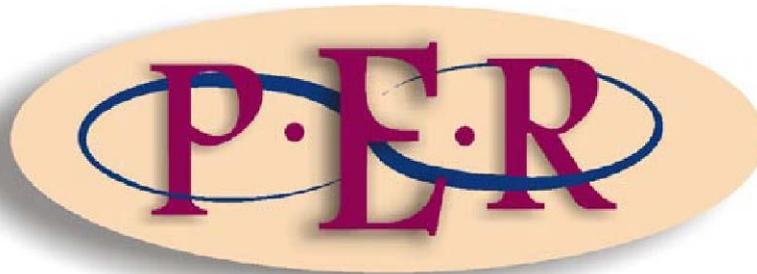


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# CONSTITUTIONAL BASIS FOR THE ENFORCEMENT OF "EXECUTIVE" POLICIES THAT GIVE EFFECT TO SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA

ON Fuo\*

## 1 Introduction

For government to effectively govern, it needs instruments through which it can pursue public purposes and defined objectives.<sup>1</sup> Generally, laws (legislation/by-laws) and policies have been identified, *inter alia*, as some of the types of instruments used by government to govern.<sup>2</sup> For example, the *Local Government: Municipal System Act*<sup>3</sup> provides that in governing a municipality a municipal council could exercise its executive and legislative authority by developing and adopting policies.<sup>4</sup> In general, governance instruments (including policies) are used to allocate resources, to regulate people's behaviour (*inter alia* by creating incentives, rights and duties) and to communicate government's understanding of society's collective problems and its vision for the future to the public.<sup>5</sup> Despite the importance of policies as governance instruments,<sup>6</sup> there seems to be uncertainty on the status and possible basis for the enforcement of "executive" policies that give effect to socio-economic rights in South Africa. In a recent article analysing a judgment of the

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<sup>1</sup> See Salamon 2000-2001 *Fordham Urb LJ* 1624; Linder and Peters "Study of Policy Instruments" 33-34.

<sup>2</sup> See Steytler 2011 *SAPL* 484-496; Salamon 2000-2001 *Fordham Urb LJ* 1623-1641; Patel "Tools and Trade-offs" 363-368; Du Plessis 2010 *Stell LR* 274-275; Bovaird 2005 *International Review of Administrative Sciences* 217-221.

<sup>3</sup> *Local Government: Municipal Systems Act* 32 of 2000. Hereafter, the *Systems Act*.

<sup>4</sup> See s 11(3)(a) of the *Systems Act*.

<sup>5</sup> See Peters and Van Nispen "Prologue" 3; Linder and Peters "Study of Policy Instruments" 34; Salamon "New Governance" 1-41.

<sup>6</sup> For details, see Thornhill *South African Public Administration* 124-125; Cloete *Public Administration and Management* 91; Hanekom *et al Key Aspects* 25.

Constitutional Court,<sup>7</sup> Professor David Bilchitz clearly raised this problem when he asserted that:<sup>8</sup>

At the outset, it is important to recognise that the principle of subsidiarity as expressed by the court relates to the legislative instruments that are enacted to realise rights. Yet, when the court dealt with the applicants' claim, it focused on their arguments in terms of chapters 12 and 13 of the National Housing Code. *The latter document is not legislation, but policy. The manner in which the court dealt with the case suggests that it treated these policy documents as legislation.* The principle of subsidiarity thus seems to have been broadened to include policy documents. This extension seems to have no clear justification.

Although Bilchitz may have raised this problem from the point of view of the so-called subsidiarity principle,<sup>9</sup> this reveals a problem amongst some South African legal scholars. The perception exist amongst some of them that policies cannot be enforced in a court of law because they are "policies" and not "law".<sup>10</sup>

The purpose of this article is to critically reflect on the status and possible constitutional basis for the enforceability of "executive" policies that give effect to socio-economic rights in South Africa. It argues that the constitutional basis for the enforceability of "executive" policies could be located *inter alia* in the positive duties

<sup>7</sup> *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC) (hereafter *Nokotyana*). See Bilchitz 2010 *SALJ* 591-605.

<sup>8</sup> Bilchitz 2010 *SALJ* 598. Own emphasis.

<sup>9</sup> For details on the origins of the subsidiarity principle, see Friesen 2003 *Federal Governance* 5-6; Marquardt 1994 *Fordham Int'l LJ* 619-622. For a detailed discussion of the different versions of the principle of subsidiarity as developed by the Constitutional Court, see Van der Walt *Property and Constitution* 35-39, 46-112; Van der Walt 2008 *Constitutional Court Review* 99-116; Du Plessis 2006 *Stell LR* 207-231.

<sup>10</sup> See Bilchitz 2010 *SALJ* 598; *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 4 SA 501 (SCA) para 7 (hereafter *Akani Garden Route*); *Minister of Education v Harris* 2001 11 BCLR 1157 (CC) (hereafter *Minister of Education*) paras 10-11. I have run into debates with some legal scholars who hold the view that "policy" cannot be enforced merely because it is "policy". It was against the backdrop of such a debate with Theunis Meyer that I was given an opportunity by Professor Louis Kotze and other organisers of a conference on "The Regulation of Invasive Species - European and South African Perspectives" (4-6 November 2012, Seminaris Campus Hotel, Berlin) to share some of the findings of my ongoing research. I gave a short presentation entitled "Policies as a governance instrument in regulating invasive species: Comments from a South African constitutional perspective". In that presentation, I explained what constitutes the core of this article in relation to the regulation of invasive species. Although not directly related to the status of "executive" policies, Klare explains that in South Africa, the general tendency amongst conservative legal scholars and judges is to eschew "extra-legal factors" when interpreting and enforcing law – especially the *Constitution of the Republic of South Africa*, 1996. See Klare 1998 *SAJHR* 158-172.

of government (the state) imposed by sections 24(b), 25(5), 26(2) and 27(2) of the *Constitution* to "take reasonable legislative and other measures" within the context of available resources to give effect to relevant socio-economic rights.<sup>11</sup> These positive duties appear to amount to a constitutional delegation of authority to the legislature and executive arms of government to concretise socio-economic rights. As such, it could be argued that, in practice, where "executive" policies should give content to socio-economic rights pursuant to powers delegated by original legislation that covers the field of socio-economic rights, such policies should have the force of law.<sup>12</sup>

In order to achieve the above objective, this article is structured in three main parts. The first part draws from the work of some South African scholars on public administration to distinguish various types of policies and their legal status. It illustrates that when the executive adopts policies to give effect to legislative provisions, these constitute what is referred to as "executive" policies, which have the force of law. The second part explores the constitutional basis for enforcing "executive" policies with specific reference to those that give effect to socio-economic rights in South Africa. It begins by providing a brief overview of the socio-economic rights contained in the *Constitution* and an explanation of the Constitutional Court's interpretation of the positive obligation imposed on government to "take reasonable legislative and other measures" to give effect to socio-economic rights. This is followed by a discussion on the powers of the legislature to further delegate law-making powers to the executive in giving effect to socio-economic rights. This discussion highlights the difficulty raised when the executive exercises delegated law-making powers in the form of an "executive" policy instead of "regulations", for example. The third part of the article provides an

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<sup>11</sup> It should be noted that the right of access to land and environmental rights guaranteed in sections 25(5) and 24 of the *Constitution*, respectively, are not expressly subject to progressive realisation. In addition, section 24 of the *Constitution* does not qualify the environmental rights as subject to available resources.

<sup>12</sup> The phrase "legislation that covers the field" is borrowed from Professor Van der Walt and used in this sense to refer to all legislation adopted to give effect to a socio-economic right in the Bill of Rights. See Van der Walt *Property and Constitution* 40-43; Van der Walt "2008 *Constitutional Court Review* 100-103, 106-111. For details on the classification of legislation, see Du Plessis *Re-Interpretation of Statutes* 25-61; Du Plessis 2011 *PER* 95-96.

overview of a selection of court cases that were decided based on "executive" policies, to demonstrate that such policies could give effect to socio-economic rights and that they are judicially enforceable.

## 2 Types of policies in South Africa

The idea of public policy-making originated from the United States of America and became increasingly popular following Woodrow Wilson's seminal lecture in 1886, which was later published as an article in 1887.<sup>13</sup> Public policy-making focused on separating politics from administration and stressed the role of bureaucrats in managing public organisations and in "translating policy ideals and aspirations into legislation, services, programmes, regulations, and so on".<sup>14</sup> In South Africa, policy studies "is relatively recent and still evolving".<sup>15</sup> Due to the ambiguous nature of the word "policy"<sup>16</sup> this section does not venture into the many contentious definitions of the term<sup>17</sup> but rather draws from the work of some South African experts on public administration to distinguish the various types of policies in the country. This distinction can help legal scholars understand the different policies that exist in the country and their associated status. In addition, this distinction will provide a foundation for a critical reflection on the possible constitutional basis for the enforceability of "executive" policies with specific reference to socio-economic rights.

The first type of policy identified by Hattingh and Cloete is referred to as "political policies".<sup>18</sup> This is the "primary type" of policy that is covered in most academic

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<sup>13</sup> See Wilson 1887 *Political Science Quarterly* 197-222. For a detailed discussion on the evolution of policy studies, see Wissink "Policy Studies and Policy Analysis" 56-74.

<sup>14</sup> Gumede "Public Policy Making in South Africa" 165.

<sup>15</sup> Gumede "Public Policy Making in South Africa" 166. For definitions of "policy studies" see De Coning "Nature and Role of Public Policy" 6-7.

<sup>16</sup> *Akani Garden Route* para 7.

<sup>17</sup> For some definitions, see Gumede "Public Policy Making in South Africa" 166-167; Hattingh *Governmental Relations* 55; De Coning "Nature and Role of Public Policy" 3-14.

<sup>18</sup> Hattingh *Governmental Relations* 55; Cloete *Public Administration and Management* 94; De Coning "Nature and Role of Public Policy" 15-16; Thornhill *South African Public Administration* 127.

literature.<sup>19</sup> Political policies can be represented as a plan of action adopted by a political party or the government in power and presented to the electorate/public as a series of value preferences which it seeks to implement upon election/re-election.<sup>20</sup> Such policies cannot be enforced irrespective of their content and at best remain the party's/government's vision for the future.<sup>21</sup> This is the common view in academic literature, which draws largely from the manner in which public policy developed as a branch of public administration in the United States.<sup>22</sup> According to Cloete, such policies could be seen as election slogans or convenient propaganda documents which may only be better formulated when tabled in Parliament as a Bill.<sup>23</sup> From the above explanation, it seems that political policies can be further sub-divided into "government" policies and "party" policies. Cloete indicates that when a political party decides to take part in an election, it examines community life and "on the basis of its findings and the political beliefs of its members, it declares its stand on various issues".<sup>24</sup> This initial declaration is purely a "party policy" and reflects the beliefs of members of that political party.<sup>25</sup> On the other hand, a government can transform a "party policy" into a "government" policy, outlining the government's vision for the country.<sup>26</sup> Although government policies still adhere to party philosophy, they generally aim at promoting the collective welfare of society as a whole.<sup>27</sup> Good examples of "political" policies include the ANC *Freedom Charter*,<sup>28</sup>

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<sup>19</sup> Hattingh *Governmental Relations* 55. The discussion by Gumede in Gumede "Public Policy Making in South Africa" 166-183 is a typical example in the South African context. See also Mokale and Scheepers *Introduction to Developmental Local Government* 51.

<sup>20</sup> Hattingh *Governmental Relations* 55; Thornhill *South African Public Administration* 127.

<sup>21</sup> Hattingh *Governmental Relations* 55; Cloete *Public Administration and Management* 94.

<sup>22</sup> See Venter "Administering National Government" 89-90; Gumede "Public Policy Making in South Africa" 165-183.

<sup>23</sup> Cloete *Public Administration and Management* 94; Thornhill *South African Public Administration* 128.

<sup>24</sup> Cloete *Public Administration and Management* 94; Thornhill *South African Public Administration* 128.

<sup>25</sup> Cloete *Public Administration and Management* 94; Thornhill *South African Public Administration* 128.

<sup>26</sup> Cloete *Public Administration and Management* 94-95; Thornhill *South African Public Administration* 127-128.

<sup>27</sup> Thornhill *South African Public Administration* 128; De Coning and Cloete "Theories and Models" 26.

<sup>28</sup> The *Freedom Charter* was adopted at the Congress of the People in Kliptown on 26 June 1955.

the RDP (Reconstruction and Development Programme),<sup>29</sup> the recent *New Growth Path*,<sup>30</sup> and all "White Papers".

A second type of policy is referred to as "executive policy".<sup>31</sup> When an elected government translates a political policy into legislation, it then becomes the responsibility of "political executive institutions" and "executive office-bearers" to take the initiative to implement the legislation.<sup>32</sup> Political executive institutions include "the Cabinet, Provincial Executive Councils and the executive mayor/executive committee of a municipal council".<sup>33</sup> On the other hand, "executive office-bearers" include ministers and deputy ministers.<sup>34</sup> It is the responsibility of executive office-bearers such as ministers to transform legislation into a form that is passed unto various government departments for implementation.<sup>35</sup> This becomes relevant in instances where legislation explicitly requires a member of the executive arm of government such as a cabinet minister to adopt specific policies in order to give effect to specific legislative provisions.<sup>36</sup> In other instances, legislation may require that the executive give meaning to some provisions through interpreting and delimiting the scope of application.<sup>37</sup> Hattingh argues that "executive" policies are therefore implementable and enforceable.<sup>38</sup> Such "executive" policies should complement, but "cannot override, amend or be in conflict with" legislation.<sup>39</sup> It is

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<sup>29</sup> See *White Paper on Reconstruction and Development* (1994) (GN 353 in GG 16085 of 23 November 1994). This example is cited by Cloete. See Cloete *Public Administration and Management* 94; Thornhill *South African Public Administration* 128.

<sup>30</sup> National Planning Commission 2011 [www.npconline.co.za](http://www.npconline.co.za). This example is cited by Cloete in Thornhill *South African Public Administration* 128.

<sup>31</sup> Hattingh *Governmental Relations* 55; De Coning "Nature and Role of Public Policy" 15-16; Cloete *Public Administration and Management* 46-47.

<sup>32</sup> Hattingh *Governmental Relations* 55; Cloete *Public Administration and Management* 46-47, 95-96; Thornhill *South African Public Administration* 129.

<sup>33</sup> See Cloete *Public Administration and Management* 92-94; Thornhill *South African Public Administration* 126-127.

<sup>34</sup> See Cloete *Public Administration and Management* 92-94; Thornhill *South African Public Administration* 126-127.

<sup>35</sup> Hattingh *Governmental Relations* 55. See Cloete *Public Administration and Management* 46-47, 95-96; Thornhill *South African Public Administration* 129.

<sup>36</sup> See Cloete *Public Administration and Management* 95; Thornhill *South African Public Administration* 129.

<sup>37</sup> See Thornhill *South African Public Administration* 130.

<sup>38</sup> See Hattingh *Governmental Relations* 55. This view is endorsed by Cloete in his distinction between the functions of political executive institutions and administrative executive institutions. See Cloete *Public Administration and Management* 46.

<sup>39</sup> See *Akani Garden Route* para 7.

also important to note that enforceable "executive" policies can also emanate from negotiations between the executive (especially in municipalities) and the public (community residents) with regard to the content of a socio-economic right that the executive seeks to provide.<sup>40</sup> Examples of "executive" policies in South Africa include national and municipal indigent policies which specifically give effect to the socio-economic rights of poor households by catering for their basic needs such as water, sanitation and electricity.<sup>41</sup> Municipalities are empowered to use their executive powers, which include designing, adopting and implementing policies, when administering local government matters listed in schedules 4B and 5B of the *Constitution*.<sup>42</sup>

The *National Framework for Municipal Indigent Policies* (2006) remains a framework executive policy which sets out minimum standards which municipalities must realise for poor households.<sup>43</sup> In terms of the obligations imposed on municipalities to provide essential services to poor households,<sup>44</sup> each municipality is required to put in place the infrastructure required to ensure the supply of 25 litres of potable water per person per day, supplied within 200 metres of a household and with a minimum flow of 10 litres per minute (in the case of communal points) or 6000 litres of potable water supplied per formal connection per month (in the case of a yard or house connections). This is referred to as basic water supply facility.<sup>45</sup> This obligation speaks to the minimum content of the right of access to water for indigent

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<sup>40</sup> See *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC) (hereafter *Mazibuko*) paras 70-72 for similar reasoning. Gumede acknowledges that policies "can come about through informal processes and bargaining". See Gumede "Public Policy Making in South Africa" 166. This type of agreement could emanate from "meaningful engagement" that was developed by the Constitutional Court in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 5 BCLR 475 (CC) (hereafter *Occupiers of 51 Olivia Road*). See paras 13-21. For more reading on the concept of meaningful engagement, see: Chenwi 2011 *SAPL* 128-156; Muller 2011 *Stell LR* 742-758; Holness 2011 *SAPL* 1-36.

<sup>41</sup> *National Framework for Municipal Indigent Policies* (2006).

<sup>42</sup> See s 156(1)(a) of the *Constitution* and 11(3)(a) of the *Systems Act*. The matters outlined in Schedules 4B and 5B of the *Constitution* include: electricity and gas reticulation; air pollution; municipal healthcare services; water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems; stormwater management; and municipal planning. For details, see s 156(1) read with Schedules 4B and 5B of the *Constitution*.

<sup>43</sup> *National Framework for Municipal Indigent Policies* (2006) 6; *Draft Framework for a Municipal Indigent Policy* (2005) 1.

<sup>44</sup> See *National Framework for Municipal Indigent Policies* (2006) 21-23.

<sup>45</sup> *National Framework for Municipal Indigent Policies* (2006) 21; *Draft Framework for a Municipal Indigent Policy* (2005) 17.

households, subject to justification. The adequacy of this content in the City of Johannesburg's indigent policy was a fact in issue in *Mazibuko v City of Johannesburg*.<sup>46</sup>

Secondly, each municipality is obliged to sustainably manage a basic water supply facility so as to ensure that water supply is available for at least 350 days per year and not interrupted for more than 48 consecutive hours per incident and to communicate to the public the importance of good water use, hygiene and related practices. This is referred to as a basic water supply service.<sup>47</sup> Although this requirement can be rightly seen as a positive obligation imposed on local government to take action that will ensure and sustain access to the right of access to sufficient water, it can also be seen as imposing a negative obligation on municipalities to refrain from actions that will impede the enjoyment of the right of access to water.

Thirdly, each municipality is obliged to provide indigent households with a basic sanitation facility which is safe, reliable, private, protected from the weather and ventilated and which keeps smells to the minimum.<sup>48</sup> In addition, the basic sanitation facility should be easy to keep clean, and should minimise the risks of the spread of sanitation-related diseases by facilitating the proper treatment and/or removal of human waste and wastewater in a manner that is environmentally sound.<sup>49</sup> Moreover, municipalities are obliged to sustainably operate the basic sanitation facilities provided to the indigents. This includes the safe removal of human waste and waste water from premises where this is appropriate and necessary, and the communication of good sanitation, hygiene and related practices to community members.<sup>50</sup>

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<sup>46</sup> *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC) paras 52-58, 61.

<sup>47</sup> *National Framework for a Municipal Indigent Policies* (2006) 21; *Draft Framework for a Municipal Indigent Policy* (2005) 17.

<sup>48</sup> *National Framework for a Municipal Indigent Policies* (2006) 21; *Draft Framework for a Municipal Indigent Policy* (2005) 17.

<sup>49</sup> *National Framework for a Municipal Indigent Policies* (2006) 21; *Draft Framework for a Municipal Indigent Policy* (2005) 17.

<sup>50</sup> *National Framework for a Municipal Indigent Policies* (2006) 21; *Draft Framework for a Municipal Indigent Policy* (2005) 17.

Furthermore, in relation to electricity, the *National Framework for Municipal Indigent Policies* obliges municipalities to provide indigent households with "sufficient energy to allow for lighting, access to media and cooking".<sup>51</sup> The content of electricity to be supplied to indigent households is the national minimum of 50 kWh per household per month. The *National Framework for Indigent Policies* acknowledges that this basic level of electricity may not be sufficient to cover all basic needs, including cooking.<sup>52</sup> In addition, other experts have expressed serious doubts about the adequacy of this amount of electricity in satisfying the basic needs especially of poor households in urban areas, in the absence of other supplementary sources of energy.<sup>53</sup>

The above remain basic service levels which are subject to revision and increase by national government, in consultation with other spheres of government, periodically in accordance with changing circumstances.<sup>54</sup> Municipalities that can afford it are at liberty to provide higher service levels.<sup>55</sup> Basic service levels also vary across settlement conditions in the sense that "what is appropriate in a deep rural area will not be appropriate in an inner city situation". For example, while wells or public standpipes may be appropriate to ensure water supply in a deep rural area, metered household connections are more suitable to urban centres.<sup>56</sup> Therefore, it is expected that municipalities would give context specific content to local indigent policies.<sup>57</sup> What is important to note in the context of this article is that, although indigent policies remain a "policy" adopted by the executive to give effect to some socio-economic rights, they have a legal status and can be enforced in court. This was the subject of litigation in the famous *Mazibuko* cases. The constitutional basis

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<sup>51</sup> *National Framework for a Municipal Indigent Policies* (2006) 22.

<sup>52</sup> *National Framework for a Municipal Indigent Policies* (2006) 23.

<sup>53</sup> For a detailed analysis, see Adam *Free Basic Electricity*, Pillay *et al Democracy and Delivery*, McDonald *Electric Capitalism*.

<sup>54</sup> *National Framework for a Municipal Indigent Policies* (2006) 23.

<sup>55</sup> *Draft Framework for a Municipal Indigent Policy* (2005) 18-19.

<sup>56</sup> *Draft Framework for a Municipal Indigent Policy* (2005) 19; *National Framework for a Municipal Indigent Policies* (2006) 23-24.

<sup>57</sup> The Constitutional Court has held that, in giving effect to socio-economic rights, the social and historical context should be taken into account, because what is appropriate in rural areas may not be appropriate in urban areas, for example. See *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) (hereafter *Grootboom*) paras 22-25, 37.

for the enforcement of executive policies will be explored in the second part of this article with specific reference to socio-economic rights.

The third type of policy is "administrative".<sup>58</sup> For an executive policy emanating from "the highest authority to be duly implemented", it must be accompanied by an administrative policy to guide government departments and municipalities on the practical steps to be followed in effectively and correctly implementing that executive policy.<sup>59</sup> From this angle, Hattingh perceives "administrative" policy as a third genre of policy which is unenforceable *per se*.<sup>60</sup> In other words, these are internal policy documents or administrative guidelines which may have the force of law and give directions on how sub-ordinate staff members should approach certain tasks.<sup>61</sup> Examples of such guidelines could include the various Integrated Development Planning Guidelines<sup>62</sup> and Guidelines for the Implementation of the National Indigent Policy.<sup>63</sup> Although administrative policies are not enforceable *per se*,<sup>64</sup> their implementation constitutes administrative action which can be subjected to judicial review.<sup>65</sup>

This researcher believes the above classification of policies and the discussion that follows may help in clarifying the confusion surrounding the status especially of executive policies that give effect to socio-economic rights in South Africa and the basis for their enforcement. This is important given the fact that, just as in most

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<sup>58</sup> Hattingh *Governmental Relations* 55; De Coning "Nature and Role of Public Policy" 15-16.

<sup>59</sup> See Hattingh *Governmental Relations* 55; Cloete *Public Administration and Management* 96-97; Thornhill *South African Public Administration* 131.

<sup>60</sup> Hattingh *Governmental Relations* 55.

<sup>61</sup> See Hattingh *Governmental Relations* 55; Cloete *Public Administration and Management* 96-97; Thornhill *South African Public Administration* 131; Baxter 1993 *Administrative Law Reform* 177.

<sup>62</sup> See for example DPLG Date Unknown [iphone.cogta.gov.za](http://iphone.cogta.gov.za).

<sup>63</sup> *Guidelines for the Implementation of the National Indigent Policy by Municipalities* (2006).

<sup>64</sup> Hattingh *Governmental Relations* 55.

<sup>65</sup> See Hoexter *Administrative Law* 177-178; Baxter 1993 *Administrative Law Reform* 178. This will be based on s 33(1) of the *Constitution* which guarantees everyone "the right to administrative action that is lawful, reasonable and procedurally fair". For a detailed discussion of the scope of what constitutes administrative action under the *Constitution* and the *Promotion of Administrative Justice Act* 3 of 2000 (PAJA), see Hoexter *Administrative Law* 175-251. For examples on how the Constitutional Court has interpreted and applied the right to administrative action that is lawful, reasonable and procedurally fair, see: *Premier, Mpumalanga v Executive Committee, Association of State-aided Schools, Eastern Transvaal* 1999 2 BCLR 151 (CC) paras 30-42; *Walele v City of Cape Town* 2008 11 BCLR 1067 (CC) paras 27-42. See also Plasket *Fundamental Right to Just Administrative Action* 81-108; Roux 2003 *Democratisation* 103-105.

other modern states, there is an increasing delegation of powers to the executive arm of government,<sup>66</sup> which is the head of government administration, to make rules and regulations in order to effectively implement legislation.<sup>67</sup> Through the discharge of its executive and administrative powers, the contact of the executive arm of government with society in general is ever-present. As Woodrow Wilson once asserted, "administration is the most obvious part of government; it is government in action, it is the executive, the operative, the most visible side of government".<sup>68</sup> Due to the increasing delegation of regulatory powers to the executive, the executive and administrative arm of government has witnessed remarkable growth in importance, performing most of the "minor" legislative functions of parliament.<sup>69</sup> Although this may not sit well with the traditional application of the doctrine of the separation of powers, this generally indicates that the executive performs both administrative and legislative functions.<sup>70</sup>

### **3 The constitutional basis for enforcing "executive policies"**

This part of the article critically reflects on the possible constitutional basis for the enforceability of "executive" policies that give effect to socio-economic rights in South Africa. It begins by identifying the socio-economic rights entrenched in the *Constitution*.

#### **3.1 Socio-economic rights in the Constitution**

The socio-economic rights entrenched in the Bill of Rights include the rights of access to housing;<sup>71</sup> healthcare services, including reproductive health care;

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<sup>66</sup> See 3.3 below for examples of legislation delegating such authority to the executive.

<sup>67</sup> Plasket *Fundamental Right to Just Administrative Action* 109-112.

<sup>68</sup> Woodrow Wilson as quoted in Coetzee *Public Administration* 3.

<sup>69</sup> Plasket *Fundamental Right to Just Administrative Action* 112.

<sup>70</sup> For a detailed discussion of "administrative action" and the complexities of distinguishing between the legislative and administrative functions of the executive, see Plasket *Fundamental Right to Just Administrative Action* 121-166.

<sup>71</sup> Section 26 of the *Constitution* provides that: "(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be

sufficient food and water; social security and social assistance;<sup>72</sup> further education;<sup>73</sup> access to land on an equitable basis;<sup>74</sup> environmental rights;<sup>75</sup> and the right of detainees and prisoners to conditions of detention that are consistent with human dignity and to have at state expense, adequate accommodation, nutrition, medical treatment and reading material.<sup>76</sup> Furthermore, in *Joseph v City of Johannesburg*,<sup>77</sup> the Constitutional Court used existing constitutional and legislative provisions that oblige local government to provide basic services to community residents to establish a (constitutional) right to electricity.<sup>78</sup> The reasoning of the Court in *Joseph* could also be interpreted to establish a (constitutional) right to sanitation,<sup>79</sup> independent of other related but self-standing rights.<sup>80</sup> However, in *Nokotyana*, the Constitutional Court declined to make a finding on the applicant's submission that the right to sanitation is integral to the constitutional right of access to adequate housing.<sup>81</sup>

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

<sup>72</sup> Section 27 of the *Constitution* provides that: "(1) Everyone has the right to have access to- (a) healthcare services, including reproductive health care; (b) sufficient food and water; and (c) social security, including if they are unable to support themselves and their dependents, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. (3) No one may be refused emergency medical treatment".

<sup>73</sup> Section 29(1)(b) of the *Constitution* provides that: "Everyone has the right - to further education, which the state, through reasonable measures, must make progressively available and accessible".

<sup>74</sup> Section 25(5) of the *Constitution* provides that: "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis".

<sup>75</sup> Section 24 of the *Constitution* provides that: "Everyone has the right – (a) to an environment that is not harmful to their health or well being; and (b) to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".

<sup>76</sup> See s 35(2)(e) of the *Constitution*.

<sup>77</sup> *Joseph v City of Johannesburg* 2010 3 BCLR 212 (CC) (hereafter *Joseph*).

<sup>78</sup> *Joseph* paras 34-40. In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 9 BCLR 847 (CC) (hereafter *Residents of Joe Slovo Community*), Justice Sachs indicated that the socio-economic rights obligations established by the *Constitution* and legislation create a special cluster of legal relationships between municipalities and homeless people occupying municipal land. See paras 343-344.

<sup>79</sup> See *Joseph* paras 34-40.

<sup>80</sup> *Nokotyana* paras 46-49.

<sup>81</sup> *Nokotyana* para 47.

As will become evident in the discussion that follows, the socio-economic rights contained in the *Constitution* are abstract entitlements which become meaningful entitlements only when government adopts legislation, policies, plans and programmes to give effect to them.<sup>82</sup> Without these processes of translation, the socio-economic rights remain vague guarantees.

### **3.2 The duty to take "reasonable legislative and other measures"**

The abstract nature of socio-economic rights entrenched in the *Constitution* requires that they should be translated into concrete enforceable legal rights.<sup>83</sup> In addition to the duty to respect, protect, promote and fulfill socio-economic rights,<sup>84</sup> the *Constitution* imposes an obligation on the government to adopt "reasonable legislative and other measures" to give effect to the rights guaranteed *inter alia* in sections 24, 25(5), 26(1) and 27(1). Read jointly, these provisions create "an open-ended" duty with significant initiative left in the hands of public authorities to realise socio-economic rights.<sup>85</sup> The task to concretise abstract constitutional guarantees into concrete entitlements is supposed to be executed broadly by the legislature, the executive and state administration, and their respective organs of state, through various processes.<sup>86</sup> In terms of local government, for example, this obligation entails that, in addition to by-laws, local government should adopt policies, plans, programmes and strategies that would contribute to the realisation of socio-

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<sup>82</sup> Brand "Introduction to Socio-economic Rights" 12, 14; Pieterse 2010 *Law, Democracy and Development* 231-232.

<sup>83</sup> Brand "Introduction to Socio-economic Rights" 12, 14; Pieterse 2010 *Law, Democracy and Development* 231-232.

<sup>84</sup> See s 7(2) of the *Constitution*. For a detailed discussion of these obligations, see Liebenberg *Socio-Economic Rights* 80-87.

<sup>85</sup> Du Plessis 2010 *Stell LR* 269.

<sup>86</sup> Brand "Introduction to Socio-economic Rights" 12; Pieterse 2010 *Law, Democracy and Development* 231-232. In reflecting on the limits of socio-economic rights litigation in realising the transformative potential of the *Constitution*, Liebenberg recognises the primary duty of the legislature and the executive to adopt and implement measures that will lead to the realisation of socio-economic rights with courts largely playing an interpretative but transformative role. She argues that: "An approach premised on the courts possessing all the answers on how best to realise socio-economic rights, can also have negative repercussions for democratic transformation. The likely effect is to induce legislative and executive lethargy, and an abdication of the primary role of these branches under the *Constitution* to give effect to socio-economic rights guaranteed by formulating and implementing social legislation and programmes through broadly participative processes". See Liebenberg *Socio-Economic Rights* 40.

economic rights.<sup>87</sup> This is consistent with the executive and legislative authority of municipalities generally outlined in section 11(3) of the *Systems Act*.

Although the term "reasonable" has not been defined by the Constitutional Court,<sup>88</sup> the Court has outlined several conditions that must be satisfied before legislative and other measures adopted to realise socio-economic rights can be considered to be reasonable.<sup>89</sup> Firstly, according to the Court, the government must put in place comprehensive legislation, policies and programmes to realise socio-economic rights.<sup>90</sup> Such legislation, policies and programmes must be reasonable from conception to implementation and must be backed by a strong commitment to realise socio-economic rights.<sup>91</sup>

Secondly, in view of the fact that the *Constitution* creates three distinct but interrelated and interdependent spheres of government<sup>92</sup> tasked *inter alia* with the same constitutional mandate to realise constitutional rights through a system of co-operative governance,<sup>93</sup> reasonable legislative and other measures aimed at realising constitutional socio-economic rights must clearly allocate responsibilities and tasks to the different spheres of government and ensure that appropriate financial and human resources are available to execute assigned responsibilities.<sup>94</sup> Responsibilities should be allocated after consultation between all spheres of government and must be guided by national framework legislation.<sup>95</sup>

Thirdly, the legislative and other measures adopted by government must establish coherent programmes directed towards and capable of progressively realising socio-

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<sup>87</sup> Du Plessis and Du Plessis "Balancing of Sustainability Interests" 432.

<sup>88</sup> Iles 2004 *SAJHR* 455-457

<sup>89</sup> See *Grootboom* para 39-44.

<sup>90</sup> *Grootboom* para 42.

<sup>91</sup> *Grootboom* para 42.

<sup>92</sup> Section 40(1) of the *Constitution* outlines the three spheres of government.

<sup>93</sup> For details on the principles of cooperative government, see ss 40(2) and 41 of the *Constitution*; Du Plessis 2008 *SAPL* 90-92; Layman 2003 [www.sarpn.org](http://www.sarpn.org) 8; De Visser "Institutional Subsidiarity in the Constitution" 2-3, 11-12; De Villiers and Sindane *Cooperative Government*; De Visser *Developmental Local Government* 209-254; Kirkby *et al* 2007 *SAPL* 144; Bekink *Principles of South African Local Government Law* 89-94.

<sup>94</sup> *Grootboom* para 38.

<sup>95</sup> *Grootboom* paras 40, 66.

economic rights for all, within the state's available resources. The Court has expressed the view that the "*contours and content of the measures to be adopted are primarily a matter for the legislature and the executive*", who must ensure that such measures are reasonable.<sup>96</sup> This expression of the Court seems to suggest that the executive can use the governance instruments at its disposal to determine the content and scope/"contour" of socio-economic rights. The Court has indicated that one of its main concerns is to ensure that there was meaningful engagement in the design and implementation of such legislation and policies.<sup>97</sup> In *Occupiers of 51 Olivia Road*, the Court linked the obligation of municipalities to involve communities in local governance to "meaningful engagement".<sup>98</sup> The Court defined meaningful engagement as a two-way process in which the City of Johannesburg and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives.<sup>99</sup> It held that meaningful engagement has the potential to contribute towards the resolution of disputes and to "increased understanding and sympathetic care" if both sides are willing to participate in the process. The Court noted that people may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. The Court held that if this happens, a municipality cannot merely walk away but must make reasonable efforts to engage with such vulnerable people and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. The Court stated that because the engagement process precisely seeks to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people, that process should preferably be managed by careful and sensitive people.<sup>100</sup> It held that the failure of the City to engage with the occupiers was contrary to the spirit and purport of the *Constitution*, a violation of the right to human dignity, as well as other socio-economic rights obligations imposed by the

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<sup>96</sup> *Grootboom* para 41. Own emphasis. See also *B v Minister of Correctional Services* 1997 6 BCLR 789 (CC) (hereafter *B v Minister*) paras 32, 34.

<sup>97</sup> See *Residents of Joe Slovo Community* paras 236-245; *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) paras 123-125, 129-134; *Occupiers of 51 Olivia Road* paras 14-15.

<sup>98</sup> *Occupiers of 51 Olivia Road* paras 13-15.

<sup>99</sup> *Occupiers of 51 Olivia Road* para 14.

<sup>100</sup> *Occupiers of 51 Olivia Road* para 15.

*Constitution*.<sup>101</sup> Yacoob J stressed that where a municipality's strategy, policy or plan is expected to affect a large number of people, there is a greater need for "*structured, consistent and careful engagement*".<sup>102</sup> The Court further observed that the process of meaningful engagement can work only if both sides act reasonably and in good faith.<sup>103</sup> The Court cautioned that community residents who approach the engagement process with an intransigent attitude or with unreasonable and non-negotiable demands may stall the engagement process. Municipalities must not perceive vulnerable groups and individuals as a "disempowered mass" but rather encourage them to be pro-active rather than being purely defensive. The Court expressed the view that civil society organisations that champion the cause of social justice should preferably facilitate the engagement process in every possible way.<sup>104</sup> Lastly, the Court indicated that secrecy is inimical to the constitutional value of openness and counter-productive to the process of meaningful engagement.<sup>105</sup> This requires that in negotiating a policy, plan or programme that affects the rights of communities, municipalities *must furnish complete and accurate information* that will enable affected communities to reach reasonable decisions.<sup>106</sup> The objectives of meaningful engagement would differ from one context to another.<sup>107</sup>

In *Residents of Joe Slovo Community*, Justice Ngcobo asserted that in implementing any programme giving effect to socio-economic rights, the key requirement which must be met is meaningful engagement between the government and residents.<sup>108</sup> This requirement flows from the need to treat community residents with respect and care for their inherent human dignity as well as the need for government to ascertain the needs and concerns of individual households.<sup>109</sup> The process of meaningful engagement does not require the parties to agree on every issue. What is required of the parties is that they should approach the engagement process in

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<sup>101</sup> *Occupiers of 51 Olivia Road* para 16.

<sup>102</sup> *Occupiers of 51 Olivia Road* para 19. Own emphasis.

<sup>103</sup> *Occupiers of 51 Olivia Road* para 20.

<sup>104</sup> *Occupiers of 51 Olivia Road* para 20.

<sup>105</sup> *Occupiers of 51 Olivia Road* para 21.

<sup>106</sup> *Occupiers of 51 Olivia Road* para 21.

<sup>107</sup> *Occupiers of 51 Olivia Road* para 14. See also *Residents of Joe Slovo Community* paras 241-242.

<sup>108</sup> *Residents of Joe Slovo Community* para 238.

<sup>109</sup> *Residents of Joe Slovo Community* para 238.

good faith and reasonableness and should understand the concerns of the other side.<sup>110</sup> Meaningful engagement can be achieved only if all the parties approach the process in good faith and a willingness to listen, and where possible, to accommodate one another. Justice Ngcobo stressed that the goal of meaningful engagement is to find a mutually acceptable solution to the difficulties confronting the government and citizens in the quest to realise socio-economic rights.<sup>111</sup> The need for structured and concerted engagement was equally emphasised by Justice Ngcobo when he observed that different messages and perhaps conflicting information from officials of all three spheres of government conveyed to residents of Joe Slovo created misunderstanding and distrust in the minds of the residents regarding the relocation project.<sup>112</sup> Even though mutual understanding and accommodation of each others' concerns remains the primary focus of meaningful engagement, the decision ultimately lies with government. However, government must ensure that the decision is informed by the concerns raised by the residents during the process of engagement.<sup>113</sup> In view of the above pronouncements from the Constitutional Court, it has been argued that meaningful engagement has emerged as a requirement of the reasonableness standard.<sup>114</sup>

In addition to the above requirements, the Constitutional Court has indicated that reasonable measures directed towards realising socio-economic rights must take into consideration the objectives of the *Constitution*, the multi-dimensional nature and prevalence of poverty in South Africa and the capacity of institutions responsible for implementing social legislation and policies.<sup>115</sup> The legislation and policies adopted to give effect to socio-economic rights must be balanced and flexible and must pay attention to short-, medium- and long-term needs. Any social programme that excludes, for example, a significant segment of society, especially the poor, cannot be said to be reasonable.<sup>116</sup> According to the Court, reasonableness must be

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<sup>110</sup> *Residents of Joe Slovo Community* para 244.

<sup>111</sup> *Residents of Joe Slovo Community* para 244.

<sup>112</sup> *Residents of Joe Slovo Community* para 247.

<sup>113</sup> *Residents of Joe Slovo Community* para 244.

<sup>114</sup> Liebenberg *Socio-Economic Rights* 153-154.

<sup>115</sup> *Grootboom* para 43.

<sup>116</sup> *Grootboom* paras 43, 56 and 63.

understood in the context of the objectives and values of the Constitution and the Bill of Rights as a whole.<sup>117</sup> The Court reasoned that:<sup>118</sup>

To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving the realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.

In view of the above, and by way of analogy, any challenge based on sections 24(b), 25(5), 26(2) and 27(2) of the *Constitution* in which it is argued that the state failed to meet the positive obligations imposed on it by these constitutional provisions, courts will have to simply decide if the legislative and other measures adopted are reasonable, taking into consideration the available resources. According to the Court:<sup>119</sup>

A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. *It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations.* Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.

The above extract demonstrates the very flexible nature of the reasonableness standard. It clearly indicates that government can use a variety of measures to realise socio-economic rights. It should be stressed that the Court expressed the view that the content and contours of socio-economic rights are best determined by the executive and the legislature.<sup>120</sup> In view of the fact that policy constitutes the

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<sup>117</sup> *Grootboom* para 83.

<sup>118</sup> *Grootboom* para 44.

<sup>119</sup> *Grootboom* para 41.

<sup>120</sup> *Grootboom* para 41.

main governance instrument for executive office-bearers, this implies that where the executive adopts specific policies to give effect to socio-economic rights, the executive acts within the prescripts of the *Constitution*. This constitutional context informs Brand's argument that where the executive adopts policies that create concrete socio-economic rights or entitlements to particular social goods for defined categories of persons, it becomes easier for them to be claimed and for the courts to uphold such claims.<sup>121</sup> To borrow from Cloete, the *Constitution* "declares what action specified institutions and office bearers are to take in accordance with prescribed procedures".<sup>122</sup> The duty on the executive to adopt measures, including policies, to give effect to socio-economic rights is informed by the *Constitution*. What must be stressed from the Court's jurisprudence for the purpose of our discussion is the reality that the "contours and content" of the measures adopted to give effect to socio-economic rights are primarily a matter for the legislature and the executive, subject to the standard of reasonableness.<sup>123</sup> In addition, the criteria used by the Constitutional Court to determine the reasonableness of measures implemented to give effect to socio-economic rights are non-exhaustive.<sup>124</sup>

### **3.3 Delegation of legislative powers to the executive in South Africa**

In South Africa, the legislative authority of the national sphere of government is vested in Parliament as set out in section 44 of the *Constitution*.<sup>125</sup> In terms of the provincial sphere of government, the legislative authority is vested in provincial legislatures.<sup>126</sup> Lastly, the legislative authority of the local sphere of government is vested in municipal councils.<sup>127</sup> As deliberative bodies, Parliament, provincial legislatures and municipalities exercise original legislative authority and can adopt, of their own volition, any law/legislation on any matter falling within their respective

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<sup>121</sup> See Brand "Introduction to Socio-economic Rights" 13-14; *Mazibuko* para 66; and *Nokotyana* paras 47-51.

<sup>122</sup> See Thornhill *South African Public Administration* 124.

<sup>123</sup> See *Grootboom* para 41; *B v Minister* paras 32, 34

<sup>124</sup> Liebenberg *Socio-Economic Rights* 223.

<sup>125</sup> See s 43(a) read with s 44 of the *Constitution*.

<sup>126</sup> See s 43(b) read with s 104 of the *Constitution*.

<sup>127</sup> See s 43(c) read with s 156 of the *Constitution*.

areas of competence.<sup>128</sup> This is referred to as original legislation.<sup>129</sup> Although it is not expressly stated in the *Constitution*, just as under the *Interim Constitution*,<sup>130</sup> it is constitutionally permissible for (original) legislation adopted by these bodies to contain enabling provisions which delegate powers to members of the executive branch of government to adopt subordinate legislation (such as regulations) in the process of implementation.<sup>131</sup> This means that by virtue of enabling provisions in legislation, a member of the executive branch of government or any other functionary could be assigned powers to further make laws. For example, in *Constitutionality of the Mpumalanga Petitions Bill*, Langa DP (as he then was) made this clear when he asserted that:<sup>132</sup>

Regulations are a category of subordinate legislation framed and implemented by a functionary or body other than the legislature for the purpose of implementing valid legislation. Such functionaries are usually members of the executive branch of government, but not invariably so. A legislature has the power to delegate the powers to make regulations to functionaries when such regulations are necessary to supplement the primary legislation. Ordinarily the functionary will be the President or the Premier or the member of the executive responsible for the implementation of the law... The factors relevant to a consideration of whether the delegation of law-making power is appropriate are many. They include the nature and ambit of the delegation, the identity of the person or institution to whom the power is delegated, and the subject matter of the delegated power.

Although the power to delegate law-making functions to the executive branch of government raises difficult questions relating to the traditional application of the

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<sup>128</sup> Du Plessis *Re-Interpretation of Statutes* 45-47. It should be noted that, apart from legislation which may emanate from the deliberative procedures of Parliament, certain provisions of the *Constitution* prescribe that Parliament should adopt subsidiary constitutional legislation. According to Du Plessis, subsidiary constitutional legislation should be enacted in order to "give more concrete effect to key provisions of the *Constitution* and the Bill of Rights. See Du Plessis 2011 *PER* 95-96. An example of such legislation is PAJA, that was enacted by Parliament to give effect to s 33(3) of the *Constitution*.

<sup>129</sup> Du Plessis 2011 *PER* 95-96; Du Plessis *Re-Interpretation of Statutes* 32-37, 45.

<sup>130</sup> *Constitution of the Republic of South Africa*, Act 200 of 1993.

<sup>131</sup> See Du Plessis *Re-Interpretation of Statutes* 37-41; *Constitutionality of the Mpumalanga Petitions Bill* 2001 11 BCLR 1126 (CC) para 19; *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 10 BCLR 1289 (CC) (hereafter *Executive Council, Western Cape Legislature*) 51. See Bishop and Raboshakga "National Legislative Authority" 17-45; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 8 BCLR 872 (CC) paras 109, 113.

<sup>132</sup> *Constitutionality of the Mpumalanga Petitions Bill* 2001 11 BCLR 1126 (CC) para 19.

doctrine of separation of powers,<sup>133</sup> this practice is inevitable in a modern state, where parliament may be too busy with law-making processes and therefore unable to attend to dynamic changes in society. Within the context of the *Interim Constitution*, the Constitutional Court held in *Executive Council, Western Cape Legislature* that for the purposes of good governance, it was constitutionally permissible for an Act of Parliament to delegate law-making powers to the executive.<sup>134</sup> The Court stated that:<sup>135</sup>

In a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body.

Despite the above finding, there are limitations on the legislative authority that parliament could delegate.<sup>136</sup> The Constitutional Court has indicated that, in any given case, the question of whether or not Parliament is entitled to delegate sub-regulatory authority must depend on whether or not the *Constitution* permits the delegation.<sup>137</sup> To the Court, this is based on the fact that, "the authority of Parliament to make laws, and so too to delegate that function, is subject to the Constitution".<sup>138</sup> This means that the decision as to whether Parliament may delegate regulatory authority depends on the language and context of the empowering constitutional/legislative provision.<sup>139</sup> In any case, the exercise of sub-regulatory authority by a member of the executive branch of government or any

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<sup>133</sup> The Court has indicated that the doctrine of the separation of powers cannot be construed as absolute in the South African context. See *Constitutionality of the Mpumalanga Petitions Bill* 2001 11 BCLR 1126 (CC) para 25.

<sup>134</sup> *Executive Council, Western Cape Legislature* para 51.

<sup>135</sup> *Executive Council, Western Cape Legislature* para 51.

<sup>136</sup> See Bishop and Raboshakga "National Legislative Authority" 17-45 to 17-47.

<sup>137</sup> *Justice Alliance of South Africa v President of the Republic of South Africa, Freedom Under the Kaw v President of the Republic of South Africa, Centre for Applied Legal Studies v President of the Republic of South Africa* 2011 10 BCLR 1017 (CC) (hereafter *Justice Alliance*) para 54.

<sup>138</sup> *Justice Alliance* para 54.

<sup>139</sup> See *Justice Alliance* paras 54-58.

relevant functionary must be consistent with the empowering provision of the *Constitution* or relevant legislation.<sup>140</sup>

Another important factor which must be taken into consideration is the nature and extent of the delegation.<sup>141</sup> The Court has indicated that the primary reason for delegation is to ensure that the legislature is not overwhelmed by the need to determine minor regulatory details. Delegation therefore relieves the legislature from dealing with detailed provisions that are often required for the purpose of implementing and regulating laws.<sup>142</sup> Thus, the legislature may delegate subordinate regulatory authority to the executive but may not assign plenary legislative power to the executive.<sup>143</sup> The legislature can therefore delegate "the determination of mere minor detail" to the executive but cannot "shift" all its law-making power to the executive.<sup>144</sup> According to the Court, the legislature "may not ordinarily delegate its essential legislative functions" to the executive in a constitutional democracy.<sup>145</sup> This limitation is informed by the delegation doctrine, which is informed by the doctrine of the separation of powers. The delegation doctrine requires that law-making, which is a proper function of the legislature, "should not be delegated excessively to the executive branch of government".<sup>146</sup> In addition, this restraint is intended to balance "the need for efficiency in government against the need to avoid subverting the constitutional legislative framework".<sup>147</sup> It is acknowledged that the potential of such transfer does not sit easily with the traditional notions of the doctrine of the separation of powers.<sup>148</sup>

The above paragraphs demonstrate that, as under the *Interim Constitution*, it is constitutionally permissible under the *Constitution* for the legislature to delegate legislative authority to the executive. When such delegated authority is exercised it

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<sup>140</sup> See *Justice Alliance* para 60; Du Plessis *Re-Interpretation of Statutes* 38.

<sup>141</sup> *Justice Alliance* para 61.

<sup>142</sup> *Justice Alliance* para 65. See Du Plessis *Re-Interpretation of Statutes* 38.

<sup>143</sup> See *Executive Council, Western Cape Legislature* para 51; *Justice Alliance* para 61; Bishop and Raboshakga "National Legislative Authority" 17-45 to 17-47.

<sup>144</sup> *Justice Alliance* para 62.

<sup>145</sup> *Justice Alliance* para 62; Du Plessis *Re-Interpretation of Statutes* 49.

<sup>146</sup> See Bishop and Raboshakga "National Legislative Authority" 17-45 to 17-46.

<sup>147</sup> See Bishop and Raboshakga "National Legislative Authority" 17-45 to 17-47.

<sup>148</sup> See Bishop and Raboshakga "National Legislative Authority" 17-49.

has the force of law and the main question which should be addressed is whether there is constitutional or legislative authority to delegate the power in question to the executive (the minister, for example).<sup>149</sup> As Bishop and Raboshakga put it, the discretion of the executive to exercise sub-regulatory authority or draft laws remains valid as long as "it does not alter the text of the legislation" and "there is no specific constitutional mandate for the legislature to act".<sup>150</sup> This means that the executive has discretion on how it exercises its sub-regulatory power provided such power and discretion does not conflict with the delegating legislation or the *Constitution*. There is therefore no prescribed manner in which the executive should exercise delegated regulatory authority except that it should comply with principles of delegating legislation and the *Constitution*. The subsequent paragraphs show that this discretion enables ministers to exercise sub-regulatory authority in the form of "regulations", "strategies", "policies", "notices" and even "lists".

In South Africa, original legislation that seeks to give effect to socio-economic rights is replete with provisions delegating sub-regulatory authority to the executive. In the area of social assistance, for example, section 5(1)(c) of the *Social Assistance Act*<sup>151</sup> provides that the Minister of Social Development, in concurrence with the Minister of Finance, can prescribe a category of persons who are not South Africans to be beneficiaries of social assistance programmes.<sup>152</sup> In addition, in terms of section 5(2) of the *Social Assistance Act*, the Minister of Social Development in agreement with the Minister of Finance may prescribe additional requirements in respect *inter alia* of income threshold, means testing, and age limits. In terms of section 16(2) of *Social Assistance Act* the minister may prescribe circumstances where persons absent from South Africa can continue to receive grants. In the area of housing, the *Housing Act*<sup>153</sup> requires that the Minister of Human Settlements must determine national housing policy which includes national "norms and standards" in respect of

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<sup>149</sup> See *Executive Council, Western Cape Legislature* paras 117, 122-125; *Justice Alliance* paras 54-69.

<sup>150</sup> See Bishop and Raboshakga "National Legislative Authority" 17-49.

<sup>151</sup> *Social Assistance Act* 13 of 2004.

<sup>152</sup> This power has not yet been exercised.

<sup>153</sup> *Housing Act* 107 of 1997.

housing.<sup>154</sup> In terms of section 4(1) and (2), of the *Housing Act*, the national policy must be contained in the *National Housing Code* (2009) which must also be published by the Minister of Human Settlement.<sup>155</sup> In the area of environmental legislation, Chapter 2 of the *National Water Act*<sup>156</sup> delegates powers to the Minister of Water and Environmental Affairs to develop a national water resource strategy (after consultation with society at large) to facilitate the proper management of water resources and clearly states that this strategy "is binding on all authorities and institutions exercising powers or performing duties under this Act".<sup>157</sup> In addition, in terms of section 56 of the *National Environmental Management: Biodiversity Act* (NEMBA),<sup>158</sup> the Minister of Water and Environmental Affairs has the powers to list species that are in need of national protection.<sup>159</sup> The "list" published by the Minister of Water and Environmental Affairs pursuant to section 56 of NEMBA has the force of law because in terms of section 57 of NEMBA, any person carrying out a restricted activity involving listed threatened or protected species without a permit will be in violation of the law. In terms of local government legislation, section 108(1) of the *Systems Act* grants the Minister of the Department of Cooperative Government and Traditional Affairs powers to set essential minimum or national standards, in consultation with relevant stakeholders, for the provision of free services to poor households in situations where framework legislation does not clearly define such

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<sup>154</sup> See s 3(2)(a) of the *Housing Act* 107 of 1997.

<sup>155</sup> DHS 2009 [www.dhs.gov.za](http://www.dhs.gov.za). Volume 3 of the *National Housing Code* (2009) entitled "Financial Interventions" details the extent to which government will provide individual housing subsidies to eligible citizens and permanent residents as well as the qualifying criteria. In addition, the *National Housing Code* (2009) details different forms of housing assistance and eligibility criteria for farm workers. See Volume 5 (Rural Interventions: Farm Resident Subsidies) of the *National Housing Code* (2009) 23-30.

<sup>156</sup> *National Water Act* 36 of 1998.

<sup>157</sup> See Preamble of Chapter 2 and ss 5 and 6 of the *National Water Act* 36 of 1998.

<sup>158</sup> *National Environmental Management: Biodiversity Act* 10 of 2004 (NEMBA).

<sup>159</sup> Section 56 of NEMBA provides that: "56(1) The Minister may, by notice in the Gazette publish a list of – (a) Critically endangered species, being any indigenous species facing an extremely high risk of extinction in the wild in the immediate future; (b) endangered species, being any indigenous species facing a high risk of extinction in the wild in the near future, although they are not a critically endangered species; (c) vulnerable species, being indigenous species facing an extreme risk of extinction in the wild in the medium term future, although they are not a critically endangered species; and (d) protected species, being of any species which are of such high conservation value or national protection, although they are not listed in terms of paragraph (a),(b) and (c)". The list contemplated by s 56(1) was published on 23 February 2007. See *Lists of Critically Endangered, Endangered, Vulnerable and Protected Species* (2007) (GN R151 of GG 29657 of 23 February 2007).

standards.<sup>160</sup> These provisions amount to a delegation of the functions of the legislature to the executive and illustrate the important role that must be played by the executive in order to ensure that socio-economic rights entrenched in the *Constitution* can be translated into reality.

Bishop and Raboshakga have indicated that the jurisprudence of the Court does not provide clear criteria for the exercise of delegated legislative power.<sup>161</sup> However, as pointed out by the Supreme Court of Appeal, for the purposes of certainty in governance, legislative authority delegated to the executive should preferably be exercised by way of regulation or rules and not "policy" because the former constitute legal instruments which are legally binding.<sup>162</sup> However, the reality remains that, the exercise of delegated legislative authority does not always find expression as regulations and rules and has often been captured under other nomenclatures such as codes, strategies, notices and policies. This reality was recognised by the Supreme Court of Appeal in *Akani Garden Route (Pty) Ltd* when it asserted that:<sup>163</sup>

The word 'policy' is inherently vague and may bear different meanings. It appears to me to serve little purpose to quote dictionaries defining the word. To draw the distinction between what is policy and what is not with reference to specificity is, in my view, not always very helpful or necessarily correct. For example, a decision that children below the age of six are ineligible for admission to a school, can fairly be called a "policy" and merely because the age is fixed does not make it less of a policy than a decision that young children are ineligible, even though the word "young" has a measure of elasticity in it. Any course or program of action adopted by a government may consist of general or specific provisions. Because of this I do not consider it prudent to define the word either in general or in the context of the Act. *I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments.* Policy

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<sup>160</sup> This provision should be read in conjunction with the obligation imposed on municipalities by s 4(2)(j) of the *Systems Act* to "contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution".

<sup>161</sup> See Bishop and Raboshakga "National Legislative Authority" 17-47 to 17-50.

<sup>162</sup> *Akani Garden Route* para 7. See *Minister of Education* paras 10-11; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 8 BCLR 872 (CC) para 611.

<sup>163</sup> *Akani Garden Route* para 7. Own emphasis. See *Minister of Education* paras 10-11.

determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between legislature and executive will disappear.

From the above extract, it is clear that the mere fact that an instrument is referred to as a policy, code or strategy does not clearly determine its legal consequences.<sup>164</sup> This potentially increases uncertainty in governance. According to Steytler, the most important factor to be taken into consideration in determining the legislative effect of a policy, code or strategy is the legislative intent of the executive.<sup>165</sup> For example, the delegated legislative authority to the Minister of Cooperative Government and Traditional Affairs to prescribe minimum standards, in consultation with relevant stakeholders, for the provision of free basic services to poor households finds expression in the form of policy – indigent policies.<sup>166</sup> In addition, a national water resource strategy developed by the Minister of Water and Environmental Affairs pursuant to Chapter 2 of the *National Water Act*<sup>167</sup> is intended to be "binding on all authorities and institutions exercising powers or performing duties under this Act".<sup>168</sup> It is interesting to note that according to section 6(1)(b)(ii) of the *National Water Act*, the content of the national water resource strategy must set out international rights and obligations. It is obvious that if rights and obligations are spelt out in a strategy, that strategy can be enforceable to the extent that it creates rights and duties. Brand has indicated in the context of socio-economic rights jurisprudence that policies aimed at giving effect to socio-economic rights *inter alia* define the obligations of the executive arms of government in relation to those rights and that they are enforceable to the extent that such policies create concrete rights or entitlements.<sup>169</sup>

It is now established that although the *Constitution* is silent on Parliament's powers to delegate law-making functions to the executive, this is (to an extent)

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<sup>164</sup> Steytler 2011 *SAPL* 488-489.

<sup>165</sup> Steytler 2011 *SAPL* 488-489.

<sup>166</sup> See *National Framework for Municipal Indigent Policies* (2006).

<sup>167</sup> *National Water Act* 36 of 1998.

<sup>168</sup> See Preamble of Chapter 2 and ss 5 and 6 of the *National Water Act* 36 of 1998.

<sup>169</sup> See Brand "Introduction to Socio-economic Rights" 16-19. See also Pieterse 2010 *Law, Democracy and Development* 234-235.

constitutionally permissible for the purposes of good governance.<sup>170</sup> However, there is no prescribed manner in which the executive must exercise such powers. This allows the executive discretion to decide on how it will exercise delegated legislative authority. It appears that when the executive exercises delegated legislative authority in the form of policies, strategies or notices, it acts in accordance with the constitutional discretion it enjoys. The nomenclature of the instrument used by the executive when it exercises delegated legislative powers should therefore not automatically determine the legal effect thereof. If exercised in accordance with the *Constitution* and delegating legislation in the form of a policy, such a policy should be classified as an executive policy as now established by South African public administration experts.

Based on the preceding paragraphs, it can be said that executive policies which seek to realise socio-economic rights can be a direct response to the positive duties imposed on the executive arm of government to adopt measures to give effect to socio-economic rights or to give effect to the provisions of original legislation in the field of socio-economic rights. Due to the fact that executive policies derive their legal validity from the *Constitution* or delegated legislation, they should be enforceable in a court. The Constitutional Court has established that where a policy gives effect to constitutional socio-economic rights, individuals may challenge the policy against constitutional norms.<sup>171</sup> However, the claims of such individuals must be clearly formulated as a constitutional challenge against the policy and not a direct claim in terms of the *Constitution*.<sup>172</sup> For example, where a municipal indigent policy creates a concrete quantifiable right to social goods for the indigents within its jurisdiction, individuals can claim only the quantified right so created by the indigent policy except where they wish to challenge the constitutional validity of an indigent policy. One of the implications of the ability to enforce (executive) policies that give effect to socio-economic rights at especially the local government level is that it has

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<sup>170</sup> *Executive Council, Western Cape Legislature* para 51.

<sup>171</sup> Brand "Introduction to Socio-economic Rights" 15-17; Bilchitz 2010 *SALJ* 594; *Mazibuko* paras 71-73; *Nokotyana* paras 46, 49-50.

<sup>172</sup> See Bilchitz 2010 *SALJ* 594; *Mazibuko* para 73; *Nokotyana* paras 47-50; Du Plessis 2011 *PER* 95-96. See also: Van der Walt *Property and Constitution* 35-39; Van der Walt 2008 *Constitutional Court Review* 99-104.

the potential of creating an avalanche of avenues through which socio-economic rights claims could be located. For example, a community resident could claim a right of access to sufficient water either based on the *Constitution*, on legislation or on a municipal indigent policy. In the absence of awareness, it becomes difficult for community residents to legally ground their claims. In other words, they may for example demand that their right of access to water should be fulfilled and in the absence of awareness it becomes difficult to identify if this claim should be grounded in a municipal indigent policy, the national indigent policy, a by-law, the *Water Services Act*<sup>173</sup> or the *Constitution*.<sup>174</sup>

#### 4 Review of cases where courts enforced "executive" policies

Although it may be difficult to draw broad conclusions from the Constitutional Court's jurisprudence in particular, because it often considers it irrelevant to make broad/binding decisions when dealing with constitutional matters,<sup>175</sup> the ability and willingness of courts to enforce executive policies is evident from a number of socio-economic rights cases.

In *B v Minister of Correctional Services*,<sup>176</sup> the applicants, HIV-positive inmates of Pollsmoor Prison, approached the Western Cape High Court, Cape Town, with an application for an order declaring *inter alia* that they and all HIV-positive prisoners with a CD4 count of less than 500/ml should be entitled to receive anti-retroviral medication at State expense as consistent with their section 35(2)(e) constitutional right to adequate medical treatment.<sup>177</sup> In the absence of "firm guidelines relating to anti-retroviral treatment of HIV prisoners", and informed by the Department of Correctional Services operating principle that "prisoners should have access to health services and treatment equal to that provided to persons attending health facilities

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<sup>173</sup> *Water Services Act* 108 of 1997.

<sup>174</sup> For a similar type of reasoning, see Hattingh *Governmental Relations* 56-57.

<sup>175</sup> For example, the Constitutional Court has evaded all opportunities to give content to socio-economic rights. See *Grootboom* paras 29-33. In *Minister of Education*, the Constitutional Court refused to make a decision on the legal effect of a notice published by the then Minister of Education. See paras 10-13.

<sup>176</sup> *B v Minister of Correctional Services* 1997 6 BCLR 789 (C).

<sup>177</sup> *B v Minister* paras 1-4.

of provincial hospitals", the court expressed its willingness to extend the provincial hospital's policy on the treatment of AIDS patients to prisoners.<sup>178</sup> The provincial hospital's policy defined the extent to which the executive was committed to realising the right of access to adequate health services for members of the public that were infected by AIDS. According to this policy, full-blown AIDS persons attending public health facilities qualified for ARV treatment at the State's expense if their CD4 count was less than 200/ml but more than 50/ml.<sup>179</sup> The court indicated that at the very least, HIV positive prisoners should receive the same treatment enjoyed by members of the public who attend provincial public hospitals.<sup>180</sup> However, considering that the main issue under contention was what constitutes "adequate" medical treatment in terms of section 35(2)(e),<sup>181</sup> the court indicated that it lacked institutional competence to determine for medical doctors and the executive the content of that right.<sup>182</sup> The court held that since medical experts had translated what constitutes adequate medical treatment for the first and second applicants (including a prison doctor for the second applicant) through prescription, they had given concrete form to the constitutional right of prisoners to adequate medical treatment which it was prepared to uphold.<sup>183</sup> The court ordered that anti-retroviral treatment should be extended to the first and second applicant because they were entitled to receive it on prescribed medical grounds.<sup>184</sup> What is important to note for current purposes is that in the absence of a challenge on constitutional compliance, the court was willing to apply to prisoners the provincial hospital policy on the treatment of members of the public infected with AIDS.

In *Dudley Lee v Minister of Correctional Service*,<sup>185</sup> the Constitutional Court declared that the respondents were liable for delictual damages suffered by the applicant when he contracted tuberculosis (TB) while in detention because the responsible

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<sup>178</sup> *B v Minister* para 24.

<sup>179</sup> *B v Minister* paras 24-25.

<sup>180</sup> *B v Minister* para 24.

<sup>181</sup> *B v Minister* para 41.

<sup>182</sup> *B v Minister* paras 32, 34.

<sup>183</sup> *B v Minister* paras 31, 35-36, 60.

<sup>184</sup> *B v Minister* paras 60, 61.

<sup>185</sup> In *Dudley Lee v Minister of Correctional Services* 2013 2 BCLR 129 (CC) (hereafter *Dudley Lee*). For details on the facts of this case, see paras 1-10.

Correctional Services authorities failed to take preventative and precautionary measures to prevent the applicant from contracting TB as required by Standing Correctional Orders (SCOs).<sup>186</sup> The SCOs were specifically adopted pursuant to sections 2(a)-(b) and 12 of the *Correctional Services Act*<sup>187</sup> to define health measures that were supposed to be implemented by prison authorities in order to cater for the health of detainees and prevent the spread of contagious diseases amongst inmates.<sup>188</sup> The Constitutional Court held that non-adherence to the SCOs by responsible authorities violated *inter alia* the applicant's constitutional right to medical treatment at state expense as required by section 35(2)(e) of the *Constitution*.<sup>189</sup> What is important to note in this context is the fact that the Constitutional Court used obligations delimited by the executive through the SCOs to establish negligence and general non-compliance with the constitutional right of detained persons to receive adequate medical treatment by the Minister for Correctional Services.

In *Nokotyana*, the Constitutional Court found that the municipality acted reasonably in terms of its obligations to provide basic services to the applicants within the context of Chapters 12 and 13 of the *National Housing Code*.<sup>190</sup> According to Chapter 13, the municipality could not invest in capital-intensive services in informal settlements except after the MEC's approval for the upgrade of such informal settlements. The main reason behind this policy position is to eliminate "fruitless and wasteful expenditure" by municipalities.<sup>191</sup> In addition, Chapter 12 of the *National Housing Code* allows for essential assistance to be provided in cases of emergency only subject to the determination of an emergency by the MEC.<sup>192</sup> The Court decided this case based on the nature of obligations that the executive had concretised for municipalities, through policy, in order to contribute towards realising the

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<sup>186</sup> See *Dudley Lee* paras 37, 59-71 and 77.

<sup>187</sup> *Correctional Service Act* 111 of 1998. S 11 of the *Correctional Service Act* defines the obligations of the Department of Correctional Services re the rights of prisoners to receive adequate health care services.

<sup>188</sup> For details on relevant provisions of the SCOs, see *Dudley Lee* para 9.

<sup>189</sup> See *Dudley Lee* paras 61-65.

<sup>190</sup> *Nokotyana* paras 42-44.

<sup>191</sup> *Nokotyana* para 43.

<sup>192</sup> *Nokotyana* paras 32-40.

constitutional right of access to adequate housing and other basic services. In this connection and possibly overlooking the constitutional basis for enforcing executive policies, Bilchitz criticised the Court for giving policy the force of legislation in the *Nokotyana* case without a clear justification.<sup>193</sup>

In *Mazibuko*, litigation centred on the constitutional validity – reasonableness – of the City's Free Basic Water policy and indigent policy, especially in terms of the sufficiency of the quantity of water guaranteed therein for the purposes of human dignity.<sup>194</sup> This case demonstrates that, if the quantity of water guaranteed in those policy documents was "sufficient", residents could claim the supply of that quantity as consistent with their constitutional right of access to sufficient water. This thinking is discernable in the Constitutional Court's undecided position with regards to the application of the principle of "constitutional subsidiarity" in relation to the City's Free Basic Water policy.<sup>195</sup>

In *Minister of Education v Harris*, relying wrongly on section 3(4) of the *National Education Policy Act*,<sup>196</sup> the Minister of Education published a notice which imposed that a learner may not be enrolled for grade one in an independent school if he/she did not reach the age of seven in the same calendar year.<sup>197</sup> The Court declared *ultra vires* the policy decision of the Minister of Education, *inter alia* on the ground that the *National Education Policy Act* did not empower the minister to impose binding legal obligations on provinces, parents and independent institutions.<sup>198</sup> However, it appears from the unanimous judgment written by Sachs J that had the minister relied on section 5(4) of the *South African Schools Act*,<sup>199</sup> which expressly empowered him/her to determine the age at which pupils should be admitted into independent institutions as well as public schools, such a policy determination would

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<sup>193</sup> Bilchitz 2010 *SALJ* 598.

<sup>194</sup> See *Mazibuko* paras 6, 51, 71-77.

<sup>195</sup> *Mazibuko* paras 73-76. Dugard has generally criticised the Constitutional Court judgment in *Mazibuko* for failing to advance the interests of the poor. See Dugard "Civic Action and Legal Mobilisation" 71-99; Dugard 2010 *Review of Radical Political Economics* 175-194.

<sup>196</sup> *National Education Policy Act* 27 of 1996.

<sup>197</sup> See *Minister of Education* paras 1-3.

<sup>198</sup> See *Minister of Education* paras 10-20.

<sup>199</sup> *South African Schools Act* 84 of 1996.

have had a binding legal effect.<sup>200</sup> In *Minister of Education v Harris* the Court therefore ruled on the illegality of a ministerial policy determination that was grounded on a wrong legislation as opposed to the legal effect of a ministerial policy determination that is consistent with legislation.<sup>201</sup>

The approach of the Constitutional Court on the enforcement of executive policies giving effect to socio-economic rights in the above cases appears *ad hoc*. Its jurisprudence in a number of cases - *B v Minister of Correctional Services; Dudley Lee*; and *Mazibuko* suggest that, where an executive policy delimits and self-imposes obligations on the executive arm of government, the Court will easily enforce such self-imposed obligations. The same applies to instances where executive policies create objective legal entitlements for the poor in particular. However, it seems that the Court is slow to enforce executive policies when they purport to impose duties on third parties. In enforcing executive policies in *Nokotyana*, the court does not clearly explain that the basis for the enforcement of policies such as the Housing Code lies in the fact that legislation expressly delegates powers to the executive to adopt such a policy in terms of the *Housing Act*. To the contrary, in *Harris v Minister of Education* the Court decides the case on the basis of delegated legislative authority. It held that the notice published by the Minister could not be enforced because it was *ultra vires*. Instead of clearly pronouncing that the policy would have been binding if the Minister had relied on the correct legislation, Justice Sachs leaves us to draw this inference from his comments.<sup>202</sup>

## 5 Conclusion

The purpose of this article was to critically reflect on the status and possible constitutional basis for the judicial enforcement of executive policies that give effect to socio-economic rights in South Africa. This article has demonstrated that the basis for the enforcement of executive policies that give effect to socio-economic rights can be situated in the Constitutional Court's interpretation of the positive duties

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<sup>200</sup> See *Minister of Education* paras 15-18.

<sup>201</sup> See *Minister of Education* para 19.

<sup>202</sup> See *Minister of Education* paras 15-18.

imposed on the government to "adopt reasonable legislative and other measures" to give effect to relevant socio-economic rights. This article has argued and demonstrated that these positive duties amount to a constitutional delegation to the executive branch of government to use governance instruments such as executive policies to give effect to socio-economic rights. A review of selected cases has revealed that courts have enforced executive policies giving effect to socio-economic rights based on the obligation imposed on government to adopt reasonable legislative and other measures to realise socio-economic rights. This reasoning of the Court is discernable from the cases reviewed: *B v Minister of Correctional Services; Mazibuko; Nokotyana*; and *Dudley Lee*. In addition, it argued that where executive policies are adopted pursuant to delegated legislative authority, they are enforceable to the extent that they are consistent with relevant delegating legislation and the *Constitution*. It has been established through a number of Constitutional Court cases that although the *Constitution* does not expressly provide for the legislature to delegate law-making powers to the executive, it is permissible for purposes of good governance for original legislation to delegate regulatory powers to the executive: *Constitutionality of the Mpumalanga Petitions Bill; Executive Council, Western Cape Legislature*; and *Justice Alliance*. In addition, it has been established that the executive often has discretion on how it exercises delegated law-making powers. This could take the form of a regulation, policy, code or strategy.

This author hopes that the above exposition will help in clarifying the confusion surrounding the legal status and possible basis for the enforcement of executive policies that give effect to socio-economic rights in South Africa.

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## List of abbreviations

|                  |   |
|------------------|---|
| DHS              | Department of Human Settlements               |
| DPLG             | Department of Provincial and Local Government |
| Fordham Int'l LJ | Fordham International Law Journal             |
| Fordham Urb LJ   | Fordham Urban Law Journal                     |
| PER              | Potchefstroom Electronic Law Journal          |
| SAJHR            | South African Journal on Human Rights         |
| SALJ             | South African Law Journal                     |
| SAPL             | South African Public Law                      |
| SCOs             | Standing Correctional Orders                  |
| Stell LR         | Stellenbosch Law Review                       |