THE BREAD CARTEL: CAN THE CONDUCT OF FIRMS IN CONTRAVENTION OF THE COMPETITION ACT BE RECOGNISED AS A VIOLATION OF HUMAN RIGHTS?

by

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DECLARATION

I, **599941**, declare that this research report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

Section 4 of the South African Competition Act, 89 of 1998 ('the Competition Act') prohibits horizontal restrictive practices in the form of price-fixing, market allocation, and collusive tendering. According to Maphwanya, cartels are among the most egregious forms of competition harm globally. Entities that form cartels frequently weigh the benefits of joining a cartel against the risks of being investigated by competition authorities (Maphwanya, 2017). The Pioneer Foods decision handed down by the Competition Tribunal ('the Tribunal') in 2009 charts a complaint lodged in 2006 against various bread manufacturers for allegedly engaging in cartel behaviour; in that these manufacturers engaged in a cartel which had the outcome of fixing the price of bread and dividing markets between themselves. Following the Competition Commission's investigation and a determination that the bread manufacturers had indeed participated in the cartel, the Tribunal penalised the cartel members by imposing various administrative penalties.

The conduct of the bread manufacturers occurred in a South African context, where bread is considered a staple food for many South Africans living in poverty. In light of the aforementioned decision, it is to be considered whether the coordinated conduct of firms seeking to raise prices to maximise on profits at the expense of ordinary and penurious South Africans should be considered a human rights violation. The impact of section 27(1) (*b*) of the Constitution of the Republic of South Africa, 1996 ('the Constitution'), which states that everyone has the right to access to food, will be considered explicitly in this report. Furthermore, the obligations of firms found to have violated the provisions of section 4 of the Competition Act are examined in light of whether private persons have constitutional obligations to provide access to food in accordance with section 27(1) (*b*) of the Constitution. To this end, reference will be made to the provisions of sections 8(2) and 39(2) of the Constitution.

KEYWORDS: Cartels; Competition Act; human rights; section 8(2) of the Constitution; right to access to food, obligations of private persons

LIST OF ACRONYMS

CAC	Competition Appeal Court
ILO	International Labour Organization
MMHS	Matlosana Medical Health Services (Pty) Limited
OECD	Organisation for Economic Co-operation and Development
UNCTAD	United Nations Conference on Trade and Development

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I. INTRODUCTION

Collusion has been described as the most egregious form of anti-competitive conduct due to the fact that such conduct has the effect of bringing about adverse effects on both customers and consumers.[1] After initiating a preliminary investigation, the Competition Commission ('the Commission'), initiated a complaint against three of South Africa's largest bread manufacturers, namely Premier Foods, Tiger Brands, and Pioneer Foods, for allegedly having contravened the provisions of section 4 of the Competition Act 89 of 1998 ('the Competition Act')[2]. The three firms were accused of directly setting the price of bread, fixing the discounts to be offered on bread and agreeing to divide the market in so far as the manufacturers concluded that they would not poach each other's distributors.[3] After reviewing the case, the Competition Tribunal ('the Tribunal') concluded that the manufacturers' conduct amounted to a contravention of section 4(1) (*b*) (i) and (ii) of the Competition Act insofar as the manufacturers sought to fix the price of bread and divide markets.[4] Following the various litigations as well as consent orders[5] arising from the bread cartel, the liability of the manufacturers triggered the application of penalties in the Competition Act. As such, the manufacturers were held liable through the imposition of several administrative penalties.[6] The Tribunal's decision illustrates an awareness that the bread cartel, from its inception, impacted the 'poorest of the poor' in South Africa.[7] However, there was no acknowledgement in the judgments or the consent orders that the conduct of the bread manufacturers could constitute or amount to a violation of a fundamental constitutional right of the ordinary South African as enshrined in Chapter II the Constitution of the Republic of South Africa, 1996 ('the Constitution'). This report investigates whether firm conduct, such as that demonstrated by the bread manufacturers involved in the bread cartel, that has been found to contravene the provisions of section 4 of the Competition Act (which prohibits cartel conduct), should, in addition to the competition law penalties, be recognised as a human rights violation.[8]

The argument will be made that where conduct that contravenes the provisions of the Competition Act has been determined by competition authorities, the provisions of section 8(2) of

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[1] *Competition Commission v Bank of America Merrill Lynch International Limited and others* 2020 (4) SA 105 (CAC) para 61 and 79. OECD 'Hard Core Disclosure' *https://www.oecd.org/competition/cartels/2752129.pdf* available at accessed on 04 December 2021.

[2] See section 4(1)(*b*) of the Competition Act.

[3] *The Competition Commission v Pioneer Foods (Pty) Ltd* [2009] 2 CPLR 323 (CT) (*Pioneer Foods*).

[4] Ibid para 79.

[5] See section 49D of the Competition Act.

[6] *Pioneer Foods* op cit note 3 paras 6-7.

[7] Ibid para 158.

[8] Whilst the focus of this paper will be on section 4(1) (*b*) of the Competition Act, with the bread cartel being used as a case study, due to the interdisciplinary nature of this paper, a consideration beyond section 4 of the Competition Act is necessary.

the Constitution must also be considered. It will be argued that insofar as section 8 binds both natural and juristic persons, it should be used as the basis for arriving at a finding that firms that have engaged in cartel conduct that fundamentally has the effect of contravening a fundamental right in the Constitution, can and should be deemed to have contravened the Bill of Rights.[9] It will also be argued that firms, for example, that provide products and services that are fundamental to the achievement of a particular right in the Bill of Rights (such as the provision of bread which is imperative to the fulfilment of the right to food as set out in section 27(1) (*b*) of the Constitution) have a negative obligation with reference to some of the rights encompassed in the Constitution. In addition, it will be submitted that, in some but not all circumstances, firms can also have positive obligations to realise and fulfil the right to food as set out in section 27(1) (*b*) of the Constitution. The above submissions will be made in light of the emerging case law developments from the Constitutional Court, with particular reference to the interpretative exercise that must be adhered to by courts and tribunals as envisaged in section 39(2) of the Constitution.[10]

II. CARTELS IN SOUTH AFRICA

'The bread cartel was a low point in the history of collusion in South Africa'[11]

Section 4 of Competition Act regulates horizontal restrictive practices.[12] Horizontal restrictive practices (cartels) are practices that occur between competitors when competitors co-operate with each other rather than compete.[13] Cartels are one of the most significant concerns for competition authorities globally and this is no different for the South African competition authorities.[14] Cartels hinder competition in that firms that should ordinarily be competing instead act in concert, allowing them to charge higher prices and restrict supply, circumstances that would not arise if firms were competing as they should.[15] The ultimate victims of cartel conduct are customers and end-consumers.[16] It is for this reason that cartel conduct is regarded as the most egregious of all

[9] See section 8(2) of the Constitution.

[10] See section 39(2) of the Constitution.

[11] Times Live 'Competition Commission welcomes 'finality' of bread cartel' available at *settlementhttps://www.timeslive.co.za/news/south-africa/2016-05-12-competition-commission-welcomes-finality-of-bread-cartel-settlement/* accessed on 20 September 2021.

[12] Horizontal restrictive practices refer to conduct committed by firms in a horizontal relationship (i.e. competitors).

[13] Philip Sutherland & Katharine Kemp *Competition Law of South Africa* (2000) 5-3.

[14] R Maphwanya 'Cartel likelihood, duration and deterrence in South Africa?' in J Klaaren, S Roberts & I Valodia *Competition Law and Economic Regulation in Southern Africa: Addressing Market Power in Southern Africa* (2017) 50. Competition Commission & Competition Tribunal 'Ten years of enforcement by the South African competition authorities 1999 – 2009' available at *http://www.compcom.co.za/wp-content/uploads/2014/09/10year*.pdf accessed on 30 December 2021.

[15] Maphwanya ibid.

[16] Ibid.

anticompetitive conduct engaged in by firms, and why, even in South Africa, such conduct is considered *per se* anticompetitive with the parties having no scope to raise procompetitive outcomes to justify such conduct.[17]

Although the Competition Act was adopted in 1999, it was not until the adoption of the Corporate Leniency Policy in 2004[18] that the Commission began to investigate cartel conduct in South Africa more frequently. Since then, the Commission has found several firms guilty of contravening section 4 and instituting several administrative penalties. This paper focuses on the Commission's investigation into the bread cartel case, between 2006 and 2008. What follows is a discussion of the Tribunal's decision in *Competition Commission v Pioneer Foods*,[19] addressing what is commonly referred to as 'the bread cartel'.

III. THE BREAD CARTEL

In 2006, Western Cape based independent bread distributor Imraahn Ismail-Mukaddam lodged a complaint with the Commission following an increase in the price of bread when Albany, Blue Ribbon, and Sasko all raised their bread prices by the same margin.[20] Following the initiation of the complaint, the Commission conducted a preliminary investigation. The investigation led the Commission to initiate its own complaint against Premier Foods,[21] Tiger Brands,[22] and Pioneer Foods,[23] for their role and participation in the bread cartel.[24] In its decision, the Tribunal referred to this part of the complaint as 'the Western Cape complaint'.

During the Commission's investigation of the Western Cape complaint, Premier Foods expressed its willingness to co-operate with the Commission and applied for leniency under the Commission's Corporate Leniency Policy. Premier Foods' undertaking in applying for leniency was to provide the Commission with information on its role in the bread cartel, as well as the roles of Pioneer Foods and Tiger Brands.[25] In doing so, Premier Foods revealed that the bread cartel had been operating in other parts of South Africa and that agreements had been entered into which sought to

[17] Ibid.

[18] T Muzata, S Roberts and T Vilakazi 'Penalties and settlements for South African cartels: An economic review?' in J Klaaren, S Roberts & I Valodia Competition Law and Economic Regulation in Southern Africa: Addressing Market Power in Southern Africa (2017) 13.

[19] *Pioneer Foods* op cit note 3.

[20] Fin24 'Bread whistleblower cries foul' available at *https://www.news24.com/fin24/bread-whistleblower-cries-foul-20071211* accessed on 20 November 2021.

[21] Premier foods manufactured Blue Ribbon bread.

[22] Tiger Brands manufactured Albany bread.

[23] Pioneer Foods manufactured Sasko and Duens bread.

[24] *Pioneer Foods* op cit note 3 para 2.

[25] Ibid para 3.

divide markets through the allocation of territories.[26] Based on this information, the Commission initiated a second investigation which assessed the bread cartel nationally.[27] The Tribunal referred to this investigation as the 'national complaint'.[28]

The Commission referred both the Western Cape and national complaints to the Tribunal.[29] Following the filing of its answering affidavit, Tiger Brands approached the Commission with a view of entering into a consent agreement. The consent agreement was entered into and the Commission fined Tiger Brands a sum of R98 874 869.90 for its role in the bread cartel.[30] As such, Pioneer Foods became the only respondent to both the national and Western Cape complaints.[31] The Tribunal, having considered all the evidence, as well as the evidence of Premier Foods as the leniency applicant, determined that Pioneer Foods had contravened section 4(1)(*b*)(i) and (ii) of the Competition Act in both the Western Cape and national complaints.[32] As such, the Tribunal imposed a penalty of R195 718 614 for a contravention of section 4(1)(*b*)(i) and (ii) of the Competition Act for the national and Western Cape complaints.[33]

In reaching its decision, the Tribunal opined about the egregious nature of cartels both in South Africa and globally. Furthermore, the Tribunal considered the extent of the harm caused by the bread cartel on ordinary South Africans and held:

> 'Naked cartel behaviour is not justifiable under our legislation and is presumptively harmful. In this particular case, the offences are more so repugnant because they have affected the poorest of the poor, for whom standard bread is a staple.'[34]

It is observed that what we do not see, in any of the many litigations involving the bread cartel, is a discussion or analysis of the consequent human rights violations by the firms involved in the bread cartel and how these firms can and should have been held accountable from a human rights/constitutional perspective. This is despite the fact that the Competition Act, in its preamble, and section 2 recognises the need to advance consumer social welfare as one of its pivotal purposes. The following section discusses the objectives and purposes of the Competition Act. It is also

[26] Ibid par 4.

[27] Ibid.

[28] Ibid.

[29] Ibid para 5.

[30] Ibid para 6.

[31] Ibid. Foodcorp was cited as second respondent in the national complaint. However, it also proceeded to enter into a consent agreement with the Commission and was fined R45 406 359, 82 on Foodcorp.

[32] Ibid paras 79 and 128.

[33] Ibid para 175.

[34] Ibid para 158.

considered whether the Competition Act and its enforcers fully comprehend the legislation's objectives and purposes.

IV. DOES THE OBJECTIVE AND PURPOSE OF THE COMPETITION ACT EXTEND TO THE PROTECTION OF HUMAN RIGHTS?

In the early 1990s, the first democratically elected South African government prioritised societal transformation in order to heal South Africa's past imbalances caused by racial discrimination.[35] The Competition Act was one of the legislative instruments enacted to achieve this objective.[36] This is evidenced in the preamble of the Competition Act which recognises that excessive concentrations of ownership and control within the national economy are products of apartheid and other past discriminatory laws of the past. In addition, section 2 of the Competition Act sets out the purpose of the Competition Act as being to promote and maintain competition in South Africa. This purpose includes, amongst others, the advancement of the social and economic welfare of South Africans and the greater participation of small and medium-sized businesses and historically disadvantaged businesses.[37]

The preceding demonstrates that the Competition Act is not only enforced as a legislative tool for the regulation of markets but that the Act is mandated to go far beyond this objective. The decision of the Constitutional Court in *Mediclinic* reminds us of this purpose by noting that '[s]ight must therefore never be lost of the central purpose for the enactment of that Act . . . to remind all of us and ensure that the fundamental challenges sought to be remedied through this Act and allied institutions are never left out of consideration'.[38]

The question then becomes whether the Competition Act and its enforcers fully appreciate the said Act's central purpose and whether the remedies available under the Act are effective in remedying what the Act seeks to protect. I argue that, unfortunately, the Competition Act does not fulfil its entire purpose in the way envisaged by the legislation. In fact, the bread cartel is a prime example of how the Competition Act was successful in enforcing one aspect of its purpose while failing to enforce another. As previously noted, the Tribunal imposed various administrative penalties in order to hold the bread manufacturers accountable for their actions.[39] However, although the

[35] Liberty Mncube & Hardin Ratshisusu 'Competition Policy and Black Empowerment: South Africa's Path to Inclusion' (2022) *Journal of Antitrust Enforcement*.

[36] Ibid.

[37] Section 2 of the Competition Act.

[38] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* [2021] ZACC 35 (*Mediclinic*).

[39] *Pioneer Foods* op cit note 3 paras 6-7.

Tribunal stated that the conduct of the bread manufacturers had the effect of affecting the 'poorest of the poor, for whom standard bread is a staple',[40] the Tribunal did not go as far as to address the human rights consequences of the conduct of the bread manufacturers as envisaged in section 2 of the Competition Act.

It can be argued that the Tribunal sought only to address and remedy certain conduct embodied in the Competition Act, the section 4 prohibitions, because there is clear direction on how such conduct should be remedied.[41] This is not the case for the human rights obligations which the Competition Act recognises. While the Act recognises social economic human rights contraventions that must be protected in order to advance its purposes and objectives,[42] it does not provide clarity as to how such contraventions are to be remedied. The question then becomes: '*If the Competition Act fails to adequately provide for remedies to address human rights contraventions related to competition contraventions, what other instruments in our legislation can fill this gap*?'

In the following section, certain provisions of the Constitution will be explored with the aim of bridging the gap so that firms found in contravention of the provisions of section 4 of the Act can, in certain circumstances, also be held accountable for human rights violations. Prior to relying on any constitutional provisions, the principle of subsidiarity and its application to the Competition Act will be considered.

V. THE APPLICATION OF THE PRINCIPLE OF SUBSIDARITY

Subsidiarity, as a theory, makes a proposition for a bottom-to-top approach, in that, before reliance can be placed on the highest level of intervention, the lowest level of intervention must be exhausted in their entirety.[43] From a legal standpoint, the principle of subsidiarity entails the notion that substantive legal issues should be interpreted with particular reference to indirect constitutional norms, as opposed to general and direct constitutional norms.[44] This is done to ensure that the direct application of the Constitution is not overused, especially in circumstances where there are specific

[40] Ibid para 158.

[41] Section 59 of the Competition Act. See also OECD 'Remedies and Sanctions in Abuse of Dominance Cases' available at *https://www.oecd.org/competition/abuse/38623413.pdf* accessed on 24 September 2022 which finds that the purposes of competition law penalties is to 'stop the violator's illegal behaviour, its anticompetitive effects, and its recurrence, as well as to restore competition.'

[42] Section 2 of the Competition Act.

[43] Melanie Murcott and Werner van der Westhuizen 'The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on Motau and My Vote Counts' (2015) VII 43 *Constitutional Court Review* at 46.

[44] Ibid.

legislative tools to address legal issues; thus increasing the chances of legal uncertainty and proliferation of forums.[45]

In this regard, the decision of the Constitutional Court in *My Vote Counts* is imperative as it clarifies the principle of subsidiarity in simple terms in finding that: '[o]nce legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.'[46] In other words, the only way a litigant can seek the direct application of the Constitution without relying on legislation is if the constitutionality of the legislation is challenged or if there is no legislation that seeks to vindicate the constitutional right at dispute.[47] However, as can be discerned from the above, the argument that this paper seeks to make is not that the Competition Act is unconstitutional or invalid. The argument, at its core, is that over and above the administrative penalties that are in force to address competition contraventions, the same administrative remedies are insufficient to address the human rights violations. To clarify, although the Competition Act can be interpreted as the legislative tool which seeks to recognise socio-economic welfare of consumers; however, the Act fails to address appropriate remedial action when those socio-economic rights are infringed – this is the lacuna in the Competition Act.

Moreover, the Constitutional Court in *My Vote Counts* addressed the question of whether, if at all, the principle of subsidiarity would apply if a direct challenge to legislation has not occurred.[48] In its finding, the Constitutional Court found that the principle of subsidiarity cannot apply absent a frontal challenge of constitutional invalidity of legislation.[49] In other words, absent a challenge to the constitutionality of a piece of legislation, a party cannot rely on a constitutional right to vindicate a right in the Constitution. Nonetheless, it is essential to note that not all the judges of the Constitutional Court shared this view.[50] In fact, the minority decision penned by Cameron J held that 'when a litigant does attack the legislation, as here, saying that it falls short of a standard embodied in the Constitution itself, then they are free to invoke the Constitution directly'.[51] The minority decision determined that when the question is not whether legislation is valid but whether it goes far enough to fulfil the

[45] Ibid.

[46] *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31 at para 53 (*My Vote Counts*).

[47] Ibid para 193.

[48] Ibid para 184.

[49] Ibid para 193.

[50] Ibid para 67.

[51] Ibid para 69.

obligations for which it was imposed, the principle of subsidiarity cannot apply and a litigant can rely directly on the Constitution.[52]

Cameron J's reasoning is accepted by van der Walt, who notes that circumstances may arise where codifying legislation may leave gaps and that if such gaps are left open but can appropriately be filled by relying on the relevant constitutional provisions, this should occur.[53] Van der Walt notes that placing reliance on the relevant constitutional provisions is better than challenging the constitutional validity of the codifying legislation.[54] Van der Walt's reasoning as well as the decision of the minority in *My Vote Counts* is one which I agree with fully. I say so because I believe that it is important that provision is made for litigants to challenge legislative instruments without necessarily seeking to find those instruments as being constitutionally invalid. Litigants should be permitted to rely on the Constitution if a legislative instrument does not go far enough to address specific concerns, and this should occur without a litigant having to embark on the costly and time-consuming exercise of challenging the constitutionality of the legislation.

In light of the minority judgment in *My Vote Counts*, it is submitted that the reasoning of Cameron J is precisely the argument that this report makes with regard to the principle of subsidiarity. The challenge to the Competition Act is not that the Act should be found to be constitutionally invalid; rather, the challenge is that the remedies in the Competition Act are insufficient to deal appropriately with human rights violations, and for this reason, it is important to consider whether the Constitution is capable of addressing this deficiency. The argument – as discussed further below – is that section 8(2) of the Constitution can fill the gap left open by the Competition Act.

VI. DEMARCATING COMPANIES' HUMAN RIGHTS RESPONSIBILITIES AND OBLIGATIONS

In a world where corporations such as multinational companies, financial institutions, and the like are the vast providers of goods and services that are utilised in the daily lives of ordinary citizens, the ever-increasing economic power and size of these corporations give rise to certain questions and concerns regarding the human rights obligations, if any, on such corporations.[55] Many authors have focused their work on seeking to understand the relationship between corporations and their human

[52] Ibid para 67.

[53] AJ van der Walt 'Normative pluralism and anarchy: reflections on the 2007 term' (2008) 1 *Constitutional Court Review* 109.

[54] Ibid.

[55] Aoife Nolan 'Holding non-state actors to account for constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland' (2014) 12 *Oxford University Press* 61.

right obligations.[56] Below, firstly, an in-depth discussion of section 8(2) of the Constitution is considered as this provision will be relied on as the benchmark for a finding that juristic persons can be responsible for certain human rights violations. As discussed above, due to the inefficiencies of the Competition Act to address and provide for appropriate remedies for human rights contraventions related to competition law transgressions, a look into the proposition that section 8(2) of the Constitution can act as the appropriate legislative framework is discussed below.

(a) Human Rights Responsibilities of Corporations: A South African perspective

(i) The direct and indirect application of the Bill of Rights

The literature concerning the responsibilities of corporations in South Africa is very few and far between.[57] This is noteworthy, especially because the Constitution contains a provision that expresses the application of the Constitution to both natural and juristic persons.[58] This provision assumes that the application of the Constitution goes beyond what is often referred to as the 'vertical relationship', being the relationship between individuals and the state.[59] It assumes that certain rights contained in the Bill of Rights apply *directly* against private individuals.[60] Direct application of the Bill of Rights envisages the imposition of certain duties contained in the Bill of Rights, which failure to adhere to such duties amounts to a breach of a constitutional right.[61] While indirect application of the Bill of Rights means that the Bill of Rights may only influence the court's application and interpretation of the common law.[62]

It is important to note that the direct application of the Bill of Rights to private persons does not mean that all constitutional rights will always apply directly against private persons.[63] The limitation to section 8(2) is contained in the section itself in that it finds that the Bill of Rights will only apply to natural and juristic persons having taken 'into account the nature of the right and the nature of the duty imposed'. It is important at this stage to note that the provisions of section 8(2) of the Constitution were not initially contained in the interim Constitution.[64] Although it seems that the accepted view of section 8(2) is that this section imposes direct application of the Bill of Rights on

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[56] David Bilchitz, 'Corporate law and the constitution: Towards binding Human Rights responsibilities for corporations?' (2008) 125 SALJ (2008) 754.

[57] Ibid 773-4.

[58] Section 8 of the Constitution.

[59] Bilchitz op cit note 56 at 774.

[60] Ibid.

[61] Alfred Cockrell 'Private Law and the Bill of Rights: A threshold issue of horizontality' in Mokgoro and Tlakula (eds) *Bill of Rights Compendium* (2004) 3A4.

[62] Ibid.

[63] Ibid at 3A8.

[64] Ibid at 3A6.

private persons; this is certainly not the case.[65] Academics have inconsistent views on the interpretation of this section.[66] The inconsistencies are noted in an article authored by Chirwa where he notes that Cheadle and Davis argue that section 8(2) should not be read to mean that the Bill of Rights applies directly to private individuals and that in fact the Bill of Rights can only apply indirectly to private individuals. Moreover, Sprigman and Osborne argue that section 8(2) has not changed the stance under the Interim Constitution[67] and finds that the Bill of Rights can only ever be indirectly applied.[68]

Not only have academics grappled with the application of the Bill of Rights on corporations, but South African courts have also considered the application of the Constitution on private persons, and the 1996 Constitutional Court decision of *De Klerk* was that Court's first decision on this issue[69]. However, we see through the developments of the cases considered and decided by the Constitutional Court on this issue that the Court's interpretation of the application of the Bill of Rights on private persons has been inconsistently applied, and in certain decisions, the Court has not been able to reach a unanimous outcome.[70] However, in considering the decision of the Constitutional Court in *De Klerk*, it must be noted that this decision was decided under the auspices of the Interim Constitution. This decision came after various lower court decisions had held inconsistent views, with some finding that Chapter 3 of the Interim Constitution had direct application[71] while other courts found that it did not[72]. Some courts opted not to consider this issue at all and left it undecided.[73] Therefore, for the first time, the Constitutional Court provided direction on the application of the Bill of Rights on private persons. The Constitutional Court held that the position in terms of the Interim Constitution was such that constitutional rights can only be directly applicable against the state and that the Interim Constitution cannot be directly applied against private individuals.[74] The Court held that to interpret Chapter 3 of the Interim Constitution to mean that constitutional rights apply directly 'would be surprising if [it] . . . were to be left to be implied'.[75] Perhaps what was most surprising about the decision of the

[65] Danwood Mzikenge Chirwa 'The horizontal application of constitutional rights in a comparative perspective' (2006) 2 *Law, Democracy & Development* 21 at 38.

[66] Ibid.

[67] See section 7(2) of the interim Constitution.

[68] *Chirwa* op cit note 65 at 39.

[69] *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (*De Klerk*).

[70] *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) (*Daniels*).

[71] *Mandela v Falati* 1995 (1) SA 251 (W) para 98.

[72] See *De Klerk v Du Plessis* 1995 (2) SA 40 (T).

[73] *Waltons Stationery Co (Edms) Bpk v Fourie* 1994 (4) SA 507 (O).

[74] *De Klerk* supra note 69 para 62.

[75] Ibid para 49.

Constitutional Court in *De Klerk* was that the decision was made even though the Constitutional Assembly had already concluded that constitutional rights could apply directly to private persons.[76] Through the jurisprudence discussed below, we see how this very issue develops in the Constitutional Court.

The second time the Constitutional Court dealt with the interpretation of section 8(2) was in its decision of *Khumalo*[77]. The decision in *Khumalo* concerned two private individuals, wherein the applicants contended that because, in terms of section 8(1), the Bill of Rights applies to all law, the right to freedom of expression should be interpreted to have direct application to the common law of defamation.[78] In coming to a decision, O'Regan J rejected the applicant's argument. The Constitutional Court held that the right to freedom of expression could find direct horizontal application and considered a number of factors to arrive to this conclusion.[79] O'Regan J held that given the intensity of the right to freedom of expression and the likely intrusion of the right by private individuals, the right to freedom of expression applied directly to private persons.[80]

(ii) Do corporations have positive or only negative obligations in respect of human rights?

The section 8(2) jurisprudence was further developed by the Constitutional Court in 2011 through its decision in *Juma Musjid*[81]. The Constitutional Court had to consider whether a private person (in the form of a Trust) had any obligations to fulfil the provisions of section 29(1)(*a*) of the Constitution that relate to the right to basic education.[82] In considering the application of section 8(2) and the obligations of private persons in relation to the Constitution, the Constitutional Court held that the Trust did not have a positive obligation to provide basic education to the learners and that such, the obligation rested sorely on the MEC of Education.[83]

The Constitutional Court's latest consideration of the application of section 8(2) on private persons was in *Daniels.* In *Daniels*, the reasoning and the principle having been adopted in *Juma Musjid* were somewhat developed. In *Daniels*, Madlanga J (writing for the majority) explained that on his interpretation of the decision in *Juma Musjid,* that decision could not be interpreted to give rise to the principle that private persons do not and cannot, in all instances, bear positive obligations

[76] Nolan op cit note 55 at 77.

[77] 2002 (5) SA 401 (CC) ('*Khumalo'*).

[78] Ibid para 30.

[79] Ibid para 33.

[80] Ibid.

[81] *Governing Body of the Juma Musjid Primary School & Others v Ahmed Asruff Essay N.O. and Others* [2011] ZACC 13 (*Juma Musjid*).

[82] Ibid para 31.

[83] Ibid para 57.

under the Bill of Rights.[84] Madlanga J noted that he did not interpret the wording in section 8(2) of the Constitution to mean that, where a right to have the effect of imposing a positive obligation on a private individual, such an obligation would not bind a natural or juristic person.[85] Instead, in his view, whether a right in the Bill of Rights imposes a positive or a negative obligation depends on a range of factors which include: the nature of the right, the history of the right, what was termed in *Khumalo* as the likely intrusion of the right by private individuals.[86] Madlanga J went on to find that although the Court's jurisprudence has held that, particularly with regard to the socio-economic rights, that it is the state that has a positive obligation, these findings do by no means indicate that the Bill of Rights will not impose positive obligations on private persons.[87]

However, it must be noted that although Madlanga J's view reflected the view of the majority (and remains the view of the Court), the decision of the majority did not reflect the view of all the Justices on this issue. In a concurring judgment (however, pointing to the disagreement on this issue) Jafta J (with Nkabinde ACJ, who authored the judgment in *Juma Musjid*) agreed with the view that section 8(2) is applicable both vertically and horizontally. However, Jafta J held that, in his view, the section cannot be interpreted as the basis of any obligation, especially a positive one, on private individuals.[88] Jafta J goes on to find that whether a right applies vertically or horizontally depends on the nature of that right and to the extent that a right imposes a positive and negative obligation and is binding on private persons, it will only ever impose negative obligations.[89] In concluding on the obligations of private persons, Jafta J, in his view, held that the Constitution does not impose a positive obligation on private persons at all. He notes that were this the intention of the Constitution, the legislation would have expressly shown this intention.[90]

Although the decision of the Constitutional Court is not unanimous in this regard, the majority's decision remains the law and is moreover supported by the Court's decision in *AB v Pridwin Preparatory School*[91]. In my view, the argument put forward by Jafta J that no provision in the Constitution expressly imposes a positive obligation on private persons is inconsistent with the provisions of section 8(2) of the Constitution. Section 8(2) expressly sets out that (any) provision of the Bill of Rights binds natural and juristic having regard to the nature of that right. It is unclear how

[84] *Daniels* supra note 70 para 47.
[85] Ibid para 39.
[86] Ibid.
[87] Ibid para 43.
[88] Ibid para 156.
[89] Ibid para 159.
[90] Ibid at para 162.
[91] 2020 (5) SA 327 (CC) (*AB*).

much clearer the drafters of the Constitution ought to have been beyond expressing that the Constitution binds natural and juristic persons.

Moreover, in his judgment in *Daniels*, Jafta J interprets section 25(6) of the Constitution and suggests that this provision does not place a duty on private persons to restore lost tenure.[92] He further denotes that 'the loss of tenure that was suffered occurred as a result of discriminatory laws or practices of the state' and denotes that '*innocent private persons*' cannot be saddled with 'the duty to remedy the wrongs of the state'.[93] Meyersfeld critiques Jafta J's reasoning by pointing out that this reasoning assumes that private persons were not at all instrumental in the implementation of apartheid laws that benefitted their organisations.[94] The point is further corroborated by the findings of the Truth and Reconciliation Commission which recognised that some corporations both orchestrated and profited from the system of apartheid despite they claims that they did not.[95] Evidence of this kind, as well as evidence of, for example, firms that participated in the bread cartel, illustrates that private persons cannot be considered 'innocent' as alluded by Jafta J. To consider such private persons as 'innocent' is imperceivable and will continue to allow private persons the autonomy to act in a manner that violates human rights due to the inability of the law to hold such firms accountable. Unfortunately, if we continue to maintain the view that private persons are 'innocent', as alluded in Jafta J judgment, concerning their obligations in the Bill of Rights, as Madlanga eloquently put it, 'we risk maintaining a perverse *status quo* which entrenches a social and economic system that privileges the haves, mainly white people in the South African context. By imposing certain human rights obligations on private individuals and companies, we acknowledge that our current social and economic realities have arisen out of our perverted past and cannot be sanitised'.[96]

It is imperative to address the concerns that Jafta J raises regarding setting a precedent that enforces a private person with a positive obligation. Jafta J alludes to the difficulties that such a precedent would set. He notes that questions regarding the identification of private persons, the fulfilment of the obligations, and the consequences that would arise if a private individual or firm indicated that they do not have the financial means to fulfil the obligation have not yet been addressed.

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[92] *Daniels* supra note 70 para 165.

[93] Id.

[94] Bonita Meyersfeld, 'The South African Constitution and the human rights obligations of juristic persons?' (2020) 137 439 at 471.

[95] Truth and Reconciliation Commission, 'Truth and Reconciliation Commission of South Africa Report, Volume Four' (1998), https://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf (accessed 16 November 2021) para 161. See also Charmika Samaradiwakera-Wijesundara 'Reframing Corporate Subjectivity: Systemic Inequality and the Company at the Intersection of Race, Gender and Poverty' (2022) 7 Business and Human Rights Journal 100 at 110.

[96] Mbuyiseli Madlanga 'The human rights duties of companies and other private actors in South Africa' (2018) 29 Stell LR 359 at 368.

Meyersfeld accepts these difficulties but notes that these difficulties are not more different from the difficulties that arise when the state bears positive obligations.[97] The difficulties that Jafta J advances are relevant and ones that need to be addressed; however these difficulties should not be used as a basis to avoid holding private persons accountable in the manner envisaged by the Constitution.[98] Courts are enjoined to undertake this difficult exercise and not shy away from addressing these issues simply because a clear answer is not available in the Constitution or from the legislature. As succinctly pointed out by Madlanga J 'if section 8 is to have the effect that the Constitution truly wants it to have, it must be a tool that plays a role in dismantling the legacy of colonialism and apartheid.'[99] In addition, the wording in section 8(2) itself acknowledges the varying extent to which rights may find application to private persons.[100] This wording provides the judiciary with the appropriate discretion to undertake an interpretative exercise to establish the extent of the obligations, if any, that private persons may have with respect to constitutional rights.[101]

Moreover, there is no reason to infer that section 8(2) only gives private persons negative duties. As further alluded in *AB*, section 8(2) provides recognition to the fact that private persons have the potential to violate the right entrenched in the Bill of Rights, and when they do, courts should not adopt an approach that seeks to avoid holding private persons accountable when holding private persons accountable, is the most appropriate means to remedy a constitutional violation.[102] In this regard, there is no reason why a restrictive approach to interpreting section 8(2) should be adopted especially if the provision does not expressly exclude the obligation of positive duties on private persons.

In the circumstances, as suggested by Liebenberg, positive duties on private persons may arise only in two distinct circumstances, the first being where there exists a special relationship between the parties.[103] The second is, where the private actor has substantial power to control access to the particular social goods or services, this will activate the entities positive duty as enshrined in the Constitution.[104] However, it is important to note that although the question will be posed below as to whether the bread manufacturers in the bread cartel held either a positive or negative obligation, it is important to clarify that the purpose of this report does not advance the theory that at all times will

[97] Meyersfeld op cit note 94 at 473.
[98] Ibid.
[99] Madlanga op cit note 96 at 368.
[100] Nolan op cit note 55 at 78.
[101] Ibid.
[102] *AB* supra note 91 paras 130-1.
[103] Sandra Liebenberg 'The application of socio-economic rights to private law' (2008) 3 TSAR 464 at 469.
[104] Ibid.

large corporations have positive obligations in terms of section 8(2) of the Constitution. Therefore, where a case for imposing positive obligations is made, it will be useful to that inquiry to determine whether the circumstances identified by Liebenberg are present.

Before I consider the whether the bread cartel was a constitutional violation, it is imperative to take into consideration the recent decision of the Constitutional Court which seeks to reiterate the duty imposed on every court, tribunal or forum when interpreting legislation and the potential impact of this duty on competition authorities. I do so in the coming section.

VII. INTERPRETING THE COMPETITION ACT THROUGH A CONSTITUTIONAL LENS

(a) The scope of section 39(2) of the Constitution

Section 39(2) guides every court, tribunal or forum, when interpreting legislation and developing the common or customary law, to do so in accordance with the spirit, purport, and objects of the Constitution. There is a vast amount of case law which deals with the interpretation of this particular provision of the Constitution.[105] One such case is the decision of the Constitutional Court in *Investigating Directorate Serious Economic Offences*[106] wherein the Court held that section 39(2) must be interpreted to mean that all legislation ought to be viewed through the prism of the Bill of Rights.[107] Moreover, section 39(2) requires courts, tribunals, or forums when adjudicating disputes that are either commercial, contractual, or family law based, to do so in a manner which advances the spirit, purport and objects of the Constitution.[108] This means that the courts should always seek to avoid adopting a narrow and formalistic approach to developing legislation, especially if the interpretation may have consequences on the socio-economic provisions of the Constitution.[109]

The most recent decision of the Constitutional Court which interprets section 39(2) of the Constitution does so in the context of facts arising from a decision by the CAC in *Mediclinic*.[110] In the initial paragraphs of this decision, Mogoeng CJ places emphasises on the duty that rests on courts in interpreting legislation and notes that this duty 'ought not to be viewed as an optional extra'.[111] Moreover, the Constitutional Court contends that it is irrelevant whether litigants have pleaded the application of section 39(2) of the Constitution in their papers; courts have a duty to apply section

[105] See *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC).

[106] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 1 SA 545 (CC).

[107] Ibid para 21.

[108] Liebenberg op cit note 103 at 477.

[109] Ibid.

[110] *Mediclinic* op cit note 38.

[111] Ibid para 9.

39(2) irrespective whether it is pleaded or not.[112] In coming to its decision, the Constitutional Court criticized the manner in which the CAC arrived at its decision.[113] Mogoeng CJ was of the view that the CAC did not fulfil its section 39(2) responsibilities by failing to deal with the implications of the merger in view of section 27(1) (*a*) of the Constitution.[114] The Constitutional Court went as far as saying that the CAC decision raised a 'grave concern'.[115] The decision is vital in that it reemphasises the duty on courts and tribunals when interpreting legislation and serves as an important reminder that competition authorities have a mandate to ensure that the Competition Act is interpreted in accordance with the spirit, purport and objects of the Constitution.

The Constitutional Court's approach in this regard is not novel. As indicated above, section 39(2) has previously been interpreted by the courts and we see in *Mediclinic* the established principles being confirmed. The decision is likely to be used as a base by litigants in the interpretation of the Competition Act, more specifically where litigants seek to raise arguments that seek to hold organs of state or private parties constitutionally liable.

(b) Other constitutional obligations

In terms of section 27(1) (*b*) of the Constitution, everyone has the fundamental right to sufficient food. Section 27(2) states that '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'. With respect to the right to food, there is currently no government policy or legislative instrument in South Africa which seeks to realise this right.[116] Despite the lack of legislative instrument which seek to give effect to the right to food in the Constitution, the Department of Social Development has in the past developed social grants programmes, such as the National School Nutrition Programme (NSNP) and the Department of Health's nutrition education and food safety programmes to realise section 27(1) (*b*).[117] However, it should be noted that of the many bread manufacturers in South Africa, the government does not constitute one of the manufacturers of bread in South Africa.[118] Therefore, a fundamental food in South Africa, that is consumed by a large proportion of especially poorer South Africans, is left in the hands of corporations.

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[112] Ibid.

[113] Ibid paras 71 and 74.

[114] Ibid.

[115] Ibid para 74.

[116] Refiloe Joala and Nkanyiso Gumede 'Realising the Right to Food in South Africa' *http://spii.org.za/wp-content/uploads/2018/12/SPII-Working-Paper-21-Right-to-Food_Digital.pdf* accessed on 09 September 2022.

[117] Ibid.

[118] Who Owns Whom *Manufacture of bakery products* (2021).

Section 8(1) of the Constitution states that the Bill of Rights binds all organs of state. This means all government departments, falling within the definition of organ of state in terms of section 239, constitute an organ of state.[119] This means for all intents and purposes, and upon a reading of section 239 of the Constitution, corporations that are involved in the manufacturer of bread would not ordinarily be considered a 'organs of state' with binding obligations in terms of section 8(1) of the Constitution. However, we see that this very issue was addressed in Constitutional Court decision in *AllPay* which found that the presence or absence of governmental control over an entity, although a factor, is not determinative of whether an entity amounts to an organ of state.[120] Instead, the Constitutional Court found that what was important to assess is whether the function performed by the entity was fundamentally public in nature.[121] Therefore, it can be said that, taking into consideration the imperative function of bread manufacturers, in providing access to a staple food which is consumed by a majority of poor South African, large producers of bread, by virtue of the function they perform, which is directly linked to the fulfilment of the right to food in section 27(1) (*b*) Constitution, should be considered organs of state and thus subject to positive obligations that bind all organs of state in terms of section 8(1) of the Constitution.

Having now considered the jurisprudence of sections 8 and 39(2) of the Constitution and arriving at a finding that section 8(2), and to an extent, section 8(1), can be used as a base to conclude that private persons have both private and positive obligations, an examination of the bread cartel, in light of these provisions, is considered below.

VIII. SHOULD THE BREAD CARTEL HAVE BEEN CONSIDERED A HUMAN RIGHTS VIOLATION?

(a) The negative obligation

The *Mediclinic* case is instructive to the approach that should be followed at all times by competition authorities when interpreting the Competition Act. As emphasised by Mogoeng CJ, applying the principles of section 39(2) to the interpretation of legislation is not an 'optional extra'.[122] Courts are enjoined to do so at every instance when interpreting legislation. The section 39(2) interpretive

[119] See section 239 of the Constitution.

[120] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others (No 2)* [2014] ZACC 12 at para 52 (*AllPay*).

[121] Ibid.

[122] Ibid para 9.

approach is not new to South African jurisprudence. This section stems as far as the Interim Constitution, although the wording in the Interim Constitution was slightly different.[123]

How then should the bread cartel decision have looked like had the Tribunal exercised it duty under section 39(2) of the Constitution? As indicated above, we see some recognition from the Tribunal in the *Pioneer Foods* decision on the implications of the cartel on South African citizens through the acknowledgement that the cartel affected the 'poorest of the poor' in South Africa.[124] Therefore, it is unfortunate that at no point in the judgment of the Tribunal did it not see it fit to firstly exercise its section 39(2) duty and secondly to not acknowledge how the actions of the bread manufacturers, in affecting the poorest South Africans, could have violated the provisions of section 27(1) (*b*) of the Constitution. However, as already alluded to above, it is presumed that the reason that the Tribunal did not address the constitutional implications of the actions of the bread manufacturers may be a direct consequence of the remedies available to competition authorities. As further noted above, although the Competition Act appropriately deals with competition contraventions through the enforcement of administrative penalties, unfortunately, the Act does not provide for remedies that are sufficient to address contraventions that contravene human rights which are related to competition law contraventions.[125] Therefore, the lack of all-inclusive remedies to address human rights concerns may provide reasons as to why competition authorities, when confronted with circumstances where human rights contraventions occur that are directly related to competition contraventions, merely address the direct competition contravention.[126]

The bread manufacturers involved in the cartel enjoyed a market share in excess of 50% - this can hardly be considered a small percentage. Acting collectively, these manufacturers constituted the largest bread producers in South Africa. Bread is a staple food in South Africa, which is consumed mostly by the poor as it is considered a cheaper source of food.[127] Even the smallest increase in the price of bread could have dire consequences for the ordinary South African and the ability of individuals to have access to a basic meal. Therefore, in my view, the obligation that rests on the bread manufacturers is largely negative in scope – the duty to do no harm. This obligation requires bread manufacturers to abstain from conduct that can negatively impact the enjoyment of the right to

[123] See section 35(1) of the Interim Constitution.

[124] *Pioneer Foods* op cit note 3 para 158.

[125] See section 59 of the Competition Act. OECD op cit note 41 above.

[126] Although section 58 of the Competition Act provides the Tribunal with the power to make an "appropriate order in relation to a prohibited practice", it is not clear that this provision is wide enough to contend that the Tribunal can make orders declaring that a firm has contravened the rights in the Bill of Rights.

[127] Ntombi Mkandhla 'Dietary fibre in bread can boost wellness' available at *https://mg.co.za/special-reports/2021-03-29-dietary-fibre-in-bread-can-boost-wellness/* accessed on 28 December 2021.

food as enshrined in the Constitution. This obligation is rooted in section 8(2) of the Constitution and the cases of *Juma Musjid* and *Daniels*. In *Juma Musjid*, the Constitutional Court considered that in concluding that a private person has a negative obligation two factors were important; one being the intensity of the right and the second being the potential invasion of that right by private individuals.[128] On the first factor, the intensity of the right, this suggests that courts will consider the importance of the right.[129] Section 27(1) (*b*) of the Constitution is a fundamental constitutional right, one which is intrinsically linked to the right to dignity and life.[130] The importance of socio-economic rights has been recognised by the Constitutional Court in its decisions, one such decision being *Grootboom*.[131] In *Grootboom*, the Court took an outright approach to the question as to the justiciability of socio-economic rights and held that these rights ought not 'to exist on paper only' and that the 'question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case'.[132] This is important. As advanced by Liebenberg, the justiciability of socio-economic rights is particularly fundamental in assisting the poor and impoverished in the protection of their fundamental socio-economic needs and interests.[133] Moreover, essential to the right to food is the price of food and the ability for individuals to afford to purchase it. That is, it is not enough that food is available, what is vital is whether it is affordable to those that require it. It is on this premise that, in my view, the high intensity of the right of food is established.

The second factor considered in *Juma Musjid* is the potential invasion of the right by private persons; this refers to the potential impact that private individuals can have on the fulfilment of the right.[134] This factor is crucial. The size, role and influence of private actors can no longer be misstated. Private actors such as banks, insurance companies, large manufacturers have incredible power in their contribution to the economy. Therefore, where these companies provide products or services which are the core of a socio-economic right in the Constitution, such as food, these entities have a real responsibility to ensure that they refrain from acting in a manner that infringes upon the right.[135] Bread

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[128] *Juma Musjid* supra note 81 para 58.

[129] Bilchitz op cit note 56 at 776.

[130] South African Human Rights Commission 'Right to Food' available at *https://www.sahrc.org.za/home/21/files/brochure_A3_English.pdf* accessed on 28 December 2021. See also section 10 of the Constitution.

[131] *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (*Grootboom*).

[132] Ibid para 20.

[133] Sandra Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty' (2002) 6 *Law, Democracy and Development* 159 at 160.

[134] Bilchitz op cit note 56 at 776.

[135] Liebenberg op cit note 133 at 464.

manufacturers involved in the bread cartel illustrated, through their collusive conduct and their ability to set prices, that they have the potential to have an impact on the fulfilment of the right to food.

Given the intensity of the right, as well as the ability of the bread manufacturers to have an impact on the fulfilment of the right to food, in my view, no other conclusion besides one which places a negative obligation on the bread manufacturers not to collude to inflate prices beyond access to impoverished persons can be sustained.

(b) The positive obligation

Moreover, it is necessary to determine whether, over and above the negative obligation, there is a positive obligation on bread manufacturers to fulfil the right to food as enshrined in the Constitution.

As we see in the case law as well as academic literature, this question is not straightforward, nor is there one consistent view on whether section 8(2) of the Constitution confers positive obligations on positive actors. As provided in the preceding paragraphs of this report, it is noted that Liebenberg recognises two instances where positive duties on private persons may arise, the first being where there exists a special relationship between the parties.[136] For example, a special relationship exists between a child and a parent.[137] The second is, where the private actor has substantial power to control access to the particular social goods or services, this will activate the entities positive duty as enshrined in the Constitution.[138] The second point is consistent with the reasoning of the Constitutional Court decision in *AllPay* where the Court held that in order to determine whether a corporation could be deemed as an organ of state with positive obligations, what is important to assess is whether the function performed by the entity was fundamentally public in nature.[139] In my view, the bread manufacturers fall with Liebenberg's second scenario. The point has been made on a number of occasions in this paper that the cartelist in the bread cartel, combined, had a market share between 50 – 60%. There is no doubt that these are large entities with significant power and which, when acting together, as they did, could easily control the supply of bread at a price that was suitable to their needs. The power to control accessibility to the supply of bread, in my view, is enough to conclude that the bread manufacturers, over and above their negative obligation, also have a positive obligation to the realisation and fulfilment of the right to food as set out in section 27(1)(*b*) of the Constitution. In other words, in certain circumstances, a corporation can be found to

[136] Ibid at 469.

[137] *Grootboom* supra note 131 paras 76-7.

[138] Liebenberg op cit note 133 at 469.

[139] *AllPay* op cit note 120 para 52.

have both positive and negative obligations arising from the rights in the Bill of Rights and that, in fact, these rights can co-exist.

For the sake of clarity and in an effort to not be presumed to be advocating that at all times will large corporations have positive obligations in terms of section 8(2) of the Constitution, I pause to emphasise the argument that I make. I make the point that a positive obligation will arise in the two instances proffered by Liebenberg. In Liebenberg's second scenario, where the corporation or a group of corporations that act in concert are the only providers of a good, there is a positive obligation to ensure the availability of consumers to access the good. There is no doubt that the bread manufacturers in the bread cartel when acting together, had a significant impact on the market largely because of the size of these entities. Therefore, the way I see it, the positive obligation on bread manufacturers is one that seeks to impose a legal obligation that ensures that the price charged for bread does not undermine access to bread by persons who rely on bread as their staple food. This will require a balancing exercise, in that, it will be necessary to balance the needs of the bread manufacturers to make a profit from a business perspective, alongside the need to ensure that bread is accessible by those that rely on it. From a competition perspective, one example of ensuring that the price of bread is not unreasonably high to the extent that bread becomes inaccessible is by ensuring that the firms in the market compete rather than collude. Where firms compete, the ultimate beneficiaries, from a competition perspective, are the consumers. Where firms compete on the merits, price competition occurs in that firms will seek to lower their prices to avoid customers switching to competitor firms.[140] However, in a cartel, consumers do not have the option to switch between suppliers and are either required to pay the high prices of bread or to exit the market completely.[141] For example, where the largest manufacturers of bread come together to set prices and trading conditions, the only option available for a consumer that is displeased with the price of a manufacturer is to continue to either buy at the higher price or to completely exit the bread market – a consequence which would have dire consequences on consumers who rely on bread as a staple food source as such an exit to the market would potentially ultimately lead to hunger. In such a scenario, the increase in price by the major manufacturers of bread has a direct and substantial impact on the ability of a consumer to afford a basic human right necessity conferred by the Constitution.

However, from a human rights perspective, where it is concluded that there is a positive obligation on the bread manufacturers, the remedy would be different. This remedy is one that seeks

[140] *Competition Commission of South Africa v Media 24 (Pty) Limited* 2019 (9) BCLR 1049 (CC) at 58.

[141] UNCTAD. Secretariat 'The impact of cartels on the poor: note / by the UNCTAD Secretariat' (24 July 2013) UN Doc TD/B/C.I/CLP/24/Rev.1.

to ensure that the price charged for bread does not undermine access to bread by persons who rely on bread as their staple food – this often being the poor in society. In a report published by Black Sash, it was recorded that recipients of the Child Support Grant were constantly faced with the threat of food running out and that when this happened, families would rely on tea and bread.[142] The South African social grant system aims to provide social grants to vulnerable South African who are considered to be poor and in need of the support of the government.[143] Social grants are available to different categories of individuals depending on the need. For example, there are various categories of social grants and these includes: Child Support Grant, Care Dependency Grant, Foster Child Grant, Disability Grant, and Older Person's Grant, to name a few.[144] As noted in the decision of the Tribunal in *Pioneer Foods*, bread is considered a staple food consumed by the poorest of the poor[145] and as such, South Africans that are likely to be most affected by inordinate price increases of bread are those that receive social grants. In the Black Sash Report, one respondent recorded that bread is often the last resort for their family when all other food options have been exhausted.[146] The respondent that '[o]ver the weekend they eat the porridge if it is available, but when there is no porridge they eat the bread with tea . . . However, sometimes I buy a half [loaf] bread even though I know it will not be enough for them.'[147]

As a result, where firms have been found to contravene the provisions of section 4 of the Competition Act by participating in cartels, in circumstances where such a firm's conduct violates a constitutional right, consequences that impose positive obligations may be necessary. In the circumstances, what kind of positive obligations could have been appropriate for the firms in the bread cartel had the courts pronounced that such conduct amounted to a human rights violation? In my view, it seems that a remedy that would have to benefit persons most affected by the conduct of the firms involved in the cartel – these persons would most likely be the poorest South Africans. As we see from the examples in the Black Sash report, poorer South Africans often rely on the social grant system to make ends meet. Therefore, any positive obligation must seek to benefit those recipients. As such, a remedy that seeks to subsidise the price of bread for the same duration as that of the cartel for all grant beneficiaries in South Africa would be most appropriate in the circumstances.

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[142] Black Sash 'Children, Social Assistance and Food Security' available at *http://www.blacksash.org.za/images/Report/0606_BS_-_Children_Social_Assistance_and_Food_Security_Research_Report_V15.pdf* accessed on 23 April 2022.

[143] South African Government 'Grant in aid' available at *https://www.gov.za/services/social-benefits/grant-aid* accessed on 17 April 2022.

[144] Id.

[145] *Pioneer Foods* op cit note 3 at 156.

[146] *Black Sash* op cit note 142.

[147] Id.

The financial obligation of such a remedy would lie squarely as an obligation imposable on bread manufacturers who have been found in contravention of both a competition law violation and a human rights violation. The additional threat of imposition of further financial penalties on firms will increase cartel deterrence.[148] However, it is important to note that the proposed remedy is not as clear-cut as it may seem. This is because, unfortunately, the imposition of further financial penalties on a firm may not necessarily be felt directly by the beneficiaries of the prohibited conduct, but may be felt by employees who, for example, may be subjected to retrenchments as a result of the financial implications suffered by the firm.[149] Therefore, while the proposed remedy may seek to deter cartel conduct and further violations of human rights obligations by firms, it highlights a critical issue that the development of appropriate remedies when positive obligations arise, that do not result in unintended consequences, is still an issue that requires exploration in our law.

Finally, I must stress that imposing positive obligations on private actors will only occur in exceptional circumstances. I believe that the conduct of the bread manufacturers fits squarely into the first category, that is, the conduct had a direct effect on the ability of the poorest South Africans to meet their section 27(1) (*b*) right to access food. In my view, the circumstances justify imposing a positive obligation on the bread manufacturers.

IX. CONCLUSION

As discussed above, the debate over whether human rights obligations are solely the responsibility of the state or whether private persons are and should be held liable for human rights obligations is one that is alive. Although this paper provides an in-depth analysis of the decisions of South African courts on the issue of whether human rights obligations can be imposed on private persons in certain circumstances, this does not constitute the focus of this paper. Rather, the objective of this paper was to determine whether the conduct of firms found in contravention of the provisions of section 4 of the Competition Act could, in exceptional circumstances, be said to infringe certain provisions of the Bill of Rights. To accomplish this aim, the conduct of the bread manufacturers who participated in the bread cartel was used as the primary case study. Based on my analysis and review of section 8(2) of the Constitution and the various cases that interpreted this provision, I submit that juristic persons do not only have negative obligations to do no harm but that in certain exceptional and limited circumstances, juristic persons may also have positive obligations in terms of the Bill of Rights. This finding, in my opinion, is consistent with the constitutional vision of achieving a socially just society,

[148] Maphwanya op cit note 13.

[149] Charmika Samaradiwakera-Wijesundara 'Complementarity and Criminal Liability of Companies in Africa: Missing the Mark?' in Lubaale, E.C., Dyani-Mhango, N. (eds) *National Accountability for International Crimes in Africa* (2022) 144.

which seeks to eradicate the link between the power and authority of juristic persons and poverty, which is a result of South Africa's perverted history.[150]

It is submitted that this approach does not seek to impose the states' positive obligations entirely on juristic persons as doing so would encroach on their private autonomy.[151] However, the suggestion that juristic persons will never and can never have positive obligation contradicts this paper's findings.

[150] Ibid.

[151] Ibid.

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