

"It is the Poor Who Will Suffer the Most": The Discriminatory Impact of Covid-19 Lockdown Restrictions on the Poor in South Africa

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Online ISSN
1727-3781

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Date Submission

26 January 2023

Date Revised

18 July 2023

Date Accepted

18 July 2023

Date Published

18 August 2023

Editor Prof N Kilian

How to cite this article

De Man A "It is the Poor Who Will Suffer the Most": The Discriminatory Impact of Covid-19 Lockdown Restrictions on the Poor in South Africa" *PER / PELJ* 2023(26) - DOI <http://dx.doi.org/10.17159/1727-3781/2023/v26i0a15506>

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DOI

<http://dx.doi.org/10.17159/1727-3781/2023/v26i0a15506>

Abstract

In 2020 the Coronavirus disease 2019 (COVID-19) spread across the globe at a seemingly unstoppable rate. Countries implemented various lockdown regulations to curb the spread of the virus. South Africa was no different and went into lockdown on 26 March 2020 under a five-tier risk-adjusted strategy. Under the regulations, all non-essential economic activity was immediately suspended. This had dire financial consequences for all in the country. However, statistics show that the poorest and most vulnerable in society have borne a disproportionate brunt of the impact of the economic restrictions. In this context this article asks whether the economic restrictions implemented under the lockdown regulations (as promulgated in terms of the *Disaster Management Act 57 of 2002*) discriminated unfairly on the grounds of poverty. This is in line with a 2018 decision by the Equality Court of South Africa that poverty constitutes unlisted grounds for discrimination as envisioned under the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Social Justice Coalition v Minister of Police 2019 4 SA 82 (WCC))*. In this article, the test for unfair discrimination laid down in *Harksen v Lane 1998 1 SA 300 (CC)* is applied to the economic restrictions implemented under the lockdown regulations to determine whether they constitute unfair discrimination. It is argued that a case of indirect discrimination on the grounds of poverty could be made. However, determining the justifiability (in terms of section 36 of the *Constitution of the Republic of South Africa, 1996*) of the regulations would require a thorough analysis based on expert evidence. Nevertheless, this article lays the foundation for an actionable case that could be brought before a court against the government of South Africa on behalf of a specific community to determine whether the economic restrictions were unfairly discriminatory on the grounds of poverty. This would allow for the consideration of a suitable remedy. This could include the formulation and implementation of development programmes to rectify the harm caused.

Keywords

Poverty; COVID-19; lockdown regulations; unfair discrimination; right to equality; South Africa.

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1 Introduction

The year 2020 will go down in history as the year the human species was reminded of its vulnerability, despite our self-proclaimed technological, economic, and medical achievements. In reaction to the COVID-19 pandemic, countries across the globe implemented strict regulations to "curb the spread of the virus" and "flatten the curve".¹ In response to the arrival of the virus in South Africa, the government implemented lockdown measures via a five-stage risk-adjusted strategy.² While some were baking banana bread, navigating the world of online videoconferencing, or taking that much-needed break, too many others had to fight for survival. The poorest in our society were expected to endure lockdown in cramped living spaces with limited income, resources and employment opportunities. The following statement from a typical poor South African man is poignant: "How can I buy a sanitiser when I can't even feed myself?"³

Under level five of the risk-adjusted strategy, all non-essential economic activity was prohibited. People were required to stay at home, schools were shut down, non-essential travel was banned, and personal movement was limited.⁴ The restrictions were enforced by the South African Police Service and National Defence Force in, some would argue, an overly militarised manner. Regulations were implemented across race, class and other divides with little consideration of differences. Whilst some have called COVID-19 "the great equaliser", some felt the burden of the implemented restrictions more than others. This had an impact on various human rights, including the rights to health care, food, education, work, and respect for human dignity and freedom of movement. People already at the lower end of the income spectrum and facing the consequences of pre-existing structural inequality and discrimination were made even more vulnerable to violations of these rights. In an address to the World Health Organisation,

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¹ Herfurth 2020 <https://www.uab.edu/news/youcanuse/item/11268-what-exactly-does-it-mean-to-flatten-the-curve-uab-expert-defines-coronavirus-terminology-for-everyday-life>.

² GN R480 in GG 43258 of 29 April 2020.

³ Ngqambela 2020 <https://mg.co.za/opinion/2020-11-10-recommendations-for-a-nation-in-crisis/>.

⁴ GN R480 in GG 43258 of 29 April 2020.

South African President Cyril Ramaphosa recognised that "it is the poor who will suffer the most" due to the pandemic.⁵

In a recent judgment of the South African Equality Court in *Social Justice Coalition v Minister of Police* 2019 4 SA 82 (WCC) (hereafter the *Social Justice Coalition* case) it was determined that poverty can be a basis for direct and indirect discrimination as outlined in section 9 of the *Constitution of the Republic of South Africa, 1996* and the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (hereafter the *Equality Act*). The latter prohibits "any act or omission ... which directly or indirectly (a) imposes burdens, obligations or disadvantages on; or (b) withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds."⁶ In addition to the listed grounds, it further prohibits discrimination based on any other grounds where such discrimination "causes or perpetuates systemic disadvantage; undermines human dignity; or adversely affects the equal enjoyment of a person's rights and freedoms."⁷

The importance of following a constitutional approach in curbing the pandemic was highlighted by Fabricius J as follows:

The virus may well be contained (but not defeated until a vaccine is found) but what is the point if the result of harsh enforcement measures is a famine, an economic wasteland and the total loss of freedom, the right to dignity and the security of the person and, overall, the maintenance of the rule of law? The answer in my view is: there is no point.⁸

In line with this statement, this article will explore to what extent the regulations implemented under the South African COVID-19 Risk-Adjusted Strategy were indirectly discriminatory, based on the grounds of poverty, and thus unconstitutional. This will be done by analysing the lockdown regulations in the light of the test for unfair discrimination set out in the well-known case of *Harksen v Lane* 1998 1 SA 300 (CC) (hereafter the *Harksen* case), which laid the foundation for inquiries into alleged discrimination in South Africa.

The paper will begin by providing an overview of the measures and limitations implemented in South Africa to contain the spread of the virus.

⁵ Ngatane 2020 <https://ewn.co.za/2020/05/18/the-poor-will-suffer-most-from-coronavirus-pandemic-says-ramaphosa>.

⁶ Section 1 of the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (hereafter the *Equality Act*).

⁷ Section 1 of the *Equality Act*.

⁸ *Khosa v Minister of Defence and Military Veterans* 2020 5 SA 490 (GP) (hereafter the *Khosa* case) para 6.

While not all the regulations will be discussed, the focus will be on the strictest regulations that impacted economic activity. Next, an analysis will be conducted on these regulations' impact, specifically on impoverished individuals. To demonstrate that poverty is also a form of unfair discrimination, the *Social Justice Coalition* case will be examined. For the purpose of this paper, those considered poor are those with low levels of income, earning potential, education, and skills levels. The paper will then scrutinise the lockdown regulations using the *Harksen* analysis to assess whether unfair discrimination occurred. This will involve exploring the concept of equality, determining whether discrimination occurred, examining whether the alleged discrimination was unjust (under section 9 of the *Constitution*), and ultimately evaluating if the discriminatory conduct can be justified by section 36 of the *Constitution*.

2 COVID-19 – regulations and preventive measures implemented in South Africa

2.1 Overview of regulations and preventive measures

On 15 March 2020, in response to the rapid increase in COVID-19 infections in South Africa, the Minister of Cooperative Governance and Traditional Affairs declared a national state of disaster in terms of section 27 of the *Disaster Management Act 57 of 2002*. This entailed that on 26 March 2020 South Africa was placed under lockdown with severe restrictions on economic activity and the movement of persons.⁹ As part of a more extensive set of regulations, these restrictions were promulgated in terms of section 27 of the *Disaster Management Act* (hereinafter referred to as the lockdown regulations). All persons were restricted to their places of residence unless they were performing essential services,¹⁰ needed to obtain essential goods and services or a social grant, or needed to receive emergency, life-threatening or chronic medical care.¹¹ Only businesses supplying, manufacturing, providing and selling essential goods and services were allowed to operate.¹² All other businesses and entities had to remain closed,¹³ including schools and other educational institutions.¹⁴ All forms of public transit were suspended except for the movement of essential

⁹ GN R398 in GG 43148 of 25 March 2020.

¹⁰ Annexure B in GN R398 in GG 43148 of 25 March 2020.

¹¹ Reg 11B(1)(a) in GN R398 in GG 43148 of 25 March 2020.

¹² Reg 11B(1)(b) and (c) in GN R398 in GG 43148 of 25 March 2020.

¹³ Reg 11B(1)(e) in GN R398 in GG 43148 of 25 March 2020.

¹⁴ Reg 11B(1)(a) in GN R398 in GG 43148 of 25 March 2020.

goods, the movement of people to perform key services or obtain crucial supplies, seek medical care, attend a funeral or receive a grant.¹⁵

On 29 April 2020, in line with section 27(2) of the *Disaster Management Act*, the Minister introduced the five-tier Risk-Adjusted Strategy that outlined the restrictions at each tier (alert level) and the phased reopening of the economy.¹⁶ Alert level four took effect on 1 May 2020. The movement of persons and goods was still significantly restricted and schools remained closed. Moreover, only a minimal number of products and services were permitted to be provided in addition to those already being provided under alert level five, for example, winter clothing, bedding, stationery and educational books.¹⁷ The country moved to level three on 1 June 2020, and this was eventually followed by levels two and one. Schools were reopened in phases starting with the return of Grade 12 and 7 learners on 1 June 2020. All learners were able to return to school by 3 August 2020. The stringent restrictions on economic activity put in place under alert levels five and four will be the focus of the rest of this article. This includes the closure of schools under the same alert levels as this has had a particular impact on future poverty levels.

In April 2020 President Ramaphosa announced the implementation of a R500 billion stimulus package to assist those facing a loss of income.¹⁸ Among others, and in addition to existing social grants, a special COVID-19 Social Relief of Distress grant of R350 per month was made available to "individuals who are currently unemployed and do not receive any other form of social grant or [Unemployment Insurance Fund] payment."¹⁹ It was projected that it would eventually reach up to 10 million people.²⁰ Other forms of social assistance included an additional R500 per month to child support grant beneficiaries and an additional R250 per month paid to all other grant beneficiaries.²¹ Furthermore, relief was provided to small businesses through debt relief, financial aid, tax payment deferrals, etc., including a COVID-19 Loan Guarantee Scheme.²² The Temporary

¹⁵ Reg 11C(1) in GN R398 in GG 43148 of 25 March 2020.

¹⁶ GN R480 in GG 43258 of 29 April 2020.

¹⁷ See Chapter 3 and Table 1 in GN R480 in GG 43258 of 29 April 2020.

¹⁸ Tromp and Kings 2020 <https://mg.co.za/article/2020-04-21-ramaphosa-announces-r500-billion-covid-19-package-for-south-africa/>.

¹⁹ South African Government date unknown <https://www.gov.za/COVID-19/individuals-and-households/social-grants-coronavirus-COVID-19>.

²⁰ Borat and Khöler 2020 <https://www.brookings.edu/articles/lockdown-economics-in-south-africa-social-assistance-and-the-ramaphosa-stimulus-package/>.

²¹ UNDP *COVID-19 in South Africa* 30.

²² The Presidency 2020 <http://www.thepresidency.gov.za/from-the-desk-of-the-president/desk-president%2C-monday%2C-9-november-2020>.

Employer Relief Scheme also provided income protection to workers and short-term relief to business owners.²³

2.2 Effects of the pandemic and lockdown regulations in South Africa

In his weekly newsletter dated 9 November 2020 President Ramaphosa proudly stated that:

[w]e massively expanded social protection on a scale that has never been attempted before in this country. We are one of the few countries in the world where the right of access to social security is enshrined in the Constitution, and we can be proud that during this grave crisis we gave practical expression to this right in many ways.²⁴

Even though this statement might be true, the reality for many South Africans was far less pleasant. South Africa had one of the harshest lockdowns globally, and the restrictions on economic activities and the movement of persons forced many to face financial difficulties. Job cuts, the inability to access the workplace and technological resources, and minimal or no working hours for hourly wage-earning employees caused economic hardship for many. It was reported that lockdown measures caused earnings to decrease by 30 per cent.²⁵ According to Statistics South Africa (Stats SA), October 2020 saw the national unemployment rate increase to 30.8 per cent, a 17-year high.²⁶

The pandemic and the consequent regulations had a disastrous impact on many households, especially in terms of the overall poverty levels of the country. However, this paper focusses on the possible disproportionate impact of the lockdown regulations on households already classified as poor before the pandemic, or those who fell into poverty because of the pandemic or the lockdown regulations.

Former Public Protector Professor Thuli Madonsela argues that the pandemic and the consequent lockdown regulations have "brought into focus the harsh realities of the inequality that still exists in South Africa, despite it having one of the most ground-breaking constitutions in the

²³ The Presidency 2020 <http://www.thepresidency.gov.za/from-the-desk-of-the-president/desk-president%2C-monday%2C-9-november-2020>.

²⁴ The Presidency 2020 <http://www.thepresidency.gov.za/from-the-desk-of-the-president/desk-president%2C-monday%2C-9-november-2020>.

²⁵ Payi 2020 <https://www.iol.co.za/weekend-argus/news/calls-for-economic-reforms-post-COVID-94e3a68e-f8b3-48b0-a982-c6ac3f8523c9>.

²⁶ Stats SA 2020 <http://www.statssa.gov.za/publications/P0211/P02111stQuarter2020.pdf>; Nathan 2020 <https://www.biznews.com/global-citizen/2020/11/12/job-losses-COVID-19>; Winning 2020 <https://www.reuters.com/article/safrica-economy-unemployment-idUKL8N2HY3RG>.

world."²⁷ The United Nations Development Programme (UNDP) reported that poorer households that rely on wage earnings or perform unskilled labour were more negatively affected by the pandemic and the lockdown restrictions than wealthier households.²⁸ For example, more than 250 000 domestic workers lost their jobs during lockdown levels five and four, with many still unemployed.²⁹ Households that were most affected are those where the income-earners have no more than a Grade 11 education, as they are generally employed as unskilled or semi-skilled workers in sectors deemed non-essential.³⁰ Many of these households fall within the International Labour Organisation's (ILO's) classification of the "working poor",³¹ as well as the definition of "the poor" on which this paper relies (see section 3 below). According to the ILO's annual *Global Wage Report*, low-income workers recorded the biggest losses in wages at 17.3 per cent of their standard earnings.³² It was reported that the poorest 10 per cent of households lost nearly 45 per cent of their income during the national lockdown.³³ In addition, food prices significantly increased during the strictest lockdown levels as travel costs spiked due to the restrictions on the movement of goods.³⁴ This further impacted the ability of poorer households to meet their basic needs. Even though many households faced job losses, the majority of people in the middle- and upper-class economic brackets were able to work from home and earn an income or were able to make use of savings to sustain them throughout the strictest lockdown periods. This was not the case for those that fell into the lowest income brackets of the country.

Those characterised in this paper as the poor also include, to a large extent, workers in the informal sector. Some three million people in South Africa work in the informal sector, which amounts to 20 per cent of total

²⁷ Payi 2020 <https://www.iol.co.za/weekend-argus/news/calls-for-economic-reforms-post-COVID-94e3a68e-f8b3-48b0-a982-c6ac3f8523c9>.

²⁸ UNDP *COVID-19 in South Africa* 19.

²⁹ Mutandiro 2020 <https://www.dailymaverick.co.za/article/2020-10-23-domestic-workers-who-lost-their-jobs-during-lockdown-forced-to-beg-on-the-streets-with-their-babies>; Harradine 2020 <https://www.conservativewoman.co.uk/lockdowns-will-kill-millions-more-than-COVID-ever-could/>; Naidoo 2022 <https://www.sabcnews.com/sabcnews/domestic-workers-among-hardest-hit-by-covid-19-pandemic/>.

³⁰ UNDP *COVID-19 in South Africa* 20.

³¹ "The working poor are employed people who live in households that fall below an accepted poverty line"; See ILO date unknown <https://ilostat.ilo.org/topics/working-poverty/>.

³² ILO *ILO Global Wage Report 2020-21* 15.

³³ Sambath 2023 <https://borgenproject.org/impact-of-covid-19-on-poverty-in-south-africa/>.

³⁴ Sambath 2023 <https://borgenproject.org/impact-of-covid-19-on-poverty-in-south-africa/>.

employment in the country.³⁵ As determined by the UNDP, workers in this sector faced the largest average of job losses due to the restrictions placed on economic activity and were not directly targeted for assistance under the stimulus package.³⁶ According to the Gauteng Health Member of the Executive Councils' spokesperson, informal settlers were particularly vulnerable to the virus due to high population density of the areas where they live and the near-impossibility of practising social distancing in cramped living spaces.³⁷ Income-earners in this category who fell ill faced further income deficits. Furthermore, mandatory lockdowns forced many multigenerational households living in cramped spaces to be vulnerable to diseases such as tuberculosis, further impacting their income-earning potential.³⁸ As a result, they were not able to meet their basic needs in the same manner as wealthier households.

The UNDP's socio-economic impact analysis also suggests that most households lost nearly 40 per cent of their income, and the special COVID-19 grants and national stimulus package were not enough to cover these losses.³⁹ This is compounded by the fact that money allocated for social assistance was illegally diverted due to corruption and financial mismanagement. Furthermore, many informal workers were curtailed from receiving social assistance due to prerequisites like submitting bank statements and tax clearance.⁴⁰

Moreover, with the use of technology reaching an all-time high as many with access to the technology resorted to working from home and taking online classes because of mandatory school closures, those without access to the necessary technology due to their income levels fell further behind. Even though many educational institutions offered internet data to students, only 34.7 per cent of households had access to a laptop or computer and only

³⁵ However, it is argued that due to the informality (and sometimes illegality) of the sector the exact number of income-earners in this sector is difficult to determine; See Rogan and Skinner 2019 <https://theconversation.com/south-africas-informal-sector-creates-jobs-but-shouldnt-be-romanticised-122745#:~:text=The%20latest%20QLFS%20found%20about,sector%20activities%20are%20not%20visible>.

³⁶ UNDP *COVID-19 in South Africa* 11.

³⁷ Maphanga 2020 <https://www.news24.com/news24/southafrica/news/two-sub-districts-in-johannesburg-have-recorded-over-10-000-COVID-19-cases-each-20200721>.

³⁸ Harradine 2020 <https://www.conservativewoman.co.uk/lockdowns-will-kill-millions-more-than-COVID-ever-could/>.

³⁹ UNDP *COVID-19 in South Africa* 19.

⁴⁰ Surico 2020 <https://news.trust.org/item/20201214132919-93fg5>.

23.9 per cent could access the internet at home.⁴¹ This was a particularly precarious situation for those children who already had limited access to quality education.⁴² The loss of learning time could have potentially impaired cognitive development, which impairment would be carried into adulthood unless educational programmes are redesigned to address this.⁴³ This is particularly harmful to poor children as they face further obstacles to escape the cycle of poverty.

From the above information, it is clear that the lockdown regulations that restricted economic activity, including the closure of schools, had a disproportionately harsh impact on those with the least income-earning potential, namely the poor. This conclusion accords with the finding of the Constitutional Court in *Democratic Alliance v President of South Africa*,⁴⁴ that the pandemic "has brought sharply into focus the fissures in our society caused by race, gender and other forms of egregious discrimination." This was confirmed by Pierre de Vos,⁴⁵ who argued that "the effects of the COVID-19 disaster are not evenly spread."

3 Poverty as grounds for discrimination: *Social Justice Coalition* case

Even though there is no standard definition of poverty, several indicative factors have been identified to determine whether a specific group, community or part of society can be characterised as poor. As argued by Chetwyn,⁴⁶ poverty relates to the standard of living of a portion of society and is usually determined in terms of economic capacity. According to the World Bank poverty is indicated by factors such as low income, low-level education, poor health, vulnerability and powerlessness.⁴⁷ In the context of this paper those considered poor are those with low levels of income and limited economic capacity, earning potential and education, and low skills level.

⁴¹ Sambath 2023 <https://borgenproject.org/impact-of-covid-19-on-poverty-in-south-africa/>.

⁴² UNDP *COVID-19 in South Africa* 22; Maseko and Rosa 2020 <https://www.dailymaverick.co.za/article/2020-12-03-the-new-lost-generation-COVID-19-has-poured-rocket-fuel-on-our-education-crisis/>.

⁴³ Hanushek and Woessmann *The Economic Impacts of Learning Losses* 12-13.

⁴⁴ *Democratic Alliance v President of South Africa* (21424/2020) [2020] ZAGPPHC 237 (19 June 2020) para 49.

⁴⁵ De Vos 2020 <https://www.dailymaverick.co.za/opinionista/2020-06-23-court-ruling-on-COVID-19-relief-criteria-affirms-that-the-pandemic-is-not-the-great-equaliser/>.

⁴⁶ Chetwynd, Chetwynd and Spector *Corruption and Poverty* 5-6.

⁴⁷ World Bank *World Development Report for 2000/01* 15.

Section 9 of the *Constitution* clearly states that unfair discrimination based on several listed grounds is prohibited. However, in *Prinsloo v Van der Linde* (hereafter the *Prinsloo* case) it was found that these "specified grounds are not exhaustive".⁴⁸ The Court held that:

[w]here discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of section 8(2). Other forms of differentiation, which in some other ways affect persons adversely in a comparably serious manner, may well constitute a breach of section 8(2) as well.⁴⁹

Therefore, any grounds of differentiation other than those listed in section 9(3) can also constitute grounds for discrimination if they have "an adverse effect on the dignity of the individual, or some comparable effect".⁵⁰ Furthermore, in addition to listing prohibited grounds the *Equality Act* goes further and prohibits unfair discrimination on any other grounds with certain discriminatory consequences (which will be discussed in detail below). Establishing that poverty meets the criteria of *any other grounds* will lay the foundation for the argument that the lockdown regulations restricting economic activity are unfairly discriminatory based on the unlisted ground of poverty.

In the case of *Social Justice Coalition* the Equality Court of South Africa considered a case of alleged unfair, indirect discrimination on the grounds of race and poverty against the inhabitants of a predominantly black settlement. The Court specifically considered the provisions of the *Equality Act*, which "has its origin in section 9 of the Constitution".⁵¹ Section 6 of the Act provides the general prohibition that "[n]either the state nor any person may unfairly discriminate against any person". The *Equality Act* defines discrimination as:

[a]ny act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-

- (a) imposes burdens, obligations or disadvantages on; or

⁴⁸ *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) (hereafter the *Prinsloo* case) paras 28, 31-32. Even though this finding was based on s 8 of the *Constitution of the Republic of South Africa Act* 200 of 1993 (the interim *Constitution*), it is generally accepted that the same argument can be applied to s 9(3) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*).

⁴⁹ *Prinsloo* case para 33.

⁵⁰ *Khosa* case para 70; Also see *Harksen* case paras 46-49.

⁵¹ *Social Justice Coalition* case para 30.

- (b) withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds.⁵²

The prohibited grounds include:

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
- (b) *any other ground* where discrimination based on that other ground-
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).⁵³

For the first time, the Equality Court had to consider whether poverty "qualifies as an unlisted ground in terms of paragraph (b) of the definition of prohibited ground."⁵⁴ It was held that for poverty to qualify as an unlisted ground it must be determined whether it falls within the Act's definition of "any other ground". Considering the definition of "prohibited grounds", poverty will qualify as an unlisted ground if discrimination on that basis results in:

[u]ndesirable consequences which (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyments of a person's rights and freedoms in a serious manner that is comparable to discrimination on any of the prohibited grounds.⁵⁵

To make the argument that poverty qualifies as an unlisted ground, the applicants in the case relied on section 34(1) of the *Equality Act*, which states that:

[i]n view of the overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status-

- (a) special consideration must be given to the inclusion of these grounds in paragraph (a) of the definition of "prohibited grounds" by the Minister.

The *Equality Act* defines socio-economic status as:

⁵² Section 1 of the *Equality Act*.

⁵³ Section 1 of the *Equality Act*. My emphasis.

⁵⁴ Section 1 of the *Equality Act*.

⁵⁵ *Social Justice Coalition* case para 57.

[i]ncluding a socio or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level education qualification.⁵⁶

The applicants further argued that poverty is a systemic problem that violates human dignity and leaves the poor vulnerable and marginalised.⁵⁷ The Court agreed with the applicants' arguments and further held that discrimination based on poverty hampers the protection and fulfilment of the economic and social rights of all.⁵⁸ The finding of the Court is also in line with the following views of the United Nations Committee on Economic, Social and Cultural Rights (CESCR):

The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of 'other status' is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds. ... These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization.⁵⁹

The Committee further recognised that peoples' economic or social status can make them vulnerable to discrimination, resulting in unequal access to the enjoyment of economic, social, and cultural rights.⁶⁰

One could argue in this light that it is possible to unfairly discriminate based on poverty because of the continued marginalisation and vulnerability experienced by people living in poverty, as well as the effect that systemic disadvantages have on their human dignity and equal enjoyment of rights.

4 The lockdown regulations and the right to equality and non-discrimination

The preceding information paints a bleak picture, especially for those already part of one of the most vulnerable sectors in society before the pandemic, i.e. the poor. In line with the finding of the Equality Court that poverty can constitute a ground for discrimination, it is possible to ask if the

⁵⁶ Section 1 of the *Equality Act*.

⁵⁷ *Social Justice Coalition* case paras 63-64.

⁵⁸ *Social Justice Coalition* case para 65. Note that the Constitutional Court of South Africa dismissed an appeal against the judgment of the Equality Court which was heard on 3 February 2022.

⁵⁹ CESCR *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights* UN Doc E/C.12/GC/20 (2009) para 27.

⁶⁰ CESCR *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights* UN Doc E/C.12/GC/20 (2009) para 35.

government's lockdown regulations were discriminatory against those living in poverty.

It is important to note that, according to the rule of subsidiarity, "adjudication of substantive issues should (subject to certain provisos ...) be determined with reference to more particular, indirect constitutional norms applicable, rather than more general, direct constitutional norms applicable."⁶¹ Therefore, claims of unfair discrimination must be based on the *Equality Act* rather than invoking the constitutional right to equality under section 9. However, an important proviso of the subsidiarity rule applies. The specific constitutional right should be relied upon when a regulation or legislation is challenged on the basis of its alleged inconsistency with the *Constitution*.⁶² Therefore, an argument that the lockdown regulations are unfairly discriminatory should be based on section 9 of the *Constitution*, not on the *Equality Act*, as the constitutionality of regulations is in question.

4.1 The meaning of equality

Section 9(2) of the *Constitution* states that "[e]quality includes the full and equal enjoyment of all rights and freedoms." The *Equality Act* defines "equality" as "the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and equality in terms of outcome." The formal definition of equality requires that all people are treated equally without differentiation on any arbitrary grounds such as race, sex, religion, etc.⁶³

On the other hand, substantive equality requires "that laws or policies do not reinforce the subordination of groups already suffering social, political or economic disadvantage and requires that laws treat individuals as substantive equals, recognising and accommodating peoples' differences."⁶⁴ The Constitutional Court of South Africa has demonstrated a preference for the notion of substantive equality over that of formal equality.⁶⁵ The rest of the paper will also rely on the substantive interpretation of equality.

⁶¹ Murcott and Van der Westhuizen 2015 CCR 46-47; Also see Albertyn 2018 SALJ 413.

⁶² Murcott and Van der Westhuizen 2015 CCR 47-48; Also see *Solidariteit Helpende Hand NPC v Minister of Basic Education* (58189/2015) [2017] ZAGPPHC 1220 (8 November 2017) (hereafter the *Solidariteit* case) para 75.

⁶³ Smith 2014 AHRLJ 611.

⁶⁴ Smith 2014 AHRLJ 613.

⁶⁵ See Smith 2014 AHRLJ 614-629; Albertyn and Goldblatt 1998 SAJHR 462.

4.2 *Harksen v Lane: Test for unfair discrimination*

In *Harksen*, Goldstone J outlined a comprehensive test to determine whether unfair discrimination had occurred. As the first step, it must be determined whether the provision in question differentiates between people or categories of people. If this is the case, whether the differentiation bears a rational connection to a legitimate government purpose should be considered. With reference to the interim *Constitution*⁶⁶ in place at the time when the case was heard, Goldstone J held that section 8(1) would be violated if no rational connection could be made. On the other hand, even if a rational connection exists, the provision could still amount to discrimination. This leads to the second question in the inquiry: "Does the differentiation amount to unfair discrimination?"⁶⁷ Answering this question depends on a two-stage analysis: First, "does the differentiation amount to 'discrimination'?"⁶⁸ If it is alleged that the differentiation is based on specified grounds, then discrimination needs to be established. In the case of unspecified grounds, "then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner."⁶⁹

If discrimination is determined, the next step in the two-stage analysis is determining whether the discrimination amounts to unfair discrimination. If discrimination was based on specified grounds, then unfairness can be presumed. If, however, discrimination was based on unspecified grounds, then the onus rests on the complainant to prove unfairness. The focal point of the test for unfairness is the "impact of the discrimination on the complainant and others in his or her situation." If it is found that the discrimination was not unfair, then section 8(2) will not have been violated.⁷⁰ However, if it has been found that the discrimination was unfair, then as the final step, it will have to be determined whether it can be justified under the limitations clause of the *Constitution*.⁷¹ Even though the test was formulated more than 20 decades ago, most judges still rely on it, as seen from the *Social Justice Coalition* case that was decided in 2018. As stated by Rósaan

⁶⁶ *Constitution of the Republic of South Africa* Act 200 of 1993.

⁶⁷ *Harksen* case para 53(b).

⁶⁸ *Harksen* case para 53(b)(i).

⁶⁹ *Harksen* case para 53(b)(ii).

⁷⁰ *Harksen* case para 53(b)(ii).

⁷¹ *Harksen* case para 53(c).

Krüger,⁷² "[t]he test has certainly proven to be practical, at least to presiding officers, since it has been endorsed and applied over and over again since it was formulated."

The first step of the *Harksen* test is based on section 9(1) of the *Constitution* (section 8(1) of the interim *Constitution*) and is seen as the "gatekeeper clause".⁷³ The purpose of the rationality test was explained in *Prinsloo*:

It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as 'mere differentiation'. In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation.⁷⁴

The Constitutional Court went further and explained that at the root of the rationality test:

[t]he question is not whether the government may have achieved its purposes more effectively in a different manner, or whether its regulation or conduct could have been more closely connected to its purposes. The test is simply whether there is a reason for the differentiation that is rationally connected to a legitimate government purpose.⁷⁵

The novel COVID-19 virus posed a significant risk to the health and life of everyone. With more than six million deaths related to the virus globally,⁷⁶ the priority at the time of the implementation of the regulation was to save lives. The rights to life and access to health care are fundamental rights contained in the *Constitution*. The Constitutional Court of South Africa views the right to life as the most fundamental human right from which all other rights emanate.⁷⁷ The respondent in the case of *De Beer v The Minister of Cooperative Governance and Traditional Affairs* (hereafter the *De Beer* case)⁷⁸ submitted that the protection and fulfilment of these rights were the

⁷² Krüger 2011 SALJ 479.

⁷³ Albertyn and Goldblatt 1998 SAJHR 462.

⁷⁴ *Prinsloo* case paras 25-26.

⁷⁵ *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council* 1998 2 SA 61 (CC) para 24; See also Albertyn and Goldblatt 1998 SAJHR 464.

⁷⁶ Worldometer 2023 https://www.worldometers.info/coronavirus/?utm_campaign=homeAdvegas1?%22%20%5C%20%22countries.

⁷⁷ *S v Makwanyane* 1995 3 SA 391 (CC) paras 80-86.

⁷⁸ *De Beer v The Minister of Cooperative Governance and Traditional Affairs* 2020 11 BCLR 1349 (GP) (hereafter the *De Beer* case) para 4.8. It is worth noting that the judge did not find fault with the ultimate objective of the lockdown regulations (i.e., to limit the spread of the virus) and even found it to be "commendable" (para 7.17).

overarching objectives of the regulations. It was contended that this could be achieved only through curbing the spread of the virus and ensuring that hospitals had enough resources to care for those in need, even if this was achieved at the cost of economic losses and restrictions on the freedom of movement.⁷⁹ Richard Calland agrees and argues that:

[t]he risk-adjusted strategy that creates the framework of different COVID-19 alert levels, under the Disaster Management Act 2002, seeks to strike a balance at every stage of the unfolding crisis between competing and overlapping priorities. This includes the public health priority of building capacity in the health system to absorb an inevitable rise in infections, and the duty of the state to protect lives and livelihoods.⁸⁰

For the argument at hand, and to proceed to the next stage of the *Harksen* test, we can assume that the lockdown regulations served a legitimate government purpose and that there was no violation of section 9(1) of the *Constitution*. A claim of unfair discrimination of this nature should therefore be brought in terms of section 9(3), and a comprehensive examination of fairness under this section would be more appropriate.⁸¹ However, according to the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice* "[t]his does not mean ... that in all cases the rational connection inquiry of stage (a) must inevitably precede stage (b). The stage (a) rational connection inquiry would be clearly unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable."⁸²

4.3 Determining whether discrimination occurred

The second step in the inquiry requires a "two-stage analysis". First, it has to be determined whether the differentiation amounts to discrimination, as outlined in section 9(3). Two forms of discrimination exist. The first is differentiation on one or more of the grounds listed in section 9(3). The second form is differentiation based on grounds not specified in section 9(3) but analogous to those listed.⁸³ In *Prinsloo*, it was held that:

[g]iven the history of this country we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them... [U]nfair

⁷⁹ *De Beer* case paras 6.9-6.11.

⁸⁰ Calland 2020 <https://theconversation.com/court-throws-south-africas-lockdown-exit-strategy-into-disarray-but-it-got-it-wrong-139991>.

⁸¹ See Albertyn 2018 SALJ 406.

⁸² *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 18.

⁸³ *Harksen* case para 46; *Prinsloo* case para 28.

discrimination, when used in this second form in section 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity... Where discrimination results in treating persons differently in a way that impairs their fundamental dignity as human beings, it will clearly breach section 8(2). Other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner, may well constitute a breach of section 8(2) as well.⁸⁴

To determine whether discrimination occurred, it first has to be established against whom the alleged discrimination occurred, and thus the grounds for discrimination. Based on the information set out in section 1.2 above, it is argued that the lockdown regulations disproportionately impacted those living in poverty at the start of the pandemic (and eventually those pushed into poverty because of the pandemic and the lockdown restrictions).

The question then must be answered whether the differential treatment, in this case the differentiated impact as highlighted in section 1.2 above, was of such a nature that it impaired the fundamental human dignity of those living in poverty. The United Nations Office of the High Commissioner for Human Rights has explicitly stated that "poverty is not only deprivation of economic or material resources but a violation of human dignity too."⁸⁵ Furthermore, according to Moseneke DCJ: "The well-earned and lofty thrust of our Constitution is at strenuous odds with demeaning deprivation. Abject poverty wrenches dignity out of any life."⁸⁶ Pushing people further into the cycle of poverty through restrictions on their income-earning potential (as has been the case with the lockdown measures) will violate their right to have their human dignity respected and upheld as contained in sections 7 and 10 of the *Constitution*.⁸⁷ This argument is supported by the fact that the Supreme Court of Appeal of South Africa has found the "freedom to engage in productive work ... an important component of human dignity."⁸⁸ Therefore, based on the arguments presented above, a case of discrimination based on the unlisted grounds of poverty can be made.

⁸⁴ *Prinsloo* case paras 31, 33.

⁸⁵ OHCHR date unknown <https://www.ohchr.org/en/issues/poverty/dimensionofpoverty/pages/index.aspx>.

⁸⁶ *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) 705; See also Van der Linde 2020 *PELJ* 18.

⁸⁷ Section 7(1) of the *Constitution* states: "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom." and s10 states: "Everyone has inherent dignity and the right to have their dignity respected and protected."

⁸⁸ *Minister of Home Affairs v Watchenuka* 2004 1 All SA 21 (SCA) para 27.

In *Social Justice Coalition* the Court further recognised that discrimination might be direct or indirect. It defined indirect discrimination as "differentiation [that] appears to be neutral but has the effect of discriminating on prohibited grounds, whether listed or unlisted".⁸⁹ Reference was also made to the definition of indirect discrimination provided by the United Nations CESCR as "refer[ing] to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination."⁹⁰ In determining whether the alleged discrimination in the present case was of a direct or indirect nature, it is clear that the lockdown regulations appeared to be neutral at face value as they were generally applied to all within South Africa's jurisdiction. However, the regulations had a disproportionately harmful impact on a specific group of people based on an inherent characteristic, in this case, on the poor. As such, a case of indirect discrimination based on the unlisted ground of poverty can be argued.

4.4 Test for unfairness

In line with the concept of substantive equality, differential treatment will not always *per se* constitute a violation of the right to equality. In *President of the Republic of South Africa v Hugo*⁹¹ (hereafter the *Hugo* case) it was held that to ensure an equal society, different treatment of different groups is sometimes necessary, especially where the aim is to alleviate disadvantage. However, any such differential treatment must be fair. Speaking to the concept of unfairness, the Court in *Hugo* held that:

[t]he prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.⁹²

⁸⁹ *Social Justice Coalition* case para 36. See also *Pretoria City Council v Walker* 1998 2 SA 363 (CC), where unfair indirect discrimination on the ground of race was found.

⁹⁰ CESCR *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights* UN Doc E/C.12/GC/20 (2009) para 10(b). "Covenant rights" refer to rights contained in the *International Covenant on Economic, Social and Cultural Rights* (1966).

⁹¹ *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) (hereafter the *Hugo* case) para 41.

⁹² *Hugo* case para 41.

It thus falls to be determined, in line with the second leg of the *Harksen* two-stage analysis, whether the indirect discrimination based on the grounds of poverty, as determined above, amounts to *unfair* discrimination. The Constitutional Court has found that unfairness can be presumed in the event of discrimination on specified grounds. However, in the case of discrimination on unspecified grounds, as is in the present case, no such presumption can be made, and unfairness must be established.⁹³ The focus should primarily be on the impact of the discrimination on the complainant and others in the same position.⁹⁴ This was confirmed in the case of *Pretoria City Council v Walker*.⁹⁵ In section 1.2 above it was highlighted that the economic restrictions and the closure of schools had a disproportionately greater impact on the ability of the poor to meet their basic needs than on those in the middle and upper classes of society. This disproportionate impact caused by the loss of income and learning time was not only felt during the strictest lockdown periods, but continues to hamper the ability of the poor to escape the cycle of poverty.

In *Harksen* Goldstone J listed several factors whose cumulative effects must be considered in determining the fairness of the alleged discrimination as it relates to its impact on a complainant. These are a) "the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage"; b) whether the discrimination in question is on a specified ground or not; c) the nature of the provision that constitutes the alleged discrimination; d) the purpose of the provision; e) the extent of the alleged discrimination on the rights of the complainants; f) whether "it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature"; and g) any other relevant factors.⁹⁶

In the present instances, the alleged unfair discrimination is based on the grounds of poverty, with the poor constituting the disadvantaged group. Therefore, the position of the disadvantaged group, in this case the poor, needs to be considered. Poverty can have long-lasting consequences for households and creates a negative spiral that can span generations.

⁹³ *Harksen* case para 47; *Prinsloo* case para 28.

⁹⁴ *Harksen* case para 54(b); *Social Justice Coalition* case para 38; Also see Alibertyn 2007 SAJHR 259.

⁹⁵ *Pretoria City Council v Walker* 1998 2 SA 363 (CC) para 37.

⁹⁶ *Harksen* case para 51.

Notions like a "cycle of poverty"⁹⁷ and "poverty trap"⁹⁸ are well-known and accepted in practice and scholarship. Even before the 2019 coronavirus pandemic South Africa had been plagued by high poverty levels and growing inequality.⁹⁹ In a briefing to the World Bank, it was estimated that 55.5 per cent of the population lives in poverty, and South Africa is known as "one of the most unequal countries in the world".¹⁰⁰ In *Social Justice Coalition* the Court agreed with the applicant's argument that poverty creates and contributes to systemic disadvantages, especially in South Africa, due to our history and its impact on our current economic system.¹⁰¹ Section 34(1) of the *Equality Act* also recognises the link between systemic disadvantages and socio-economic status.

Moreover, people living in poverty are considered vulnerable and need special protection. As already mentioned, one of the effects of the discriminatory lockdown regulations was pushing people in this group further into an often-inescapable cycle of poverty, thereby enhancing their vulnerability. In *Hugo* it was held that "[t]he more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair."¹⁰² Additionally, the notion of substantive equality requires that this group receives special protection. The disadvantages caused by the economic lockdown restrictions and the closure of schools (as shown in section 1.2 above) contributed to the downward spiral of poverty and made it even more difficult for those trapped in its clutches to escape. The precarious position of the poor in society and the fact that their vulnerability was enhanced due to the lockdown restrictions strengthen the argument that the discrimination faced was unfair.

In terms of the next stage of the determination of fairness, the Court in *Hugo* held that:

⁹⁷ World Vision 2021 <https://www.worldvision.ca/stories/child-sponsorship/what-is-the-cycle-of-poverty>.

⁹⁸ The Economic Times date unknown <https://economictimes.indiatimes.com/definition/poverty-trap#:~:text=Definition%3A%20Poverty%20trap%20is%20a,capital%20and%20credit%20to%20people>.

⁹⁹ It was reported that 25.2 per cent of the population lived in extreme poverty in 2017; Stats SA 2019 http://www.statssa.gov.za/MDG/SDGs_Country_Report_2019_South_Africa.pdf 45.

¹⁰⁰ World Bank 2020 https://databank.worldbank.org/data/download/poverty/33EF03BB-9722-4AE2-ABC7-AA2972D68AFE/Global_POVEQ_ZAF.pdf; Stats SA 2020 <http://www.statssa.gov.za/?p=12930>.

¹⁰¹ *Social Justice Coalition* case paras 63-65; Also see Van der Linde 2020 *PELJ* 18.

¹⁰² *Hugo* case para 112; Also see *Solidariteit* case para 53.

[t]o determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.¹⁰³

This is in line with *Harksen*, where the Judge held that:

[i]f its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question.¹⁰⁴

Considering the high death toll related to COVID-19 globally and nationally, the importance of the objectives of the lockdown regulations as a whole, namely to save lives by limiting the spread of the virus and conserving limited medical resources, cannot be denied. At first glance, the regulations seemed to serve a legitimate societal interest. However, how this interest balances with the rights of the poor will in my view be one of the more difficult considerations in determining the fairness of the lockdown restrictions and will be expanded upon in section 3.5 below.

Lastly, the extent to which the infringement of the complainant's rights impairs their human dignity has to be considered.¹⁰⁵ According to the Constitutional Court, "the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair."¹⁰⁶ This was one of the primary considerations of unfairness in *Hugo*.¹⁰⁷ In *Harksen* Goldstone J held that:

The prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner.¹⁰⁸

It is argued that discrimination that is likely to impair human dignity will likely be held to be unfair.¹⁰⁹ As already argued in detail above, poverty significantly impacts on human dignity. Moreover, bearing in mind the considerable effect of the economic restrictions on the livelihoods of many poor households in South Africa, and considering the findings of the UNDP's

¹⁰³ *Hugo* case para 43.

¹⁰⁴ *Harksen* case para 51; Also see Krüger 2011 *SALJ* 486.

¹⁰⁵ Albertyn 2018 *SALJ* 411.

¹⁰⁶ *Solidariteit* case para 53; Also see Kok 2017 *SAJHE* 33; De Waal 2002 *SA Merc LJ* 141-156.

¹⁰⁷ *Hugo* case paras 41, 43.

¹⁰⁸ *Harksen* case para 50.

¹⁰⁹ Kok 2017 *SAJHE* 33.

socio-economic impact assessment outlined above, an argument can easily be made that the lockdown restrictions constituted a significant impairment of the well-being and human dignity of those living in poverty.

A comprehensive view of the arguments presented above lays a strong foundation for the argument that the lockdown restrictions were unfairly and indirectly discriminatory on the ground of poverty. This brings us to the next step in the inquiry: whether the perpetrator of the alleged discrimination can prove that the differential treatment (in this case, the differential impact) was indeed fair and a justifiable limitation of the right to equality.

4.5 Section 36 of the Constitution: Justifying the limitation of rights

In the event of a finding of unfair discrimination, according to *Harksen*, the final leg of the inquiry involves a determination as to whether the discriminatory provision is justifiable under the limitation clause of the *Constitution*.¹¹⁰ Section 36 of the *Constitution* enables a respondent to argue that the limitation of the right to equality (unfair discrimination) is justifiable. As contained in section 9 of the *Constitution*, the right to equality is not an absolute right and can be limited if the standards outlined in section 36 are met.¹¹¹ Section 36(1) of the *Constitution* states:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

The first requirement of section 36 is that the limitation of a fundamental right must be in accordance with a "law of general application".¹¹² This is indeed the case with the lockdown regulations, which were applied without differentiation to all in South Africa. In terms of the rest of the requirements of section 36, according to Anton Kok,¹¹³ many of the same factors

¹¹⁰ *Harksen* case para 52.

¹¹¹ Smith 2014 *AHRLJ* 616; *De Beer* case para 6.1.

¹¹² See Kok 2017 *SAJHE* 34.

¹¹³ Kok 2017 *SAJHE* 34; Also see Krüger 2011 *SALJ* 504.

considered in determining whether discrimination was unfair will also be considered in determining the justifiability of the unfair discrimination. These have already been set out in detail above. However, it is worth recognising that the right to equality and the right to have one's inherent human dignity respected are fundamental human rights. Respect for and the protection of these rights are especially important in the light of the history of the country and current high levels of inequality. In addition, the purpose of the lockdown restrictions deserves further attention.

In this specific case, the global coronavirus pandemic and its significant effect on health and well-being will play a crucial role in determining the justifiability of the limitation of rights due to the lockdown regulations.¹¹⁴ As already mentioned, the purpose of the lockdown restrictions seems to have been laudable. Undoubtedly, the spread of the virus was significantly slower during the strictest lockdown levels. However, many nations, South Africa included, experienced continued waves of COVID-19 despite the lockdown. The argument by many "lockdown sceptics" that the lockdown regulations served only to postpone the inevitable seems to hold water. Many have argued that considering the low mortality rates and their severe impact on the economy the lockdown was not justified and that lockdowns only postpone the inevitable.¹¹⁵ Keeping in mind the toll that the pandemic took on the lives and health of millions across the globe, it would be difficult to argue that the restrictions did not serve a legitimate purpose. The question whether less restrictive means was available to achieve this purpose would be more complex to answer. This would require an in-depth comparative analysis of countries with populations and socio-economic compositions similar to South Africa's. At this moment in time one should be wary of the benefits of hindsight based on the mass of knowledge acquired since the virus first crossed our borders. However, it would be safe to assume, for the purpose of this article, that the restrictions served an important societal purpose.

It is also worth considering the steps taken by the government to mitigate any disadvantages caused by the lockdown restrictions. As mentioned above, the government introduced a R500 billion stimulus package to minimise the impact of the economic restrictions on individuals and businesses. However, current projections indicate that the respective grants and loans were not sufficient to cover all financial losses (which was to be

¹¹⁴ Kok 2017 *SAJHE* 33.

¹¹⁵ See for instance Harradine 2020 <https://www.conservativewoman.co.uk/lockdowns-will-kill-millions-more-than-COVID-ever-could/>; Jones 2020 <https://www.conservativewoman.co.uk/flawed-science-of-the-lockdown-lobby>.

expected, considering the impact of the pandemic as well as the economic restrictions put in place on the global and national economic levels). However, in this instance the question should be whether the stimulus package was enough to protect poor households and individuals from suffering a disproportionate loss in their overall well-being as against their wealthier counterparts. According to the UNDP's assessment, this does not seem to have been the case.¹¹⁶

Whether the restrictions served a legitimate purpose or important societal goal is only one side of the coin. All the factors outlined in section 36 above should be considered in their entirety and balanced against one another. According to the Constitutional Court: "[t]his will involve a weighing of the purpose and effect of the provision in question, and a determination as to the proportionality thereof in relation to the extent of its infringement of equality."¹¹⁷

As argued by Krüger:

The limitation analysis proposed by the court involves a 'proportionality exercise, in which the purpose and effects of the infringing provisions are weighed against the nature and extent of the infringement caused'.¹¹⁸

This analysis should be contextual and should consider the prevailing social, economic and political circumstances. The leader of the Democratic Alliance, John Steenhuisen, has adamantly stated that the effects of the lockdown on poverty, hunger, unemployment, domestic violence and general public health have "shown to be far more deadly than COVID in lower-income countries."¹¹⁹ The extent of the lockdown restrictions and their impact on the poor, as outlined above, must be balanced with the purpose and extent of the limitation of rights. This includes balancing various interests, for example, protecting society at large against individual financial hardships. Keeping in mind the fundamental importance of the rights to equality and respect for human dignity, as well as the disproportionate hardships experienced by the poor, which are still affecting many today, a strong case can be made that the impact of the economic restrictions under the lockdown regulations constitutes unfair discrimination.

¹¹⁶ UNDP *COVID-19 in South Africa* 19.

¹¹⁷ *Harksen* case para 52.

¹¹⁸ Krüger 2011 *SALJ* 503.

¹¹⁹ Cothia 2020 <https://www.thesouthafrican.com/news/steenhuisen-da-comments-ramaphosa-address-speech/>.

Balancing the various interests in society is a delicate matter usually left up to the prerogative of policymakers, whom the courts see as adequately positioned to make decisions in this regard. Bearing in mind the unprecedented times we found ourselves in, Calland argues that:

[a]t a time of such extreme crisis, courts may be inclined to give the government a little more latitude – such as the decision of the German Supreme Court ... in finding that its government has a wide scope for the assessment, evaluation and design of its COVID-19 response. As South Africa's Constitutional Court has found in other cases involving complex public policy and socio-economic rights, the more 'polycentric' the governmental decision-making or policy choice, the more careful the court should be not to stray into the executive's lane. Nothing could be as polycentric as COVID-19.¹²⁰

However, this does not permit a government to act in an authoritarian manner without regard to the constitutionally recognised rights of its people.¹²¹ This is not to say that the South African government acted with complete indifference of all fundamental human rights. However, the question is rather whether sufficient consideration was given to the impact of the regulations on various groups in society, in this case the poor, and how best these effects could have been minimised. The *Constitution* still forms the cornerstone of South African society, and its values become even more critical when we must find a way forward amidst uncertain times. In this instance South African courts play an invaluable role as they have a norm-setting power and must fulfil this role by ensuring that policy decisions are in line with constitutional values, especially the notion of substantive equality.

5 The way forward

In the event of a finding that the lockdown regulations which formed the focus of this article constitute indirect, unfair discrimination on the grounds of poverty, an appropriate remedy should be considered. However, any such finding should be based on a consideration of each regulation individually and not on the entirety of the regulations. Section 172 of the *Constitution* grants courts broad discretion to order suitable remedies in the event of a violation of constitutionally protected rights. Even though the claim of unfair discrimination in the present case does not rely on the *Equality Act*, section 21 of the Act sets out the remedies for complainants

¹²⁰ Calland 2020 <https://theconversation.com/court-throws-south-africas-lockdown-exit-strategy-into-disarray-but-it-got-it-wrong-139991>.

¹²¹ Calland 2020 <https://theconversation.com/court-throws-south-africas-lockdown-exit-strategy-into-disarray-but-it-got-it-wrong-139991>.

of unfair discrimination. It can provide guidance in deciding on appropriate relief. This could include an order to implement redress measures to rectify the disproportionate impact of restrictions on the most vulnerable.

In the present case, individual compensation for harm caused would be practically impossible and difficult to determine. Long-term policy interventions that prioritise the needs of the poor and address the harm caused by the discriminatory regulations would be the most suitable remedy. This is in line with De Vos¹²² argument that there is "indeed a positive obligation on the state to include redress measures in its response to COVID-19. This would be so because COVID-19 and the lockdown have disproportionately impacted on those who are economically vulnerable." He argues further that "to minimise these effects would require not identical treatment but different treatment."¹²³ The UNDP has called for future policy interventions to remedy the impact of the lockdown restrictions (for instance, the extension of existing social assistance or the creation of new forms of aid) to focus specifically on the most disadvantaged due to their pre-existing poverty and inequality.¹²⁴

It should be kept in mind that a finding of unfair discrimination constitutes a violation of the state's obligation to respect, protect, promote and fulfil rights in terms of section 7(2) of the *Constitution*. In this instance this would include a violation of the obligation to progressively realise the socio-economic rights contained in the Bill of Rights, particularly the rights related to an adequate standard of living. The lockdown regulations could be perceived as a retrogression in the performance of the state's duties, and pressure must be placed on the state to rectify this violation. There have been renewed calls for implementing a basic income grant in South Africa to address the effects of the pandemic and the lockdown regulations and the country's high inequality and poverty levels.¹²⁵ However, any proposed policy interventions must meet the criteria for a *reasonable measure* aimed

¹²² De Vos 2020 <https://www.dailymaverick.co.za/opinionista/2020-06-04-lockdown-regulation-judgment-is-flawed-but-so-is-governments-means-justifies-the-ends-defence/>.

¹²³ De Vos 2020 <https://www.dailymaverick.co.za/opinionista/2020-06-23-court-ruling-on-COVID-19-relief-criteria-affirms-that-the-pandemic-is-not-the-great-equaliser/>.

¹²⁴ UNDP *COVID-19 in South Africa* 22.

¹²⁵ Nyoka 2021 <https://mg.co.za/news/2021-05-25-renewed-calls-for-sa-to-have-a-basic-income-grant/>.

at fulfilling socio-economic rights.¹²⁶ A human rights-based approach¹²⁷ could be employed to inform policy interventions and future development programmes to address the inequalities caused by the pandemic and the lockdown restrictions.¹²⁸

6 Conclusion

This article has made several generalised arguments regarding poverty and the discriminatory impact of the lockdown regulations on the poor. These arguments lay the foundation for an actionable case to be brought before the courts of South Africa on behalf of a specific group of people or community that falls within the classification of the poor. The courts will then be able to consider the impact of each relevant regulation via the section 9 test for unfair discrimination and its impact on the particular group. Moreover, the contextual and qualitative information presented in this study adds to the evidence base of the impact of the lockdown restrictions on the poor and highlights areas that should be considered in future policy interventions.

This country is facing a difficult future with severe economic problems impacting society. The government plays a central role in protecting the most vulnerable and poor. Various temporary relief measures have already ended, with the focus shifting to the Economic Reconstruction and Recovery Plan to stimulate economic growth and job creation. However, the message of the United Nations' 2030 Agenda for Sustainable Development still rings true, i.e. that no one should be left behind. This would require policymakers to adopt a differentiated approach to meet the needs of those suffering the most. South Africa is unique in its poverty and inequality levels, and we cannot blindly follow the same path as our more developed counterparts. This would require adopting a human rights-based approach to future policy interventions to overcome the hardships created by the pandemic and the associated restrictions and regulations.

¹²⁶ See for instance the criteria laid down in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) and *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC).

¹²⁷ This approach is defined as "a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights" in OHCHR 2007 <https://www.ohchr.org/sites/default/files/Documents/Publications/FAQen.pdf>

¹²⁸ Mubangizi 2021 *JAL* 251-257.

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List of Abbreviations

AHRLJ	African Human Rights Law Journal
CCR	Constitutional Court Review
CESCR	United Nations Committee on Economic, Social and Cultural Rights
COVID-19	Coronavirus disease 2019
ILO	International Labour Organisation
JAL	Journal of African Law
OHCHR	Office of the United Nations High Commissioner for Human Rights
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal

SAJHE	South African Journal of Higher Education
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
Stats SA	Statistics South Africa
UNDP	United Nations Development Programme