Learning from others: An insight into the experiences in the enforcement of ESC rights in comparative foreign and international law jurisdictions by Justice Mavedzenge

INTRODUCTION

This paper was originally presented at the Economic Social and Cultural Rights Symposium held on the 17th of April 2015 and was organised by the International Commission of Jurists (ICJ) in collaboration with the Zimbabwe Law Students Association. The purpose of this paper is to provide some ideas around the lessons which Zimbabwean courts can draw from South Africa and India as comparative foreign jurisdictions as well as international law, in order to enforce and or implement the ESC rights guaranteed under the new Constitution of Zimbabwe.

The entrenchment of Economic Social and Cultural (ESC) rights as part of the family of fully justiciable fundamental rights is a new constitutional phenomenon in Zimbabwe. The Zimbabwean judiciary, legal practitioners and Government will need to look up to comparative foreign jurisdictions as well as international law, in order to draw lessons on how best these ESC rights can be adjudicated over and implemented. In any case, one of the critical functions of foreign as well as international law is that they can be used as interpretive aids to determine and establish the scope and content of some of the fundamental rights protected under the Declaration of Rights. Fortunately, the new Constitution of Zimbabwe allows the courts to consider both foreign law and international law when interpreting provisions under the Declaration of Rights. In actual effect, it is mandatory that the Courts must consider international law when interpreting fundamental rights enshrined under the Declaration of

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1 The former Constitution of Zimbabwe only provided for ESC rights as part of the National Objectives rather than part of the Declaration of Rights.
However, this cannot be taken to mean that internationally law must always be invoked when interpreting the provisions under the Declaration of Rights. Certain circumstances must exist before international law is referred to. The question whether international law is to be invoked or not will arise when there is ambiguity about the scope, content or meaning of a provision of the Declaration of Rights, and the ambiguity has not been fully addressed in some domestic case law or legislation. Where such an ambiguity exists, then the courts must adopt an interpretation that meets the relevant international law standards.

Generally, international law is a discipline that includes international treaties or conventions, international customary law and resolutions made by international organisations such as the United Nations Security Council and the General Assembly of the African Union. However for purposes of section 46 (1) (c) of the Constitution of Zimbabwe, international law refers to treaties and conventions to which Zimbabwe is party to as well as the general principles of international customary law.

The courts have the discretion to consider foreign law when interpreting the provisions of the Constitution’s Declaration of Rights. Again foreign law will not be invoked whenever the Declaration of Rights is being interpreted. The question whether foreign law can be referred to will arise when there is an ambiguity concerning the scope, content or meaning of a provision under the Declaration of Rights and such ambiguity has not been fully addressed in domestic case law or legislation. Where such an ambiguity has been addressed through a decision of a superior court in a comparative foreign jurisdiction, then one may bring such information to the attention of the court and the court may be persuaded to consider it in making its final determination as to the meaning of the constitutional provision in question. Again when bringing foreign law before the court, one ought to be able to justify why they think the

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2 See section 46 (1) (c) of the Constitution of Zimbabwe Amendment (No.20) of 2013
3 See section 46 (1) (e) of the Constitution of Zimbabwe Amendment (No.20) of 2013
particular jurisdiction from which the law has been taken is comparable to Zimbabwe. These are important questions that legal practitioners must be able to address and assist the court with.

This paper makes reference to South Africa and India as jurisdictions that are comparable to Zimbabwe because the Declaration of Rights under the new Constitution of Zimbabwe has similar provisions to the Bill of Rights under the Constitution of South Africa, 1996. The Republic of India is comparable to Zimbabwe because India is still viewed as a developing country from the South and the country is grappling with the same socio economic challenges similar to Zimbabwe’s. In terms of International law, this paper makes reference to the International Covenant on Economic Social and Cultural Rights (ICESCR) because Zimbabwe is party to this convention and this convention is primarily dedicated to the recognition of ESC rights.

In terms of the discourse on the adjudication of ESC rights, South Africa and India are very interesting case studies because they represent two contrasting constitutional jurisdictions that nonetheless have a robust track record and a rich jurisprudence of enforcement of ESC rights. The contrast between the two jurisdictions is that, South Africa has a Constitution that guarantees ESC rights as fully justiciable, while the Republic of India does not have ESC rights protected as justiciable fundamental Rights. Rather India has provided for what are termed “Directive Principles of State Policy (DPSP)” under Part IV, articles 36 to 50 of her Constitution. Many of the provisions under the DPSP correspond to the provisions of the International Covenant on Economic Social Cultural Rights.

With respect to South Africa, this paper makes reference to the landmark case of *Government of the Republic of South Africa and Others v Irene Grootboom and others* CCT11/00 as well.

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4 See the preamble of the International Covenant on Economic Social and Cultural Rights.

5 See Government of the Republic of South Africa and Others v Grootboom and Others CCT11/00, para 20
as the case of *Soobramoney v Minister of Health, KwaZulu Natal* 1998 (1) SA 765 (CC). In the words of Yacoob J, who handed down the judgment, the *Grootboom case* involved,

“a group of people who lived in appalling conditions, who decided to move out and illegally occupy someone else’s land. They were evicted from this land and were left homeless. The root cause of their problems was the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low cost housing”.

Ms Irene Grootboom and others approached the Cape of Good Hope High Court and obtained a judgment requiring government to provide them and their children with adequate basic shelter until they obtained permanent accommodation. It is part of this judgement which the Government of the Republic of South Africa appealed against at the Constitutional Court and it is the decision of the Constitutional Court which this paper refers in the discussion of lessons that Zimbabwean judiciary and legal practitioners can learn in terms of enforcement of ESC Rights. This paper makes reference to this case, notwithstanding that the Zimbabwean Constitution does not provide for an express and general right to adequate housing for everyone as in the case of South Africa. However, the principles laid down in this case are nevertheless relevant to the enforcement of every other ESC right as guaranteed under the Constitution of Zimbabwe.

In the *Soobramoney case* the appellant was;

“…..a 41 year old unemployed man, [who was] diabetic [and] suffers from ischaemic heart disease and cerebro-vascular disease which caused him to have a stroke during 1996. In 1996 his kidneys also failed. Sadly his condition is irreversible and he is now in the final stages of chronic renal failure. His life could be prolonged by means of regular renal dialysis. He has

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6 See Government of the Republic of South Africa and Others v Grootboom and Others CCT 11/00, para 3
7 See the judgement of Davis J in Grootboom v Oostenberg Municipality and Others 2000 (3) BCLR 277 (C)
sought such treatment from the renal unit of the Addington state hospital in Durban. The hospital [could], however, only provide dialysis treatment to a limited number of patients. The renal unit [had] 20 dialysis machines available to it, and some of these machines [were] in poor condition. Because of the limited facilities that [were] available for kidney dialysis the hospital [was] unable to provide the appellant with the treatment he had requested”

**Interpretation of ESC Rights**

One of the key lessons that the Zimbabwean judiciary and legal practitioners can draw from the *Grootboom case and the Soobramoney* case is the approach to interpretation of ESC rights. In the *Grootboom case*, Yacoob J held that fundamental rights must be interpreted by taking into account the context and by context the learned judge referred to the textual setting, social and historical context. In this case, Yacoob J defined textual setting as referring to the Bill of Rights as well as the Constitution as a whole. When one looks at the Constitution of Zimbabwe, section 46 (1) (d) requires the courts to pay attention to all relevant provisions of the Constitution when interpreting fundamental rights. So one can argue that the consideration of textual setting when interpreting fundamental rights is already provided for as a requirement under the Constitution of Zimbabwe. However, what can be learnt from the *Grootboom case* is that it is necessary to also go out of the text of the Constitution and consider the social and historical setting in order to deduce the proper scope and content of fundamental rights. In his judgment Yacoob J held that;

“Fundamental rights must be interpreted and understood in their social and historical context. The right to freedom from unfair discrimination, for example, must be understood against our legacy of deep social inequality”.

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8 See Government of the Republic of South Africa and Others v Grootboom and Others CCT11/00, para 22
9 Government of the Republic of South Africa and Others v Grootboom and Others CCT11/00, para 25
Equally in Zimbabwe, it can be argued that every ESC right guaranteed under the Constitution is a constitutional protection aimed at dealing with certain social and historical realities that the Zimbabwean people face on a daily basis or have experienced in the past. For instance, the right to freedom from arbitrary eviction is a constitutional protection that will lose meaning if the courts interpret it without appreciating that Zimbabwe is going through a national housing crisis and this country has a terrible history of large scale forced evictions. It is therefore important that in keeping with the ‘Grootboom spirit’, the Zimbabwean courts must consider the social and historical context when interpreting ESC rights. Some of the Zimbabwean judges are already doing this but more can be done. For instance Mathonsi J’s ruling in Peter Makani and Other v Epworth Local Board and Others stands out as a classic example of a how a court considers socio-historical context when interpreting the scope and content of ESC rights. In his judgement in this case, the leaned Judge of the High Court stated the following at the very beginning of his judgement;

“There can be no doubt whatsoever in the minds of all well informed persons that this country currently faces extremely serious problems relating to poverty, unemployment and more importantly housing. The latter problem has, in recent history, manifested itself in illegal occupants of municipal land by hordes of citizens who are without shelter…..Illegal settlements are sprouting all over the place with indecent abandon under the watch of local authorities charged with the responsibility of superintending urban settlements…”

A review of both the Grootboom judgement and Soobramoney judgment also shows that social context is not only limited to the past and present realities of our society. Social context also speaks to the national transformational vision and aspiration of a society that the Zimbabwean people want to be, as defined under the Constitution of Zimbabwe. In Grootboom, Yacoob J was able to define and locate the significance of the case vis-avis the constitutional vision of
South Africa as a society. In that regard, the judge commenced his judgement by stating as follows;

“The people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The Preamble to our Constitution records this commitment. The Constitution declares the founding values of our society to be “human dignity, the achievement of equality and the advancement of human rights. This case grapples with the realisation of these aspirations…”¹⁰

Earlier on in *Soobramoney v Minister of Health, KwaZulu Natal* (1998) (1) SA 765 (CC) Chaskalson stated the following as the social context within which the South African Bill of Rights must be interpreted;

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which where will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring”.¹¹

It is therefore a lesson that courts and legal practitioners here in Zimbabwe can draw from both *Grootboom and Soobramoney*; to strive to think about the significance of the case in the context of the constitutional vision of Zimbabwe as defined under the *Preamble of the Constitution* and section 3 of the Constitution of the country. This kind of an interpretation will give life to the Constitution and will surely enable the Constitution to be a real, effective instrument for

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¹⁰ Government of the Republic of South Africa and Others v Grootboom and Others CCT11/00,para 1
¹¹ Soobramoney v Minister of Health, KwaZulu Natal (1998) (1) SA 765 (CC) para 8
transformation of the Zimbabwean society towards being “a democratic society based on openness, human dignity, equality and freedom”. As Chaskalson rightly pointed out in Soobramoney, this vision will remain a hollow ring as long as the Declaration of Rights is interpreted without taking into account the transformation agenda of the Constitution.

The use of international law when interpreting ESC rights

It is common cause now that the new Constitution of Zimbabwe requires the courts to interpret the fundamental rights provided for under the Declaration of Rights in a manner that is consistent with international law, subject to the requirements and circumstances discussed earlier on. However, Grootboom demonstrates to us how this can actually be done in practical terms. In delivering his judgment, Yacoob J endorsed Chaskalson P’s landmark ruling in S v Makwanyane, a non ESC rights case which however provided the South African Constitutional Court with an approach on how to use international law to interpret the Bill of Rights. The part of Chaskalson P’s ruling which Yacoob J quoted is as follows;

“International agreements and customary international law accordingly provide framework within which the Bill of Rights can be evaluated and understood, and for that purpose, the decisions of tribunals dealing with comparable instruments such as the UN Committee on Human Rights…..may provide guidance as to the correct interpretation of particular provisions of the Bill of Rights.”

The above ruling can help Zimbabwean legal practitioners to understand the meaning and practical application of section 46 (1) (c) of the Constitution of Zimbabwe which requires the courts to consider international law when interpreting the Declaration of Rights.

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12 See section 86 (2) of the Constitution of Zimbabwe Amendment (No.20) of 2013.
13 Section 46 (1) (c) of the Constitution of Zimbabwe Amendment (No.20) of 2013
14 S v Makwanyane and Another 1995 (3) SA 391 (CC) para 35
In another example of how international law can actually be applied to interpret fundamental rights, Yacoob J used Article 2.1 of the IESCR to define benchmarks that would show progressive realisation of ESC rights.\(^\text{15}\) Obviously, there are various international conventions to which Zimbabwe is a party, which codify ESC rights. However, the International Covenant on Economic Social and Cultural Rights (ICESCR) remains the primary international convention on ESC rights\(^\text{16}\) and in keeping with the spirit of \(S v\ Makwanyane\) and as reflected in the \(Grootboom\) case, the General Comments of the Committee on Economic Social and Cultural Rights (CESCR) are very relevant interpretive aids which the local courts must consider when interpreting ESC rights under the Constitution of Zimbabwe.

**Interpretation or definition of State Obligations**

One of the key contributions that \(Grootboom\) makes to the ESC rights adjudication jurisprudence is that it provides a clear analysis of the constitutional provisions on the positive obligations of the State. Most of the ESC rights provided for under the Constitution of Zimbabwe are subject to clauses on progressive realisation. The provision reading “The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the rights set out in this section” is a common feature appearing under most of the ESC rights provided for under the Declaration of Rights.\(^\text{17}\) This provision will be at the centre of the adjudication of most of the ESC rights, especially as the courts try to determine whether or not the State is in violation of its positive obligations as imposed by the relevant ESC right. \(Grootboom\) provides a very clear, elaborate interpretation of the meaning of this provision.

\(^{15}\) Government of the Republic of South Africa and Others v Grootboom and Others CCT11/00, Para 45

\(^{16}\) The ICESCR is the most detailed international convention, which was specifically crafted to provide for ESC rights only.

\(^{17}\) See for example section 75 (4), section 76 (4) and section 77 of the Constitution of Zimbabwe Amendment (No.20) of 2013, relating to Right to education, Right to health care, and Right to Food and Water.
According to Yacoob J, the extent of the State’s obligation under this provision is defined by three key elements which are summarize below.

a) **Reasonable legislative and other measures**

The following factors must be considered when testing the reasonability of the legislative and other measures;

i. According to the Grootboom judgement, legislative measures by themselves are not likely to constitute constitutional compliance.\(^{18}\) Thus, the State is required to go beyond merely enacting legislation. The state must support the legislation with appropriate measures and or programs of action that are aimed at bringing about the realisation of the right.\(^{19}\)

ii. The programs and the legislation must speak to one another. There must be a logical nexus between the legislation’s purpose and the supporting programme of action.\(^{20}\)

iii. The programme of action must be reasonably implemented. *An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state’s obligations.*\(^{21}\)

iv. The programme must clearly allocate responsibilities to the different stakeholders\(^ {22}\)

v. The programme must be backed by adequate human and material resources.\(^ {23}\)

vi. The programme or the measures must be coherent. In terms of the Grootboom ruling “*The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive*”, but whatever those measures are and entail, there must be a logical connection between the measure and the objective to

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\(^{18}\) Government of the Republic of South Africa and Others v Grootboom and Others CCT11/00, Para 42

\(^{19}\) Ibid 42

\(^{20}\) Ibid 42

\(^{21}\) Ibid 42

\(^{22}\) Ibid 39

\(^{23}\) Ibid 39
ensure the realisation of the right. Thus, logically, there must be a nexus between
the measures and the realisation of the right.

vii. The programme must be inclusive in the sense that it must seek to benefit all the
concerned groups and must not exclude other needs persons. 24

viii. The programme must be continuously reviewed in order to remain relevant to the
context 25

b. To ensure progressive realisation

Although the term “progressive” shows that the Constitution does not contemplate an
immediate realisation of the right, the State must nevertheless take measures that result in
continuous progression in the fulfilment of the right, and there must be clear benchmarks that
shows this progress. 26

c. Within available resources

The content of the obligation in relation to the rate at which it is achieved as well as the
reasonableness of the measures employed to achieve the result are governed by the availability of
resources. 27 However the ICESCR requires the State to do all it can, including engaging the
international community to raise funds for the implementation of the ESC rights.

Separation of powers and adjudication of ESC rights
There is always a debate on whether the courts are not overstepping their mandate when they make certain decisions that have budgetary implications, especially when they seek to enforce the positive State obligations attached to ESC rights. In terms of the Constitution of Zimbabwe, every state action is subject to judicial review. The learned Judge of the High Court of Zimbabwe, Bhunu J has already alluded to and upheld this constitutional fact when he held in *Farai Mushoriwa v City of Harare* case that,

“This Court has been conferred with the necessary jurisdiction to hear and determine this matter [to review the actions of a state institution] by the Supreme law of the land [The Constitution] and it cannot abdicate its functions on account of an illegal municipal by law crafted by municipal authorities contrary to the Constitution. Above all, it is the function of this court to do justice according to the law so that justice may be seen to be done…”

The sacrosanct principle of constitutional supremacy, upon which the Zimbabwean society is founded would be hollow and unenforceable if the courts are precluded from reviewing any action by the State or any other institution. However, the Constitution entrenches separation of powers as a principle and if the judiciary does not observe this principle then there will be a constitutional crisis. The question therefore is how do the courts perform their constitutional mandate but without offending this principle of separation of powers. One of the key lessons that the courts can learn from *Grootboom* is the proper approach that must be taken in order to navigate the thin line between Separation of powers and the need to enforce ESC rights, particularly the positive State obligations.

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29 This is the net effect of section 44, section 45 (1), section 69 (3), section 85 (1) and section 165 (1) (c) of the Constitution of Zimbabwe Amendment (No.20) of 2013.
30 See section 3 (1) (a) of the Constitution of Zimbabwe Amendment (No.20) of 2013.
31 See sections 88, section 116 and section 162 of the Constitution of Zimbabwe Amendment (No.20) of 2013.
In that regard, Yacoob J in the *Grootboom* case held that:

“A court considering reasonableness will not enquire whether other desirable or favourable measures could have been adopted, or whether public money could have been spent better. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirements of reasonableness. Once it is shown that the measures do so, this requirement is met” 32

What is clear in this ruling is that the Court has a mandate to enforce the positive obligations relating to ESC rights but the review of the State action is confined to whether the action is reasonable or not rather than desirable or not. Matters of desirability must be deferred to the legislature and the executive.

**LESSONS FROM INDIA**

*Expanded interpretation of fundamental rights*

As discussed earlier on, India stands out as an example of a country that does not have ESC rights entrenched under the Bill of Rights but the Indian judiciary has nevertheless found a way of enforcing these rights. Even though Zimbabwe now has justiciable ESC rights, the Indian experience is still relevant and the courts can still draw lessons from it because there are some important ESC rights that are either completely ignored or are partially guaranteed under the Zimbabwean Declaration of Rights yet, Zimbabwe is experiencing an acute national housing crisis, stemming from the failure by the State to make adequate provision of access to housing amid a growing urban population. The country’s terrible history of State sponsored mass evictions has also contributed to the worsening of this housing crisis. The learned Judge of the

32 Government of the Republic of South Africa and Others v Grootboom and Others CCT11/00, Para 41
High Court, Justice Mathonsi aptly captured the national housing crisis in his ruling in *Peter Makani and Others v Epworth Local Board and Others*, when he held that;

“There can be no doubt whatsoever in the minds of all well informed persons that this country currently faces extremely serious problems relating to poverty, unemployment and more importantly housing” [My emphasis]

There is clearly a need for an enforceable right to adequate housing for everyone in Zimbabwe. The same is true about the right to work given our high unemployment rates and the absence of an enforceable constitutional right to work. Both the right to housing for everyone and the right to work are not provided for as part of the justiciable fundamental rights under the Zimbabwean Declaration of Rights. Rather they are provided for as part of the National Objectives, which must guide Government in formulating and implementing laws and policies. One cannot claim a right on the basis of these National objectives and therefore one cannot claim a right to shelter or work on the basis of section 28 or 24 of the Constitution. The question is therefore that; how do legal practitioners enforce these important rights in order to secure and protect these socio economic needs relating to such pertinent issues as employment and shelter? The answer to this question lies in the Indian experience of enforcing ESC rights, notwithstanding the fact that all the ESC rights are only provided for under the “Directive Principles of State Policy (DPSP)”, which are not justiciable as fundamental rights. The Indian judiciary has overcome this apparent limitation and managed to protect ESC rights through broadly interpreting the scope of the expressly provided civil and political rights to include some elements of the ESC rights. The case of *Francis Coralie Mullin v. The*

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33 See section 24 and section 28 of the Constitution of Zimbabwe Amendment (No.20) of 2013  
34 See section 8 (1) of the Constitution of Zimbabwe Amendment (No.20) of 2013  
35 See Part IV of the Constitution of India  
36 See Article 37 of the Constitution of India which provides that the DPSP “shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.”
Administrator, Union Territory of Delhi (1981) 2 SCR 516, decided by the Indian Supreme Court is one of those examples where the court broadly interpreted the right to life which is expressly protected under article 21 of the Constitution, to include that individuals can claim certain entitlements related to the right to health. The Court held as follows:

“The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self”.

This ruling by the Indian Supreme court makes it clear that ESC rights and civil and political rights are inseparable and interconnected. Nineteen years later, albeit in a different but related jurisdiction, this same point was underscored by the Constitutional Court of South Africa in the Grootboom case when the court held that:

“Our Constitution entrenches both civil and political rights and social and economic rights. All the rights under the Bill of Rights are inter related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter. Affording socio economic rights to all people therefore enables them to enjoy the other rights enshrined under Chapter [Bill of Rights]. The realisation of these rights is also key to the advancement of race and gender

37 Francis Coralie Mullin v. The Administrator, Union Territory of Delhi (1981) 2 SCR 516, p. 529 B-F.
equality and the evolution of a society in which men and women are equally able to achieve their full potential.\textsuperscript{38}

Therefore even though such rights like the Right to adequate housing for everyone and the right to work are not enshrined under the Zimbabwean Declaration of Rights, the courts have the discretion by virtue of section 46 (1) (e) of the Zimbabwean Constitution to adopt the Indian experience and broadly interpret the other expressly provided rights and constitutional values such as the right to human dignity and equality to include certain constituent aspects of missing rights such as the right to shelter and the right to work. In any case, the Constitution mandates the Courts to widely interpret these fundamental rights\textsuperscript{39}. The Constitutional Court in \textit{Daniel Madzimbamuto v Registrar General and others} [2014] ZWCC 5 embraced this mandate when Ziyambi J observed and reproduced in her judgement the earlier ruling by the Supreme Court of Zimbabwe in \textit{Rattigan & Ors v Chief Immigration Officer & Ors} 1994 (2) ZLR 54 (S) at 57 F-H in which the court held as follows;

“This Court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose…”

Although this judgement concerned a civil and political right, the same rule of constitutional interpretation applies to the interpretation of ESC rights by virtue of the fact that ESC rights are regulated by the same interpretation guidelines regulating civil and political rights under the Constitution of Zimbabwe. Effectively this means, whenever faced with a situation where

\textsuperscript{38} Government of the Republic of South Africa and Others v Grootboom and Others CCT/00,Para 23

\textsuperscript{39} See section 46 (1) (a) of the Constitution of Zimbabwe Amendment (NO.20) of 2013
there are numerous interpretations to the constitutional provisions on the ESC rights, the Court must determine and choose the interpretation that gives the widest or fullest effect to the right under consideration. The courts can use or refer to comparative foreign law in order to properly demarcate the scope of the right which will afford citizens the widest and fullest enjoyment of the right. In that context, the Zimbabwean courts have the Indian experience as a source of inspiration and ideas.

**The important role of National Objectives**

Earlier on this paper has alluded to the constitutional fact that national objectives enshrined under Chapter 2 of the Constitution of Zimbabwe cannot be enforced as justiciable fundamental rights. This however does not mean that national objectives are irrelevant in the enforcement of ESC rights. First and foremost, when interpreting fundamental rights, the courts are mandated to consider all the other relevant provisions of the Constitution of Zimbabwe. This is what Yacoob J alluded to as the textual setting within which fundamental rights must be interpreted in order to establish their proper scope and meaning. As also fully demonstrated in the Indian jurisprudence, particularly in the case of *Bandhua Mukti Morcha v. Union of India*[^41], these Objectives can be used to interpret the content of the fundamental rights enshrined under the Bill of Rights. In this case the Indian Supreme Court held as follows:

"The right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Article 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity."

[^40]: See section 46 (1) (d) of the Constitution of Zimbabwe

[^41]: *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161
educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State has the right to take any action which will deprive a person of the enjoyment of these basic essentials.”

In another case of *Keshavananda Bharati v. State of Kerala*, the Indian Supreme Court held as follows:

“Fundamental rights have themselves no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgement, curtailment and even abrogation of these rights in circumstances not visualised by the constitution makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in Part IV.”

These two cases demonstrate the style with which and the extent to which the Indian Supreme Court went to use the Directive Principles of State Policy (equivalent of the Chapter 2 National Objectives under the Constitution of Zimbabwe) as aids to interpret the Constitution, and more specifically to provide the basis, scope and extent of the content of the entrenched fundamental rights to include those other rights that are not provided for under the Bill of Rights. If Zimbabwean courts take this approach, which they are mandated to do by virtue of section 46 (1) (d) of the Constitution, they must be able to adopt the Indian’s expansive approach to interpreting fundamental rights such as right to human dignity to include the missing right to adequate housing for everyone by interpreting section 51 of the Constitution in light of section 28 national objective on shelter. Therefore one lesson to draw from the Indian

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42 Ibid para. 10, p. 183
44 Right to human dignity
45 National objective on shelter
experience is that national objectives can be used to interpret fundamental rights in a broad manner that allows the enforcement of those other ESC rights which are not expressly provided for under the Bill of Rights.

Lastly, national objectives can also be used to examine the constitutionality of legislation. The Zimbabwean Constitution is supreme to any other law\(^{46}\) and therefore all legislation must be consistent with it, including the constitutionally entrenched national objectives. At this time when Zimbabwe is reforming its legislation to bring it in alignment with the Constitution, it must be ensured that the new legislation brings into effect Chapter 2 national objectives. That way, there is a chance that some of the ESC rights that are not provided for under the Declaration of Rights can actually be implemented as statutory rather than constitutional rights.

\(^{46}\) See section 2 of the Constitution of Zimbabwe.