

Corporate Social Responsibility and the State's obligation to protect socio-economic rights in South Africa

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ABSTRACT

This article argues that contrary to what is required by states' obligation to protect human rights, existing regulatory framework in South Africa does not mandate Corporate Social Responsibility (CSR) to contribute to the progressive realization of socio-economic rights, in particular, the right to an environment that is not harmful to human wellbeing, the right to have access to adequate housing, right to health care, water and social security, and the right to education. This legislative gap is a disincentive for courts to engage CSR with the view of fulfilling the same end. On the way forward, the article recommends the need for the incorporation of an amendment or interpretation of the existing legislation on CSR to ensure its contribution to the realization of socio-economic rights in South Africa.

Key words: Corporate social responsibility, Obligation to protect, Socio-Economic Rights, South Africa

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Družbena odgovornost gospodarskih družb in državna obveznost varovati socialne in ekonomske pravice v Južni Afriki

POVZETEK

Pravni red Južne Afrike ne vzpostavlja družbene odgovornosti gospodarskih družb, da bi lahko prispevale k postopnemu uresničevanju socialnih in ekonomskih pravic, zlasti pravice do zdravega življenjskega okolja, pravice do ustreznega bivališča, pravice do zdravstvenega varstva, vode in socialne varnosti ter pravice do izobraževanja. Ta pravna praznina zato odvrča tudi sodišča, da bi vzpostavila obvezujoče obveznosti gospodarskih družb do socialnih in ekonomskih pravic. Članek zato zagovarja reformo obstoječe zakonske ureditve o družbeni odgovornosti gospodarskih družb, da bi lahko bolje prispevala k uresničevanju socialno in ekonomskih pravic v Južni Afriki.

Ključne besede: družbena odgovornost podjetij, obveznost varovanja, socialne in ekonomske pravice, Južna Afrika

1. Introduction

The contribution that corporate social responsibility (CSR,¹ can make to the realization of human rights is debated. The argument that it has a significant role to play forms the core aspect of robust scholarship dealing with businesses and human rights.² In particular, it is evident in the 2011 UN Guiding Principles on

¹ There is no universally accepted definition of Corporate social responsibility, but it has been referred to as a corporation's responsibility and relationship with its internal stakeholders, with the state both locally and nationally and finally with its host community where they operate, see Asad Ghalib and Patricia Agupusi, 'How Socially Responsible are Multinational Corporations? Perspectives from the Developing World' (2011) 32 (5) *Development Working Paper Series*; Archie Carrol, 'The Pyramid of CSR: Toward the Moral Management of Organisational Stakeholders' (1991) *Business Horizons* 42.

² Margaret Ryznar and Karen Woody, 'A Framework on Mandating Versus Incentivizing Corporate Social Responsibility' (2015) 98(4) *Marquette Law Review* 1667; William Bradford, 'Beyond Good and Evil: Toward a Solution of the Conflict between Corporate Profits and Human Rights' (2012) 26(1) *Notre Dame Journal of Law, Ethics & Public Policy* 141; Scott Jerbi, 'Business and Human Rights at the UN: What Might Happen Next?' (2009) 31 *Human Rights Quarterly* 299; Patricia Feeney, 'Business and Human Rights: The Struggle for Accountability in the UN and the Future Direction of the Advocacy Agenda' (2009) 6(11) *SUR- International Journal on Human Rights* 161.

Business and Human Rights (Guiding Principles) which emanated from the work of the United Nations Special Representative of the Secretary-General on Business and Human Rights.³ Although criticized as being too ambitious,⁴ the instrument constitutes the first global standard for preventing and addressing the risk of adverse human rights impact linked to business activities,⁵ and is adjudged as the current position of international law in relation to the interface of business with human rights.⁶ This viewpoint itself is grounded in the analysis of provisions of a number of international instruments, such as the Universal Declaration of Human Rights,⁷ the International Covenant on Economic and Social Cultural Rights (ICESCR),⁸ regional instruments such as the African Charter on Human and Peoples' Rights (African Charter)⁹ and soft instruments such as United Nations Global Compact (UNGC),¹⁰ the Organisation for Economic Co-operation and Development (OECD) principles¹¹ and the Draft Norm on the Responsibilities of Transnational Corporations and Other Business Enterprises (Draft norm).¹² However, there are writings that contend the link

³ Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. A/HRC/17/31. (Mar. 21, 2011); Guiding Principles on Business and Human Rights: Implementing the United Nations; on an elaborate discussion of this principles, see Florian Wettstein, 'Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment' (2015) 14 (2) *Journal of Human Rights* 162; Jernej Cernic, 'United Nations and Corporate Responsibility for Human Rights' (2011) 1 *Miskolc Journal of International Law* 23.

⁴ David Bilchitz, 'A Chasm Between 'Is' and 'Ought'? A Critique of the Normative Foundations of the SRSG's Framework and Guiding Principles', in Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 103.

⁵ Carlos Lopez, 'The 'Ruggie Process': From Legal Obligations to Corporate Social Responsibility', in Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 70-71; Jernej Letnar Čerňič and Tara Van Ho, 'Introduction' in Jernej Letnar Čerňič and Tara Van Ho (eds.) *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Wolf Legal Publishers, WLP, 2015) .

⁶ John Ruggie, Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization, in César Rodríguez-Garavito (ed.), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press, 2017) 46.

⁷ Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly in Paris on 10 December 1948, General Assembly resolution 217 A (III) .

⁸ International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 3 January 1976.

⁹ African Charter on Human and Peoples Right Adopted in Nairobi June 27, 1981 entered into Force October 21, 1986.

¹⁰ The Global Compact of the United Nations, is an initiative launched in 2000 by Secretary General Kofi Annan, is based on nine major principles encompassing human rights, labour standards and environmental sustainability, integrating as well the ILO's Declaration on fundamental principles and rights which is qualified this way as universal social standard.

¹¹ OECD-guidelines for multinational enterprises, drafted in 1976 and revised in June 2000.

¹² Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12 (2003).

of CSR to human rights due to the voluntariness of the former as compared to the concrete nature of obligations of the latter.¹³ Notwithstanding the debate, the hope that CSR is a valuable means of achieving rights has also been contextualized in the discussions on states' obligations to respect, protect and fulfill human rights, a tripartite level of obligation that has for long gained international acceptance,¹⁴ among scholars working in the broader area of economic, social and cultural rights.¹⁵ In particular, the obligation to protect human rights suggests a positive responsibility required of the state to put in place appropriate legislation on CSR to encourage realization of rights.

South Africa ratified the ICESCR on 12 April 2015,¹⁶ the African Charter in 1996¹⁷ and adopted other instruments at the UN level such as United Nations Global Compact (UNGC).¹⁸ In addition to the copious evidence of the application of international law by its judiciary,¹⁹ arguably, the domestic legislative and institutional environment of bearing with the CSR and social economic rights include the 1996 Constitution,²⁰ which guarantees the rights to an environment that is not harmful to human wellbeing,²¹ the right to have access to adequate housing,²² right to health care, water and

¹³ Claret Vargas, 'A Treaty on Business and Human Rights? A Recurring Debate in a New Governance Landscape' in César Rodríguez-Garavito (ed.), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press, 2017) 113.

¹⁴ Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton University Press, 1980) 52; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 2d ed (N. P. Engel, 2005) 37 – 41; International Covenant on Civil and Political Rights General Comment 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' CCPR/C/21/Rev.1/Add. 1326 May 2004 (ICCPR General Comment 31).

¹⁵ Oliver De Schutter, 'Economic, Social and Cultural Rights as Human Rights: An Introduction' CRIDHO Working Paper 2013/2 6 <<http://cridho.uclouvain.be/documents/Working.Papers/CRIDHO-WP2013-2-ODESchutterESCRights.pdf>> 30 January 2018; Asbjorn Eide, 'Realisation of Social and Economic Rights and the Minimum Threshold Approach' (1989) 10 *Human Rights Law Journal* 35, 37.

¹⁶ ESCR-Net International Network for Economic, Social & Cultural Rights, 'The Government of South Africa ratifies the ICESCR', <<https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr>> accessed 2 February 2018.

¹⁷ ACHPR, 'Ratification Table: African Charter on Human and Peoples' Rights', <<http://www.achpr.org/instruments/achpr/ratification/>> accessed 2 February 2018.

¹⁸ The Global Compact of the United Nations is an initiative launched in 2000 by Secretary General Kofi Annan. It is based on nine major principles encompassing human rights, labour standards and environmental sustainability, integrating as well the ILO's Declaration on fundamental principles and rights which is qualified this way as universal social standard.

¹⁹ For examples, see *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC); *S v Makwanyane* 1995 6 BCLR 665 (CC); *Harksen v President of the Republic of South Africa and Others* 2000 1 SA 1185 (CPD).

²⁰ Constitution of the Republic of South Africa, 1996 (1996 Constitution).

²¹ *Ibid*, section 24.

²² *Ibid*, section 26.

social security,²³ and the right to education.²⁴ There are other key legislation such as the Companies Act,²⁵ Companies Regulations, 2011,²⁶ the Employment Equity Act (EE Act),²⁷ Broad-Based Black Economic Empowerment Act (BEE Act),²⁸ Mineral and Petroleum Resources Development Act,²⁹ Mine Health and Safety Act,³⁰ Skills Development Act³¹ and the National Environmental Management Act.³² However, whether the foregoing offers an adequate framework for the application of CSR of businesses in a manner that can facilitate the realization of socio-economic rights by the State is the focus of investigation in this paper.

Against the backdrop of the obligation of state to protect social economic human rights and its relevance to CSR, this paper demonstrates that existing regulatory framework in South Africa is weak in that it does not offer an adequate legal basis for harnessing CSR as a tool for enhancing the realization of socio-economic rights. It then points out the implication of this gap for courts and the way forward in South Africa.

2. States' Obligation to Protect Socio-Economic Rights: CSR in context

States are the duty bearers of human rights and are generally obliged to respect, protect, promote and fulfil the observance of human rights within their respective jurisdictions.³³ According to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, the obligation to protect includes:

The State's responsibility to ensure that private entities or individuals, including transnational corporations over which the exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result

²³ Ibid, section 27.

²⁴ Ibid, section 29

²⁵ Companies Act 71 of 2008.

²⁶ Companies Act Regulations 2011.

²⁷ Employment Equity Act 55 of 1998.

²⁸ Broad-Based Black Economic Empowerment Act 53 of 2003.

²⁹ Mineral and Petroleum Resources Development Act 28 of 2002.

³⁰ Mine Health and Safety Act 29 of 1996.

³¹ Skills Development Act 97 of 1998.

³² National Environmental Management Act 107 of 1998.

³³ ICCPR General Comment 31 (n 14) .

from their failure to exercise due diligence in controlling the behaviour of such non-state actors.³⁴

Arguably, the above connotes that there is a positive obligation on the part of the State to control corporate entities in a manner that can aid the realization and not negation of human rights inclusive of socio-economic rights. It further means that the extent to which the CSR of businesses support socio-economic rights should matter to the state. The basis for this reasoning lies in the fact that socio-economic rights are only to be progressively realized, a fact which itself reflects that the role of corporations is necessary in achieving the purpose. However, this is contested in the sense that owing to its nature of voluntariness, a stream of literature indicate that to link CSR to human rights at all is difficult as it contrasts with the nature of human rights obligations which are legally ascertainable. For instance, ascertaining the voluntariness of CSR as a reason for exclusion from drawing such a linkage, Nwete submits that corporations may declare their responsiveness to community's socio-economic needs but no law should compel or regulate them so to act.³⁵ Linking CSR to human rights is problematic as Chandler argues, it moves attention away from legal regulation and accountability.³⁶ Along similar lines, Andrew and Scott suggest that even if corporations take upon themselves concrete human rights obligations, they do not have the same legal duties considering that non-state actors under international law cannot be expected to substitute for the role of states to deliver human rights mandates.³⁷ Gatto submits that human rights obligation is traditionally made for States to respect, promote and fulfil human rights.³⁸ Based on this worldview, corporations may not be bothered with human

³⁴ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997; also see Oliver De Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1084, 1096.

³⁵ Bede Nwete, 'Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets: Is Soft Law the Answer?' (2007) 8 *German Law Journal* 317.

³⁶ Geoffrey Chandler, 'The Curse of Corporate Social Responsibility' (2003) 2 (1) *New Academy Review* 31.

³⁷ Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' Based on a Background Paper for the Global Compact dialogue on the Role of the Private Sector in Zones of Conflict (2001) 339. <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Clapham-Jerbi-paper.htm>

³⁸ Alexandra Gatto, 'The European Union and Corporate Social Responsibility: Can the EU Contribute to the Accountability of Multinational Enterprises for Human Rights?' Institute for International Law Working Paper No 32, September 2002.

rights, hence, it is not compulsory for them to formulate a CSR that aids socio-economic rights.

However, there are writings indicating the position that formulation or application of law for a CSR that is pro-socio economic rights is feasible.³⁹ According to Ruggie, for instance, appropriate regulation of CSR can aid compliance and contribute to the realization of rights.⁴⁰ Jägers also argues that international human rights law places obligations on corporations.⁴¹ Vasquez demonstrates that corporations have direct and indirect obligations for human rights,⁴² while Greathead explains the importance of human rights compliance for businesses, making the 'business case' for abiding by human rights.⁴³ In particular, as Finney argues, this is inevitable owing to the rising cognizance of the budding human rights responsibilities of private entities and the growing acknowledgement of socio-economic rights. Robinson views that the call for businesses to be involved in human rights merely demands that corporations should advance human rights in their areas of influence, and do not mean that they should usurp the function of the state.⁴⁴ That the CSR of corporations can be engaged in such a positive manner is also clear from commentaries. For instance, Kofi Annan, the former UN Secretary General, once opined that 'it is utopian to assume that poverty can be overcome without the active participation of corporate institutions'.⁴⁵ Authors including

³⁹ Jernej Čerňič, *Human Rights Law and Business* (Europa Law Publishing, 2010); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 266-270; David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44(4) *Virginia Journal of International Law* 931; Nicola Jägers, *Corporate Human Rights Obligation: in Search of Accountability* (Intersentia, 2002) 75-95; for a contrary view, see José Alvarez, 'Are Corporations «Subjects» of International Law?' (2011) 9 (1) *Santa Clara Journal of International Law* 1.

⁴⁰ John Ruggie, 'Remarks Delivered at a Forum on Corporate Social Responsibility' Co-Sponsored by the Fair Labor Association and the German Network of Business Ethics Bamberg, Germany June 14, 2006 <<https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-remarks-to-Fair-Labor-Association-and-German-Network-of-Business-Ethics-14-June-2006.pdf>> accessed 11 February 2018

⁴¹ Jägers (n 40) 75.

⁴² Carlos Vasquez, 'Direct vs. Indirect Obligations of Corporations under International Law' (2005) 43 *Columbia Journal of Transnational Law* 927.

⁴³ Scott Greathead, 'The Multinational and the New Stakeholder: Examining the Business Case for Human Rights' (2002) 35 *Vanderbilt Journal of Transnational Law* 719.

⁴⁴ Mary Robinson, 'Human Rights are good for Business' <<https://knowledge.insead.edu/ethics/mary-robinson-human-rights-are-good-for-business-2093>> accessed 9 February 2018.

⁴⁵ Quoted in Temitope Obisanya, 'Philanthropic Corporate Social Responsibility as a Tool for Achieving Socio-economic Rights in South Africa' A Dissertation submitted in fulfilment of the requirements of the LL.M Degree, University of Venda (2017) 1 <<http://univendspace.univen.ac.za/bitstream/handle/11602/711/Dissertation-Obisanya%20c%20t.%20a%20c-.pdf?sequence=1&isAllowed=y>> accessed 13 February 2018.

Visser,⁴⁶ Ihugba,⁴⁷ and Flores-Araoz⁴⁸ reinforce the position that through CSR, corporations remain best placed to make positive contribution towards the realization of socio economic rights.

The above is not difficult to imagine. A number of hard and soft international instruments dealing with business and human rights support the proposition that through the delivery of its obligation to protect, there is a positive obligation on the part of the State to require through the agency of law the application of CSR to enhance the realization of socio-economic rights. For instance, there is no direct provision dealing with CSR, but, in interpreting article 11 of the ICESCR on the right to food, the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No.12 indicates that the obligation to protect requires states to take measures to ensure that corporate institutions or individuals do not deprive individuals of their access to adequate food.⁴⁹ Arguably, such measures may also include a legislation mandating corporations to ensure that CSR is felt in the sphere of socio-economic rights

In relation to states' obligation to protect its citizens from forced evictions, the CESCR on the right to adequate housing in General Comment No. 7, urges states to ensure that it enacts laws and take alternative strategies sufficient to avert and, if fitting, penalise involuntary evictions done short of correct precautions, by non-state entities.⁵⁰ The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which the exercise jurisdiction, aid and not negate individuals' economic, social and cultural rights. Similarly, although the African Charter does not have an express provision which directly regulates CSR, it has been argued that non-state actors have legal duties which they are required to fulfil. Article 28 of the Charter prescribes that '(e)very individual shall have the duty to

⁴⁶ Wayne Visser, 'The Age of Responsibility: CSR2.0 and the New DNA of Business' (2010) 5(3) *Journal of Business Systems, Governance and Ethics* 7.

⁴⁷ Bethel Ihugba, 'Compulsory Regulation of CSR: A Case Study of Nigeria' (2012) 5(2) *Journal of Politics and Law* 61.

⁴⁸ Micaela Flores-Araoz, 'Corporate Social Responsibility in South Africa: More than a nice intention' <http://www.polity.org.za/article/corporate-social-responsibility-in-south-africa-more-than-a-nice-intention-2011-09-12> accessed 9 February 2018.

⁴⁹ UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 12: The Right to Adequate Food (Art. 11) Adopted at the Twentieth Session of the Committee on Economic, Social and Cultural Rights, on 12 May 1999 (Contained in Document E/C.12/1999/5).

⁵⁰ UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22.

respect and consider his fellow beings without discrimination and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance'. The South African Institute for Advance Constitutional Public, Human Rights and International Law (SAIFAC) have argued that the Charter's express inclusion of the duties of individuals in regard to the realisation of human and people's rights also extends to corporate entities.⁵¹

In relation to soft law dealing with CSR in the context of human rights and business, Guiding Principle 25 urges states to guarantee, via judicial, administrative, parliamentary or alternative ways that corporations do not violate rights. Similarly, the Draft Norm recognises that the primary responsibility to respect human rights is incumbent on states but that corporations and other business enterprises as well bear this duty 'within their respective spheres of activity and influence'.⁵² Guiding principle 7 prescribes that states should ensure that corporations are not involved in human right abuses especially in conflict affected areas, a development which agrees with the OECD guideline introduced in 2011.⁵³ Although the phrasing of these principles is negative in terms of obligation, the regulation of CSR by states arguably constitutes an alternative measure to ensure that corporations enhance the realization of economic and social cultural rights in their spheres of activity and influence.

In all, at the very least, the foregoing discussion connotes that, in accordance with their obligation to protect, states have the role to put in place an appropriate regulatory framework which requires corporations to focus their CSR on the enhancement of the realization of socio-economic rights. While examining the existing legislative framework in South Africa, the next section argues that its potential to require a positive obligation from corporations by ensuring that CSR enhances the realization of socio-economic rights is limited.

⁵¹ South African Institute for Advance Constitutional Public, Human Rights and International Law, Human Rights and International Law, 'The State Duty to Protect, Corporate Obligations and Extra-territorial Application in the African Regional Human Rights System', 2010, <<https://business-humanrights.org/sites/default/files/reports-and-materials/SAIFAC-paper-re-business-human-rights-in-African-regional-system-17-Feb-2010.pdf>> 31-32.

⁵² UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)', Adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, on 13 December 1991 (Contained in Document E/1992/23).

⁵³ Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises*, 27 June 2000.

3. Limited Regulatory Framework on CSR for Enhancing Social Economic Rights

Although South Africa is committed to international instruments which suggest that the obligation to protect can be used in regulating CSR to achieve socio-economic rights end, an analysis of key domestic legislation pertinent to business and human rights in South Africa, namely, the 1996 South African Constitution,⁵⁴ the Companies Act,⁵⁵ the Employment Equity Act (EE Act),⁵⁶ National Black Economic Empowerment Act (BEE Act),⁵⁷ Mineral and Petroleum Resources Development Act,⁵⁸ and the National Environmental Management Act,⁵⁹ reveals that this is not yet the case.

3.1 The 1996 South African Constitution

No doubt, the advent of the Constitution brought in a transformation of governance that demands for the application of the Bill of rights to all laws and all institutions either private or public. In particular, section 8(2) of the Constitution provides that ‘the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’. The significance of this provision is that both natural and juristic persons have rights but may have a varying duty under the Constitution. This provision can be both useful and counterproductive for CSR and realization of socio-economic rights in South Africa. For instance, based on this reasoning, it can be argued that in so far as the Constitution recognises the application of international law in terms of its section 39 (1)(b), then CSR of corporations can contribute to socio-economic rights as envisaged under international human rights law in South Africa. On the other hand, the argument can also be made that there is no specific provision in the Constitution that requires the realization or the contribution to the realisation of socio-economic rights from corporations. Hence, at best what is clearly ascertainable from the bill of rights section of the Constitution is merely a form of negative duty on the part of corporations

⁵⁴ n 20.

⁵⁵ n 25.

⁵⁶ n 27.

⁵⁷ n 28.

⁵⁸ n 29.

⁵⁹ n 32.

not to negate human rights in terms of section 8(2) of the Constitution. As shall be made manifest later, this is often the case as discernible from the decisions of court dealing with the realization of social economic rights in South Africa which hardly interpret the Constitution to support corporations CSR contribution to the realization of socio economic rights.

3.2 Employment Equity Act (EE Act)

Binding only on businesses that engage above 50 employees or companies within the Agricultural industry with yearly revenue greater than R2 million,⁶⁰ the EE Act is targeted at upholding rational and uniform action towards every individual. The statute stipulates that businesses formulate a work-place equity policy mapping the corporations' strategy to ensure occupational parity and render a year on year account of its developments in this respect.⁶¹ Its section 24(1) gives a directive to businesses to designate one or more high-ranking administrators to assume the function of effecting and supervising the equity strategy. Arguably, this law should be helpful in securing parity of rights of workers in different settings and ensuring that rights of workers to work are not undermined by businesses. In line with the Constitution, it seeks to ensure that employers protect the rights to dignity and self-actualization of their employees as part of their social responsibility. Nevertheless, the main downside of this instrument lies in its lack of provision for a committee which can monitor and report issues relating to employment equity as it affects businesses and socio-economic rights. Such a committee, arguably, can ensure that responsibilities required of businesses under the EE Act is implemented. The consequence of this gap is that the responsibilities required of businesses under the Act are at best voluntary.

3.3 National Black Economic Empowerment Act

The National Black Economic Empowerment establishes a national framework for the promotion of Black Economic Empowerment (BEE) and the Black Economic Empowerment Advisory Council.⁶² Additionally, it authorizes the Minister to provide codes

⁶⁰ n 27.

⁶¹ Employment Equity Act section 20(2)(f).

⁶² Black Economic Empowerment Act section 4.

of good practice on BEE, as well as a scorecard to measure accomplishments, and encourage sector-specific BEE agreements that are considered to be in conformity with the aims of the Act.⁶³ If corporations take this seriously, the Act can ensure the empowerment of populations which were disadvantaged by apartheid and indeed help facilitate the realisation of socio-economic rights, as work is central to the realisation of other rights. However, there is lack of focus in the Act on the CSR of businesses, let alone its relevance in guiding businesses to contribute more directly to the realization of socio-economic rights.

3.4 Mineral and Petroleum Resources Development Act

The Mineral and Petroleum Resources Development Act accords all mining rights to the State and requires mining corporations to exhibit due diligence in social and environmental issues, and that directors may be held accountable for environmental destruction.⁶⁴ This is useful for the realization of the right to a healthy environment guaranteed by section 24 of the Constitution. Within the context of CSR, the most vital objective of the Act is section 2(i) which obliges mining companies to fund the socio-economic advancement of the areas in which they carry out their business activities. However, the point to which businesses opt to conform to these statutory provisions is voluntary. Also the Act does not create a roadmap on CSR towards the achievement of socio-economic ideals. Arguably, being a sector specific instrument, one would expect such an instrument to make it an imperative for companies to advance CSR activities in the broader context of socio-economic development of the State, but this is not considered by the Act.

3.5 National Environmental Management Act

The preamble of National Environmental Management Act (NEMA) sets down basic tenets that place an obligation on the State to respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities. In an effort to achieve this aim, section 28(1) amongst others prescribes that:

⁶³ Black Economic Empowerment Act sections 10 and 11.

⁶⁴ Mineral and Petroleum Resources Development Act, section 3.

Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring,

While the word 'every person' arguably refers to natural and juristic person in terms of section 8(2) of the Constitution, the above provision merely connotes a negative not a positive obligation on the part of 'every person', be they natural or juristic. It does not impose any duty on corporations, for instance, to deploy part of their profits for ensuring realization of socioeconomic rights but merely urge them to 'prevent' environmental degradation. No doubt, there is a sense of positivity in prevention of environmental degradation in that financial commitment of corporations may be necessary. However, this remains limited as it does not extend to other sphere of socio-economic rights outside the scope of environmental protection.

3.6 The Companies Act

The Companies Act has interesting provisions on CSR, but, generally does not make CSR mandatory or situate it within the broader obligations of state to progressively realize socio-economic rights. Read together, sections 66(1) and 76 of the Act imply that businesses are solely under the discretion of the company's board of directors and exist mainly to maximise wealth on behalf of the shareholders. The above provisions are fraught with problems in that they place no responsibility on corporate directors to contribute to the realization of socio-economic rights.

In an attempt to regulate CSR, section 72 of the Act authorizes the Minister of Trade and Industry through the use of regulatory mechanisms to mandate corporations to establish Social and Ethics Committee (SEC), which would monitor corporate governance and implementation of CSR projects. By virtue of that Regulations 2011 made pursuant to the Act, SEC is required to monitor corporate contribution towards community development and to record all forms of corporate philanthropy such as sponsorship, donations and charitable giving.⁶⁵

In spite of the above, SEC as an institution is hardly constitut-

⁶⁵ Companies Regulations 2011 (n 26) Regulation (43)(5)(ii)(bb).

ed in such a manner that encourages directors to commit to CSR let alone harness it for socio-economic rights purpose. Regulation 43(4) provides that SEC must constitute at least three directors or prescribed officers of the company and other committee members. It is unclear from the wording of the regulation whether other members of the committee are required from the same company having different portfolios or other stakeholders (the community, state agencies, NGOs and so on). As it stands, what is clear is that the SEC is composed of company directors and/or employees. Thus, if section 76(2) of the Companies Act binds company directors to the best interest of the company, it would be a daunting task for SEC directors/committee members to direct CSR of corporations to suit socio-economic rights obligations.

The second problem of SEC relates to accountability deficiency. Regulations 2011 requires SEC to monitor the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice, namely:

(aa) the 10 principles set out in the United Nations Global Compact Principles; and (bb) the OECD recommendations regarding corruption; (cc) the Employment Equity Act; and (dd) the Broad-Based Black Economic Empowerment Act; (ii) good corporate citizenship, including the company's--(aa) promotion of equality, prevention of unfair discrimination, and reduction of corruption;(bb) contribution to development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and (cc) record of sponsorship, donations and charitable giving.⁶⁶

The reference to OECD, Global compact principles, employment equity, good corporate citizenship which have provisions of bearing on human rights suggests that if properly oriented, both international and national standards exist that empowers SEC to make meaningful impact in enforcing CSR of businesses to safeguard social economic rights. However, the legal direction is not clear where corporate institutions fail to fulfill their mandate of being socially responsible through their SEC. It is uncertain whether they can be sued and on what legal grounds.

⁶⁶ Companies Regulations 2011 (n 26) Regulation 43(5).

There are even more specific concerns in relation to Regulation 43(5) (bb) and (cc) of Regulations 2011 which requires SEC to monitor and report company's activities such as corporate sponsorships, donations and charitable or philanthropic gestures in communities where they operate. Logically, company shareholders are profit oriented and their primary goal is to maximise profit returns for their investments. Hence, reporting by SEC, excepting a clear provision making it compulsory cannot yield a fruitful result as it merely reduces CSR to a voluntary gesture. This undermines the expectation that businesses can contribute meaningfully into the realisation of socio-economic rights. In all, existing legislation does not mandate CSR as an approach of corporations to contribute to the realization of rights. The next section discusses the implication of the inadequate legislative environment on CSR for socio-economic rights in South Africa.

4. The Implication of Legislative Gap on CSR for Socio-Economic Rights

The limited potential in the existing legislation on positive obligation of corporations to engage their CSR for socioeconomic rights benefits is not without an implication for the progressive realization of socio-economic rights in South Africa. Arguably, it operates as a disincentive for the interpretive role of courts in the sense that it reduces the options of courts to engage with the role of CSR in disputes relating to socio-economic rights. This is better demonstrated by reference to the disposition of courts in matters affecting socio-economic rights, in particular, the right to an environment that is not harmful to their wellbeing, the right to have access to adequate housing, right to education, right to health care, water and social security all guaranteed under the South African Constitution.

4.1 The Right to Healthy Environment

In terms of section 24 of the 1996 Constitution, every individual has the right to an environment that is not detrimental to their health or well-being.⁶⁷ The section further provides that everyone has a right to have the environment secured, for the

⁶⁷ 1996 Constitution (n 20) section 24(a).

benefit of current and coming generations, by way of reasonable statutory and other mechanisms designed to: avoid pollution and environmental dilapidation; encourage environmental preservation; and protect environmentally viable growth and utilisation of raw materials that encourages acceptable socio-economic advancement.⁶⁸ In so providing, the Constitution makes sustainable development an imperative. Environmental challenges that have been experienced by South African include: extreme climate change due to high carbon emission; poor access to water and sanitation; increase in solid waste due to poor waste-disposal capacity, soil degradation which is resulting in lower agricultural yields, destructive intrusion of biodiversity, decline in air quality; and depletion of coastal and marine resources.⁶⁹ These problems continue to exist despite the existence of environmental protection laws such as the National Environmental Management Act and the Mineral and Petroleum Resources Development Act. Most of the activities underlying these challenges are attributable to corporations involved in the exploration of environmental and mineral resources. Yet, while the involvement of corporations in dealing with these challenges should have been quite appropriate, it remains lacking. This development has implication on the analysis and consideration of courts while dealing with disputes pertaining to the protection of the environment. For instance, although the South African courts have engaged issues on the environment, they have not considered in their judgements how corporations can contribute to the realization of socio-economic rights through CSR. In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company*,⁷⁰ the Court ruled that the respondent acted irresponsibly because they failed to take cognizance of the impact of water pollution in the community. In arriving at that decision, the Court reinstated the need for corporations to act more responsibly and went further to assert that exercising strong business administration is vital to the health of a business and the advancement of the Country's economy.⁷¹

⁶⁸ Ibid.

⁶⁹ National Planning Commission *National Development Plan 2030 Our Future-make it work; the Presidency Republic of South Africa* (2012) 47.

⁷⁰ *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company* [2006] ZAGPHC 47 at para 16.7-16.9).

⁷¹ Ibid.

The Court, however, fell short of discussing extensively the CSR of the corporation in relation to the realization of the right to healthy environment and the difference that it would have made to the image of the company and realization of broader social economic rights. The approach of the Court is itself not surprising in the face of the lack of a clear provision of law on CSR. The presence of such provision would have enriched the decision of the Court as it would have had the opportunity to pronounce on the CSR as it relates to the mining corporations and their obligations to ensure that the right of the affected communities to healthy environment is not undermined.

4.2 Right to Housing

Section 26 of the 1996 Constitution guarantees every individual's right to have access to adequate housing.⁷² The duty to deliver sufficient housing may affect the state as well as other private entities in society. This means that the state as the law-making authority can use legal means that enable private actors to contribute to the actualisation of rights of other private entities. The availability of such law will give the leeway for application of CSR towards the realisation of the right by courts. In the absence of such a clear provision, evidence exists to show that courts hardly examine the importance role of CSR in matters relating to the right to housing. In *Government of the Republic of South Africa and Others v Grootboom and Others*,⁷³ for instance, Mrs Irene Grootboom and fellow respondents were at the start of the cold, windy and rainy Cape winter, involuntarily ejected from their unsanctioned accommodation located on personal property reserved for official low-cost accommodation municipally funded. In arriving at a decision of a violation of the right to housing, the Court affirmed that section 26 of the Constitution imposes a clear obligation on the government to adopt 'reasonable legislative and other measures' in order to actualise the right to have access to sufficient housing.⁷⁴ However, the Court did not interpret or consider the provision to mean that regulating the CSR can help address the challenge of the right to housing in South Africa. Arguably, it could have been

⁷² 1996 Constitution (n 20) section 24.

⁷³ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46; 2000 (11) BCLR 1169 (*Grootboom* case).

⁷⁴ *Grootboom* case (n 73) para 587.

more enriching if the CSR role of corporations in achieving the right to housing is reflected in its analysis.

4.3 Right to Education

Section 29 of the 1996 Constitution provisions on the right to education may be classified as a ‘hybrid’ form of right due to its dynamic nature.⁷⁵ Section 29(1) subsists as a socio-economic right and prescribes that “everyone has the right (a) to a basic education, including adult basic education”. Section 29 (2) provides for the right to decide on the language of teaching in state schools while section 29(3) gives the right to choose in relation to private and public education through acknowledging the freedom to set up and manage autonomous educational bodies. The same clause places the State under an obligation to take rational steps in order to ensure gradual availability and accessibility.⁷⁶

South Africa has a significantly dispersed rural population for which it is difficult to provide satisfactory education services.⁷⁷ There is poor infrastructure in many rural areas, where schools still operate in unsatisfactory buildings with poor facilities.⁷⁸ Yet, the government has not fully subsidized education, even when students qualified for fee exemptions. In addition, parents who were poor had difficulty paying for the university fees, accommodation, feeding and other necessary supplies.⁷⁹ While there have been some recent improvements in governments policy innovations towards funding or supporting higher education level, the picture that emerges time and again is that the government is not doing enough to actualise the realisation of free quality education it promised years ago. These developments are a pointer to the necessity to involve corporations in funding the educational sector through their CSR.

While the government has called upon institutions to voluntarily channel their CSR efforts towards educational development, the nature of CSR and or the beneficiary of the CSR initiative is unclear. The ambiguity underlying the call is because of the general perception of CSR as a voluntary choice for corporations. This in

⁷⁵ Fons Coomans and Faranaaz Veriava, ‘The Right to Education’ in Danie Brand & Christof Heyns (eds.), *Socio-Economic Rights in South Africa* (Pretoria University Law Press, Pretoria) 60.

⁷⁶ 1996 Constitution (n 20) section 29 (1).

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

effect can explain the lack of attention in the Court analysis and decisions on the role of CSR in achieving, in particular the right to basic education. For instance, in the *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*,⁸⁰ the Court noted that it is paramount to have an understanding of the nature of the right to “a basic education” as enshrined in section 29(1)(a) of the South African Constitution. In contrast to certain socio-economic rights, it is instantly attainable. There is hardly any inherent restraint stipulating that the right be “progressively realised” within “available resources” subject to “reasonable legislative measures”.¹²⁵

Although not so clarified by the Court, the decision is a pointer to the fact that the government is yet to fully harness the potential in CSR for the purposes of enhancing the right to education. No doubt, a rational alternative is arguably within the exercise of the state's obligation to protect the right to education, by mandating through the law the need for corporations to channel their CSR initiative towards the realization of the right.

4.4 The Right to Health Care, Food, Water and Social Security

Section 27 of the Constitution guarantees every person the right to have access to health care services, reproductive health care; sufficient food and water; and social security.⁸¹ In keeping with these values, the government is under an obligation to take rational statutory and additional means, within its existing resources, in order to actualise all the rights pertinent to the above section.⁸² In *Soobramoney v Minister of Health, KwaZulu-Natal*, the actualisation of the right to health was denied on the basis the Court could not interfere with the *bona fide* resolutions of state entities and health officials apropos the distribution of public funds. The applicant, Soobramoney a 41 year old unemployed man was terminally ill, suffering from ischaemic heart disease and cerebro-vascular disease. His kidneys had failed in 1996 and required renal dialysis for survival. After depleting his resources on private health care, he sought for free dialysis treatment in a state-

⁸⁰ *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 7 BCLR 651 (CC).

⁸¹ 1996 Constitution (n 20) section 27 (1) (a), (b) & (c).

⁸² 1996 Constitution (n 20) section 27 (2).

funded institution in Durban. He was however rejected due to the provision of dialysis treatment to a limited number of patients and budget of the hospital. Soobramoney applied unsuccessfully to the Durban High Court for an order to enable him access treatment based on section 27(3) of the 1996 Constitution. His appeal to the Constitutional Court was dismissed for want of merit on the point that his non-treatment did not amount to an infringement of his freedoms. While the Court confirmed the state's constitutional duty to provide care, it found that, were Soobramoney to be given the full benefit of this, according to the Court, everyone else in his position would have to benefit as well and that the state's limited resources could not accommodate such a burden. Basically the case portrays how limited resources can contribute to the denial of access to healthcare, a reality that underscores the need for the involvement of corporations in the delivery of health services. This possibility was, however, not up for consideration by the Court.

The realization of the right to food under section 27(1)(b) of the Constitution is just as challenging. The right of everyone to have access to food is guaranteed along with prisoners and detainees right to food under section 35(2)(e) of the Constitution and the right of every child to basic nutrition guaranteed under section 28(1)(c). Despite these provisions, South Africa is regarded as having one of the highest rates of poverty and inequality in the world with about 11 million people without an idea on where or how they will get their next meal.⁸³ With regard to the right to potable water, it was reported that South Africa is the 30th driest country in the world; it is expected to experience further drying trends, and an increase in extreme weather events, including cycles of extreme drought and sudden excessive rains.⁸⁴ The South African Constitution and National Water Act⁸⁵ explicitly declare water as a human right. The government has even established a benchmark guaranteeing a minimum allocation of 6000 litres of free, clean water a month for every South African. However, given all the competing priorities seeking the government's attention and limited financial resource, invest-

⁸³ South Africa Human Rights Commission, 'Right to Food Fact Sheet'. <https://www.sahrc.org.za/home/21/files/brochure_A3_English.pdf> accessed 8 Feb 2018

⁸⁴ Cameron Harrington, 'Water Security in South Africa: The Need to Build Social and Ecological Resilience' 2014 <https://sustainablesecurity.org/2014/05/02/water-security-in-south-africa/>.

⁸⁵ 1996 Constitution (n 20)

ment in the necessary resources to create, maintain and upgrade water infrastructure and conservation is weak. In *Lindiwe Mazibuko and Others v City of Johannesburg and Others*⁸⁶ (Mazibuko case), Mrs Mazibuko and four other residents of Phiri, Soweto challenged the City of Johannesburg's Free Basic Water policy in terms of which 6 kilolitres of water are provided monthly for free to all households in Johannesburg and, secondly, the lawfulness of the installation of pre paid water meters in Phiri. The Court ruled that the installation of pre-paid water meters in Phiri was unlawful and unfair and that the City's Free Basic Water policy was unreasonable and unlawful. It further directed the City to provide 50 litres of free basic water daily to the applicants, but, the order of 50 litres of free basic water daily was varied to 42 litres of water per day by the Supreme Court of Appeal which also directed the City to reformulate its policy and bye laws. However, in what seems a reversal of the decisions of the lower courts, the Constitutional Court held that it is not appropriate for a court to give a quantified content to what constitutes 'sufficient water' because this is a matter best addressed in the first place by the government.⁸⁷ The decision of the Constitutional Court in Mazibuko is premised on the conventional understanding of the State as the duty bearer of rights. It is not consistent with the idea that corporations may have importance role to support the effort of government in the delivery of water services. It reinforces privatization of water for profit purposes. Yet, in line with the development in international law on business and human rights, the Constitutional Court could have considered corporations as critical partners in the delivery of adequate water services or recommended to the government to explore the public private partnership for that purpose.

Regarding the right to social security, section 27(2) of the Constitution enjoins the state to take reasonable legislative and other measures within its available resources to achieve the progressive realization of the right to social security. In this regard, the government promulgated the Social Assistance Act.⁸⁸ The aims of the Act are to provide the administration of social as-

⁸⁶ *Lindiwe Mazibuko and Others v City of Johannesburg and Others* (2009) 8 BCLR 791 (SCA) (*Mazibuko* case)

⁸⁷ *Mazibuko* case (n 86) para 61.

⁸⁸ Social Assistance Act No.13 of 2004.

sistance and payment of social grants; make provision for social assistance; determine the qualification requirement thereof and to ensure that minimum norms and standards are prescribed for the delivery of Social Assistance. Realizing these aims can, however, only be achieved if they are well matched with funds. This is not always the case as discernible in the case of *Ngalo v South African Social Security Agency* (SASSA),⁸⁹ In that case, the applicant sought to vindicate her constitutional right of access to social security which is guaranteed by section 27(1) (c) of the Constitution. She was an unemployed and semi-illiterate mother of a disabled minor child. The child, Inathi was suffering from septic arthritis and hip deformity which resulted in her leg being shorter than the other. Upon medical examination, because of her anticipated long term deformity, a doctor qualified her for a care dependency grant. This is based on the provision of section 7 of the Act which stipulates that a person is eligible for a care dependency grant if he or she is a parent, primary care giver or foster parent of a child who requires and receives permanent care or support services due to his or her physical or mental disability. Section 6(1) of the regulations made pursuant to the Act provides that “a parent, primary care giver, or foster parent is eligible for a care dependency grant in respect of a care dependent child if a medical officer certifies the child as a care dependent child as defined in the Act”.

Despite series of applicant's application on behalf of the child for a care dependency grant to the South African Security Agency, there was no response. Hence, the applicant approached the Court for a mandamus directing the respondent to consider and decide the application for a care dependency grant and that having so decided, to inform the Applicant's Attorneys of the outcome thereof within 15 days from the date of the decision but also to furnish reasons for refusing the grant in the event of such a refusal. The Court held that the respondent was obliged to notify the Applicant of the outcome of her application for care dependency grant within a reasonable time from the date of its approval and that failure to do so constitutes an infringement of the applicant's constitutional right. The case illustrates that assistance from the state or its agency in relation to social grants is not always as-

⁸⁹ *Ngalo v South African Social Security Agency* (SASSA) 2013 2 All SA 347 (ECM).

sured and therefore underscores the need for the involvement of corporations, a point that is missing in the analysis of the Court in the matter,

The above discussion indicates that due to legislative disconnect on the interface of CSR with human rights, in matters of socio-economic rights brought for their decision, the Court does not consider the role of CSR in enhancing the realization of socio-economic rights. The implication of this development is that CSR of corporations has received little or no judicial backing as an avenue through which the State can progressively realize socio-economic rights. Hence, South Africa remains confronted with the challenge of how to progressively realize these rights.

5. Conclusion and the Way Forward

Despite the emerging development under international law which envisages the role for CSR in the realisation of socio-economic rights, existing legislative framework in South Africa, as has been demonstrated in the paper, is yet to make the link. The implication of this is that in determining matters relating to socio-economic rights, the place of CSR in contributing to the obligation of the state to ensure the realisation of socio-economic rights is yet to receive judicial endorsement of courts in South Africa. Yet, in the exercise of its obligation to protect, the state has the positive role to either strengthen existing legislation with appropriate provisions or ensure their implementation in a manner that enhances the use of CSR as a tool of enhancing the realisation of social economic rights.

As a way forward, a major review of the key legislation such as the Companies Act 2008 is required to mandate corporations to focus their CSR on the realisation of socio-economic rights. Examples from jurisdiction such as India shows that this is feasible. CSR in India is regulated by clause 135 of the Indian Companies Act.⁹⁰ The Indian Act mandates companies whose turnover is greater or equal to R10 billion or its Net worth is greater or equal to INR 5 billion or its Net Profit is greater or equal to R 50 million must use a part of their profit for CSR in order to meet socio-economic needs of populations. As in the case with India, this will aid the actualisa-

⁹⁰ The Indian Companies Act, 2013.

tion of socio-economic rights in that companies can gauge what is expected of them.

Even in the absence of a legislative amendment that accommodates a clear provision of law directing that corporations should through their CSR enhance the realisation of socio-economic rights, in terms of its section 39 (1)(b) of the Constitution, international standards to which the South Africa is committed can be applied by domestic courts for the purpose of attaining such end. Arguably, through the application of such standards by courts, cases can be differently analysed and decided to yield different outcomes. More importantly, a body of case law can emerge which can shape the policy and practices of all stakeholders to channel CSR in a manner that enhances the state's obligation to ensure the realisation of socio-economic rights in South Africa.

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