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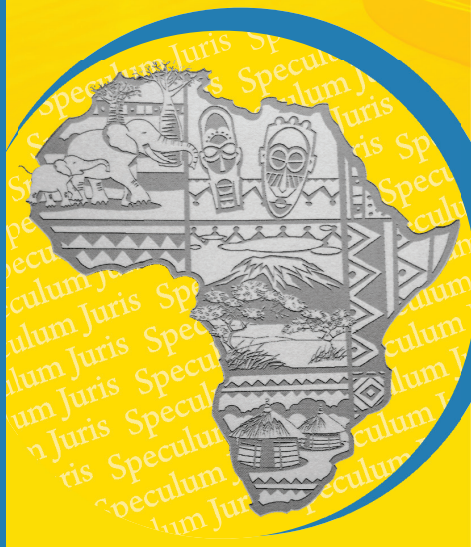

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Constitutionalising Socio-Economic Rights in SADC: An Impact Assessment on Judicial Enforcement in South Africa, Zimbabwe, Botswana, Lesotho and Zambia

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Abstract

This paper assesses the manner in which socio-economic rights have been incorporated into the constitutions of selected countries in the Southern African Development Community. This debate is particularly important because, in the last decade, there have been changes or attempted changes to constitutions in some member states of this sub-regional community. However, much of the comparative work on socio-economic rights in the region predates these changes and is therefore, largely, no longer relevant. Accordingly, the constitutions of South Africa, Zimbabwe, Zambia, Botswana and Lesotho are surveyed. It was found that the state of socio-economic rights in these countries could be divided into three categories: those that have constitutionalised socio-economic rights, those without socio-economic rights in their constitutions, and those that have socio-economic rights as directive principles of state policy. To understand the implications of these categories, an investigation was undertaken into whether a specific category undermines the enforcement, and subsequently, the realisation of these rights. The conclusion is that, if socio-economic rights are not entrenched constitutionally, it is difficult to realise these rights. While other options are available such as trying to realise socio-economic rights through the interdependence and indivisibility of human rights, the success of these approaches is very limited. Therefore, the exposition now, as it was then, is that states must take strides to protect these rights. This involves a concomitant responsibility to provide an enabling environment, free of limitations such as political interference and corruption, for the judicial enforcement of these rights. Zimbabwe is a clear example

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of how constitutional changes can facilitate an improved realisation of these rights. It is, however, also a cautionary tale, via the Mushoriwa case, of how judges in interpreting socio-economic rights should keep in mind the states' international, regional and sub-regional obligations in promoting and protecting these rights, to not reverse the gains of previous judgements.

Keywords: Socio-economic rights; Constitutionalisation; Regionalism; SADC; Justiciability; Enforcement; Realisation; Constitutional changes; Interdependence; Indivisibility.

1 INTRODUCTION

This paper explores the constitutionalisation of socio-economic rights (SERs) in selected Southern African Development Communities (SADC) like South Africa, Zimbabwe, Botswana, Lesotho and Zambia and how it has not aided or otherwise, the judicial enforcement of these rights. The different options, at a domestic level, for protecting SERs are discussed. These are: (1) justiciable SERs, (2) SERs as directive principles of state policy and (3) non-constitutionalisation of SERs. It is demonstrated that in South Africa and Zimbabwe where SERs have been constitutionalised, they are vigorously protected and judicially enforced. In Zambia and Botswana where SERs have not been constitutionalised, the enforcement of these rights by the courts is problematic. Where SERs are directive principles of state policy, as in Lesotho, no additional benefits in terms of judicial enforcement are discernible. This paper does not seek to interrogate all measures of legal protection at a domestic or regional level for protecting SERs[1] nor does it attempt to unpack international, regional and sub-regional human rights instruments in these jurisdictions. However, the discussion will take place against this background.

2 THE SOCIO-ECONOMIC RIGHTS DISCOURSE

Socio-economic rights are a series of rights imposing obligations on a state to deliver basic goods and services to citizens.[2] They represent a desired set of social outcomes[3] in which rights holders should not, at any time, lack access to a minimum standard of services such as education, housing, healthcare, and subsistence. Socio-economic rights are instrumental in ensuring that, via a new social order, a state is able to provide a quality life to all its citizens, while ensuring that everyone reaches their full potential.[4] Therefore, these rights are inextricably connected to political freedom, which is self-evident in most constitutions.[5]

In spite of the above, there have been lengthy debates around the purpose of constitutional SERs. Trilsch argues that the entrenchment of SERs in a constitution protects the rights of the marginalised and the socially outcast,[6] the driving force being the need to promote equality and free previously disadvantaged groups from hunger, poverty, landlessness and homelessness.[7] Liebenberg provides that SERs are part of an "enabling legal framework for redressing the injustices of the past and creating a transformed society".[8] Supporters of the constitutionalisation of SERs, argue that it would be illogical to educate people about their civil and political rights (CPR) whilst they are exposed to the elements and subjected to social exploitation.[9]

Others again, argue that SERs have no place within a constitution,[10] the main reason being that the constitutionalisation of SERs is not the central tenet of a successful political

1 For this analysis, see Moyo "Sub-regional and Constitutional Protection of Socio-economic Rights: SADC: Botswana, Lesotho, Malawi, Namibia and Zimbabwe" 2011 *MLJ* 75 90.
2 Davis "Socioeconomic Rights: Do they Deliver the Goods" (2008) 6 *International Journal of Constitutional Law* 687.
3 Michelman "Socioeconomic Rights in Constitutional Law: Explaining America Away" (2008) 6 *International Journal of Constitutional Law* 667.
4 Foundation for Human Rights *Socio-economic Rights: Progressive Realisation* (2016) 16.
5 International Institute for Democracy and Electoral Assistance *Social and Economic Rights* (2017) 4.
6 Trilsch "What's the Use of Socio-Economic Rights in a Constitution? Taking a Look at the South African Experience" 2009 *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 552.
7 Ibid.
8 Liebenberg *Socio-Economic Rights. Adjudication Under a Transformative Constitution* (2010) xxi.
9 Heyns & Brand "Introduction to Socio-economic Rights in the South African Constitution" (1998) *Law, Democracy and Development* 154.
10 Epstein "Drafting a Constitution: A Friendly Warning to South Africa" (1993) 8 *American University Journal of International Law and Policy* 567 577.

society.[11] They argue that from a risk management perspective, social protection should be the responsibility of the citizen.[12] The thinking in this regard is that citizens' social protection should be secured by their participation in the free market. Other arguments have also been raised. A good example is the polycentric argument stipulating that courts may not be suitably qualified to adjudicate on matters involving the allocation of resources.[13] Proponents of this argument claim that these are policy issues preserving the separation of power and do not concern the court. [14] This is however debatable and Liebenberg, for example, advances that SERs should be fully justiciable and that courts should not shy away from their role in interpreting the substance of rights.[15]

Those in support of this "non-inclusion" movement also suggest that the absence of SERs in a constitution does not necessarily alter the realisation of socio-economic demands. In this regard, the United States of America (USA) is often cited as a case in point. This is because, although SERs are deliberately excluded from the USA Constitution, these rights are still largely met by jurisprudence.[16] An informal second Bill of Rights (BORs) was adopted by former president, Franklin Delano Roosevelt.[17] Roosevelt proposed an "economic Declaration of Rights" to counter the poverty in the aftermath of the great depression and World War II. and. In his speech, he noted that:

> . . . We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all…. I ask the Congress to explore the means for implementing this economic bill of rights—for it is definitely the responsibility of the Congress to do so. . .[18]

In his speech he also stipulated the rights to: A job; adequate wages and decent living conditions; medical care; economic insurance during sickness, accident, old age or unemployment; and proper education. While these are often cited as the basis of SERs, the courts have however rejected them as binding.[19]

A middle-of-the-road position is taken by those who believe that SERs should be included in a constitution, but only in the capacity as directive principles of state policy.[20] A notable supporter of this movement is South African Judge Dennis Davis, who, in the South African context, argued that socio-economic demands should be included in a BORs only as directive principles of state policy.[21] His contention was that the inclusion of indeterminate rights in the constitution would place judges at the risk of falsely interpreting such rights in a manner not in keeping with a social democratic reading of the constitution.[22] Accordingly, a state has many options to choose from when deciding the nature of SERs within their constitution.

3 SOCIO-ECONOMIC RIGHTS AS JUSTICIABLE RIGHTS

A discussion on SERs in SADC would be incomplete without mentioning SERs in the Constitution of the Republic of South Africa Act 108 of 1996 (South African Constitution) because of the drastic shift in South African post-apartheid legislation. The South African Constitution contains justiciable SERs for all, which was unimaginable under an oppressive, undemocratic apartheid regime that sought to segregate and differentiate between white and non-white citizens.[23]

11 Barak-Erez & Gross *Exploring Social Rights: Between Theory and Practice* (2007) 22.
12 Barbosa-Fohrmann "Exploring Social Rights: Between Theory and Practice" 2008 *European Journal of International Law* 1111.
13 Barak-Erez & Gross 22.
14 Mhango "Between Separation of Powers and Justiciability: Rationalising the Constitutional Court's Judgement in the Gauteng E-tolling Litigation in South Africa" (2017) *Law, Democracy and Development* 2.
15 Liebenberg 33 – 34.
16 See Sunstein "Why Does the American Constitution Lack Social and Economic Guarantees?" (2005) *Syracuse Law Review* 1 26.
17 USHistory.org "The Economic Bill of Rights" https://www.ushistory.org/documents/economic_bill_of_rights.htm (accessed 02-11-2020).
18 Roosevelt "Message to Congress on the State of the Union" 11 January 1944.
19 See *De Shaney v Winnebago Cty Dept. of Social Services* 489 U.S. 189 (1989).
20 Liebenberg 13.
21 Davis "The Case Against the Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles" 1992 *South African Journal on Human Rights* 489.
22 Davis 489.
23 McLean *Constitutional Deference, Courts and Socio-economic Rights in South Africa* (2009) 7.

South Africa has become a role model for the enforcement of SERs over the last two decades.[24]

Chapter 2 of the South African Constitution contains SERs. While no distinction is made between civil and political rights (CPRs) and SERs within the BORs, SERs can be identified by their distinctive nature – social measures that require the allocation of resources.[25] This would mean the right to: A healthy environment;[26] access to adequate housing and protection against arbitrary evictions;[27] access to healthcare, food, water and social security;[28] basic nutrition; shelter; healthcare services and social services for every child;[29] education;[30] and detention that respects human dignity, including the provision at the state's expense; adequate housing; nutrition; reading material; and medical treatment.[31] The onus is placed on the state to realise these rights progressively.[32] In terms of s 36 of the South African Constitution however, these rights can be limited only in terms of the law of general application, to the extent of being justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors.[33]

South Africa has succeeded in entrenching SERs as justiciable rights to some degree. This is often viewed as an impossible task as it requires judges getting involved in the allocation of resources – a situation that imposes on the government's ability to manage public affairs.[34] Since 1997, in the case of *Soobramoney v Minister of Health*,[35] the courts have succeeded in developing jurisprudence that gained international interest.[36] The case dealt with the right to access to healthcare by Mr Soobramoney, who was unemployed and had chronic kidney failure. He sought admission to the renal unit of a provincial hospital to receive dialysis treatment. S 27(3) of the Constitution provides that no person may be denied emergency treatment. However, as Mr Soobramoney's case did not fall within this category,[37] the hospital could not be expected to offer medical assistance. In addition, noted correctly that the right to healthcare is limited by the availability of resources.

A second and often cited case is that of *Government of the Republic of South Africa v Grootboom*,[38] which dealt with two constitutional *provisos*, specifically, the right to access to adequate housing[39] and the right to shelter of children.[40] A group of 390 adults and 510 children had been living in an informal settlement, Wallacedene, in appalling circumstances.[41] To ease their plight, they invaded a nearby piece of land earmarked for low cost housing.[42] In response, they were evicted and their shacks destroyed, after which they were forced to settle in a sports field and community hall.[43] They then applied to the High Court seeking an order directing all three spheres of government to provide them with temporary shelter or housing that is more permanent.[44]

The Cape High Court found that although there was a violation of the right to shelter of the children under s 28(1)(c) of the Constitution, no such violation had taken place under the right to housing.[45] In order to enforce the right to shelter of the children, through their parents, the court ordered the national and provincial governments as well as the Cape Metropolitan Council and the Oostenberg Municipality, to provide them with tents, portable latrines and a

24 Trilsch 552.
25 See Palmer *Judicial Review, Socio-Economic Rights and the Human Rights Act* (2007) 1.
26 Section 24 of the Constitution of South Africa.
27 Section 26 of the Constitution of South Africa.
28 Section 27 of the Constitution of South Africa.
29 Section 28(1)(c) – (d) of the Constitution of South Africa.
30 Section 29 of the Constitution of South Africa.
31 Section 35(2)(e) of the Constitution of South Africa.
32 Section 26(2) of the Constitution of South Africa.
33 Section 36 of the Constitution of South Africa.
34 Goldstone "A South African Perspective on Social and Economic Rights" 2006 *Human Rights Brief* 1.
35 *Soobramoney v Minister of Health* (CCT32/97) [1997] ZACC 17.
36 Trilsch 557.
37 *Soobramoney v Minister of Health* 19.
38 *Government of the Republic of South Africa v Grootboom CCT 11/00 ZACC* 19.
39 Section 26 of the Constitution of South Africa.
40 Section 28(1)(c) of the Constitution of South Africa.
41 *Government of the Republic of South Africa v Grootboom* 4.
42 *Government of the Republic of South Africa v Grootboom* 4.
43 *Government of the Republic of South Africa v Grootboom* 10.
44 *Government of the Republic of South Africa v Grootboom* 4.
45 *Government of the Republic of South Africa v Grootboom* 14 – 16.

regular supply of water.

On appeal, the Constitutional Court (CC) found that s 26 of the Constitution compels the state to devise and implement a coherent, co-ordinated programme to meet housing needs.[46] Furthermore, the programme that had been implemented in the Cape Metro at the time of the application fell short of the obligations imposed upon the state by s 26(2) in that it failed to provide for any form of relief for those desperately in need of access to housing.[47] The state was ordered to comply with its s 26(2) obligations by devising, funding, implementing and supervising measures to those in desperate need of housing.[48] By so doing, the court removed any uncertainty with regard to the status of SERs in South Africa.[49] The court also demonstrated that it was also willing to find creative ways to enforce SERs guaranteed in the Constitution.[50]

While the cases discussed above are landmark decisions, there have been many others since then in which SERs have been confirmed and furthered. As such, SERs jurisprudence in South Africa is developing. One example is the case of *Fisher v Unlawful Occupiers*[51] in which the court had to deal with a land invasion where 60 000 individuals had established a settlement on three neighbouring farms.[52] This presented a substantial challenge, as neither the owner of the land nor the local council wished to house this community.[53] The court reasoned that the rationale for this decision was premised in a privileged mindset in which the elite fear that shacks housing the poor, will jeopardise an excellent future.[54] It would have been preferred to have the homes of the previously disadvantaged out of sight, and "erasing" their poverty, so to speak.[55] It was highlighted that this type of thinking was reflective of pre-democratic South Africa where a lack of access to land and a place to stay were instrumental in stripping individuals of their dignity.[56] This is reflected and was reinforced in legislation such as the Native Land Act[57] and the Native Development and Trust Land Act.[58] Herein, natives were essentially allocated eight percent of the land, and later thirteen percent. While these repressive and oppressive laws have since been abolished, their legacy lives on.

It is in this context that the court had to make a judgement regarding the rights of the applicants in terms of s 25 of the Constitution of South Africa (property clause) and those in s 26 of the Constitution (the right to access to adequate housing). These rights, in terms of s 38 of the Constitution are enforceable when any litigant is of the opinion that any right specified in the BORs has been violated. The court examined this alleged breach together with the relevant Housing Act.[59] Section 9(3) of the Act provides that a municipality, may by notice in the *Provincial Government Gazette*, expropriate any land required by it for the purpose of housing development, if reasonable terms for the purchase of the land had not been agreed upon with the owner. The caveat here is that permission has to be obtained from the relevant Member of the Executive Council (MEC) before the notice can be published and that such notice is published within six months after permission is granted by the MEC.[60]

Funding for such expropriation may be obtained from a number of sources. For instance, Chapter 13 of the National Housing Code provides that grants may be made to municipalities for upgrading entire communities. The same chapter also provides for Housing Assistance in Emergency Housing Situations. Paragraph 12.3.4.1 provides for grants to be made available to municipalities in emergencies. This must be undertaken by the relevant provincial government by means of a transfer payment. However, land for emergency situations must be identified

46 *Government of the Republic of South Africa v Grootboom* 95.
47 *Government of the Republic of South Africa v Grootboom* 95.
48 *Government of the Republic of South Africa v Grootboom* 96.
49 Pillay "Implementation of Grootbom: Implications for the Enforcement of Socio-economic Rights' 2002 *LDD* 256.
50 De Vos "Grootboom, The Right of Access to Housing and Substantive Equality as Contextual Fairness" 2001 *SAJHR* 259.
51 *Fisher v Unlawful Occupiers* (Erf 150, Philippi) (297/2014) [2014] ZAWCHC 32; 2014 (3) SA 291 (WCC).
52 *Fisher v Unlawful Occupiers* 1.
53 *Fisher v Unlawful Occupiers* 1.
54 *Fisher v Unlawful Occupiers* 1.
55 *Fisher v Unlawful Occupiers* 1.
56 *Fisher v Unlawful Occupiers* 2.
57 27 of 1913.
58 18 of 1936.
59 107 of 1997.
60 Section 9(3)(a) of the Housing Act.

through Spatial Development Frameworks that supplement Integrated Development Plans.[61] Such land must be suitable, and preference should be given to state-owned land, with privately owned land being acquired as a last resort. Where privately owned land is expropriated, market related compensation subject to independent valuations, is required, in terms of the provisions and procedures of the Expropriation Act.[62]

Having regard to the social and the legal context demonstrated above, the court concluded that the City had acted unreasonably and was in breach of its constitutional duty in terms of s 7(2) of the Constitution, as read with ss 25 and 26. Mrs Fischer's rights in terms of s 25 of the Constitution had been violated.[63] In order to give effect to this right, the court decided to fashion its own appropriate remedy for the breach. Quoting *Fose v Minister of Safety and Security*[64] and *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others*,[65] the court was of the view that an appropriate remedy to this breach would be that good faith negotiations should be entered into between the owners of the property and the City. This would give effect to the rights of the owners, as set out in s 25 of the Constitution and the rights of the occupiers of the land as expressed in s 26 of the Constitution.[66] The court displayed flexibility and ruled that the amount of compensation on the three properties could be varied and that the negotiations regarding the Fisher land had to be concluded within a month, while those of the other two properties within two months.

In Zimbabwe, SERs have been recently entrenched as justiciable rights.[67] The Constitution of Zimbabwe Amendment Act 20 of 2013 draws largely from the South African Constitution regarding SERs.[68] The mix of rights protected under this constitution include the right to: Education;[69] healthcare;[70] food and water;[71] labour rights;[72] and the freedom of profession, trade and occupation.[73] However, the question is whether these rights have been thus far adequately protected by the courts of law in Zimbabwe.

Perhaps the most widely cited and interesting case with regard to the enforcement of SERs in Zimbabwe is that of *Mushoriwa v City of Harare,*[74] concerning an alleged violation of the right to water in the City of Harare.[75] The claim was that the termination of the applicant's water supply on the basis of a disputed water bill and in the absence of a court order, amounted to unlawful self-help.[76] In the interim, the applicant sought for a provisional order instructing the City of Harare to restore water supply to his property.[77] The applicant also applied for an interdict prohibiting employees of the respondent from interfering or disrupting his water supply without a court order and that the respondents be responsible for the cost of the application, should they oppose it.[78]

The facts in this case were not contested.[79] There was a clear violation of the peaceful and undisturbed use of water by the applicant. The only matter to be determined was the lawfulness of such dispossession, the specific question being whether the respondent was entitled to cut off a citizen's water supply without recourse to the law?[80]

In response to this question, the respondent argued that its by-laws, and more specifically, S.I 164 of 1913 made provision for unfettered discretion to withdraw water supplies to a citizen

61 Paragraph 2.3.8 of the National Housing Programme.
62 63 of 1975.
63 *Fisher v Unlawful Occupiers.*
64 1997 (3) SA 786 (CC).
65 [2009] ZACC 33; 2010 (4) BCLR 312 (CC)
66 See Kondo "Judicial Overreach in Protecting the Right to Housing in South Africa? A Review of Fisher v Unlawful Occupiers, Erf 150, Philippi" (2018) 19 *ESR Review: Economic and Social Rights in South Africa* 17.
67 Chapter 4 of the Constitution of Zimbabwe.
68 Chivuru "Socio-economic Rights in Zimbabwe's New Constitution" 2014 *Strategic Review for Southern Africa* 114.
69 Section 75 of the Constitution of Zimbabwe.
70 Section 76 of the Constitution of Zimbabwe.
71 Section 77 of the Constitution of Zimbabwe.
72 Section 65 of the Constitution of Zimbabwe.
73 Section 64 of the Constitution of Zimbabwe.
74 *Mushoriwa v City of Harare* (HC 4266/13) (2014) ZWHHC 195.
75 *Mushoriwa v City of Harare* 1.
76 *Mushoriwa v City of Harare* 1.
77 *Mushoriwa v City of Harare* 1.
78 *Mushoriwa v City of Harare* 1.
79 *Mushoriwa v City of Harare* 1 – 2.
80 *Mushoriwa v City of Harare* 3.

at will without recourse to the courts of law.[81] Section 8 of the by-law reads as follows:

> The council may, by giving 24 hours' notice, in writing without paying compensation and without prejudicing its rights to obtain payment for water supply to the consumer, discontinue supplies to the consumer:
> (a) If he shall have failed to pay any sum which in the opinion of the Council is due under the conditions or the water by-law.

The applicant, on the other hand contended that s 8 of S.I 164 of 1913 was inconsistent with s 77 of the Constitution as well as s 198 as read with s 69(2)(e) of the third schedule to the Urban Councils Act [Chapter 29:15] (the parent Act).[82] Section 69(2)(e) was crafted to divest the respondent of the seeming unfettered permission in s 198 of the Urban Councils Act.[83] It grants the Council power to cut off supply to a citizen after twenty-four hours' notice upon furnishing proof of failure to pay. There is thus no blanket provision for to the City Council to disrupt water supply. Further to the above, in the new Constitution, the right to water is enshrined as a fundamental right. Section 77 provides that every person has the right to safe, clean and potable water.[84] The state must take reasonable legislative and other measures with the available resources, to achieve the realisation of this right.[85] As a public body, and more specifically, an institution of local government, the respondent could not therefore deny water to a citizen without just cause.[86]

The court noted that in any matter where an applicant complained that his rights had been violated, the courts were duty-bound to interpret and enforce the law.[87] This duty is set out in s 162 of the Constitution, which provides the court with judicial authority in protecting human rights and the rule of law.[88] In exercising its constitutional mandate, the court found that in many instances, s 8 of S.I 164 of 1913 was in conflict with both the Constitution and parent Act.

To begin with, the provision permitted the respondent to arbitrarily deprive citizens of their right to water without compensation, which is contrary to the Constitution.[89] Section 85 of the Constitution affords any aggrieved persons compensation in any instance where their fundamental rights have been violated. Furthermore, the provision allowed the City Council to be a law upon itself as it is granted sole jurisdiction over the dispute without granting citizens recourse to the law. This not only violated s 69 of the third schedule to the Act as read with s 165 (1) (c) of the Constitution, but contradicted the well-established common law principle that you cannot be a judge in your own case.[90]

In concluding the above analysis, the court ruled that the law should serve the interests of the public, and accordingly, every citizen's right to water ought to be observed[91] and failure to do so was not in the interest of the public.[92] While the City had a right to collect its debts, it could not realise this objective by using unlawful means[93] as no person or legal entity is above the law. It was emphasised that an abuse of power harms members of the community.[94] Consequently, the court allowed both the provisional order, pending a response on why the final order should not be granted.[95]

81 *Mushoriwa v City of Harare* 3.
82 *Mushoriwa v City of Harare* 4.
83 It provides that the Council shall have the power to perform any act which in the opinion of the Council is necessary for administering or giving effect to any of its by-laws.
84 Section 77 of the Constitution of Zimbabwe.
85 Section 77 of the Constitution of Zimbabwe.
86 *Mushoriwa v City of Harare* 5.
87 *Mushoriwa v City of Harare* 5.
88 It states that: "The role of the courts is paramount in safeguarding human rights and freedoms and the rule of law".
89 *Mushoriwa v City of Harare* 6.
90 *Mushoriwa v City of Harare* 6.
91 *Mushoriwa v City of Harare* 6.
92 *Mushoriwa v City of Harare* 6.
93 *Mushoriwa v City of Harare* 6.
94 *Mushoriwa v City of Harare* 7.
95 *Mushoriwa v City of Harare* 7.

This was a landmark judgment on the protection of SERs in Zimbabwe, where the High Court adjudicated in a matter where a potential violation of a fundamental right exists.[96] Moreover, the court took the position that it would not abdicate its constitutional mandate as a result of illegal provisions in legislation.[97] More importantly, the court protected the newly entrenched SERs in the Constitution.[98] The judgment will no doubt help to avert the catastrophe of being without water.[99] This interpretation, according to Hellum *et al*, is consistent with Zimbabwe's international obligation.[100] They contend, in a generous interpretation, that s 77 of the Constitution of Zimbabwe requires legal measures to be taken to ensure that those who cannot afford to pay must be given access to a minimum essential quantity of water.[101] The authors however, conceded that the dire economic situations in which municipalities find themselves make it difficult to comply with these obligations.[102] Moreover, where no clear policy at local level exists, there is no incentive for municipalities to comply with such obligations.[103]

It is not surprising that the City Council was aggrieved by the decision of the High Court and lodged an appeal with the Supreme Court in the case of *City of Harare v Farai Mushoriwa*.[104] Eight reasons for the appeal were raised that, in essence, relate to: (a) the relief granted by the court a quo; and (b) the general legality of the appellants' actions. With regard to the first, the City challenged the provisional order on the basis that the requirements for the spoliatory order and the interdictory relief were not met.[105] Furthermore, it was contended that the interim relief had the same effect as the final order. On the second, it was claimed that the City must be given the power to make rules to ensure its effective administration. Accordingly, the city acted lawfully and was not *ultra vires* of the enabling Act. As regards the constitutional challenge, it was proposed that the right to water is not an absolute right, but one, which could be limited, for amongst other reasons, regional and town planning.

With these issues in mind, the court considered the City's powers, derived from its by-law (S.I 164 of 1913) to disconnect water.[106] The court averred that the by-law was fair and that disconnection was a last resort after all other avenues had been exhausted.[107] Furthermore, there was enough leeway for consumers to exercise their rights if aggrieved. This was further entrenched by a dispute resolution procedure contained in the by-laws that mentions the possible penalty of disconnection.[108]

An important question is whether the by-laws are *ultra vires* the enabling act. Regarding this matter, the court found that *a quo* where the by-laws were *ultra vires* the enabling legislation was narrow and uni-linear – although not untenable.[109] The rationale behind this was that, from the perspective of the Supreme Court, the High court failed to account for numerous well-established canons of interpretation, which dictate that statutes should be interpreted as a whole as opposed to units.[110] This entails reading the statute in a purposive manner taking into account the objects of the statute.[111]

In accordance with such interpretation, the High Court was of the view that s 198(3) of the Act was broad enough to allow every urban council the power to take the necessary action to implement its by-laws.[112] The Third Schedule to the Act provides, *inter alia*, the measures a council may take with regard to its by-laws.[113] Specifically, paragraph 69 of the Schedule confers upon the council the power to make by-laws for the purpose of regulating and rationing the

96 See *Mavedzenge v Chairperson of the Zimbabwe Electoral Commission* HC 4014/14 7 – 8.
97 *Mavedzenge v Chairperson of the Zimbabwe Electoral Commission* 8.
98 Kondo "Socio-economic Rights in Zimbabwe: Trends and Emerging Jurisprudence" 2017 *AHRLJ* 31.
99 See Couzens "Avoiding Mazibuko: Water Security and Constitutional Rights in Southern African Case Law" 1180.
100 Hellum *et al* (eds) *Water is Life: Womens' Human Rights in National and Local Water Governance in Southern and Eastern Africa* (2012) 343.
101 Hellum *et al* 343.
102 Hellum *et al* 343.
103 Hellum *et al* 343.
104 *City of Harare v Farai Mushoriwa* SC 54/2018.
105 *City of Harare v Farai Mushoriwa* 5.
106 *City of Harare v Farai Mushoriwa* 3.
107 *City of Harare v Farai Mushoriwa* 21.
108 *City of Harare v Farai Mushoriwa* 21.
109 *City of Harare v Farai Mushoriwa* 17.
110 *City of Harare v Farai Mushoriwa* 17.
111 *City of Harare v Farai Mushoriwa* 17.
112 *City of Harare v Farai Mushoriwa* 18.
113 *City of Harare v Farai Mushoriwa* 18.

distribution and supply of water.[114] Therefore, a view was adopted that s 168(3) had to be read together with paragraph 69 in a manner that promotes the overall objectives of good governance and just administration.[115]

With regard to the possible infringement on the Constitution by the by-laws, the court held that there was no violation of s 77 of the Constitution, which provides for the right to water.[116] The court's reading of s 77 favoured an interpretation that s 77 is only violated when the state or a local authority fails to provide any water or an adequate supply.[117] Such breach may also arise where a water supply may be adequate but not potable.[118] Accordingly, the court could not comprehend how a consumer with full access to an adequate supply of water could allege a violation of this right where they failed to pay for water consumed after receiving due notice to settle the account.[119]

It was further proposed that, even if s 77 of the Constitution was flawed, a thorough scrutiny of the by-laws would reveal an evaluation consistent with s 77.[120] In the view of the court, City Council's power to disconnect water was a reasonable power and did not in any way contradict s 77[121] and was justified by the fact that the provision of safe and clean water requires significant budgets that could only be achieved if citizens pay for their water.[122] It could therefore not be argued that the disconnection of water because of non-payment constituted a violation of the right to water[123] – in fact, it constituted a necessary safeguard for the rights of other consumers.[124] This view was consistent with s 86(1) of the Constitution which dictates that fundamental rights and freedoms must be be exercised reasonably and with due regard for the rights and freedoms of others.[125] On this basis, the application of the 1913 by-laws could not be found to impede the progressive realisation of the right to water.[126] The court thus ordered the appeal to be partially allowed.[127] The provisional order of the court *a quo* was set aside with each party responsible for its own costs.

The Supreme Court of Appeal's judgment is polarising because, although rational, there are reasons why it could be regarded as problematic. A major concern is that of the interpretations afforded by the courts. To begin with, the interpretation that the water by-laws are consistent with s 77 of the Constitution and do not impede the progressive realisation of the right to water is without merit. Section 44 of the Zimbabwean Constitution stipulates that the state has an obligation to respect, protect, promote and fulfil the fundamental rights as set out in the Declaration of Rights.[128] While these rights are subject to limitations as proposed in s 86 of the Zimbabwean Constitution, such limitation has to be reasonable, fair, necessary and justifiable. As conceded by the Community Water Alliance, such limitation is not justifiable, as other less restrictive means could have been implemented.[129] The organisation noted that the issuing of summons would be a more palatable measure that could still ensure revenue collection.

Moreover, this judgment is not consistent with the state's obligation to provide the minimum amount of water in terms of the African Charter on Human and Peoples' Rights (ACHPR).[130] The Draft Guidelines on the Right to Water in Africa, prepared by the African Commission on Human and Peoples' Rights, provide that water disconnections are only permissible for

114 *City of Harare v Farai Mushoriwa* 18.
115 *City of Harare v Farai Mushoriwa* 18.
116 *City of Harare v Farai Mushoriwa* 28.
117 *City of Harare v Farai Mushoriwa* 28.
118 *City of Harare v Farai Mushoriwa* 28.
119 *City of Harare v Farai Mushoriwa* 28.
120 *City of Harare v Farai Mushoriwa* 28.
121 *City of Harare v Farai Mushoriwa* 28.
122 *City of Harare v Farai Mushoriwa* 29.
123 *City of Harare v Farai Mushoriwa* 29.
124 *City of Harare v Farai Mushoriwa* 29.
125 *City of Harare v Farai Mushoriwa* 29.
126 *City of Harare v Farai Mushoriwa* 29.
127 *City of Harare v Farai Mushoriwa* 31.
128 Section 44 of the Constitution of Zimbabwe.
129 Community Water Alliance "Supreme Court Ruling on Arbitrary Water Disconnections: Implications on Human Right to Water in Zimbabwe" http://kubatana.net/2018/10/03/supreme-court-ruling-arbitrary-water-disconnections-implications-human-right-water-zimbabwe/ (accessed 6-03- 2019).
130 See African Commission on Human and Peoples' Rights "Guidelines on the Right to Water in Africa' Draft for Comment" http://www.achpr.org/files/news/2018/06/d339/achpr_draft_guidelines_on_the_right_to_water_in_africa_eng.pdf (accessed 3-04-2019).

non-payment if a user has access to an alternative source – thus ensuring the right to water.[131] Given Zimbabwe's economic situation and its history of water-borne diseases, it is mischievous of the court to make a finding to the effect that water disconnection without an alternative supply is constitutional.

Apart from this judgement, I have discussed other cases where SERs in Zimbabwe have been enforced.[132] [133] However, it is important to note that a number of areas for the improvement and enforceability of these rights exists. Ndhlovu, for example, provides that "there are conceptual and practical challenges that arise in the enforcement of these rights, such as institutional competency of the courts, constructing appropriate judicial remedies for the violations of socio-economic rights, among others".[134] He further argues that, for the successful implementation of these rights, the courts must avoid a rigid interpretation. They should rather adopt a purposive approach that reflect the founding values of the Constitution of Zimbabwe, foreign law, as well as norms in international human rights law.

4 NON-CONSTITUTIONALISATION OF SOCIO-ECONOMIC RIGHTS

While countries like Zimbabwe and South Africa have chosen to entrench SERs as justiciable rights, Zambia chose not to, which is strange, given its numerous phases of constitutional development.[135] Perhaps the most interesting one was the 2016 Constitutional referendum.[136] The distinguishing feature of this process was that it sought to enhance the Zambian BORs and to determine how future amendments should be made.[137] The proposed amendment, Constitution Amendment Bill 37 of 2016, sought to include SERs as justiciable rights. These were captured under the banner Economic, Social and Cultural Rights[138] and they include the right to: Healthcare services; decent housing; food of acceptable standard; clean and safe water; decent sanitation; social protection; education; occupation; employment and fair labour practices; and safe, clean and healthy environment.[139] These rights, as with most constitutional SERs, would be subject to progressive realisation.[140] Surprisingly, the referendum result on these propositions was non-agreement of such amendments.[141] This was ascribed to a lack of bi-partisan support for the referendum and inadequate voter education.[142] Herein, the government failed to explain to the general public the reasons and implications of a referendum.

Lumina, for example, believes that the referendum was meant to fail from the onset because, in terms of the Referendum Act,[143] at least fifty percent of entitled voters had to be registered for the referendum to be valid.[144] This number of "eligible voters" was impossible to establish, given the fact that the previous census had taken place in 2010, six years before

131 See African Commission on Human and Peoples' Rights 'Guidelines on the Right to Water in Africa' Draft for Comment" http://www.achpr.org/files/news/2018/06/d339/achpr_draft_guidelines_on_the_right_to_water_in_africa_eng.pdf (accessed 3-04-2019).

132 See Kondo "Socio-economic Rights in Zimbabwe: Trends and Emerging Jurisprudence" 2017 AHRLJ 163 – 193.

133 See also The Labour and Economic Development Research Institute of Zimbabwe *A Compendium on Socio-Economic Rights in Zimbabwe* (2017).

134 Ndhlovu "The Role of the Courts in the Enforcement of Socio-economic Rights Under the 2013 Constitution of Zimbabwe" 2015 *Africa's Public Service Delivery & Performance Review* 52.

135 See Constitutionnet "Constitutional history of Zambia" http://constitutionnet.org/country/constitutional-history-zambia (accessed 10-03-2019).

136 See Constitutionnet "Zambia's Constitutional Referendum: More Rights, Questionable Legitimacy?' *http://constitutionnet.org/news/zambias-constitutional-referendum-more-rights-questionable-legitimacy* (accessed 10-03-2019).

137 See Constitutionnet "Zambia's Constitutional Referendum: More Rights, Questionable Legitimacy?" *http://constitutionnet.org/news/zambias-constitutional-referendum-more-rights-questionable-legitimacy* (accessed 10-03-2019).

138 See Constitution Amendment Bill 37 of 2016 11.

139 See Constitution Amendment Bill 37 of 2016 39 – 45.

140 Constitution Amendment Bill 11 – 12.

141 Constitutionnet "Zambia's Failed Constitutional Referendum: What Next?" http://constitutionnet.org/news/zambias-failed-constitutional-referendum-what-next (accessed 10-03-2019).

142 See Constitutionnet "Zambia's Failed Constitutional Referendum: What Next?" http://constitutionnet.org/news/zambias-failed-constitutional-referendum-what-next (accessed 10-03-2019).

143 Chapter 14 of the Laws of Zambia.

144 Article 79 (3) of the Zambian Constitution requires that any amendments to Part III of the Constitution, or to Article 79 itself, must have the endorsement of 50% of registered voters.

the referendum.[145] This is especially in light of the fact that out of 3 345 471 ballots, 1 853 559 were "yes" votes while 753 549 were "no", testifying to the fact that of those who voted, a greater number were in favour of the referendum, had it not been for participation threshold technicalities.[146]

Lumina, further argues that there was a politicisation of the referendum[147] by calling it alongside general elections, thereby overshadowing it by party politics. However, this is not unusual as referendums can be held as either part of a general election or as a stand-alone poll but the cost of last-mentioned is prohibitive in Africa.[148] It is thus more probable that a referendum will be held alongside a general election. Even in more developed countries, this is still a preferred option as was illustrated by New Zealand in 2020 when a general election and two referendums on the legalisation of the recreational use of cannabis and the End of Life Choice Act 2019 took place. Specific evidence of politicisation of an election must be provided before such allegations can be made. Evidence from the African Union and European Union electoral observers shows that the referendum was negatively affected by boisterous individual personalities, rather than policies and manifestos.[149] Accordingly, it was recommended that future referendums should be separated from political events like national elections.[150]

A key problem that Masterson identified was that the referendum had not been properly structured[151] in that it conflated two distinct issues into one. As such, voters had to decide on whether to introduce new BORs to the Zambian Constitution as amended in 2016, and whether or not to repeal and replace Article 79 of the Zambian Constitution. The danger of such an approach is the assumption that a lay person would understand the implications of such a conflation. The problem could have been solved by calling two separate referendums together with the general election, as was the case in New Zealand.

The amendment to Zambia's Constitution in 2016 repealed Part IV of the Constitution that contained SERs as directive principles of state policy.[152] However, the consequences of the failure of the afore-said referendum[153] is that it is inconsistent with Zambia's regional and international human rights obligations. As a member of the United Nations (UN) and the African Union (AU) Zambia has subsequently ratified or acceded to instruments protecting SERs.[154] These include, amongst others, the International Covenant on Economic Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples' Rights (ACHPR).[155]

It could, however, be argued that Zambia does not make provision for self-executing treaties under its domestic law. The implication of this is that the Zambian Constitution does not require the inclusion of international law in interpreting the Bill of Rights or any other statute.[156] Rather, any international treaty requires domestic legislation to be enforceable.[157] In *Attorney General v Clarke*,[158] it was held that:

> [I]n applying and construing our statutes, we can take into account international instruments to which Zambia is a signatory. However, these international instruments are only of persuasive

145 Mangaila "Zambia: Bill of Rights Referendum Unsuccessfull" https://www.aa.com.tr/en/africa/zambia-bill-of-rights-referendum-unsuccessful/631627 (accessed 23-11-2020).

146 The number of registered voters was 7,528,091 this meant that 3,764,046 voters had to vote "yes" for the amendment to be passed.

147 Constitutionnet "Zambia's Failed Constitutional Referendum: What Next?" *http://constitutionnet.org/news/zambias-failed-constitutional-referendum-what-next* (accessed 23-11-2020).

148 Kersting "Direct Democracy in Southern and East Africa" 2009 *Journal of African Elections* 4.

149 Masterson "Constitutional Groundhog Day: Why National Debate about Constitutional Reform is not Going away Any Time Soon" 2017 *South African Institute of International Affairs* 3 – 4.

150 Masterson 2017 *SAIA* 4.

151 *Ibid.*

152 See Constitution of Zambia (Amendment) 2 of 2016. Article 112 of the Constitution of Zambia as amended by Act 18 of 1996 contained directive principles of state policy.

153 Constitution of Zambia (Amendment) 2 of 2016 contains no reference to SERs.

154 Zambia has ratified the African Charter and its supplement instrument – the Maputo Protocol. It also joined the UN on 1 December 1964.

155 See United Nations Human Rights Office of the High Commissioner "Status of Ratification Interactive Dashboard" http://indicators.ohchr.org/ (accessed 27-03-2019).

156 Banda & Kalaluka "Towards an Effective Litigation Strategy of Disability Rights: The Zambia Experience" 2014 *African Disability Yearbook* 270.

157 See Committee on the Elimination of Discrimination against Women Twenty-seventh session 3-21 June 2002 Excerpted from: Supplement No. 38 (A/57/38) 1.

158 *Attorney General v Clarke* (2008) AHRLR 259 (ZaSC 2008).

value unless they are domesticated in the laws.[159]

This judgment illustrates that international instruments that are not domesticated have no binding effect on the Zambian courts. However, in the case of *Legal Resource Foundation v Zambia*,[160] heard by the African Commission on Human and Peoples' Rights, it was decided that international treaties that do not form part of domestic law and which may not be directly enforced in the local courts, may nonetheless impose obligations on a state party.[161] Thus even if international instruments are not domesticated, they are still part of the international legal framework that ought to influence SER litigation.[162] This notwithstanding, the enforcement of such extra-territorial decisions remains problematic, accordingly, it is imperative that Zambia include SERs within its Constitution. Without this legal protection, the courts in Zambia will continue to be unable to enforce SERs and the lacunae in SERs jurisprudence will be perpetuated.

Like Zambia, the Constitution of Botswana, 1996 does not refer to SERs. Further to this, Botswana has not signed or ratified the ICESCR and its Optional Protocol. To date, the only key instrument on SERs signed by Botswana is a party to the ACHPR, which guarantees SERs. This instrument has yet to be ratified and incorporated into domestic law via an Act of Parliament. This means that the contents of the ACHPR cannot be enforced as Botswana is a dualist state and requires treaties to be domesticated before they are fully enforceable.[163] A review of the jurisprudence in Botswana reveals that the courts have been unwilling to enforce SERs. A case in point is that of *Sesana v The Attorney General*.[164] This case concerns the Central Kgalagadi Game Reserve (CKGR), an area of 52 000 square kilometres. The reserve was created to enable the indigenous peoples of the Basarwa and the Bakgalagadi to maintain their culture and way of living, which was hunting and gathering with additional governmental support services such as weekly water deliveries, access to healthcare and the provision of rations to destitute people and orphans.[165] At a later stage, the government began to encourage the inhabitants to relocate to other reserves, and subsequently terminated services to the area over a time-span of six months.

The CKGR then filed an application to have the termination of services ruled unlawful and unconstitutional on the basis that the applicants had, according to the National Parks and Game Reserve Regulations 2000, sought for the services to be reinstated. The court held that the applicants had a right to occupy CKGR, but the government had no obligation to reinstate services. Accordingly, its actions were neither unlawful nor unconstitutional. The rationale for this was found in administrative, rather than in constitutional law. This judgment signalled that SERs litigation cannot be based on non-justiciable SERs.

5 SOCIO-ECONOMIC RIGHTS AS DIRECTIVE PRINCIPLES OF STATE POLICY

Many countries continue to choose SERs to be directive principles of state policy within their constitutions. One such example is Lesotho. Chapter III of the Constitution of Lesotho 16 of 1993 contains the principles of state policy. While the principles do not expressly refer to rights, provision is made for SERs such as health,[166] education,[167] opportunity to work,[168] the environment,[169] economic opportunities[170] and cultural activities.[171] These provisions are not as forceful as the traditional grouping of rights protected under other constitutions or human rights instruments. For instance, provision is not made for water or social security. They are crafted to form part of a policy that serves as a guide for public authorities in carrying out their

159 *Attorney General v Clarke* 26.
160 *Legal Resource Foundation v Zambia* No. 211/98 (2001).
161 *Legal Resource Foundation v Zambia* 60.
162 Banda & Kalaluka 175.
163 Dinokopila "The Judicial Enforcement of Socio-economic Rights in Botswana and the Case of Basarwa in the Central Kalahari Game Reserve" 2011 *ANCL-RADC Annual Conference Working Paper* 10.
164 *Sesana v The Attorney General* [2006] 2 BLR 633.
165 *Sesana v The Attorney General* 34.
166 Section 27 of the Constitution of Lesotho.
167 Section 28 of the Constitution of Lesotho.
168 Section 29 of the Constitution of Lesotho.
169 Section 36 of the Constitution of Lesotho.
170 Section 34 of the Constitution of Lesotho.
171 Section 39 of the Constitution of Lesotho.

functions.[172] Thus they cannot be enforced in any court of law and remain subject to the limits of economic development and capacity.[173] This notwithstanding, public authorities need to work towards the full realisation of these rights through legislation or otherwise.[174]

Because of the nature of SERs in the Lesotho Constitution, judicial enforcement of these rights has been challenging. In the case of *Baitsokoli v Maseru City Council*,[175] the High Court had to rule on the issue of the "right to life" and the "right to livelihood". It was contested whether the right to life in s 5 of the Constitution of Lesotho includes the right to livelihood.[176] The specifics of the matter related to the eviction of the applicants from the Makhetheng area and other areas along Kingsway Street in Maseru where they plied their trade as street vendors.[177] They claimed that their removal violated s 5 of the Constitution of Lesotho. In addition, it was contended that the removal was *ultra vires* the first respondent's powers under s 9 of the schedule I to Urban Government Act 1983. In the court *a quo*, it was held that the right to life, however expansively and purposively interpreted, could not be construed to include the right to livelihood.[178] The court found that s 5 of the Constitution of Lesotho does not embrace a right to livelihood,[179] the rationale being that the right to livelihood proved to be a directive principle of state policy in terms of the Constitution while the right to life was a justiciable right in the same document.[180] The court refused to rely on the Indian case of *Tellis v Bombay Municipal Corporation*[181] where the court held in passing that the right to life "includes the right to livelihood".[182] It reasoned that the facts were hardly comparable and that the constitutions differed materially.[183] It also noted that it was not convinced with the approach adopted by the Indian court in reaching its conclusion.[184] In *Motbobi v Director of Prisons*,[185] the court found positive obligations relating to CPRs, in a case involving the living conditions of prisoners. The court held that conditions within prison cells were unpalatable, ordering the provision of water toilets within ninety days. From these cases, it is obvious that where there are compelling interests, the courts in Lesotho may attempt to enforce SERs via CPRs, while remaining within the bounds of reason.

6 CONCLUSION

The protection and promotion of SERs remain key issues and challenges for Africa and Southern Africa. Of the countries studied above, Zambia and Botswana were found to have no reference of SERs in their current constitutions. While Zambia has signed more international human rights instruments on SERs, the domestic enforcement of these treaties was low in both jurisdictions. As a result, courts in both these countries have been unable to enforce human rights. In Lesotho where SERs are provided as directive principles of state policy within the Constitution, the courts have been unable to directly rely on these SERs. However, in some cases, where it was appropriate to do so, the court indirectly protected SERs through CPRs – given that they are interdependent and indivisible.

The strongest protection of SERs of the surveyed countries is found in South Africa and Zimbabwe where SERs are constitutionally protected. Constitutionalising SERs is vital and enables a clear and distinct framework in which these rights should operate. It crystallises the aspirations of the people while simultaneously placing an obligation on the state to respect and promote these rights. The courts are thus motivated to enforce these rights because a fundamental legal base exists. The courts of both countries proved to be committed to the enforcement of SERs.

Although Zimbabwean courts demonstrated less resolve in later judgements, the position

172 Section 25 of the Constitution of Lesotho.
173 Section 25 of the Constitution of Lesotho.
174 Section 25 of the Constitution of Lesotho.
175 *Baitsokoli v Maseru City Council* (4/05,CONST/C/1/2004) [2005] LSCA 13 (20 April 2005).
176 *Baitsokoli v Maseru City Council* 4.
177 *Baitsokoli v Maseru City Council* 4.
178 *Baitsokoli v Maseru City Council* 5.
179 *Baitsokoli v Maseru City Council* 28.
180 *Baitsokoli v Maseru City Council* 28.
181 *Tellis v Bombay Municipal Corporation* 1985 SCC (3) 545.
182 *Tellis v Bombay Municipal Corporation* 488F.
183 *Baitsokoli v Maseru City Council* 27.
184 *Baitsokoli v Maseru City Council* 27.
185 *Motbobi v Director of Prisons* A0770020 (CIV/APN/252/96) [1996] LSCA 92 (16 September 1996).

is still better than that in countries where no constitutional protection exists or where SERs are directive principles of state policy. SERs are directive principles of state policy. This paper recommends that other SADC countries that are yet to constitutionalise SERs do so in the near future as this would assist greatly in the protection of SERs. This would also be in alignment with international commitments under various human rights instruments that state parties have signed.