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An exploration of the positive obligation of juristic persons to promote and fulfil socio-economic rights

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An Exploration of the Positive Obligation of Juristic Persons to Promote and Fulfil Socio-Economic Rights

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ABSTRACT

There is a lot of uncertainty presently regarding the nature of the obligations imposed on juristic persons in the fulfilment of socio-economic rights. Case law is inconsistent. It describes the duty as negative and sometimes as positive. This requires an enquiry on the proper interpretation and parameters of s 8(2) of the Constitution, which binds juristic persons to the bill of rights, *"to the extent that it is applicable, having regard to the nature of the right and the nature of the duty imposed by the right'.*

This paper explores the exact nature of this obligation imposed on juristic persons. In some instances it is a positive obligation. My argument is that concerns raised by corporations that "imposing" or "interpreting" this obligation as positive will have a detrimental effect on the economy and possibly open the proverbial floodgates of litigation are more imagined than real. This is because there are statutes that already provide for this positive obligation on corporations in certain circumstances. Furthermore, the enquiry is on a case by case basis. There is unlikely to be blanket findings against all corporations in all cases to incur public obligations to fulfil socio-economic rights, particularly in areas beyond the scope of their operations unless mandated by statute, in which case(s) the courts' discretion will be limited anyway.

The benefit of interpreting this obligation as positive will ensure that some of the load that is placed on the government, with its finite resources, to improve the lives of millions of people, is shared with corporations who benefit way more than they pay in taxes. This will also ensure that our jurisprudence develops through the courts pronouncing on this duty with certainty.

AN EXPLORATION OF THE POSITIVE OBLIGATION OF JURISTIC PERSONS TO PROMOTE AND FULFIL SOCIO-ECONOMIC RIGHTS

INTRODUCTION

Section 8(2) of the Constitution provides that the Bill of Rights binds both natural and juristic persons *"if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."* [emphasis added]

Notwithstanding the above, I have noted that s 8(2) is one of the most under utilised transformative tools. Yet, it has so much potential. The motivation of this report is the fact that 27 years after democracy citizens are still only looking to the government to fulfil socio-economic rights when s 8(2) has been in place since 1996.

The paucity of authorities on such an important provision is concerning in a country like South Africa, where it has been apparent for years that the existing inequalities cannot be solved by government alone. Furthermore, corporations benefitted immensely from the oppression of black people, yet they are doing very little in transforming the country's socio-economic landscape, despite s 8(2) mandating them to do so, in certain instances.

The aim of this research report is to address the inconsistency in case law in interpreting the nature of the obligation that is placed on corporations to fulfil socio-economic rights. This report will unfold as follows.

The next section highlights the main problem, the significance of the study as well as a brief review of the existing literature on this issue. In section II, I set out the history and background of s 8(2). This includes the history of its inclusion in the Constitution. Section III briefly analyses the meaning of s 8(2) and the constitutional obligations it imposes on private entities. Through an analysis of case law, I discuss the extent to which s 8(2) is permissive of the positive obligations that I argue should be imposed on corporations.

In section IV, I discuss statutes that provide for this positive obligation, including the Companies Act,[1]. the MPRDA and the Extension of Security of Tenure Act[2] (ESTA).

I will conclude by highlighting possible areas of litigation from the statutes that I have identified in section IV, identifying lessons to be learnt from Constitutions of jurisdictions which are more transformation oriented. Lastly, I will propose ways in which our courts can better interpret s 8(2) in order to give effect to company obligations that promote rights contained in the Bill of Rights.

1. Background

Given the apartheid-created wealth disparity in South Africa, the Constitutional Court in ***Du Plessis v De Klerk***[3] ***("Du Plessis")*** correctly held that the drafters of the Constitution never intended to "fossilize" privatization of apartheid or to maintain unfair apartheid gains and privileges to the select few.

Inequality in South Africa shows that ours is not a normal society. StatsSA[4] demonstrates South Africa's extremely high inequality with the Gini coefficient of household per capita income typically well above 0.6. In 2014 it was 0,73[5]. This places South Africa in the 'top 5' most unequal countries on a global scale.[6] Black African rural women suffer the most from inequality arising from lack of employment. When employed, they sometimes earn less than half what whites earn.[7]

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[1] Act 71 of 2008

[2] Act 6 of 1997

[3] 1996 (3) SA 850 (CC), para 85

[4]Inequality Trends in South Africa: A Multi Dimensional Diagnostic of Inequality (2019) Report no: 03-10-19 http://www.statssa.gov.za/publications/Report-03-10-19/Report-03-10-192017.pdf Accessed on 14 December 2020

[5] According to StatsSA, the government social grants dampen these inequality-increasing effects. Ibid, p 6

[6] Inequality Report), page 5

[7] Inequality Report), p 6

StatsSA concluded that between 2006 and 2015, inequality has increased.[8] Furthermore, the highest inequality was amongst black Africans[9] with increased unemployment rate from 24,8% in 2011 to 27,5% by 2017[10]. Black women were the highest affected, earning on average 30% less than African males.[11] Rural black South Africans had least access to education, medical aid, electricity, water and sanitation, internet connection compared to other races.[12]

StatsSA found[13] that despite a general decline in poverty between 2006 and 2011, the poverty gaps increased between 2011 and 2015.[14] Black African women, children, uneducated people, rural people, particularly from Limpopo and the Eastern Cape were most impoverished.[15]

The thesis defended in this research report is that there is a need for a more proactive role for companies to address the situation sketched above. It demands more than a liberal approach, which limits corporations' role to profit making and paying taxes. The state's finite resources are inadequate to fulfil everyone's socio-economic needs. This places an urgent need for companies to be held to this transformative positive obligation.

Furthermore, a serious shift in power from the state to the private sector, mainly through privatization, has resulted in some critical "welfare-related" functions being performed by private corporations, whose income e.g. Amazon, Apple, Netflix, and those of their chief

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[8] Inequality Report, p 144

[9] Inequality Report, p 145

[10] Inequality Report, p 146

[11] Inequality Report, p 146

[12] Inequality Report, pp 146 – 148

[13] Poverty Trends in South Africa: An examination of Absolute Poverty between 2006 and 2015 (PTR) (Stats SA, 2017) Report no :03-10-06 found on https://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf Accessed on 14 December 2020

[14] Poverty Report, p 16

[15] Poverty Report, p 18

executives[16] is greater than the Gross Domestic Product (GDP) of some countries[17]. Yet, there is no equivalent shift in the obligations imposed on corporations.[18] The ten biggest corporations, have a combined revenue of more than 180 countries, including Ireland, Indonesia, Greece and South Africa.[19]

The liberal argument that corporations must be left to paying (high) taxes and that their separate legal personality status somehow absolves them from these obligations is problematic because taxes are paid by everyone, including the poor. The government determines how those taxes are spent. Section 8(2) requires something more, a specific duty to fulfil a specific right given its nature and its content.

Neoliberals argue that if companies choose to do more, that should be through their voluntary Corporate Social Responsibility (CSR) policies and they should only refrain from infringing anyone's rights (the negative duty). This outlook is deficient and unsustainable when considering that certain companies, whose revenue and power, both fiscal and political, is more than that of GDPs of some countries[20].

Arguments for imposing positive obligations on corporations to fulfil socio-economic rights

First, companies' *de facto* role in many respects mirrors the powers and capabilities of governments. In **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others[21] (AllPay II)**, Froneman J stated that when companies like Cash Paymaster are contracted

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[16] **Amazon's head Jeff Bezos' net worth is estimated to be higher than the GDPs of Angola and Iceland, Afghanistan and Costa Rica, combined, https://www.businessinsider.co.za/how-rich-is-jeff-bezos-mind-blowing-facts-net-worth-2019-4?r=US&IR=T Accessed on 21 December 2020**

[17] **https://www.businessinsider.com/25-giant-companies-that-earn-more-than-entire-countries-2018-7?IR=T#teslas-takings-surpassed-albanias-gdp-3 Accessed on 21 December 2020**

[18] **This was reiterated in Committee on Economic, Social and Cultural Rights, 'General Comment No 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities', (10 August 2017), E/C.12/GC/24 at para 25**

[19] **https://www.independent.co.uk/news/business/news/world-s-largest-corporations-more-money-countries-world-combined-apple-walmart-shell-global-justice-now-report-a7245991.html**

[20] **Meyersfeld, Business, Human Rights And Gender: A Legal Approach to External and Internal Considerations in S. Deva and D. Bilchitz (eds) Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? Cambridge (2013) p 193 at p 194, footnote 14**

[21]) **2014 (4) SA 179 (CC) at para 66**

to perform tasks ordinarily performed by state entities like SASSA, they are, for all intents and purposes (treated like) state entities, regardless of their other business operations and ventures, which are independent of providing the payment solution for social grants. However, in certain instances, this obligation extends beyond corporations which are contracted by the state.

Second, corporations are powerful because people buy their goods and services. Some of the natural resources used to manufacture these goods belong to all people. Despite the growing trend of privatisation of companies who provide critical goods and services that exploit natural resources of the state, there are inadequate standards on regulation of their responsibilities.

Third, private ownership of property and resources entails exclusion of those who can least afford essential services like health care (where pharmaceuticals have patents and private hospitals own life-saving healthcare), mining companies own mining licences in impoverished communities etc.

Fourth, local governments failures have led to an inevitable collapse in the provision of essential services like water and electricity. Yet there are limited obligations on corporations providing these services to improve local communities.

Fifth, there are existing statutes that provide for companies to do more, including the Mineral and Petroleum Resources Development Act[22] (MPRDA) read with the Mining Charter and Social Labour Plans (SLPs). The Codes of Good Practice for the Minerals Industry[23] require Independent Power Producers (IPPs) to invest 1% of after tax net profit towards mine community and rural development.[24]

Sixth, our Constitutional jurisprudence is positioned to address the plight of the most impoverished while leaving the majority of the "black middle class" or "the missing middle" to find alternative means to assert and enforce their socio-economic rights. This gap can be breached by corporations, in relevant circumstances.

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[22] Act 28 of 2002

[23] Issued under Government Notice No 32167 dated 29 April 2009

[24] Issued under s 100(1)(b) of the MPRDA

This study is crucial because if courts are attuned to the exact content of s 8(2) then their judgments can more consistently interpreting this obligation as positive, in certain instances. This may in turn increase litigation based on, *inter alia,* the statutes identified in this paper. This will enrich our jurisprudence and potentially improve the lives of millions. To highlight the importance of this study and status quo, I will briefly sketch out existing literature on this question.

In **Khumalo v Holomisa[25] (Holomisa)** the Court held that freedom of expression (s 16) applies directly in the law of defamation under s 8(2).

In **Governing Body of Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae**)[26]) **(Juma Musjid)** and **AB and Another v Pridwin Preparatory School and Others**[27] **(Pridwin)** the Constitutional Court interpreted the obligation as negative. Currie and de Waal also contend that this is a negative duty.[28] This is unnecessarily restrictive.

Bilchitz[29] rejects Currie and de Waal's contention that this obligation is negative and motivates for a nuanced approach to corporations, which balances the societal aspect of companies (i.e. the normative understanding of companies' role for social benefit that lawmakers should adopt) and the individualistic perspective (that focuses on the corporation's drive to maximise profit, its limited liability based on separate legal personality) and implies that corporations have a positive obligation to realise fundamental rights.

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[25] **2002 (5) SA 401 (CC)**

[26] **2011 (8) BCLR 761 (CC) at paras 57 – 58**

[27] **(CCT 294/18) [2020] ZACC 12 (17 June 2020)**

[28] **Currie I & de Waal J "The Bill of Rights Handbook", 2005, Fifth Edition, p 51 (old edition). The 2013 edition is silent on this issue**

[29] **Bilchitz D "Do Corporations Have Positive Fundamental Rights Obligations?" Theoria: A Journal of Social and Political Theory, Vol. 57, No. 125, WITS Conference Proceedings: 'Poverty, Charity, Justice' (December 2010), pp. 1-35**

In ***Daniels v Scribante and Another***[30] **(Daniels)** the Court interpreted the duty as positive, in certain instances. Meyersfeld[31], largely agrees with this finding. The above literature and case law demonstrates the inconsistency in the interpretation of the nature of this duty on corporations to fulfil socio-economic rights. In this paper, I highlight the shortcomings of Juma Musjid, Pridwin and earlier cases which interpreted this duty as negative. I agree with the Court's finding in **Daniels** and support Bilchitz and Meyersfeld's respective arguments that the obligation is positive in certain circumstances.

2. HISTRORICAL BACKGROUND AND INTERPRETATION OF SECTION 8(2)

2.1 Background to Section 8(2)

The African National Congress' (ANC's) 1988 document tiled "Constitutional Guidelines for a Democratic South Africa"[32], sets out the ANC's vision for the future South Africa. The following provision appears in relation to the role of businesses post democracy:

> *(16) Business must respect the Freedom Charter, and work with the state to make a good society for all the people.*

Although not explicit on the role of corporations in the fulfilment of socio-economic rights, this document envisioned corporations playing a role in society building. This arguably signals the potential for positive obligations.

The first time that the content of what would later become s 8(2) confronted the Constitutional Court under the Interim Constitution was in ***Du Plessis***. The Interim

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[30] 2017 (4) SA 341 (CC)

[31] Meyersfeld B "The South African Constitution And The Human Rights Obligations Of Juristic Persons" 2020 an article not yet published, p 9,

[32] It was adopted in March 1988 at Lusaka

Constitution's application clause in s 7[33], differed markedly from s 8 in that it did not expressly state that the Bill of Rights imposed duties on private actors.

In this case, Du Plessis sought to impose Bill of Rights' application on De Klerk, a newspaper editor, who had published a series of defamatory articles. He relied on the common law *actio iniuriarum* following alleged loss of business and damage to commercial reputation. Du Plessis' defence was that the impugned comments were lawfully protected by the right to freedom of expression.[34] The Court had to determine whether the Bill of Rights directly applies to non-state actors.

The majority judgment held that the Interim Constitution's guarantee of freedom of expression, and by extension the Bill of Rights, has no direct horizontal application as the Bill of Rights operated only as between the state and its subjects. Consequently, the Court could not award damages against a private party guilty of defamation[35].
In one of the dissenting minority judgments, Kriegler J referred to a "*pervading misconception, of so-called direct horizontality… which will result in an Orwellian society in which the all-powerful State will control all private relationships".*[36] This statement demonstrates how the majority of Justices were weary of direct application.

Despite varied dissents from different Justices, Madala J provided the most plausible solution. He advocated for the reading of the Constitution to provide for both direct and indirect horizontal application. He held in favour of a case-by-case analysis in determining particular Chapter 3 rights' application horizontally to a particular set of circumstances, *"depend[ing] on the nature and extent of the particular right, the values that underlie it, and the context in which the alleged breach of the right occurs*"[37].

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[33] Section 7(3) provided that "Juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits."

[34] Para t5

[35] Paras [62] – [63]

[36] Para [120]

[37] Para 161, footnotes omitted

Karl Klare[38] argues that Madala's exceptionally thoughtful and creative approach best did justice to the complex question before the Court. Furthermore, that his nuanced solution[39] undoubtedly guided the National Assembly in drafting the final text of s 8(2), which reflected precisely what he proposed.[40]

At his 2018 lecture, Madlanga J[41] concurred with Klare and stated that Du Plessis *"would have loomed large in the minds of the National Assembly"* when drafting s 8(2) as they rejected the majority's finding and explicitly provided for horizontal application of human rights.[42] Although the final wording of s 8(2) is not identical to the words used by Madala J in Du Plessis, the inspiration is quite glaring and locates the precise historical context and content of the provisos contained in s 8(2).

Section 8(2)'s robust provisions not only part company with the Interim Constitution's s 7 under which Du Plessis was decided, but are also in line with the transformative obligations under s 8(2), hence its explicit provision for direct application of the Bill of Rights to private persons, in certain circumstances.

2.2 Interpretation of Section 8(2)

The horizontal / vertical distinction is deeply rooted in liberal sentiment. It has been defended to no end. In Du Plessis, Kriegler described horizontal application of rights as *'… malicious nonsense preying on the fears of privileged whites, cosseted in the past by laissez faire capitalism thriving in an environment where the black underclass had limited opportunity to share in the bounty... calculated to inflame public sentiments and to cloud people's perceptions of our fledgling constitutional democracy.'*[43]

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[38] Legal Culture and Transformative Constitutionalism (1998) 14 SAJHR p 146
[39] On p 186

[40] At p 187

[41] **Madlanga M "The Human Rights Duties of Companies and other Private Actors in South Africa" (2018) 29 Stellenbosch Law Review 359 at 362**

[42] Ibid, p 366

[43] Para 120

There's ongoing reluctance to relying on s 8(2). This is mainly because for long the Bill of Rights was invoked only against the state. This partially explains the paucity of authorities on s 8(2). Currie and de Waal[44] blame private persons' reluctance to invoke the Bill of Rights directly and the Bill of Rights' consequent failure to contribute to the resolution of private legal disputes.[45]

Madlanga J understandably blames this reluctance on the lack of clarity on the nature of fundamental rights that should bind the state and private persons, respectively.[46] He proposes using s 8 as a tool for dismantling the legacy of colonialism and apartheid.[47] This starts with interrogating the precise meaning of s 8(2).

Meyersfeld blames the reluctance on reliance on direct horizontality on s 8(2)'s limited scope arising from the proviso that binds corporations to the Bill of Rights if it is applicable and to the extent that it is applicable[48], unlike the state, which is always bound by the Bill of Rights. This is unconvincing because there is *prima facie* merit in treating the state and private persons differently. The state mainly bears duties that are uniquely intended for the state. It would be unreasonable for the state and private persons to bear exactly the same obligations under the Bill of Rights because the former is funded by public funds while the latter fund their operations from their own pockets.[49] Therefore, there is no need for a proviso contained in s 8(2) to apply to the state. That is why s 8(1) contains none. Furthermore, the proviso in s 8(2) has never been constitutionally challenged or for presenting an unreasonable constraint. Its existence appears to have merit as I shall show below.

2.3 Transformative Objectives of Section 8(2)

In this subsection, I set out s 8(2)'s transformative objectives, which directs how courts

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[44] **Currie I & de Waal J "The Bill of Rights Handbook", 2005, Fifth Edition, p 51 (old edition). The 2013 edition is silent on this issue**

[45] **Ibid, p 51**

[46] **Madlanga , p 366**

[47] **Ibid, p 368**

[48] **Meyersfeld, p 15**

[49] **Daniels, Para 40, where Madlanga J agrees with Currie and de Waal in making this contention**

should interpret s 8(2). Moseneke DCJ, stated that in the context of South Africa's unequal society, with its colonialist and apartheid past, rejecting direct horizontality is at odds "with the transformative project of the new democratic order with overt pursuit of human dignity and equality".[50]

In **Daniels**[51] Madlanga J identified s 8(2) as one of the tools of overcoming the notion of exclusive protection of human rights in vertical relationships. At his lecture, Madlanga J[52] explained one of s 8(2)'s aims as improving the quality of life of all citizens and freeing individual potential. He warned against refusal to impose human rights obligations on companies for fear of interfering with their autonomy, as this leads us to risk maintaining *"a perverse status quo"* which mirrors the apartheid legacy and leaves the whites privileged and the blacks impoverished.

Meyersfeld's discussion of the historical and present-day contribution of national and multinational corporations in South Africa's ever-increasing gap[53] corresponds with StatsSA's above findings. She then identifies two apparent purposes of s 8(2), (i) aimed at uniting people and (ii) the 'power quotient'[54] aimed at ameliorating the power imbalance between rich and poor in South Africa through holding juristic persons accountable for human rights protection.[55] This stretches s 8(2)'s transformative aims in a positive direction. Moseneke, Madlanga and Meyeserfeld contend that s 8(2) actually imports into the Constitution a sliver of distributive justice. However, Meyersfeld merely sees this role as limited to the wealthy elite potentially contributing financially to alleviate poverty, in specific circumstances, particularly where the state is unable to do so[56].This is unduly

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[50] **Moseneke "Transformative Constitutionalism: Its Implications for the Law of Contract" (2009) 20 Stellenbosch Law Review 3 at 7**

[51] **At para 41**

[52] **Madlanga "The Human Rights Duties of Companies and Other Private Actors In South Africa" (2018) 29 Stellenbosch Law Review 359 at 364, 368**

[53] **At p 9**

[54] **"Meyersfeld, p 19**

[55] **Ibid, p 19**

[56] **At p 10**

restrictive because s 8(2) is independent of whether or not the state is able to provide for the poor, even though in South Africa's context it is a serious consideration.

Section 8(2)'s wording, supports the mandatory approach, which calls for distributive justice. This call is further bolstered by the Constitution's preamble, which recognises past injustices and positions the Constitution as a tool *"to heal the divisions of the past; improve the quality of life of all citizens and free the potential of each person."* By adopting the Constitution, we consented to this distributive justice mandate sets out in the Preamble. We now need to utilise *inter alia* s 8(2) to fulfil this obligation by breaking away from the pre-Daniel incorrect interpretation of s 8(2).

2.4 The Content of Section 8(2)

Section 8(2) states that a provision of the Bill of Rights binds a natural or a juristic person *if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.* (Own emphasis)
The first enquiry is whether the section applies in a particular case. If so, to what extent. This is answered with regard to (i) the nature of the right and (ii) and the nature of any duty imposed by the right.

Meyersfeld argues that the 'nature of the right' is more expansive and applies to rights that do not contain an internal reference to natural or juristic persons. Therefore, where appropriate, s 8(2) may apply to any right in the Bill of Rights, even socio-economic rights.[57] This is correct as there would be no basis for excluding socio-economic rights from the other rights contained in the Bill of Rights.

In respect of the nature of the duty, I argue that it is positive in certain circumstances. I specifically point this out because the negative obligations appear uncontested.[58]

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[57] **Ibid, p 16**

[58] **Meyersfeld p 16**

Currie and De Waal[59] advocate for the need to consider the nature of any duty imposed by the right because private persons' primary concern is about themselves, while the state's concern should be society's wellbeing.

They argue that unlike a state hospital, a private hospital cannot have the duty to provide every child with basic healthcare services (s 28(1)(c)). This is not completely accurate as private hospitals, in emergency cases, have a positive obligation to stabilize patients who are admitted, who do not have medical aid because s 27(3), prohibits refusal of emergency medical treatment.

They could transfer them to the public hospital afterwards and invoice them. Whether those patients can pay the invoice is a different enquiry.

Currie and De Waal contend that the Bill of Rights may indicate whether or not a particular right may be applied to private conduct. They conclude that corporations only have negative obligations to fulfil fundamental rights.[60] They argue that the socio-political right to vote, to citizenship[61], to just administrative action[62] environmental rights[63], access to housing[64], healthcare, food, water, social security[65] and the right to education[66] are usually the state's responsibility and apply vertically[67]. However, the duty to refrain from interfering with existing access to social goods is horizontally binding[68]. They further argue that the remaining rights in the Bill of Rights can, depending on the circumstances

[59] **Ibid, pp 48 - 50 (2013 edition)**

[60] **Ibid pp 54 – 55 (2005 Edition)**

[61] **Sections 20, 21(3) and (4)**

[62] **Section 33**

[63] **Section 24(b)**

[64] **Section 26**

[65] **Section 27**

[66] **Section 29**

[67] **Ibid, p 50 (2013 Edition)**

[68] **Currie and de Waal "Bill of Rights Handbook" Fifth Edition, 2005, p 53**

of a particular case, be applied horizontally, so as to impose duties on private individuals to conform their conduct to the Bill of Rights[69]

This simplistic approach adopted by these authors on which right imposes a positive obligation on the corporations overlooks many other factors to consider in the s 8(2) enquiry as Madlanga J pointed out in Daniels. They include: (i) the nature of the right; (ii) history behind the right; (iii) what the right seeks to achieve; (iv) how that can best be achieved; (v) 'potential of invasion of that right by persons other than the state or organs of state'; and (vi) whether letting private persons off the net will not negate the essential content of the right. He correctly concluded that if, weighing up all these factors, leads to the conclusion that private persons are not only bound but must in fact bear a positive obligation, we should not shy away from imposing it, as s 8(2) envisages that."[70]
This was the first time that these factors are spelt out in such great detail. They will guide the courts in future in interpreting s 8(2), on a case-by-case basis as Madlanga J correctly emphasised. I next explore how courts have performed this task to date.

3. JURISPRUDENCE ON THE MEANING OF S 8(2)

Section 8 (2) provides that a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right**.**

This raises the question whether the Courts have interpreted this provision correctly. I argue, not until Daniels in 2017. Firstly, I will trace how the courts have historically incorrectly interpreted this provision pre-Daniels.

For starters, we must accept that there is, at the very least, a negative duty against all, including private persons, not to impair the enjoyment of socio-economic rights. Yacoob

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[69] Ibid, p 50 (2013 Edition)

[70] Para 39

J recognized this in **Government of The Republic of South Africa & Others v Grootboom and Others**[71] in the context of the right of access to adequate housing.[72]

Madlanga J explained the content of a positive obligation, as enjoining the duty bearer to take some action to make possible the enjoyment of the right by the right bearer.[73]

3.1 The Nature of Obligations Imposed on Companies Through The Case Law

3.2 Holomisa

Following Khumalo's publication of defamatory articles stating that the respondent, a prominent politician, belonged to a gang of bank robbers who were under police surveillance, the question in **Holomisa** was whether freedom of expression (s 16) applies directly in the law of defamation under s 8(2). The Court held in the affirmative, finding that the Bill of Rights must be applied directly to the common law, wherever appropriate "*given the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the state or organs of state, as contemplated by s 8(2) of the constitution."*[74] (own emphasis). The Court did not explain the underlined phrases (the two factors). The former refers to the right of freedom of expression. The latter refers to the rights' potential invasion by private persons.

3.3 Juma Musjid

In **Juma Musjid**, the Trust, which owned land where the private school was built, sought to close the school in order to use its property for another purpose. It gave notice to this effect to the Department of Education which was leasing it. The Department took no steps

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[71] 2001 (1) SA 46 (CC) at para 34; See also Minister of Health v Treatment Action Campaign 2 2002 (5) SA 721 (CC) at para 46 in the context of healthcare

[73] Ibid, at 370

[74] Para 33

to find an alternative location for the school, arguing that if the school closes and learners are evicted, then their right to education will be infringed.

The Constitutional Court held that the primary positive duty to provide education to learners, rests on the MEC for Education in each province and not the Trust. This duty will only fall on the Trust by agreement between it and the MEC for Education in terms of s 14(1) of the South African Schools Act (the Schools Act).[75]
The Court relied on the two factors set out in Holomisa without explaining them. It held that s 8(2)'s purpose is not to obstruct private autonomy or to impose on private parties state duties in protecting the Bill of Rights. It explained it as a negative obligation not to interfere with or diminish the enjoyment of a right.'[76] The Court concluded that the high court misdirected itself in finding differently.

In Juma Musjid, the Court reached a similar decision to Holomisa on direct horizontality. It went further than Holomisa by describing the nature of the obligation on the Trust as negative. Despite this stride, it never went into an inquiry of whether this duty could potentially be positive. It had scope to do so because after recognizing that through agreement in terms of s 14(1) of the Schools Act, the obligation on the Trust was to provide basic education. It never explained why in that particular case the obligation was not positive.

This is crucial when on the facts, the Court recognised the public character that the Trust took, through "managing, conducting and transacting all affairs of the Madressas in the most advantageous manner," including paying for some costs of items that the SGB that the Department ought to have provided, including expenses of running the school.[77] Yet, it only relegated the Trust's obligation to a negative duty. This is partially due to the failure to interrogate s 8(2) in detail. This may have yielded different results on the facts.

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[75] **Para 57; Act 84 of 1996**

[76] **Paras 58, 60**

[77] **Para 59**

3.4 Allpay II

In **Allpay II** the Constitutional Court developed this approach further, *albeit* in the context of the right to social assistance. It re-affirmed **Juma Musjid** and then added that *"where an entity has performed a constitutional function for a significant period already, ... Considerations of obstructing private autonomy by imposing the duties of the state to protect constitutional rights on private parties, do not feature prominently, if at all."*
The Court held that where an organ of state has, through a contract, assigned its constitutional or statutory powers, a private entity bears constitutional obligations towards individuals just like organs of state do[78]. This is similar to "the public character" that the Trust took on in Juma Musjid. The relationship between the parties was also based on the agreement. Although the agreement in AllPay II was explicit about Cash Paymaster's constitutional obligations[79], the agreement between the Department and the Trust in Juma Musjid was not as explicit but had similar effect as that in AllPay II.

The Court in AllPay II made all these findings based on PAJA and s 239 of the Constitution. It never relied on s 8(2). However, it noted Juma Musjid's recognition of an obligation on corporations as negative under s 8(2)[80] and expressed no opinion on this. It however, extended Juma Musjid's application by finding that because Cash Paymaster performed this function for five years as per the contract, it bore a positive duty to fulfil the right to provide social security by providing a workable system until a new operator was found. The Trust in Juma Musjid had provided the service for nine years but that was never interrogated for purposes of s 8(2). This is a further shortcoming of Juma Musjid.

In **Pridwin** (discussed below), Theron J (majority judgment) held that the Court did not hold that Cash Paymaster incurred a positive obligation to administer social grants under section 27(1)(c) purely because of its contract with SASSA; that Cash Paymaster's positive obligations survived the termination of the contract. Accordingly, Cash Paymaster merely incurred positive obligations by assuming a constitutional role that the state would

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[78] Paras 52 – 59

[79] Para 56

[80] Para 65

otherwise have had to perform itself.[81] Theron J is incorrect for reasons above. This is an unnecessary technical distinction that does not negate Allpay II's finding even though it was not decided under s 8(2).

3.5 Blue Moonlight

In **City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd[82] ("Blue Moonlight")** the Court imposed a positive obligation on the property owner, a private company, by requiring it to continue to house unlawful occupiers who would have been rendered homeless if they were evicted. This temporarily restricted the owner's right to occupation.[83]

The Court in Blue Moonlight did not expressly state that it was imposing a positive duty on the private owner. But that is precisely what it did. In fact, it did not even mention s 8(2). It relied on s 172(1)(b) for imposing just and equitable remedy. However, by directing the property owner not to evict the occupiers until the City has found temporary accommodation for them, it imposed a positive duty on the property owner, equivalent to s 8(2).

This judgment contradicts Currie and De Waal's contention that there is no positive duty on corporations to fulfil socio-economic rights in cases of housing. The Court's exclusive reliance on s 26, without mentioning s 8(2) but still imposed a positive obligation akin to s 8(2) is immaterial. It demonstrates that courts can in some instances impose a positive duty on corporations to provide accommodation to occupants for a certain time period.

3.6 Daniels

In **Daniels,** the Constitutional Court had to determine whether a labour tenant has a right to make improvements to her dwelling and whether they needed the owner's prior

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[81] **Para 179**

[82] **2012 (2) SA 104 (CC)**

[83] **Para 40**

consent.[84] Secondly, whether the property owner would have to compensate the occupier under s 13 of ESTA for improvements when she vacated the premises.

The respondents contended that compensating Daniels for improvements imposed a positive duty on them to pay for dignified living conditions, without gaining any benefit from it.[85] The question was whether ESTA imposes a positive obligation on farm owners to grant secure tenure to occupiers under s 25(6) of the Constitution .

The majority judgment (Madlanga J) held that an occupier's rights under ESTA included the right to make improvements on their dwelling which brings dignity.[86] Section 8(2) imposed fundamental rights on private persons if (i) the right in question was such that it would bind them, and (ii) the obligation of secure tenure imposed by s 25(6) via ESTA was by its nature a positive one that bound private individuals.[87]

Madlanga J concluded that while the owner's consent was not a prerequisite, the occupier had to inform them of proposed improvements[88]. Daniels was accordingly entitled to make the intended improvements[89] as s 8(2) imposed a positive constitutional duty on owners."[90] This is an express departure from the Court's judgment in **Juma Musjid,** which identified corporations' obligation as negative. The Daniels finding is correct.

I disagree with Meyersfeld**'**s accusation of the Court in Daniels as selective by allegedly not quoting the entire paragraph 58 of Juma Musjid [91] in an attempt to "overstretch the

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[84] Ibid, para 11

[85] Para 73

[86] **Para 34, This was also echoed by Zondo J in a separate judgment**

[87] Para 49

[88] Paras 61, 62, 64

[89] At paras 57, 71

[90] Ibid, para 39

[91] Meyersfeld, p 31

finding in Juma Musjid" and thereby not effectively reconciling the two contradictory decisions[92] as "this leads to uncertainty".

In paragraph 44 Madlanga J quoted both paragraphs 57 and 58 of Juma Musjid in full. What may be fair criticism would be that, after quoting these paragraphs, he did not convincingly explain its departure from Juma Musjid's express findings.

Madlanga J does not interpret Juma Musjid *as* merely imposing a negative obligation on the private persons based on "the extensive interpretative exercise it engaged in".[93] This is incorrect because Juma Musjid *did* expressly impose a negative duty. He however, correctly read Juma Musjid in the context of the Court's second certification case, on which *Juma Musjid* relied, which does not find that private persons never bear positive obligations under the Bill of Rights under any circumstances[94] as Juma Musjid intimated, but expressly held differently.

On Daniels' facts, Madlanga J further distinguished Juma Musjid's finding of a negative obligation on the Trust as opposed to the one imposed on the land owner, which *can be positive* because s 25(6) of the Constitution, through ESTA enjoins private persons to accommodate another on their land. This obligation can also be negative as the occupier's right should not be 'improperly invaded."'[95] This is correct.
ESTA's preamble recognizes apartheid's role resulting in many South Africans losing secured tenure, the land they use and their vulnerability to unfair eviction. It promotes achievement of long-term secured tenure for land occupiers, where possible, through the joint efforts of occupiers, land owners, and government bodies.

In Daniels, Jafta J's minority judgment (with Nkabinde ACJ concurring) concurred with Madlanga J's judgment save for the interpretation of s 8(2).[96] Jafta J did not read s 8(2)

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[92] Ibid, p 5

[93] Paras 46 - 47

[94] Paras 47 – 48

[95] **Ibid, para 49**

[96] Para 156

as imposing any obligation, "*let alone a positive obligation borne by a private person."*[97] He concluded that the obligation is negative.

Jafta J, comparing[98] s 7(2), which specifically imposes a positive obligation on the state to respect, protect, promote and fulfil socio-economic rights, with s 8(2) which *"does not expressly impose a positive obligation"* on a private person, incorrectly held that the Constitution's obscurity when imposing such a duty upon a private person in s 8(2) indicates that it does not impose positive obligations.[99]

This misses the point because s 8(2) does not state what type of obligation it imposes, whether negative or positive. Corporations are bound by s 8(2) to fulfil even positive obligations "subject to the nature of the right and the nature of the duty imposed". That is the sum total of the s 8(2) enquiry.

Jafta J accused the majority of "failure" to identify any provision of the Bill of Rights which imposes a positive obligation upon a private person in express terms. In paragraph 49 Madlanga J identified s 8(2) read with the right to secure tenure in s 25(6) as imposing a positive duty on private persons[100]. This denial by Jafta J renders ss 8(2) and 8(3) nugatory.

Jafta J held that there is nothing in the text of s 25(6) which suggests that restoring lost tenure rests on private persons, because apartheid's discriminatory laws and practices caused loss of tenure and that *"[i]nnocent private persons could not be saddled with the duty to remedy the wrongs of the state".*[101] This last part of Jafta J's statement is without basis. In South Africa's context, many companies benefited immensely from white people's oppression of black people. They still do.[102] To merely brand all of them as

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[97] Para 156

[98] Para 162

[99] Para 162

[100] **Para 160**

[101] Para 165

[102] Van Vuuren H "Apartheid Guns and Money – A Tale of Profit" Oxford (2018)

"innocent" for the sake of avoiding attaching corporate liability is an overstretch and it is ahistorical.

It is unclear how Jafta J concurs with the majority judgment when he denies that the majority considered s 8(2) read with s25(6) to be the source of the positive obligations. For Jafta J to not see (read acknowledge) the parallels between past racially discriminatory laws, the loss of security of tenure (s 25(6)) and the need to correct the injustices of the past in the context of s 8(2)'s transformative mandate is mind boggling given the intersectionality of all of those events in South Africa.

Jafta J raised *"practical difficulties"* that would arise with enforcing a positive obligation against a private person, including how that private person is identified; what exactly they are required to do to fulfil the obligation and the consequences that would follow if they have no financial means to discharge the obligation. He held that in the absence of internal qualifiers from the state, it is difficult to see how these challenges may be overcome.[103]

These "practical difficulties" are more imagined than real. Madlanga J already held that cases have to be considered individually and if they fall under the s 8(2) proviso of *"subject to the nature of the right and the duty imposed by it"* then they can attract positive obligations. Negative obligations are easy to enforce as they require private persons to refrain from interfering with the enjoyment of a right[104]. But that is no reason to not inquire about potential positive obligations especially when Madlanga J provided useful, non-exhaustive factors which can be used as a guide for the s 8(2) enquiry.

Jafta J's disagreement with the majority judgment on how the Court reached its decision in Blue Moonlight merits discussion. He is correct in stating that the duty on Blue Moonlight to further accommodate unlawful occupiers after the court order date was not based on a positive obligation imposed by s 8(2). He is incorrect in denying that it was imposed by s 26. To merely limit it to a *"prohibition restraining the landowner from*

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[103] **Para 171**

[104] **Para 171**

removing the occupier from the property before eviction date based squarely on s 4(8) of PIE"[105] is a play on semantics and is incorrect for reasons above. The effect of Blue Moonlight is that it imposed a positive duty on a private person to house occupants for a period past the eviction order because (ii) many of them had occupied the building for a long time, (ii) their eviction would render them homeless; (iii) Blue Moonlight was aware of such occupation for a while when it brought the property; (iv) there was no competing risk of homelessness on Blue Moonlight's part.[106]

The Court's consideration of these factors in Blue Moonlight is in line with s 8(2) which requires this type of analysis prior to imposing a positive obligation on the corporation.

Jafta J's contention that the Court was at pains in Blue Moonlight to point out that the property owner had no obligation to house the occupiers[107] is inaccurate. That Court stated that a property owner cannot be expected to house homeless unlawful occupiers for free indefinitely "*but in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted".*[108]

Jafta J further held that (i) only the state bears a positive obligation to progressively realise *socioeconomic rights, not private persons*[109]*; (ii)* that, properly construed, ss 26 and 27 of the Constitution do not impose a positive duty on private persons; (iii) to hold otherwise would mean that the qualifications in ss 26(2) and 27(2) are not available to a private person; and (iv) this would also be at odds with the construction that requires ss 26(1) and 27(1) to be read together with ss 26(2) and 27(2), respectively.[110] Jafta J reiterated

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[105] **Paras 177 - 182**

[106] **Blue Moonlight, para 39**

[107] **Para 185**

[108] **Para 40**

[109] **Para 186. He relied on Mazibuko, Khosa, TAC; Grootboom, Soobramoney and Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC));**

[110] **Para 189**

that the duty imposed on private persons is negative[111]. He relied, inter alia, on *Juma Musjid*[112] to limit the obligation in Daniels as negative.[113]

Jafta J completely rejected the transformative duty of corporations when he held that neither the Constitution nor ESTA imposes on the respondents the duty to provide accommodation despite available large tracts of spare land.*"*[114] This is incorrect in the context of ESTA and s8(2)'s transformative mandate.

Although Jafta and Madlanga JJs reached the same conclusion, Madlanga J based his decision on the respondents' breach of the positive duty to restore security of tenure under s8(2) read with s25(6) of the Constitution. However, Jafta J based the respondents' liability on their breach of negative duty not to interfere with her right of residence[115] premised on the respondents' consent for an occupier to reside on or use its land under ESTA, and not s 8(2) read with s25(6) of the Constitution as per the majority judgment[116].

The majority judgment was correct to find that there was a positive obligation on the respondents to fulfil Daniels' socio-economic rights. The minority judgment was incorrect to deny the existence of a positive obligation for reasons above.

3.7 Pridwin: SCA

Pridwin concerned the right of a private school to terminate contracts between it and the parents of two children because of one of the parents' behaviour. The high court dismissed the parents' review of this decision.

At the Supreme Court of Appeal (SCA), the school accepted that it is bound by section 8(2).[117] The parents contended that when the school provides a basic education, it is

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[111] Para 190

[112] Para 191

[113] He found is consistent with s 7(2) of ESTA, which prohibits the owner or person in charge from prejudicing an occupier in any way

[114] Paras 195 – 196

[115] Para 193 read with para 199

[116] Para 201

[117] Para 29

performing a constitutional function and bears a negative duty not to unreasonably diminish a learner's access to an education. Therefore, the school was obliged to allow parents to make representations before the parent's contract was terminated.[118]

The SCA's majority judgment [119], held that the school was not providing a basic education as per s 29(1)(a)[120]. It would only do so if contracted by the state for this purpose, like in Allpay, in which case, it would bear a positive duty because it would be performing a constitutional function. Therefore, s 29(1)(a) imposed a negative obligation on non-subsidised independent schools not to obstruct learners' rights. It cannot be used to impose a positive duty on a private school to grant a hearing before terminating a parent contract.[121] as this duty rests on the state. To find otherwise would lead to remarkable consequences[122] as the school's obligations are limited to those set out in the parent contract**.**

In a dissenting judgment, Mocumie JA[123] agreed with Juma Musjid that s 29(1) imposes a positive obligation on the state to provide basic education. He found the termination clause unconstitutional, against public policy and unenforceable in allowing the school to terminate the contracts without following fair procedure and without the minor children's views of the being considered[124]. He made no mention of s 8(2).

The consequence of the majority's reasoning is that learners are not protected under section 29(1)(a) against unreasonable disruptions to their education while they remain at

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[118] Para 38

[119] **AB and Another v Pridwin Preparatory School and Others 2019 (1) SA 327 (SCA)**

[120] Para 39

[121] Para 40

[122] Paras 40 and 42

[123] **Para 94**

[124] **Para 116**

non-subsidised independent school. The SCA not even consider, least of all, mention section 8(2) in its judgment.

The SCA in Pridwin did not state what was wrong with the majority finding in Daniels that the land-owner bore both negative and positive obligations. It appeared to endorse Jafta J's judgment[125] that obligations on the private landowner are imposed by s 25(6) and through ESTA. It extended Jafta J' s finding by characterising these obligations as positive and negative. Only Madlanga J found these obligations to be negative and in some instances, positive but under s 8(2) and not s 25(6) of the Constitution read with ESTA. It distinguished Daniels by reiterating that s 29(3) of the Constitution, read with the Schools Act, does not mean that they provide basic education as envisaged in s 29(1)(a).
The Constitutional Court found this finding by the SCA to be misconceived. Theron J held that neither Pridwin, nor Juma Musjid Trust, were compelled to provide a basic education. Notwithstanding this, she held, Pridwin did provide the minor children with a basic education.[126]

The SCA's majority judgment rejected the parents' contentions and reliance on Daniels incorrectly**.** Its finding that Pridwin was not providing a basic education under s 29(1)(a) and had no obligations in respect thereof conflates the content of the right to basic education with the obligation to provide basic education.[127]

3.8 Pridwin: Constitutional Court

The Constitutional Court's dissenting judgment by Nicholls AJ held that there is no general positive duty on private entities to provide education, basic or otherwise.[128] However, Pridiwn was offering basic education (grades 1 – 9), of a superior quality[129]. She held that it is not basic education, but rather "superior" education, to which *not* every

[125] **Para 47**

[126] **Para 177**

[127] **This was confirmed by the Constitutional Court, Theron J, at para 166**

[128] **Para 77**

[129] **Para 78**

child is constitutionally entitled. Therefore, a basic education is a component of every "superior education" as long as it is non-secondary and non-tertiary.[130]

The majority held that basic education refers primarily to the content of the right to education.[131] and children attending non-subsidised independent schools are receiving and enjoying a basic education, *albeit* superior to the level required by s 29(1)(a) from the state.[132]

Nicholls AJ criticized the SCA's reliance on AllPay II firstly, on assuming that constitutional obligations ultimately depend on the form by which they are assumed (a contract in the case of AllPay), but rather on the volitional nature of the assumption. She held that since private entities like independent schools bear negative obligations, they act voluntarily when they decide to fulfil constitutional responsibilities.[133]

Secondly, the SCA's finding that the right to basic education contains both positive and negative obligations[134]. The Court approved Juma Musjid's finding that the right to basic education is immediately realizable. It extended Juma Musjid by holding that the state has a positive and negative duty to fulfil it. However, that "*private entities, have, at the very least, a negative duty not to diminish the right".*[135].She "relied" on Juma Musjid and Daniels for this finding. Only Jafta J's judgment in Daniels held that it is a negative obligation. Madlanga J held that it could be negative and, in some instances, positive.

The majority limited the school's obligation to a negative duty.[136]

The distinction between Pridwin and all aforementioned cases is that the applicants did not argue that independent schools have a positive obligation. In fact, their counsel specifically disavowed this.[137] Despite this, Theron J, still proceeded to find that Pridiwn

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[130] **Paras 79 – 80**

[131] **Para 164**

[132] **Para 164**

[133] **Para 85**

[134] **Para 86**

[135] **Daniels, para 159**

[136] **Para 8**

[137] **Para 86**

does not incur positive obligations under section 29(1)(a) and that Pridwin may perform a constitutional function, but, unlike Cash Paymaster in AllPay it does not fulfil a constitutional duty. Much of muchness.

In relation to Daniels, Nicholls AJ held that Daniels[138] tried to distinguish between the positive obligation imposed on the state, with vast resources and private institutions with limited resources and that *"independent schools cannot be enclaves of power immune from constitutional obligations"*"[139]. This was her first reference to Daniels. She next referred to Daniels in relation to Jafta J's judgment where he held that the respondents bore a negative obligation. Nicholls AJ did not make reference to the majority judgment of Madlanga J at all.

This was a serious omission. The fact that the applicants in Pridwin, specifically disavowed a positive obligation on independent school[140] may have influenced the Court to not deal with Daniels in detail. This approach was coupled with Nicholls AJ's total avoidance of the majority judgment in Daniels as if it did not exist. This had an unintended consequence of making her judgment appear to be overstretching the finding in Daniels.

In **Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others**[141] the Court cautioned against stretching language in an attempt to promote guaranteed rights.

At worst for Nicholls AJ, this omission amounted to a misrepresentation of the actual judgment in Daniels. She preferred the minority judgment by Jafta J. She expressly quoted a paragraph from his judgment as if it was the majority judgment, without mention of the actual majority judgment by Madlanga J. She is entitled to choose whichever

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[138] **Daniels, para 40 where the Court quoted Currie and de Waal who stated that "the state is supposed to be motivated by a concern for the well-being of society as a whole".**

[139] **Para 82**

[140] **Pridwin (CC), para 86**

[141] **In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and OtherS 2001 (1) SA 545 (CC)**

judgment that she prefers. However, she should have expressly said so and set the record straight.

Only Theron J meaningfully discussed Daniels. She found Pridwin's contention that it and other independent schools did not bear positive obligations to be out of step with s 8(2)'s transformative purpose of improving the lives of all citizens and dismantling inequality and disadvantage.[142]

Theron J corrected the SCA's interpretation of the Court's finding in Daniels[143] and held that under s 8(2) corporations can bear positive obligations even in the absence of a contract with the state.[144] This was crucial in light of Nicholls AJ's treatment of Daniels.

Theron J specifically discussed Madlanga J's majority judgment in context of the corporations' transformative obligations.[145] She correctly pointed out that Madlanga J held that s 8(2) may impose positive obligations on private persons in certain circumstances[146]. She held that s 8(2)'s recognition that private institutions may violate human rights and perpetuate inequality and disadvantage does not exempt independent schools, like Pridwin from constitutional obligations and the demands for transformation of private relations.[147] This is important due to the growing number of learners who are enrolled at independent schools. This makes these schools no longer the preserve of the elite and therefore requiring greater scrutiny, control and need for constitutional protection.

The majority was correct in holding that independent schools like Pridwin provide a basic education, unlike the SCA whose error was premised on a confusion of the existence and enjoyment of a socio-economic right versus the primary duty-bearer's identity. Interestingly, Nicholls J made this exact observation when she held that the identity of the

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[142] **Para 120**

[143] **Para 180**

[144] **Para 180**

[145] **Para 121**

[146] **Pridwin (CC), para 125**

[147] **Para 131**

service provider cannot determine the nature of the service provided[148] Theron J stretched this finding further and held that neither the entity providing the education, nor the source of its obligation to provide education– if any, is relevant to that determination.

She concluded that Pridwin, like other independent schools, provides a basic education despite the fact that they do not bear a positive obligation to do so."[149] That finding, together with the applicants' disavowal of a positive obligation on independent schools to provide basic education[150] creates scope for the s 8(2) inquiry in a different case with different facts where (if) an argument is made that the obligation on independent schools to provide basic education is positive.

3.9 Conclusion

Daniels remains the judgment that best captured the nature of obligations on corporations as negative and in some instances positive. The non-exhaustive factors set out by Madlanga J and need to consider individual cases have stretched the s 8(2) inquiry in the right direction. These will hopefully guide the courts in future, particularly where statutes provide for positive obligations. I deal with some examples next

4. STATUTES THAT IMPOSE POSITIVE OBLIGATIONS ON CORPORATIONS

4.1 Introduction

Meyersfeld correctly contends that in case of a special relationship between a juristic person and an individual, and the power and capability to fulfil that individual's right rests wholly within the control of the juristic person, s 8(2) will apply.[151] Below I discuss statutes that already impose positive obligations on corporations to fulfil fundamental rights.

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[148] **Daniels, para 83**

[149] **Para 178**

[150] **Para 179**

[151] **Page 6**

4.2 Intersection Between the Companies Act and Section 8

Before the Companies Act's[152] promulgation, the companies' realisation of human rights obligations was voluntary. This, notwithstanding that s 8(2) imposed potentially positive obligations on corporations in certain instances. The Companies Act has reinforced that companies have human rights responsibilities. The remaining question is the nature of these obligations.

The intersection between the Companies Act and s 8(2) is crucial for understanding the limitations of the Companies Act. Section 7(a) of the Companies Act lists one of its purposes as to *"promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law".* This means that s 7, bolstered by the overarching directive of the Bill of Rights, demands centering of human rights concerns in the companies' policy making and holistic functioning.

Furthermore, s 158(a) of the Companies Act supports the purposive interpretation. It obliges courts to develop the common law as necessary to improve the realisation and enjoyment of rights established by the Companies Act. This is in line with s8(3) of the Constitution, which requires courts, when giving effect to rights in the Bill of Rights set out in s 8(2), to apply, or develop, the common law to the extent that legislation does not give effect to that right. These provisions tie the Companies Act with the constitutional application set out in s 8.

The inclusion of the promotion of compliance with the Bill of Rights as provided for in s 8 in the application of company law, means that the Companies Act effectively reinforces a duty for companies to ensure, at the very least, that they always seek to prevent violations of human rights, particularly those directly linked to their operations. This confirms the negative obligation on corporations, which is largely common cause.

The inclusion of these provisions, if interpreted as imposing positive obligations on companies to fulfil fundamental rights, will reconcile the values and practices of company

[152] **Act 71 of 2008**

law with the related human rights concerns. This will ensure that human rights concerns are not only considered but are actively promoted within the functioning of the company. Legislation discussed below explicitly impose positive obligations.

4.3 The MPRDA

The transformative objectives of the MPRDA are clear from its preamble. They include (i) facilitating equitable access to the mining industry; (ii) promoting sustainable development of South Africa's mineral and petroleum resources; and (iii) advancing the eradication of all forms of discriminatory practices in the mining sector.

The MPRDA requires companies' application for mining licenses to be accompanied by SLPs to explain how the mine plans to benefit communities and workers. An SLP is a collection of promises made by the mine that become binding legal commitments once the DMR approves the mining application.

Regulation 41 of the MPRDA Regulations[153] describes SLP objectives as (i) promoting employment and advancing the social and economic welfare of all South Africans; (ii) contributing to the transformation of the mining industry; and (iii) ensuring that holders of mining rights contribute towards the socio-economic development of the areas in which they are operating as well as labour sending areas. Once approved, SLPs[154] are subject to 5-year periodic reviews. Despite this, most mining communities live in extreme poverty.

This requirement is in line with the societal perspective that Bilchitz contends lawmakers should have in mind in assessing the functions of corporations[155] and not have profit maximization as an end in itself. Rather to have societal advantages and impact as the root of corporate existence and function as this, places a positive obligation on companies to fulfil fundamental rights[156]

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[153] Issued under GN R527 in *GG* 26275 of 23 April 2004

[154] Approved SLPs cannot be varied without the Minister's consent (Reg 44); In terms of Reg 45, the holder of a mining right must submit an annual report on the compliance with the approved SLP to the relevant Regional Manage and update stakeholders thtrice annually on progress

[155] Bilchitz, p 10

[156] Bilchitz, p 11

The latest Gazette issued under the MPRDA[157] contains the latest Regulations which have extended the definition of "mine community" to include the "major sending areas". This places a serious duty on the license applicant to not only develop the community where the mine is located and where miners work but also the communities that are major sending areas for the miners.

The positive obligations placed on corporations that now extend to sending communities show government's commitment to ensuring that corporations who obtain mining licences fulfil socio-economic rights of as many associated communities as possible.

Failure to adhere to SLP commitments and targets is reportable to the DMR, which is authorized to suspend or cancel the mining licence(s). If nothing is done, this should be a ground for litigation as the mine would have breached its legal obligations.

4.4 ESTA

Section 6(2)(e) – (f) of ESTA grants occupiers the right *"not to be denied or deprived of access to water"* and the right *"not to be denied or deprived of access to educational or health services."* Although I am not aware of any case decided specifically under these provisions, however, this is a ripe area for litigation seeking imposition of positive obligations on farm owners to fulfil these fundamental rights.

In Mshengu and Others v Msunduzi Local Municipality and Others[158] the court[159] only discussed s 6(2)(e) – (f) of ESTA in the context of this duty placed on landowners. It did not have to delve into this provision because relief was only sought against municipalities under the Water Services Act.[160] No relief was sought against farm owners. The court intimated a negative duty on landowners whom it cautioned against preventing the municipality from taking steps to provide water, sanitation or refuse collection on their

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[157] Amendments Regulations to the MPRDA Government Notice R420, issued on 27 March 2020 under Government Gazette No. 43172

[158] [2019] 4 ALL SA 469 (KZP) (29 July 2019)]

[159] Para 53

[160] Act 108 of 1997

property. Furthermore, that they are obliged to act reasonably in concluding agreements for provision of services with the municipality[161], which bears this duty as the Water Services Authority**.**[162]

The court held that a landowner only has a secondary obligation under ss 8 and 27 of the Constitution and the Water Services Act, which prohibits it from unreasonably denying the municipality access to his farm in order to install necessary infrastructure for provision of the services.

In a different case brought under s 6(2)(e) – (f) of ESTA**,** read with s 8(2), where relief would be sought against landowners, the positive duty that I contend is placed on landowners by this provision will have to be interrogated .
Furthermore, with the increased privatization of electricity provision, the requirement that IPPs should invest 1% of their profits in local communities' development requires close scrutiny and litigation where there is no compliance by the relevant corporations.

5 CONCLUSION

South Africa's past and present demonstrates that there is an urgent need to transform society and that government needs assistance from the private sector to fulfil fundamental rights. Section 8(2), which imposes a positive obligation on corporations, in certain circumstances, to fulfil fundamental rights was specifically promulgated to breach this gap. This mandatory obligation has to be determined on a case by case basis, guided by the factors set out by Madlanga J in Daniels. The cases that interpreted this obligation as negative (Juma Musjid and Pridwin) are unduly restrictive. Cases such as AllPay II and Blue Moonlight which imposed this positive obligation on corporations without even mentioning s 8(2) show that there are different sources for imposing this positive obligation and that this is not foreign practice.

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[161] **Para 63**

[162] **Para 62**

The Companies Act places fulfilment of fundamental rights at the forefront of company operations. The MPRDA's requirement for SLPs demonstrates that this positive obligation arises in every case for corporations applying for mining licences. Section 6(2) of ESTA imposes many positive obligations on landowners to fulfil fundamental rights of labour tenants. It is a matter of time before this provision is tested by the courts. In my view, this obligation is likely to be positive, in certain instances.

With the failings of local government and resultant privatisation of provision of water and electricity, there is an even more urgent need to interrogate legislations that require corporations who provide these essential services, including IPPs, who exploit the state's natural resources, to improve communities meaningfully where they operate as is the case with mining companies under the MPRDA.

Our Constitution has been correctly criticised for its limitations as a transformative tool. The arguments advanced in support of this criticism are beyond the scope of this paper. I, however, propose that as a starting point we meaningfully exploit s 8(2)'s imposition of a positive obligation on corporation and utilise the legislations that I have discussed above to determine how much transformation can be achieved. Furthermore, we should learn from other countries' Constitutions which are transformation oriented.

The word "Apartheid," let alone "colonialism," does not appear in the entire text of the Constitution, Madligozi argues[163] that this is unlike the 2008 Constitution of Ecuador, whose Preamble specifically states that the people of Ecuador celebrate nature, the Pacha Mama (Mother Earth), of which we are a part and which is vital to our existence, .. and AS HEIRS to social liberation struggles against all forms of domination and colonialism

Chapter 2 of Ecuador's Constitution provides for rights of the good way of living (buen vivir)[164]. This is an equivalent of the concept and the living philosophy of *Ubuntu/Botho* (African Humanness), which is missing from the South African constitution.

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[163] https://criticallegalthinking.com/2018/04/06/the-proposed-amendment-to-the-south-african-constitution/

[164] **In the preamble these rights are recognized as the sumak kaws**

The 1991 Constitution of Colombia is aimed at transforming the country's legislative institutions into pluralists, and deliberative forums, accountable to citizens, and capable of undertaking discussions of rights and principle.

I only highlight the principles that apply from the Constitutions of the aforementioned countries insofar as they are useful for transformation of an unequal society like South Africa. A full discussion of these Constitutions is beyond the scope of this paper. However, they are useful in their pro-transformation agenda, which goes far beyond the promises contained in the Preamble of the South African Constitution.

What the above countries have managed to achieve with their constitutions should be a lesson for South Africa to be bold in transformatively interpreting obligations on corporations to fulfil socio-economic rights as a start. This creates scope for further research on how the South African Constitution fares against the aforementioned Constitutions. It also creates scope for further interrogation of this positive obligation, building on from Daniels and also through litigating under s 8(2), by relying on the aforementioned legislations that I argue already impose this positive obligation on corporations to promote and fulfil socio-economic rights, in certain circumstances.

[10459 words]

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