Marutlulle 'A critical analysis of housing inadequacy in South Africa and its ramifications' (2021) 9(1) *Africa's Public Service Delivery and Performance Review* 2.

<sup>259</sup> See Chapter 3 on page 34.

or where an obligation is not qualified.<sup>260</sup> Government was thereby given the scope to progressively realise such rights provided that resources were available for such realisation to occur<sup>261</sup> This thereby meant that government was given time to realise the socio-economic rights for their people, with the understanding that provision of same was not going to be something that materialised unreasonably. Given however that government had almost three decades prior to the Covid-19 outbreak to realise these rights, the concept of citizens still not having access to running water, proper sanitation, and decent public healthcare services suggests that even within the context of subsection 2 of sections 26 and 27 respectively, government has not honoured these constitutional obligations. They have thereby breached their social contract with the citizens of South Africa by not providing them with the amenities that were required, both prior to and in response to Covid-19. Such failings are also unethical as the rights of the collective citizens, that entrusted government with the fulfilment of same, have been ignored, with the collective continuously facing an unnecessarily precarious state, be it through facing waterborne diseases or the transmission of TB.

Government's above discussed failure to provide sufficient infrastructure also impacted people's right to education.<sup>262</sup> As illustrated, the closure of schools, whilst necessary, resulted in a considerable portion of learners having their learning disabled.<sup>263</sup> Prior to the Covid-19 pandemic and resulting lockdown regulations and implementations, government had consistently failed to sufficiently maintain, improve and upgrade the schooling system, particularly that of government-aided public schools.<sup>264</sup> As discussed in Chapter 4, many schools still lacked basic infrastructure in terms of physical buildings and adequate space for learners,<sup>265</sup> insufficient learning materials, be it in the form

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<sup>260</sup> *Soobramoney v Minister of Health (Kwazulu Natal)* 1998 (1) SA 765 (CC).

<sup>261</sup> Sections 26(2) and 27(2) of the Constitution of the Republic of South Africa.

<sup>262</sup> Section 29 of the Constitution of the Republic of South Africa.

<sup>263</sup> See Chapter 4, para 4.3.3.

<sup>264</sup> Amnesty International 'Failing to learn the lessons? The impact of Covid-19 on a broken and unequal education system' (2021) available at <https://www.amnesty.org/en/documents/afr53/3344/2021/en/>, accessed on 9 September 2021, 136.

<sup>265</sup> Ibid 136.

of textbooks or information technology,<sup>266</sup> and reprehensible sanitary conditions, such as pit latrines.<sup>267</sup> The state of the public education system, prior to the pandemic was already unstable and the pandemic merely exacerbated these flaws. Learning during the lockdown has also been stymied as a result of the government not investing in technology for public schools and learners, thereby impeding the ability of students to access remote learning as was necessary. Such learning has also been inhibited owing to the lack of electricity and the inability of the national electricity grid to remain continuously in operation, thereby resulting in periods of scheduled load-shedding or unscheduled blackouts.<sup>268</sup> Corruption at Eskom, the parastatal responsible for provision of electricity in South Africa, has also drained some of funds, thereby resulting in electricity costs increasing exponentially so as to keep Eskom afloat.<sup>269</sup> Despite learners returning to school after easing of the lockdown levels and regulations, these school environments were still conducive towards the transmission of the virus due to the lack of support given by government to public schools in procuring PPE and other necessary sanitary measures, including access to clean water on the school premises.<sup>270</sup>

The failure of government to fulfil these socio-economic rights has in addition led to an uncontrolled surge in unemployment and subsequent poverty in South Africa. These developments have in turn

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<sup>266</sup> M Sterne 'The true state of South Africa's schools' *Mail and Guardian Online* 3 October 2021, available at <https://mg.co.za/education/2021-10-03-the-true-state-of-our-schools/#:~:text=South%20Africa%20has%20one%20of,are%20poorly%20funded%2C%20dysfunctional%20schools,> accessed on 13 October 2021.

<sup>267</sup> In September 2021, a five-year old child in Kwazulu-Natal died after having fallen into a pit latrine at her day-care centre – '5-year-old found dead in a pit latrine toilet' *IOL* (7 September 2021) available at <https://www.iol.co.za/mercury/news/5-year-old-found-dead-in-a-pit-latrine-toilet-20ce1e0a-d395-4d21-9ac9-45c1ce1f1743>, accessed on 30 November 2021.

<sup>268</sup> 'Ongoing load shedding negatively impacts pupils' exam preparations, say education bodies' *News24* 9 November 2021, available at <https://www.news24.com/witness/news/kzn/ongoing-load-shedding-negatively-impacts-pupils-exam-preparations-say-education-bodies-20211109>, accessed on 30 November 2021.

<sup>269</sup> 'Eskom 15% tariff hike unjustifiable and unfair' *IOL* 18 April 2021, available at <https://www.iol.co.za/sundayindependent/news/eskom-15-tariff-hike-unjustifiable-and-unfair-2d2fbf47-3fde-497b-a981-29e985745010>, accessed on 8 December 2021.

<sup>270</sup> Amnesty International 'Failing to learn the lessons? The impact of Covid-19 on a broken and unequal education system' (2021) available at <https://www.amnesty.org/en/documents/afr53/3344/2021/en/>, accessed on 9 September 2021, 34.



intensified existing issues of hunger, food and nutrition insecurity, and the rapid and ongoing rise of unhygienic conditions in informal settlements, which results in growing levels of poor health, with the poor facing the brunt of these consequences.

I thereby find that the South African government not only failed in its constitutional obligations towards its citizens, but also failed in honouring its agreement in terms of their social contract with its citizens. By not sufficiently realising the socio-economic rights of South African citizens, the government has disregarded the main goals and aims embedded in the Constitution. Instead, government has failed to correct or rebalance the inequalities experienced during apartheid. As discussed in this dissertation, South Africans live in parallel universes. A minor percentage of the population lives as citizens within the context of a first-world country, having access to private healthcare, better equipped schools, and better access to housing, water, sanitation, and food. When these citizens contract Covid-19, most of them were able to immediately get the relevant medical treatment they require. Learners from this minority were able to continue their education without any interruptions due to access to the internet, likely both at home and at school. Households in this minority were also able to take all the preventative measures that were issued in terms of the regulations issued in terms of the DMA, owing to proper housing, sufficient living spaces, and access to clean, accessible water and proper sanitary infrastructure. The majority who do not have access to these resources have experienced the harsher effects of the pandemic, with access to all of the above being limited and challenging.

Despite the intent behind the Constitution and its social contract that promised to be beneficent to South Africans, government has inhibited the fulfilment of same. Not only has the South African government failed to honour its socio-economic constitutional obligations, but also its obligation to uphold the dignity of its citizens. In this regard the author Arundhati Roy wrote:

*‘Historically, pandemics have forced humans to break with the past and imagine their world anew. This one is no different. It is a portal, a gateway between one world and the next. We can choose to walk through it, dragging the carcasses of our prejudice and hatred, our avarice, our data banks and dead*

*ideas, our dead rivers and smoky skies behind us. Or we can walk through lightly, with little luggage, ready to imagine another world. And ready to fight for it.*<sup>271</sup>

Through the lessons learnt during and as a result of the Covid-19 pandemic, the South African government has yet another opportunity to reassess its constitutional obligations, the agreement with its citizens based on the Social Contract Theory and to bring about the changes for which South African citizens have waited for so long and deserve. The Constitution is clearly providing the standards to which government must live up to. Ulrich Beck referred to the pandemic as a ‘cosmopolitan moment’.<sup>272</sup> It is subsequently my hope that the South African government uses this opportunity to apply their moral imagination,<sup>273</sup> and work towards correcting their failings to achieve the ideals set out in the Constitution and its social contract with its citizens.

### **5.3 Recommendations**

Given the discussion of the impact of the South African government’s Covid-19 response on the Constitution’s socio-economic rights in this dissertation, I wish to make the following recommendations in the context of access to healthcare, education, and the right to access water, sanitation, and housing. Given that these human rights do exist or function in isolation, some overlap in recommendations is to be expected.

In addition to my recommendations, I shall also provide recommendations as to how best government may realise these recommendations, particularly through discussion this in the context of a syndemic approach. It is my researched conclusion that by taking such an approach, South Africa may not only be better prepared for any future public health emergencies, be it either epidemic or pandemic in nature, but it may also enable South Africa to take a more proactive approach when managing these emergencies.

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<sup>271</sup> A Roy ‘The pandemic is a portal’ available at <https://www.ft.com/content/10d8f5e8-74eb-11ea-95fe-fcd274e920ca>, accessed on 23 November 2021.

<sup>272</sup> MS Patel and CB Phillips ‘Covid-19 and the moral imagination’ 2021 *The Lancet* 1.

<sup>273</sup> Ibid 2.

### 5.3.1 Specific recommendations

#### 5.3.1.1. Improvements in access to healthcare and better health

As highlighted in Chapter 4, the right to access healthcare is stymied for many South Africans due to the country's under resourced and over-burdened public healthcare sector. I subsequently recommend that the government take active steps to strengthen the country's public health systems. This will involve improvements at all tiers of this system. An increase in human resource capacity will need to be developed, including possible retraining, and upskilling in respect of leadership, governance, and management capacities<sup>274</sup> to form a strong primary healthcare network, filled with well trained and competent health workers.<sup>275</sup> By taking such steps, the personnel necessary to respond to ongoing and future emergencies will be available and better positioned to take on challenges as those experienced during the Covid-19 pandemic. In addition to this, public health financial management models, strategies and structure which are responsible for the provision and delivery of public healthcare services requires an urgent overhaul in practices<sup>276</sup> to correct antiquated systems and fight the endemic issue of corruption. In a similar vein, adequate supply chains will need to be developed<sup>277</sup> according to proper business practices and with a vision to empower public healthcare, rather than cripple same.

To sustainably strengthen the public healthcare sector, inequities in healthcare needs to be addressed effectively. Historical racial inequalities in healthcare will need to be rectified, particularly when the negative relationship between poor health outcomes and race is considered. Policies that correct this will need to be developed and implemented, particularly in terms of achieving universal access to healthcare.<sup>278</sup> It is yet to be seen what the practical implications of the National Health Insurance Bill,

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<sup>274</sup> 'Heathy systems strengthening teams' available at <https://www.cdc.gov/globalhealth/countries/southafrica/what/hss.htm>, accessed on 23 November 2021.

<sup>275</sup> R Rensburg 'Healthcare in South Africa: how inequity is contributing to inefficiency' (7 July 2021) available at <https://www.wits.ac.za/news/latest-news/opinion/2021/2021-07/healthcare-in-south-africa-how-inequity-is-contributing-to-inefficiency.html>, accessed on 9 September 2021.

<sup>276</sup> CDC (note 37 above).

<sup>277</sup> Ibid.

<sup>278</sup> CO Nwosu and A Oyenubi 'Income-related health inequalities associated with the coronavirus pandemic in South Africa: A decomposition analysis' 2021 *International Journal for Equity in Health* 10.

which is still under consideration with the National Assembly's Health Portfolio Committee, will be in this context,<sup>279</sup> regardless of the aim of universal access to ensure that availability of care is evenly distributed amongst both the private and public healthcare sectors.<sup>280</sup>

Improving the health of South Africans should be of vital importance to government, as healthier citizens will result in less strain on the healthcare system and citizens who are better positioned to survive future health emergencies. I subsequently propose two distinct recommendations. Firstly, government should prioritise the elimination of food and nutrition insecurity and hunger.<sup>281</sup> Hunger is directly linked to poor health, particularly amidst the poorer populations in the country and should not occur in a country like South Africa which is considered as an upper-middle income country. In the short-term, measures such as social grant relief programmes rolled out during the Covid-19 pandemic may help people to avoid hunger and nutrition insecurity, particularly those who have experienced negative socio-economic consequences resulting from regulated lockdowns. For these relief programmes to be successful, it must consider and be adjusted in accordance with changes in the (already high) costs of living. In addition, government should also reconsider and expand the number of food items that are zero-rated in respect of value-added tax to include more essential and basic foodstuff.<sup>282</sup> Longer term measures will entail government to take more active steps to decrease unemployment levels in the country, including substantive reforms to labour market access.<sup>283</sup>

The second recommendation is to reprioritise healthcare resources.<sup>284</sup> Persons with limited access to healthcare need to be prioritised by government, such that they are afforded access to healthcare that is in line with those South Africans who are better positioned to access same. Further to this, I suggest that in the context of South Africa, reprioritisation should also involve HIV and TB patients being

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<sup>279</sup> 'The National Health Insurance Bill' available at <https://www.parliament.gov.za/project-event-details/54>, accessed on 22 November 2021.

<sup>280</sup> Rensburg (note 38 above).

<sup>281</sup> Nwosu (note 41 above; 10).

<sup>282</sup> Nwosu (note 41 above; 10).

<sup>283</sup> Nwosu (note 41 above; 11).

<sup>284</sup> Rensburg (note 38 above).

given preference. TB is the leading cause of natural death in South Africa, with an estimated 89 000 South Africans dying from the disease annually.<sup>285</sup> TB is complicated further in South Africa by HIV, as it is estimated that of the 450 000 TB patients in the country per year, over 50 percent of them are also HIV positive.<sup>286</sup> This thereby means that over half of those South Africans who develop TB also have compromised immune systems, thereby complicating their ability to recover from TB. Further to this, over 7,9 million South Africans are HIV positive.<sup>287</sup> It is estimated that over 60 percent of South Africa's over 3 million orphans<sup>288</sup> have been orphaned due to their parents dying from HIV/Aids. Given the large prevalence of TB and HIV in South Africa, I thereby find it imperative that the provision of treatment and medical assistance to such patients be emphasised. This will enable infected persons to have a greater quality of life, owing to greater access to appropriate healthcare. Their ability to live healthy and longer lives may enable such persons to pursue ordinary standards of life, such as completing one's education and seeking employment. This in turn may positively impact the lives of those around them, such as their dependants. This will only be possible if reliable healthcare services and effective strategies, that prioritise the care of these patients are present.<sup>289</sup> Such prioritisation may be easier to achieve on the back of the Covid-19 response, in that the lessons learnt from the pandemic and the urgency given to the response, may be applied so as to expedite the treatment of, and improve the standard of care afforded to HIV, TB, and other chronic health patients.<sup>290</sup> By refocussing on pre-Covid epidemics such as TB and HIV/AIDS with the same commitment to the delivery of healthcare

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<sup>285</sup> 'South Africa Perspective: Tuberculosis' available at <https://www.copenhagenconsensus.com/publication/south-africa-perspective-tuberculosis>, accessed on 8 December 2021.

<sup>286</sup> Ibid.

<sup>287</sup> 'HIV prevention: Employed or Unemployed – who is more likely to be HIV-positive?' *Daily Maverick* 16 January 2020, available at <https://www.dailymaverick.co.za/article/2020-01-16-hiv-prevention-employed-or-unemployed-who-is-more-likely-to-be-hiv-positive/>, accessed on 8 December 2021.

<sup>288</sup> 'Sponsor a child in South Africa' available at <https://www.soschildrensvillages.ca/south-africa#:~:text=Nearly%203%2C400%2C000%20children%20in%20South,youngest%20segment%20of%20the%20population>, accessed on 8 December 2021.

<sup>289</sup> 'Resource reprioritisation amid competing health risks for TB and Covid-19' available at <https://theunion.org/news/resource-reprioritisation-amid-competing-health-risks-for-tb-and-covid-19>, accessed on 9 September 2021.

<sup>290</sup> C Keene, E Mohr-Holland, T Cassidy, V Scott, A Nelson, J Furin, L Trivino-Duran 'How Covid-19 could benefit tuberculosis and HIV services in South Africa' 2020 *The Lancet* 845.

services as was experienced during the Covid-19 pandemic, government may rekindle public trust, especially with those segments of society who are dependent on its service so heavily.<sup>291</sup>

#### *5.3.1.2 Improvements to education and its accessibility*

The impact of government's Covid-19 response on education has largely been felt in respect of the lack of infrastructure necessary to facilitate learning, be it remotely, or safely within the presence of a classroom. The Wave 5 Report of the National Income Dynamics Study-Coronavirus Rapid Mobile Survey (NIDS-CRAM study) has recommended that schools return to normal operation in the second half of 2021 or at the start of the 2022 school year, whereby learners attend school on a daily and full-time basis with traditional timetabling in place.<sup>292</sup> Such practice thereby moves away from the still ongoing rotational attendance of school, whereby students attended school on alternate days or weeks, depending on the abilities of the school to facilitate learning whilst also avoiding being a super-spreader of Covid-19. The NIDS-CRAM study found rotational learning to be disruptive to learners, with possible learner dropouts projected and the fear that learners have experienced great losses in terms of their actual learning and education.<sup>293</sup> The above recommendation is supported by this paper, as the potential of learning losses and learner dropouts is unacceptable in a modern society. The advancement of South Africa and its constitutional ideals is partly dependant on the development of its younger generations. If learners do not receive the education that they are constitutionally entitled to,<sup>294</sup> they will be inhibited in their future opportunities, be it for employment or in their living standards. This is only possible if consideration is given to the shortcomings that exist in education today. Improvements to existing physical and learning infrastructure must be made, whilst government must make strides to bring education in South Africa to global standards. Government must further, within the context of Covid-19, ensure that they provide access to PPE, water and sanitation, and safe learning spaces, which will enable learners to reintegrate into a normal learning environment again. Further to this, to prevent learners from dropping out of school and to assess the extent of learning that

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<sup>291</sup> Note 52 above.

<sup>292</sup> D Shepard and N Mohohlwane 'The Impact of Covid-19 in education – more than a year of disruption' 2021 *NIDS-CRAM Wave 5 Report* 11 38.

<sup>293</sup> Ibid 38.

<sup>294</sup> Section 29(1)(a) of the Constitution of the Republic of South Africa.

has been lost by individual learners,<sup>295</sup> a number of factors need to be assessed, evaluated, and addressed. These include the socio-economic position of learners and their families, the domestic situation in which learning takes or fails to take place in, the impact that Covid-19 has had on learners, if learning has stagnated for students and why that may be so, the role that schools and teachers have played in promoting learning, and what the intentions of the learners and their families are going forward.

The ability for all learners to return to school on a full-time basis may not be completely feasible and infrastructural and other adjustments will have to be made by government to enable and facilitate remote learning for all learners. The Department of Basic Education will need to explore different kinds of remote learning to enable them to improve existing technologies and media of accessibility such as television, radio, and the internet to ensure that coverage of these forms of media are made available at an optimal level to all learners. Internet provision and access to information and communication technologies will subsequently need to be intensified in poorer communities and rural areas.<sup>296</sup> Educators will also need to be upskilled to ensure efficient training and knowledge transfer using remote learning platforms and technologies, including parents who may be lacking in the ability to facilitate remote learning from home.<sup>297</sup> Furthermore, families vulnerable to violence or income instability will require government-aided support and social protection to enable children of such households to realise their right to education.<sup>298</sup> Government may provide such support in the form of food vouchers,<sup>299</sup> the provision of school meals via the National Schools Nutrition Programme to enable these families access to an adequate standard of living resulting from the constitutional fulfilment of various socio-economic rights.<sup>300</sup> Government must accordingly implement the 4A's

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<sup>295</sup> Ibid 38.

<sup>296</sup> Amnesty International 'Failing to learn the lessons? The impact of Covid-19 on a broken and unequal education system' (2021) available at <https://www.amnesty.org/en/documents/afr53/3344/2021/en/>, accessed on 9 September 2021 36.

<sup>297</sup> Ibid.

<sup>298</sup> Ibid.

<sup>299</sup> Shepard (note 55 above; 39).

<sup>300</sup> Amnesty International (note 59 above, 37).

framework which I discussed in Chapter 3 and monitor the implementation of it so as to address any shortfalls that may arise.<sup>301</sup>

Where learners do return to physical schooling, the school's infrastructure must also be improved or upgraded to provide adequate capacity to allow learners to safely return to school. By doing so, it will enable learners to access and exercise their right to education, as well as any other socio-economic rights that they are constitutionally entitled to. Proper infrastructure in line with Covid-19 prevention measures will also prevent educators, learners, and their families from being exposed to the virus. Accordingly, I recommend diversion of funds towards education, as discussed in Chapter 4, to fulfil the above discussed right to education. This will allow for ongoing infrastructure challenges to be addressed, particularly in those schools that have been identified for not meeting the required standards necessary for effective learning, which calls for the improvement of school buildings, and the provision of water and sanitation, technology, and learning materials.

In light of the ongoing pandemic, it is also recommended that government make a concerted effort to ensure that the school environment is compliant with all necessary Covid-19 prevention measures to enable social distancing and adequate sanitation.<sup>302</sup> This would be realised by making sure that schools have sufficient space available to practically enable appropriate social distancing, whilst also ensuring that schools have sufficient access to clean water and adequate sanitation. Government must also provide public schools with adequate supplies of PPE to mitigate the spread of the virus.<sup>303</sup>

#### *5.3.1.3 Improvements in access to housing, water, and sanitation*

The right to adequate housing, to water, and to sanitation are deeply entangled in South Africa's political history. Often, persons are unable to access a particular right as the other has not been provided for adequately. For example, persons living in informal settlements may not be able to access sufficient amounts of clean water, necessary for Covid-19 hand-sanitising, due to the fact that they

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<sup>301</sup> Ibid 37.

<sup>302</sup> Ibid 36.

<sup>303</sup> Ibid 36.



have not been able to access proper housing and are living in a communal setting in which resources need to be shared. I recommend that government approach these rights with a different view. Firstly, government should not view these rights in isolation. Whilst a person may have shelter, the enjoyment of his or her right to housing is largely undermined if he or she also lacks access to enough clean water and proper sanitation. Secondly, government should view these rights as a collection of rights which collectively allows South African citizens to enjoy a certain, but adequate standard of living and should therefore be developed on a continuous basis. Policies must also be created to practically implement these rights.<sup>304</sup>

Only by taking a holistic approach to the realisation of these intertwined rights will government be able to comprehensively fulfil them in terms of their constitutional obligations. I also recommended that these obligations must be approached with a long-term and sustainable goal in mind, as opposed to expensive and disjointed short-term solutions. If government provides proper access to water, sanitation, and housing to all citizens, they will also be implementing practices that ultimately act as enablers that will promote better health, including the possibility to effectively enable all South African citizens to effectively respond to the Covid-19 pandemic or any other health emergency, including TB and HIV. Government should strive to use the standards set for housing, water, and sanitation during the Covid-19 pandemic as basic standards of living that persons should have access to. Such recommendation is supported by the United Nations, which recognises that access to safe and clean drinking water and to sanitation is the bedrock of the complete enjoyment of life for all persons.<sup>305</sup> Whilst the constitutional provisions which give rise to these rights may also be interpreted, alongside the Preamble of the Constitution, to give effect to this standard, such standard has also been promoted through the courts. Through precedent, the link between sanitation and the right to dignity, freedom and security of person, privacy, environment, housing, and healthcare<sup>306</sup>, thereby providing that for a person to have a basic standard of living, multiple factors must be in play. The concept of progressively

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<sup>304</sup> NK Marutlulle 'A critical analysis of housing inadequacy in South Africa and its ramifications' (2021) 9(1) *Africa's Public Service Delivery and Performance Review* 14.

<sup>305</sup> Statement on the Human Right to Sanitation of the United Nations (UN) Committee on Economic, Social and Cultural Rights c/f Foundation for Human Rights. *Socio-economic Rights – Progressive Realisation?* (2016) 267.

<sup>306</sup> *Beja and Others v Premier of the Western Cape and Others* (21332/10) [2011] ZAWCHC 97; [2011] 3 All SA 401 (WCC); 2011 (10) BCLR 1077 (WCC).

realising these rights within available resources should therefore be considered with future realities and goals in mind considering the standard of living that citizens would require in future, having, for example, regard to an increase in population numbers, to prevent the transmission of diseases and illnesses in general. Such a reorientation may also assist in the country's fight against the TB and HIV epidemics as well. The Foundation for Human Rights has also recommended that government strive towards counteracting the disadvantages faced by those living in informal settlements and work towards considerable upgrading of the standard of living of these segments of the population.<sup>307</sup>

I also agree with the Foundation for Human Rights' recommendation that government must review the current manner in which services like water and sanitation are currently managed. Consideration must be given to whether the decentralised model of water and waste management is still an appropriate and effective model to attend to these services. Government needs to take constructive steps to address and correct the corruption that has entrenched itself on both national and local governmental levels of service delivery.<sup>308</sup>

#### *5.3.1.4 Measures to stop hunger*

As discussed above in respect of improvements to the public education and health systems, hunger is another endemic issue that government must proactively focus on correcting. As illustrated above, ignoring issues of food and nutrition insecurity, and hunger will only impede the growth of South Africa by deepening food poverty and inequality, as well as compromising the country's human and economic development. Government must identify hunger, and food and nutrition insecurity as central to their social development strategies.<sup>309</sup>

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<sup>307</sup> Foundation for Human Rights. *Socio-economic Rights – Progressive Realisation?* (2016) 226-227.

<sup>308</sup> Ibid 351.

<sup>309</sup> S van der Berg, L Patel, G Bridgman 'Food insecurity in South Africa: Evidence from NIDS-CRAM Wave 5' 2021 *NIDS-CRAM Wave 5 Report* 13 10.

Based on the NIDS-CRAM Wave 5 Report on Hunger,<sup>310</sup> government and its policy makers must proactively attend to making poverty relief measures a priority in fiscal planning.<sup>311</sup> By doing so, government will be empowering households and enable them to avoid falling further below the bread line. These measures must also be reviewed at regular intervals, with due consideration of the cost of living.<sup>312</sup> Initiatives to continuously monitor and evaluate household and child hunger must be undertaken to establish an understanding of whether ongoing initiatives are effective and sufficient enough, and what improvements must be made to identify and correct any issues that may pose obstacles to the fight against hunger.<sup>313</sup> Government should actively collaborate with non-governmental bodies, including corporate South Africa, to develop and implement policies and programmes that will aggressively address hunger and food insecurity.<sup>314</sup> Government should prioritise households that are most vulnerable to food insecurity and hunger. In this regard the NIDS-CRAM Wave 5 Report on Hunger defines a vulnerable household as consisting of four or more persons in an informal or rural household.<sup>315</sup> Finally, special consideration must be given to households with children.<sup>316</sup> This would comply with section 28(1)(c) of the Constitution which specifically stipulates that every child<sup>317</sup> has the right to shelter, basic nutrition, social services and basic healthcare,<sup>318</sup> and will assist in ensuring that children are in optimal physical state to also enjoy their right to education. Government must ultimately view the fight against hunger, and food and nutrition insecurity as a necessary and critical social investment in their human capital.<sup>319</sup>

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<sup>310</sup> Ibid 10.

<sup>311</sup> Ibid 10.

<sup>312</sup> Ibid 11.

<sup>313</sup> Ibid 10.

<sup>314</sup> Ibid 11.

<sup>315</sup> Ibid 11.

<sup>316</sup> Ibid 11.

<sup>317</sup> According to s28(3) of the Constitution and s1 of the Children's Act 2005, a child is any person younger than 18 years of age.

<sup>318</sup> Section 28(1)(c) of the Constitution of the Republic of South Africa.

<sup>319</sup> Van der Berg (note 72 above, 11).

### 5.3.2 Syndemic preparedness

#### 5.3.2.1 Defining a syndemic

A syndemic, otherwise known as a synergistic epidemic,<sup>320</sup> refers to two or more diseases or health-related concerns,<sup>321</sup> which interact within an ecosystem characterised by social, biological, and political<sup>322</sup> determinants that have the potential to exacerbate a person or population's susceptibility to harm.<sup>323</sup> This concept was developed by the American medical anthropologist, Merrill Singer in the 1990s and has since been developed by her and others into an approach to address public health outbreaks. According to Singer, the syndemic approach has the ability to reveal the biological and social interactions that are influential in determining the prognosis of an outbreak, that will ultimately inform the treatment responses and health policies for same. Unlike other approaches, it does not focus exclusively on clinical medicine and traditional public health approaches. Instead, it provides an integrated approach to understanding and treating diseases by looking beyond just controlling the disease or treating the affected patients.<sup>324</sup> Since its conception, the syndemic approach has been used widely to understand a range of social factors that affect health problems. These factors include issues of malnutrition, violence, HIV/Aids, TB, other infectious diseases, and non-communicable diseases (NCDs).<sup>325</sup> A proponent of syndemic theory, Emily Mendenhall carried out a series of studies, with others, so as to examine how syndemic theory may be applied to low-income and middle-income countries that are battling co-morbidities and multi-morbidities.<sup>326</sup> In this study, diabetes was used as the core disease, with its co-infection to HIV in Kenya, depression in South Africa, and TB in India, assessed. In the syndemic framework, factors such as socio-economic conditions, health system

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<sup>320</sup> 'Syndemics or Synergistic Epidemics' available at, [https://www.researchgate.net/publication/340594371\\_Syndemics\\_or\\_Synergistic\\_Epidemics](https://www.researchgate.net/publication/340594371_Syndemics_or_Synergistic_Epidemics), accessed on 23 November 2021.

<sup>321</sup> Ibid .

<sup>322</sup> C Minicucci 'Using Syndemic Theory and the Societal Lens to Inform Resilient Recovery from Covid-19: Towards a Post-Pandemic World: Proceedings of a Workshop in Brief' (2021) *The National Academies Press* 1.

<sup>323</sup> R Horton 'Offline: Covid-19 is not a pandemic' 2020 *The Lancet* 874.

<sup>324</sup> Ibid.

<sup>325</sup> I Fronteira, M Sidat, JP Magalhaes *et al* 'The SARS-CoV-2 pandemic: A syndemic perspective' 2021 *One Health* 3.

<sup>326</sup> E Mendenhall, BA Kohrt, SA Norris *et al* 'Non-communicable disease syndemics: poverty, depression, and diabetes among low-income populations' 2017 *The Lancet* 13.

structures and culture, were considered. Mendenhall et al, found that the syndemic framework had the potential to have a measurable impact on quality of life and healthcare when applied to clinical medicine and public health. They further found that syndemics can successfully prevent and intervene when addressing multiple concerns and specific vulnerabilities within the give context.<sup>327</sup> Mendenhall et al. also highlighted a number of other projects in which the syndemic approach was successful, such as the collaboration between the Ministry of Health in Rwanda with the Clinton Foundation and Partners in Health. In this collaboration, the syndemic approach allowed for a programme to be developed so as to align NCD care with that of HIV/Aids care. It was found that by moving away from preventing HIV transmission through behavioural means only, and looking at social elements of poverty, racism, and gender equality as well, a better approach to HIV prevention was rendered.<sup>328</sup> Mendenhall et al. thereby illustrates a tangible example of the benefits of a holistic, integrated and syndemic approach to healthcare and elucidates that finding solutions to healthcare concerns should include behavioural, social, economic, political, cultural and other considerations.

According to Singer's model, three elements must be in place for a syndemic to be identified. Firstly, a co-clustering of diseases or health problems must be present.<sup>329</sup> These may include diseases such as Covid-19, NCDs, and mental health concerns, as well as problems such as malnutrition, frailty, antimicrobial resistance, and co-infections that may complicate primary infections.<sup>330</sup> Secondly, the fundamental adverse interactions between biological, social, and other factors must be recognised.<sup>331</sup> Thirdly and finally, the social and structural drivers which lead to the disease clustering must be identified.<sup>332</sup> The range of drivers are diverse. Socio-behavioural drivers include issues such as income status, poor health literacy, lack of empowerment and motivation, and lifestyle behaviours, whilst

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<sup>327</sup> Ibid 13.

<sup>328</sup> Ibid 13.

<sup>329</sup> Minicucci (note 85 above, 2).

<sup>330</sup> UN Yadav, B Rayamajhee, SK Mistry, SS Parsekar, SK Mishra 'A Syndemic Perspective on the Management of Non-communicable Diseases Amid the COVID-19 Pandemic in Low- and Middle-Income Countries' 2020 *Frontiers in Public Health* 3.

<sup>331</sup> Minicucci (note 85 above, 2).

<sup>332</sup> Minicucci (note 85 above, 2).

physical environmental drivers may include issues such as urban planning and climate change.<sup>333</sup> Government policies, or rather the lack thereof, have also been identified as drivers of syndemics, with socio-marginalisation issues that manifests in the form of discrimination, protesting for rights, misogyny, and racism are also viewed as socio-ecological drivers.<sup>334</sup>

Syndemics may also be shaped by political and economic factors, including the historical intensity of these factors and the economic, social, and power inequities in which they have entrenched themselves in. Such inequities then mould the distribution of health resources and risks, often leading to the concentration of diseases in specific parts of the population and is exacerbated by the various biological factors interacting

The syndemic approach is seen as a valuable tool that provides a mechanism to alter the way we conceptualise, measure, and respond to diseases, health emergencies, or the threat thereof. It goes beyond the realm of a purely biological or scientific responses, rather working across disciplines to provide a response that is truly effective and actionable. This approach subsequently provides the foundation for a people-centred, clinically integrated care, as well as community-based interventions which have the ability to lessen disease interactions and impact.<sup>335</sup>

#### *5.3.2.2 Covid-19 as a syndemic in South Africa*

Considering the multiple factors that influence the South African government's response to the Covid-19 pandemic, this pandemic in South Africa should be considered as a syndemic, as opposed to a pandemic based on the disease's nature and ability to also involve biological and socio-economic factors.<sup>336</sup> Firstly, Covid-19 has been found to interact with both seasonal diseases such as influenza, as well as endemic epidemics and diseases, such as TB. Furthermore, it is deeply entangled with various cultural and social determinants, the extent of which is dependent on the context in which it is

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<sup>333</sup> Yadav (note 93 above, 3).

<sup>334</sup> Yadav (note 93 above, 3).

<sup>335</sup> Minicucci (note 85 above, 2).

<sup>336</sup> Fronteira (note 88 above, 3).

being assessed. These determinants include economic inequalities, food and nutrition insecurities, gender inequalities, racism, and the unequal supply of social and healthcare services. A common global example is the interaction between Covid-19 and NCDs. Such interaction has resulted in exacerbated rates of Covid-19 infections, worsened by issues of race discrimination, malnutrition, and social factors that negatively impact health.<sup>337</sup>

This approach has been criticised by arguments against Covid-19 being a global syndemic.<sup>338</sup> Rather, it has been provided that Covid-19 may provide for regional or localised syndemics, owing to the different ecosystems that exist in different countries. The critique thereby provided that the determinants within respective regions, localities and countries will provide for the pandemic or syndemic nature of a Covid-19 outbreak, and that accordingly, not every country will have an ecosystem that will render Covid-19 to a syndemic rather than a pandemic.<sup>339</sup> In the South African context, and based on my research, I consider the Covid-19 pandemic to have manifested as a syndemic. As discussed in Chapter 4, South Africa faces a myriad of health concerns including the ongoing battle around TB, HIV, and NCDs.<sup>340</sup> With the introduction of Covid-19 into these existing vulnerabilities, it is evident that South Africa is facing a syndemic. In addition to this, given the listed concerns regarding service delivery, or rather the lack thereof, in respect of our socio-economic rights of South African citizens with regards to access to healthcare, water and sanitation, food and nutrition, housing, and to education, I am of the opinion that these challenges, in addition to the challenges brought by the Covid-19 pandemic, created the perfect storm to create a true syndemic. Not only does the South African government's failure to adequately realise these constitutionally protected human rights of its citizens, but this situation also exposed South Africans to the limited resources and abilities to being able to successfully recover from the destructive wake of the Covid-19 pandemic.

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<sup>337</sup> Ibid.

<sup>338</sup> E Mendenhall 'The COVID-19 syndemic is not global: context matters' 2020 *The Lancet* 1731.

<sup>339</sup> Ibid 1731.

<sup>340</sup> N Bulled and M Singer 'In the shadow of HIV and TB: A commentary on the COVID epidemic in South Africa' 2020 *Global Public Health* 1236.

I thus conclude, having regard to Singer's modelling of a syndemic, that Covid-19 is a syndemic in South Africa and accordingly requires a solution which effectively combats the challenges raised by the syndemic model. Syndemics recognise the various non-biological factors that may aggravate any disease outbreak, including the co-clustering of diseases. Given the precarious state of government's realisation of human rights as obligated in the Constitution and its social contract with its citizens, I am of the opinion that there is no better way to approach any health emergency, including the Covid-19 outbreak, as a syndemic and prepare response strategies and resources accordingly. By following this approach, the South African government will be able to holistically respond to the Covid-19 pandemic and the numerous determinants that influence this pandemic. In addition, the syndemic model will allow government to form an understanding of how Covid-19 as an infectious disease, impacts and complicates their responses to combat same in the South Africa context and reality, at this time in its history.<sup>341</sup> By adopting a syndemic approach, government will be able to develop cross-ministerial, inter-disciplinary, and multi-level prevention strategies, allowing for a composite response.<sup>342</sup> For example, government will be able to roll out prevention measures, not just from a best practice perspective, but also by having the necessary infrastructure in place to truly realise these prevention measures, such as allowing for proper sanitising and social distancing.

An appropriate syndemic approach in South Africa may involve several responses. Firstly, it will call for the establishment of a more equitable society. This will involve government introducing measures that redress the gender, racial, and economic disparities that exist. By doing so, the South African society may start to move away from issues of poverty, gender-based violence, and the ongoing invisible lines of apartheid. Secondly and in addition to the former point, government will need to redesign the economy so that it promotes greater inclusivity. At present, the economy is market-driven and does not pay credence to the well-being of ordinary South Africans nor their livelihoods or socio-economic needs. Finally, just as they adapted to the threat of Covid-19, so government will need to be more responsive and thereby more adaptive in its responses to emergencies in the country.<sup>343</sup> By actively and continuously working to the actual realisation of the human rights contained in the

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<sup>341</sup> Fronteira (note 88 above, 4).

<sup>342</sup> Fronteira (note 88 above, 4).

<sup>343</sup> 'Local Covid-19 Syndemics and the Need for an Integrated Response' available at <https://bulletin.ids.ac.uk/index.php/idsbo/article/view/3114/3116>, accessed on 22 November 2021.



Constitution, the government will also be able to better, quicker and more effectively respond to any emergencies, including health emergencies such as epidemics, pandemics, or syndemics – ultimately enabling government to honour the social contract and constitutional obligations stipulated in the Constitution.

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## APPENDIX A:

<b>Date on which lockdown level was implemented</b>	<b>Lockdown Level</b>	<b>Total cases by given date</b>	<b>Total deaths by given date</b>
26 March 2020	Level 5	927	0
01 May 2020	Level 4	5 951	116
01 June 2020	Level 3	34 357	705
18 August 2020	Level 2	592 144	12 264
21 September 2020	Level 1	661 936	15 992
29 December 2020	Adjusted Level 3	1 021 451	27 568
01 March 2021	Adjusted Level 1	1 513 959	50 077
31 May 2021	Adjusted Level 2	1 665 617	56 506
16 June 2021	Adjusted Level 3	1 774 312	58 223
28 June 2021	Adjusted Level 4	1 941 119	60 038
26 July 2021	Adjusted Level 3	2 383 490	70 018
13 September 2021	Adjusted Level 2	2 860 835	85 002
01 October 2021	Adjusted Level 1	2 904 307	87 705

**TABLE 1: NUMBER OF COVID CASES AND DEATHS AT THE COMMENCEMENT OF EACH LOCKDOWN LEVEL IN SOUTH AFRICA FROM 26 MARCH 2020 – 1 OCTOBER 2021**

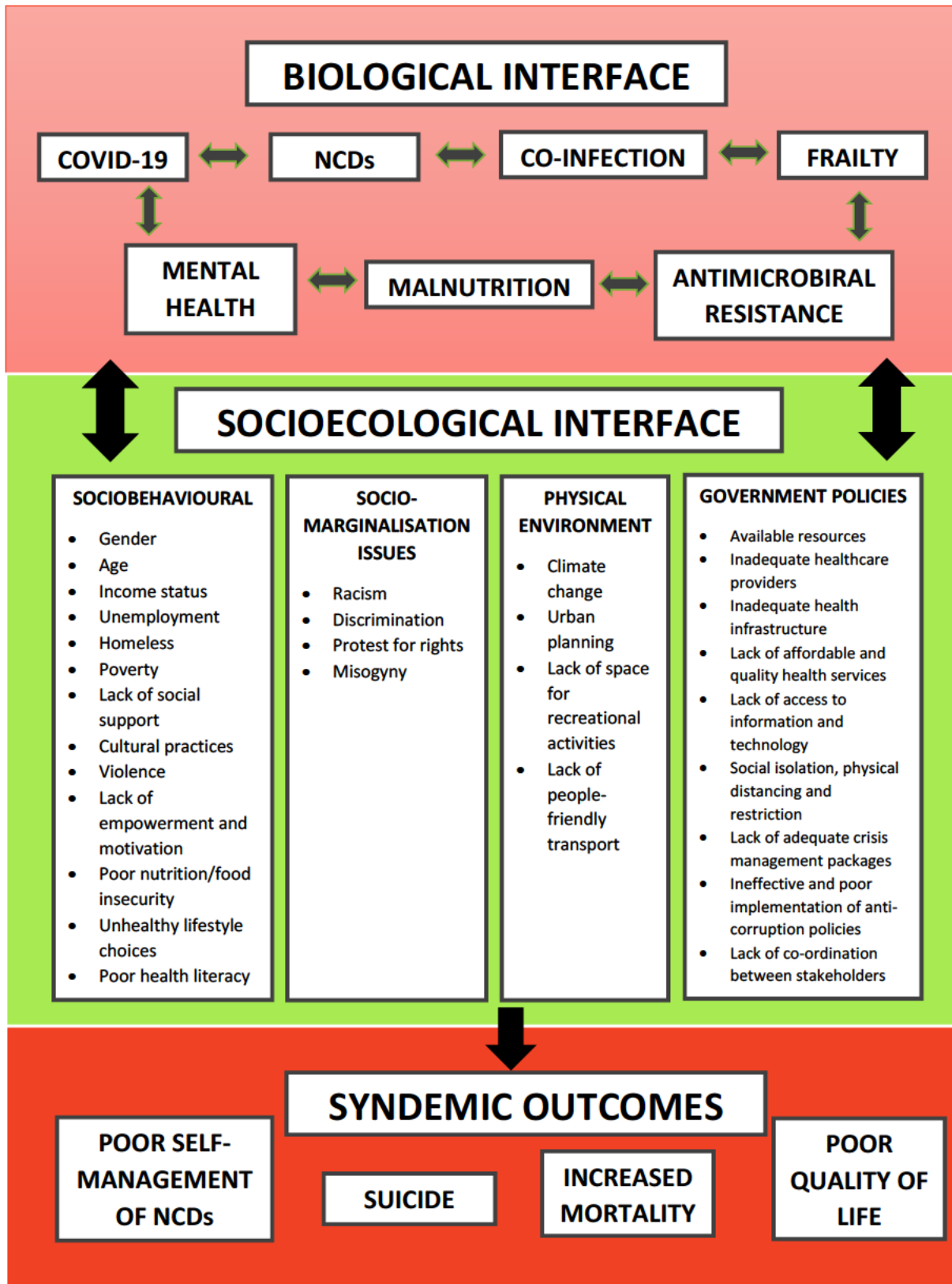
\* Lockdown levels are as per the official South African Government Coronavirus website, available at <https://sacoronavirus.co.za/>

\*\* Figures have been captured based on the reports issued by government from the official start of the lockdown

\*\*\* Source for figures: Department of Health (DoH)



## APPENDIX B:



**FIGURE 1:** A syndemic framework in relation to the factors which exacerbate Covid-19 syndemic outcomes (adapted from UN Yadav, B Rayamajhee, SK Mistry, SS Parsekar, SK Mishra ‘A syndemic perspective on the management of non-communicable diseases amid the Covid-19 pandemic in low- and middle-income countries’ (2020) 8 *Frontiers in Public Health* 3

**APPENDIX C:**  
**Covid cases and deaths for each wave in South Africa**

Wave	Duration	Cases detected during the wave	Deaths reported during the wave
1st	13 March 2020 - 1 October 2020	676 068	16 866
2nd	8 October 2020 - 7 April 2021	868 454	35 863
3rd	16 April 2021 - 5 November 2021	1 360 462	35 724

**TABLE 2:** NUMBER OF COVID CASES AND DEATHS DURING EACH OF THE FIRST THREE WAVES OF INFECTIONS IN SOUTH AFRICA

\* The start of a wave is defined as when a seven (7) day average of cases rose for seven (7) successive days.

\*\* Source: National Department of Health

Note: This report is for internal use only and will not be shared with examiners or the student

**SUPERVISOR'S REPORT**

Supervisor's Name	<b>Dr Marietjie Botes</b>
Student's Name	<b>Dhisha Narismulu</b>
Student Number	<b>206518140</b>
Dissertation Title	<b>A critical analysis of the South African government's management and response to Covid-19 in the context of its constitutional commitments to its citizens based on the Social Contract Theory</b>

What was the duration of the project and its supervision?	<b>12 months</b>
When was it first registered?	<b>January 2021</b>
When did the supervision begin?	<b>January 2021</b>
Was a schedule of work and consultations drawn up and adhered to?	<b>Yes</b>
How frequently, and for how long, did the student and you meet for supervisory sessions?	<b>Once every 3 months virtually, once every two weeks via email and otherwise as and when the student requested to meet virtually again due to COVID lock down restrictions.</b>
What guidance or assistance was given to the student in formulating the research topic, drawing up the research proposal, conducting the literature search, defining the theoretical basis for the study, devising a suitable research methodology, adopting appropriate referencing and bibliographic methods, designing questionnaires, conducting fieldwork research, and developing the argument?	<b>We discussed the conceptualization, research and structure of his dissertation in detail where after this was broken down in more detail via email exchanged drafts.</b>
Comment on the extent to which the collection of data, the solution of problems, deductions and critical discussion have resulted from the candidate's own efforts, or from discussion between the candidate and the supervisor, and how responsive the student has been to suggestions and recommendations	<b>The substantive research and content of the dissertation is entirely the work of the student.</b>
Were there resource constraints or opportunities, or equipment problems, which might have been that impacted on the research?	<b>This dissertation was researched and written during COVID-19 lock down restrictions which</b>

	<b>may have impacted on our ability to collaborate and to access certain academic resources.</b>
What assistance has been given to the student regarding matters of expression, style and general presentation?	<b>Every time the student submitted a written piece of work I have carefully reviewed it and provided him with written comments and recommendations.</b>
Is there any particular information that the examiners need to be aware of?	<b>No</b>
Have you seen and approved of the entire final draft of the dissertation?	<b>Yes</b>
Are you satisfied that, to the best of your knowledge, there is no plagiarism in the dissertation?	<b>Yes</b>



**SIGNATURE OF SUPERVISOR & CO-SUPERVISOR**

**11 December 2021**

**DATE:**

Miss Dhisha Narismulu (206518140)  
School Of Law  
Howard College

Dear Miss Dhisha Narismulu,

**Protocol reference number:** 00012852

**Project title:** A critical analysis of the South African governments management and response to Covid-19 in the context of its constitutional commitments to its citizens based on the Social Contract Theory.

## Exemption from Ethics Review

In response to your application received on 23 June 2021, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

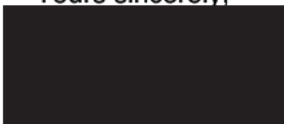
In case you have further queries, please quote the above reference number.

### PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,



Mr Simphiwe Peaceful Phungula  
obo Academic Leader Research  
School Of Law

UKZN Research Ethics Office  
Westville Campus, Govan Mbeki Building  
Postal Address: Private Bag X54001, Durban 4000  
Website: <http://research.ukzn.ac.za/Research-Ethics/>