



## Assessing the Protection of Older Persons' Access to Social Services in South Africa during the COVID-19 Pandemic

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### Abstract

One of the main justifications for the severe restrictions imposed on South Africans in the context of the COVID-19 pandemic is the need for the protection of older persons. Unfortunately, the dire scientific warnings identifying older persons as a vulnerable group confronting higher risk from COVID-19 have not translated into the prioritising by the government of social care programmes and services to older persons. The drastic changes in operations at residential facilities for older persons in order to contain the pandemic have caused many residents of the facilities hardship and have affected the standards of care to residents as prescribed in terms of the Older Persons Act 13 of 2006 ("the OPA"). In addition, there have been instances of non-payment of subsidies by one of the provincial Social Development departments to welfare organisations for providing community-based care to older persons. This article seeks to determine whether the government's application of lockdown regulations and/or the agreements with service providers in the context of the lockdown infringed older persons' right to access social services and care in terms of section 27 of the South African Constitution. If so, were the limitations of older persons' rights reasonable and justifiable in terms of section 36 of the Constitution? The article argues that the rights-based approach of the OPA should form the basis for any interventions aimed at protecting older persons, even during pandemics or other disasters. It also suggests measures to ensure that older persons' social care related rights are taken into account in any future disaster management plans.

**Keywords:** older persons; COVID-19; right to have access to social security; social services; residential care; community-based care

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## 1 INTRODUCTION

The COVID-19 pandemic has caused, and continues to cause, large-scale economic and social disruption which has fundamentally affected day-to-day life across the world.<sup>1</sup> Although all age groups are susceptible to the virus, older persons (and people of all ages with certain pre-existing conditions) have been identified by the scientists advising government as a high-risk group as they appear to develop serious illness from the virus more often than others. For much of 2020, the fatality rates for older persons were five times the global average.<sup>2</sup> In South Africa, 24 995 admissions, 17 048 recoveries and 7 947 deaths due to COVID-19 of older persons were recorded.<sup>3</sup> The mortality rate for older persons is likely to increase as the virus spreads and continues to overwhelm health and social protection systems. Age-breakdowns for reported COVID-19 deaths are hard to come by, but excess natural deaths for persons over the age of 60 between 3 May 2020 and 3 July 2021 are estimated to exceed 140 000.<sup>4</sup> These excess deaths are likely to be mainly caused by COVID-19 (either single-handedly or in combination with other risk factors, such as diabetes, HIV or TB).<sup>5</sup> Other “less visible but no less worrisome” broader effects of the pandemic on older persons have been identified: health care denied for conditions unrelated to COVID-19; neglect and abuse in institutions and care facilities; an increase in poverty and unemployment; the dramatic impact on well-being and mental health; and the trauma of stigma and discrimination.<sup>6</sup>

As the virus spreads globally, containment measures are crucial to the fight to stop the spread of the pandemic. In South Africa, as a response to the pandemic, the government has introduced unprecedented measures, including a national lockdown and varying levels of restrictions and social distancing.<sup>7</sup> Extra precautions have been taken to protect older persons and other high-risk groups.<sup>8</sup> One of the most frequently stated justifications for most of the social isolation measures has been to protect older persons and other high-risk groups.

Due to the higher risk profile of older persons, measures aimed at protecting older persons were to be expected. Many residential facilities have gone into complete lockdown temporarily for the safety of their residents,<sup>9</sup> and community services to older persons had to be reconsidered in the context of the restrictions. Unfortunately, the modalities of implementation of these otherwise justifiable measures to protect older persons have adverse consequences for the care of older persons and, it will be argued, infringes a number of older persons' constitutional and statutory rights. Older persons in residential facilities<sup>10</sup> have been suffering from loneliness and living in fear of contracting the virus during outbreaks in the facilities.<sup>11</sup>

1 Joint statement by ILO, FAO, IFAD and WHO “Impact of COVID-19 on People’s Livelihoods, their Health and our Food Systems” 13-10-2020 <https://www.who.int/news/item/13-10-2020-impact-of-covid-19-on-people's-livelihoods-their-health-and-our-food-systems#:~:text=The%20economic%20and%20social%20disruption,the%20end%20of%20the%20year> (accessed 12-7-2021).

2 United Nations “Policy Brief: The Impact of COVID-19 on Older Persons” (2020) 5 [hereafter UN Policy Brief (2020)].

3 According to the statistics from the National Institute of Communicable Diseases (NICD) as cited in a DSD media statement 01-10-2020 <https://www.dsd.gov.za/index.php/latest-news/21-latest-news/301-the-national-department-of-social-development-prioritises-the-protection-of-the-lives-and-wellbeing-of-older-persons-during-the-national-state-of-disaster> (accessed 30-12-2020).

4 South African Medical Research Council “Report on Weekly Deaths in South Africa 27 June – 3 July 2021 (Week 26)” <https://www.samrc.ac.za/sites/default/files/files/2021-07-07/weekly3July2021.pdf> (accessed 12-7-2021).

5 Proud-Sherlock et al “Data Update: Older People in South Africa and Excess Mortality during the COVID-19 Pandemic” 18-06-2021 [https://corona-older.com/2021/06/18/data-update-older-people-in-south-africa-and-excess-mortality-during-the-covid-19-pandemic/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=data-update-older-people-in-south-africa-and-excess-mortality-during-the-covid-19-pandemic](https://corona-older.com/2021/06/18/data-update-older-people-in-south-africa-and-excess-mortality-during-the-covid-19-pandemic/?utm_source=rss&utm_medium=rss&utm_campaign=data-update-older-people-in-south-africa-and-excess-mortality-during-the-covid-19-pandemic) (accessed 12-7-2021).

6 UN Policy Brief (2020) 2.

7 Regulations made by the Minister of Cooperative Government and Traditional Affairs i.t.o. section 27(2) of the Disaster Management Act, 2002, GN R398 in *Government Gazette* 43148 of 25-03-2020 (“DMA Regulations”).

8 Directions by the Minister of Social Development issued in terms of Regulation 10(5) of the regulations made under section 27(2) of the Disaster Management Act, 2002: Measures to Prevent and Combat the Spread of Covid-19, GNR 430 in GG 43182 of 30-03-2020 (“DSD Directions”).

9 Spotlight “COVID-19: As Infections Surge, how well are Older Persons in SA Protected?” <https://www.spotlightnsp.co.za/2020/05/13/covid-19-as-infections-surge-how-well-are-older-persons-in-sa-protected/> (accessed 08-01-2021).

10 The Older Persons Act 13 of 2006 (OPA) refers to “residential facilities” and not “old age homes”.

11 *Mail & Guardian* “Covid-19 Stalks Elderly Residents of Jo’burg’s Inner-city Care Homes” 11-06-2020 <https://mg.co.za/coronavirus-essentials/2020-06-11-covid-19-stalks-elderly-residents-of-joburgs-inner-city-care-homes/> (accessed 09-01-2021); IOL “How Old Age Homes are Striking a Balance between their Senior Citizen’s

Concerns have also been raised about the level of care of residents due to staff shortages due to illness. Equally worrying is the non-payment of subsidies to welfare organisations for providing care to older persons in the Eastern Cape,<sup>12</sup> despite the *Imbumba Association for the Aged v MEC for Social Development*<sup>13</sup> ruling ordering the province's Social Development department to pay the subsidies.

In view of the above-mentioned reports of difficulties faced by older persons and organisations aiming to provide care and services to them, as a result of the pandemic and the state's reaction to it, this article examines the relevant domestic law with regard to the provision of care to older persons in light of international law. It seeks to determine whether the government's application of lockdown regulations infringed older persons' right to access health and social care in terms of section 27 of the South African Constitution.<sup>14</sup> If so, were the limitations of older persons' rights reasonable and justifiable in terms of section 36 of the Constitution? The article also suggests measures to ensure that older persons' social care related rights are taken into account in any future disaster management plans.

This article is organised into five main sections, including the introduction. The relevant constitutional rights of older persons are outlined, followed by a brief analysis of the applicable international law. Next, the article outlines the relevant provisions of the Older Persons Act 13 of 2006 (OPA), which regulates social services to older persons in South Africa. It lays the basis for the argument in the next part that many of the problems in relation to the provision of care for older persons during the pandemic can be ascribed to the insufficient attention paid to the special needs of older persons in government interventions during the pandemic. It also highlights the consequences of the misinterpretation of the provisions of the OPA by the politicians and officials responsible for the funding and monitoring of services to older persons for the provisions of these services. It is argued that relatively little attention has been paid to the impact of the provisions of the OPA in protecting the interests of older persons; it has taken the pandemic for the potential of this legislation "to deal effectively with the plight of older persons by establishing a framework aimed at the empowerment and protection of older persons and at the promotion and maintenance of their status, rights, wellbeing, safety and security"<sup>15</sup> to get its rightful attention. This article concludes with the lessons learnt from the government's policy errors during the COVID-19 pandemic on how to entrench older persons' rights in the face of future pandemics, disasters and beyond.

## 2 OLDER PERSONS' RIGHTS AND THE OLDER PERSONS ACT

Globally, older persons are more likely to have ongoing health care needs that require medication and assistance than other segments of the population. They are also more likely to require routine home-based visits and community care. According to the United Nations Policy Brief on the impact of COVID-19 on older persons, such care arrangements for older persons were "patchy, fragile and fraught with inequalities" even before the pandemic. Measures to limit the spread of COVID-19 pose additional risks of disruptions of these care arrangements, with the result that many older persons now have even less access to care and support.<sup>16</sup>

To determine the extent to which measures to limit the spread of COVID-19 (and the pandemic itself) have exposed shortcomings in the legal framework for the promotion and protection of older persons' rights in the South African context, it is necessary to provide an overview of the applicable constitutional and statutory rights, as well as the relevant international law.

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Physical and Mental Health" 07-08-2020 <https://www.iol.co.za/saturday-star/news/how-old-age-homes-are-striking-a-balance-between-their-senior-citizens-physical-and-mental-health--790cfa3c-df14-4f66-9770-e7d86dc57183> (accessed 09-01-2021); Geffen "How we are Dealing with Covid-19 in Care Homes" 14-05-2020 <https://www.groundup.org.za/article/how-we-are-dealing-covid-19-care-homes/> (accessed 09-01-2021).

12 *Maverick Citizen* Eastern Cape "Social Development Head Suspended on Eve of Contempt of Court Application" 10-11-2020 <https://www.dailymaverick.co.za/article/2020-11-10-social-development-head-suspended-on-eve-of-contempt-of-court-application/> (accessed 09-01-2021).

13 (1789/2020) [2020] ZAECGHC 112.

14 The Constitution of the Republic of South Africa, 1996.

15 As promised in the preamble to the OPA.

16 UN Policy Brief: The Impact of COVID-19 on Older Persons (2020) 6.

## 2.1 Older Persons' Constitutional Rights

Many of the provisions of the South African Bill of Rights, apply to and are specifically important in the context of older persons. These rights include older persons' rights to have their dignity respected and protected,<sup>17</sup> to bodily and psychological integrity,<sup>18</sup> to have access to adequate housing;<sup>19</sup> and to have access to food, water, social security, and health care services.<sup>20</sup> In terms of section 7(2) of the Constitution the State is required to respect, protect, promote and fulfil these rights.

Section 27 of the Constitution provides that everyone has the right of access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The State is required to take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of these rights.

But what exactly is it that older persons have "access to" in terms of section 27? The Constitution deliberately does not define social security; there is no need for it to do so, as legislation, international law,<sup>21</sup> case law and policy instruments have adequately identified the current components of social security in South Africa. South African social security legislation generally comprises of social assistance legislation providing for state grants,<sup>22</sup> and social insurance legislation providing benefits to compensate for loss of income.<sup>23</sup> In addition, policy documents such as the White Paper for Social Welfare<sup>24</sup> and the National Development Plan: 2030<sup>25</sup> support the argument that social care forms part of social security. Although there has been some case law creating confusion about the exact nature and scope of South African social security,<sup>26</sup> any questions whether section 27 is applicable to social care services to older persons was laid to rest in the *Imbumba* case.<sup>27</sup> The state's obligations in terms of section 27(2) therefore covers residential and community-based care services to older persons.

Section 36(1) makes provision for the limitation of rights such as the right of access to social security. Such a limitation will only pass constitutional muster if the limitation is effected by a law of general application, and all relevant factors referred to in the subsection are taken into consideration. Older persons' social security rights should therefore only be limited when the limitation serves a sufficiently important purpose. Having regard to the nature and extent of the limitation and the relations between the limitation and its purpose, the limitation should not restrict the right more than is necessary.<sup>28</sup>

## 2.2 Older Persons' Right to Social Security in Terms of International Law

In terms of the Universal Declaration of Human Rights (UDHR), every person has "the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."<sup>29</sup> The UDHR also guarantees everyone "a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his

17 Section 10.

18 Section 12.

19 Section 26.

20 Section 27(1).

21 Section 39(1)(b) stipulates that a court, tribunal or forum must, when interpreting the Bill of Rights, consider international law.

22 In terms of the Social Assistance Act 13 of 2004.

23 For example, the Unemployment Insurance Act 63 of 2001; Compensation for Occupational Injuries and Diseases Act 130 of 1993; Pension Funds Act 24 of 1956.

24 According to the White Paper (1997), social security is "a wide variety of public and private measures that provide cash or *in-kind benefits* or both, first, in the event of an individual's earning power permanently ceasing, being interrupted, never developing, or being exercised only at unacceptable social cost and such person being unable to avoid poverty and secondly, in order to maintain children." [emphasis added].

25 The *National Development Plan 2030: Our Future – Make it Work* (2012) 327 includes social welfare services under "traditional social security measures".

26 Notably the recent judgment of the Constitutional Court, *Mahlangu v Minister of Labour* [2020] ZACC 24.

27 *Imbumba Association for the Aged v MEC for Social Development* (1789/2020) [2020] ZAECHC 112. This case is discussed in detail below.

28 Olivier *et al* 'Constitutional Issues' in Olivier, Smit and Kalula *Social Security: A Legal Analysis* (2003) 69–71.

29 Article 22.



control."<sup>30</sup> These two clauses, read together, demonstrate the international community's view on the importance of social security rights in protecting older persons' dignity. Cash benefits alone are not sufficient to achieve an adequate standard of living, and older persons may also require the provision of food, housing, medical care, and social services. Even though the UDHR is a non-binding declaration, it serves as inspiration for the interpretation of international and African human rights standards.

With the ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR), South Africa has acquired direct international law obligations to give effect to the right to social security, including social insurance, in terms of Article 9 of the ICESCR. In addition to the right to social security, provision is also made for "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."<sup>31</sup>

The UN Committee on Economic, Social and Cultural Rights (CESCR) has a supervisory role which entails monitoring compliance by State parties with their obligations in terms of the ICESCR. The CESCR has produced General Comments to clarify the content of the ICESCR.<sup>32</sup> Of particular importance to this article, is that the meaning of "social security" for the purposes of Article 9 of the ICESCR is clarified to cover "all the risks involved in the loss of means of subsistence for reasons beyond a person's control."<sup>33</sup> As a result, the additional costs faced by older persons due to deteriorating health and a need for care are regarded as risks covered by social security. In addition to social security, older persons should also have access to "adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help" in order to give effect to their right to an adequate standard of living in terms of Article 11 of the ICESCR.<sup>34</sup> The CESCR, therefore, views measures to assist older persons in attaining an adequate standard of living as an obligation shared between the state, family, communities and the individual him- or herself.

States parties are required to institute national policies in order to help older persons to continue to live in their own homes as long as possible, as opposed to living in residential facilities.<sup>35</sup> In South Africa, the OPA aims to enable older persons to live at home and/or in their communities as long as possible.<sup>36</sup> Residential care is reserved for frail and destitute older persons.

General Comment 19 clarifies that the CESCR does not regard social assistance as the only form of non-contributory social security. States parties are also required to provide "social services and other assistance" to older persons with no other resources.<sup>37</sup> Therefore, the state has the duty to provide social care to older persons who have no other resources.

## 2.3 Statutory Rights of Older Persons

The South African State's obligations in terms of the Constitution, read with international law, require it to provide social services, as well as adequate food, water and health care to older persons. Although the aim is to enable older persons to continue living in their own homes or communities as long as possible, the State has the obligation to provide access to housing in residential facilities to older persons who are either too frail or indigent to remain living at home.

The OPA supplements older persons' rights in terms of the Bill of Rights. In terms of section 2 of the OPA, the objects of the act are to:

- (a) maintain and promote the status, well-being, safety and security of older persons;
- (b) maintain and protect the rights of older persons;
- (c) shift the emphasis from institutional care to community-based care in order to ensure that

30 Article 25(1).

31 Article 11.

32 The CESCR's role with regard to older persons is particularly important, as there is no international convention dedicated to the rights of older persons equivalent to the conventions specific to the rights of children, women and persons with disabilities. CESCR General Comment 6 *The Economic, Social and Cultural Rights of Older Persons* (1995) para 13.

33 General Comment 6 para 26.

34 General Comment 6 para 32.

35 General Comment 6 para 33.

36 Section 2(c).

37 General Comment 19 *The Right to Social Security* (2008) para 15.

- an older person remains in his or her home within the community for as long as possible;
- (d) regulate the registration, establishment and management of services and the establishment and management of residential facilities for older persons; and
- (e) combat the abuse of older persons.

Any assessment of the efficacy of the provisions of the OPA in protecting the rights of older persons during the pandemic and resultant restrictions, therefore must be measured against these aims and the primary goal is to “facilitate accessible, equitable and affordable services to older persons.”<sup>38</sup>

The Department of Social Development (DSD) shares responsibility for the wellbeing of older persons in South Africa with the Department of Health. Whereas the Department of Health is responsible for providing older persons with health care services, the DSD is responsible for the general well-being of and social services to older persons.<sup>39</sup> Section 3 of the OPA recognises that there may be competing social and economic needs and that organs of State can only be expected to take measures within their available resources. However, it requires all levels of government and other organs of State to take an integrated, coordinated and uniform approach to providing services to older persons. As will be demonstrated below, it was exactly the absence of such a uniform approach that led to the dysfunctional delivery of services to older persons during the pandemic.

The constitutional and statutory rights of older persons are to inform the implementation of all legislation applicable to older persons, and therefore also disaster management legislation, as well as all decisions and actions concerning older persons. Decisions and actions – including, as will be argued below, decisions on changing the funding of services to older persons, or on restrictions imposed on residential facilities, during a pandemic – have to meet the guidelines for implementation of the OPA.<sup>40</sup> These guidelines for all actions and decisions taken include respecting, promoting, protecting and fulfilling older persons’ rights and their best interests; respecting every older person’s dignity; fair and equitable treatment of older persons; and the protection of older persons against unfair discrimination.<sup>41</sup> In addition, section 7 prohibits the violation of older persons’ rights and unfair discrimination against older persons, which underscores the importance of respect for rights to create a supportive environment for older persons.

Section 8 regulates the provision of financial awards (subsidies) by the Minister of Social Development to service providers that provide services to older persons. The Minister may prioritise the needs of and services for older persons that would attract such awards,<sup>42</sup> as well as determine the conditions under which service providers would receive the awards. The regulations to the OPA<sup>43</sup> prescribe the form of applications for financial awards as well as the factors the department should take into account when considering whether to approve the financial award.

To qualify for financial awards, service providers must comply with the guidelines for the provision of services stated in section 9 of the OPA. These guidelines aim to create an enabling environment for older persons by, among others, recognising the social, cultural and economic contribution of older persons; recognising that all older persons do not have similar needs and that inter-sectoral collaboration should be encouraged; promoting the development of, and basic care and services for older persons in rural and urban areas; promoting respect for older persons and enabling them to live with dignity in their communities and consequently ensuring that older persons receive priority in the provision of basic services. The most important guideline, in the context of the pandemic, is that service providers have to ensure, as far as is practicable, that services and facilities are accessible to older persons.<sup>44</sup> As will be seen below in the discussion of the relevant case law, the DSD’s response when service providers attempted to ensure that services remain accessible to older persons during the COVID-19

38 Preamble, OPA.

39 The OPA defines “care” as “physical, psychological, social or material assistance to an older person, and includes services aimed at promoting the quality of life and general wellbeing of an older person.”

40 Section 5.

41 These guidelines correspond with the rights enumerated in the “South African Older Persons Charter”, a document drafted with input from older persons, available at <http://www.age-in-action.co.za/images/Rights/older%20persons%20charter.pdf>.

42 Section 8(1)(b).

43 Regulation 6 of the Regulations regarding Older Persons GNR 260 in GG 33075 of 01-04-2010.

44 Section 9(j).

pandemic, as required by the guidelines, disregarded this provision of the OPA.

### 3 THE STATUTORY FRAMEWORK FOR CARE TO OLDER PERSONS

#### 3.1 Community-based Programmes

The national DSD, in collaboration with provincial governments, is responsible for developing community care programmes for older persons. Chapter 3 of the OPA puts the DSD in charge of community-based care and support services for older persons. Section 11 categorises community-based programmes as:

- (i) prevention and promotion programmes, which ensure the independent living of an older person in the community in which the older person resides; and
- (ii) home-based care, which ensures that a frail older person receives maximum care within the community through a comprehensive range of integrated services.<sup>45</sup>

Independent living programmes,<sup>46</sup> as well as home-based care programmes,<sup>47</sup> are created to promote and protect the right to reside at home for as long as possible.<sup>48</sup> The DSD is mandated to provide these services and can supply these services to older persons itself, or acquire the services from service providers in return for the funding provided by the DSD.<sup>49</sup> All community-based care and support services have to be registered with the DSD,<sup>50</sup> which is responsible for the monitoring and evaluation of community care services.<sup>51</sup>

The central statutory objective of support to community-based programmes by the DSD remains to enhance older persons' quality of life and to keep them in their communities as long as possible. This primary objective therefore should form the basis of any evaluation of community-based services to older persons and for funding decisions by the provincial Social Development departments.<sup>52</sup>

Community care services are crucial for the promotion of older persons' right to reside at home as long as possible under normal circumstances; during the COVID-19 pandemic and the resultant restrictions they became indispensable. The extent to which the provisions of the OPA adequately regulate social care to older persons who live in their own homes and/or in their communities has become an increasingly pressing issue in the context of the pandemic. Hence, the following questions arise: How effective are statutory measures aimed at enabling older persons to continue living in their own homes and in their own communities in a context where they are forced in terms of a pandemic and disaster management regulations to stay at home and avoid contact with community members? Is the state not obliged to take additional measures to protect older persons' right to access independent living services in this context? These questions are addressed in part 4 below in the context of recent case law on the government's approach to social care during the pandemic.

#### 3.2 Residential Care

Of the estimated 1150 residential homes for older persons in South Africa, only eight are fully state-run residential facilities, situated mainly in urban areas. A far greater number of older

45 The importance of the inclusion of home-based care under community-based programmes will become apparent below in the discussion of case law related to the provision of community-based care to older persons during the lockdown.

46 Section 11(2) provides a non-exhaustive list of the types of services provided by the independent living programmes including services aimed at the establishment of recreational opportunities for older persons; spiritual, cultural, medical, civic and social services; provision of nutritionally balanced meals to needy older persons; professional services, including care and rehabilitation to ensure independent living of older persons; appropriate services contained in the indigent policy for vulnerable and qualifying older persons; integrated community care and development systems for older persons; and inter-generational programmes.

47 The non-exhaustive list of home-based care programmes in s 11(3) includes the provision of hygienic and physical care of older persons; provision of professional and lay support for the care of older persons within the home; rehabilitation programmes; and the provision of free health care to frail older persons.

48 Article 10(a) OPA.

49 Service level agreements i.t.o. s 8 and reg 3 OPA are concluded between the relevant Social Development department – usually a provincial department – and the service providers.

50 Section 13. Rendering an unregistered community-based care and support service is a criminal offence – s 12.

51 Section 15 read with s 22.

52 See Tshesebe and Strydom "An Evaluation of Community-based Care and Support Services for Older Persons in a Specific Community" (2016) 52 *Social Work* 1–18.

persons in residential care reside in state-subsidised residential homes.<sup>53</sup> These are residential facilities run mainly by non-governmental organisations and faith-based organisations limited to frail and destitute older persons. There are also more than 1000 private residential facilities offering a range of long-term care services, such as assisted living and frail care, and old age care. Residents of these private facilities are responsible for the full cost of their stay.<sup>54</sup>

The OPA promotes respect for the rights of all older persons in residential facilities<sup>55</sup> and regulates services provided to older persons in residential care. In addition to their other rights in terms of the Bill of Rights and the OPA, the rights of older persons residing in residential facilities include the right to have reasonable access to assistance and visitation; have access to basic care and to participate in social, religious and community activities of their choice.<sup>56</sup> Despite the lack of enforcement mechanisms in the OPA itself for the various sets of rights conferred on older persons, the OPA regulations require each facility to create a complaints procedure and display the procedure in a prominent place.<sup>57</sup>

All residential facilities are required to register with the DSD.<sup>58</sup> Despite the prohibition on the operation of unregistered facilities, many facilities remain unregistered.<sup>59</sup> The lack of enforcement of the registration requirement represents a risk to residents and staff, as it is very difficult to monitor the level of services at unregistered facilities under normal circumstances, let alone during a state of disaster such as the COVID-19 pandemic.

The Regulations to the OPA provide for detailed norms and standards for residential facilities, including aspects such as room and dining area size; access control; emergency and disaster plans; opportunities for residents to socialise; programmes for counselling services, if suitable skilled resources are available; and individual care plans for older person for whom direct care is provided.<sup>60</sup>

The norms and standards also prescribe the ratio of administrative, general and nursing staff to the number of residents. However, even prior to the pandemic, caregivers have been exposed to work-related stress and burnout due to the high caregiver–resident ratio in residential facilities.<sup>61</sup> Studies have shown that some residential facilities face significant financial constraints as subsidies do not cover all costs and therefore the facilities cannot afford to employ the required number of caregivers.<sup>62</sup> This leads to challenging workplace conditions and workloads of nursing staff and general caregivers in residential facilities. Additional factors contributing to high attrition in the care sector have included poor remuneration, workplace insecurity, low morale, poor relationships with management, and risk to personal safety and health.<sup>63</sup> The lack of training, a clear professional identity and opportunities for career progression has left many caregivers feeling overburdened and undervalued, with only a lack of other opportunities keeping them in their jobs.<sup>64</sup> All carers also do not have to be registered<sup>65</sup> and no national training curriculum for carers exists.<sup>66</sup> Compliance with the national norms and

53 Mahomed "Residential Services for Older Persons" (2017) as cited in Jacobs, Ashwell, Docrat and Schneider *The Impact of COVID-19 on Long-Term Care in South Africa* (2020) 7.

54 Jacobs *et al* (2020) 7. Although the discussion below primarily focuses on state-run and state-subsidised residential homes, the rights in terms of the OPA apply to all older persons. In addition, older residents of private facilities shared many of the hardships faced by residents in state-run and state-subsidised homes during the pandemic.

55 A residential facility is defined in the OPA as a "building or other structure used primarily for the purposes of providing accommodation and of providing a 24hour service to older persons."

56 The rights of older persons in residential facilities are enumerated in s 16 and the permissible services rendered at these facilities are listed in s 17.

57 Regulation 20(2)(b).

58 Section 18(2); form 9, Annexure A to the regulations.

59 Reportedly only 415 residential facilities met the OPA requirement of registration in 2017 – Jacobs *et al* (2020)

60 The National Norms and Standards for Acceptable Levels of Services to Older Persons and Service Standards for Residential Facilities, Part 2 of Annexure B to the Regulations regarding Older Persons GNR 260 in GG 33075 of 01-04-2010 ("National Norms and Standards").

61 Mapira, Kelly and Geffen "A Qualitative Examination of Policy and Structural Factors Driving Care Workers' Adverse Experiences in Long-term Residential Care Facilities for Older Adults in Cape Town" (2019) 19:97 *BMC Geriatrics*.

62 Mapira *et al* (2019) 6.

63 Jacobs *et al* (2020) 8.

64 Mapira *et al* (2019) 4.

65 The OPA and regulations currently only require caregivers providing community-based and home care to older persons to be registered.

66 Jacobs *et al* (2020) 10. Progress on Older Persons Amendment Bill of 2017, which includes the requirement that all caregivers must have received training with an accredited South African Qualifications Authority or Sector



standards has not always been regularly monitored nor adequately enforced.<sup>67</sup>

It therefore seems that, despite extensive regulation of the residential care sector, there are some regulatory gaps that may have left the sector unable to respond adequately to the COVID-19 pandemic. The effect of the COVID-19 pandemic and the resultant lockdown and associated regulations on the residential care sector is discussed next.

## 4 THE EFFECT OF THE COVID-19 PANDEMIC AND RESULTANT RESTRICTIONS ON CARE FOR OLDER PERSONS

### 4.1 Residential Care for Older Persons during the Pandemic

The United Nations describes “a particularly horrifying picture” emerging globally regarding the impact of COVID-19 on older persons in long-term care facilities, with large numbers of residents of facilities who were diagnosed with COVID-19 or had associated symptoms having died.<sup>68</sup> Although residential facilities in South Africa were required to have plans in place to deal with infectious diseases and other disasters,<sup>69</sup> many facilities were ill prepared for the scale of the pandemic and the effects of the resultant lockdowns.

The initial response of the South African government to the threat to residential facilities providing care to older persons of COVID-19, has been labelled “slow, vague and for most of the lockdown period, inadequate.”<sup>70</sup> In many instances, management of residential facilities had to rely on guidance from the World Health Organization (WHO) for weeks after the pandemic reached South Africa before any assistance and guidance on dealing with the increasing numbers of residents and staff testing positive or dying was forthcoming from the national and provincial Health and/or Social Development departments. In addition, they had to attempt to provide care to the residents despite staff absences due to illness or mandatory self-isolation even though they had limited resources.<sup>71</sup>

If the pandemic was not challenging enough in itself, the lockdown (and subsequent levels of restrictions) which was intended to protect human life including that of older persons, also created significant problems for the management of residential facilities.

After COVID-19 was classified as a pandemic by the WHO and the virus spread to South Africa, a national state of disaster relating to COVID-19 in terms of section 27(1) of the Disaster Management Act 57 of 2002 (the DMA) was declared in March 2020 to deal with the medical emergency posed by the pandemic. On 30 March 2020, and as part of the integrated and co-ordinated approach prescribed by the DMA,<sup>72</sup> the Minister of Social Development issued directions to provide for temporary measures to prevent and combat the spread of COVID-19.<sup>73</sup> In terms of these directions, no residents of residential facilities (old age homes or frail care facilities) could be released and no visitation was allowed during the lockdown period.<sup>74</sup>

That residential facilities were to be in total lockdown was clearly necessary in the context of a pandemic. However, the guidelines on how facilities were to manage the lockdown were either intended for health facilities and health care workers<sup>75</sup> (and not necessarily residential

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Education Training Authority, appropriate for the care of older persons, in the definition of “caregiver” has been delayed.

67 Mathiso “Realising the Rights of Older Persons in South Africa” (2011) 12(1) *ESR Review* 5; Adkins “Advancing the Socio-economic Rights of Older Persons in South Africa: Leaping the Implementation Barriers of the Older Persons Act” (2011) 12(1) *ESR Review* 18–19; Jacobs *et al* (2020) 17.

68 UN Policy Brief (2020) 6.

69 As required by the Norms and Standards clause 2.11.4. See also DSD *South African Plan of Action on Ageing* (2002).

70 Jacobs *et al* (2020) 8.

71 See, for example, *IOL* “Old-age Home’s Desperate Pleas ‘ignored’ after Two Deaths, 32 Positive Cases” 26-05-2020 <https://www.iol.co.za/capetimes/news/old-age-homes-desperate-pleas-ignored-after-two-deaths-32-positive-cases-48507318> (accessed 20-01-2021).

72 The DMA aims to provide for “an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery.”

73 DSD Directions: Measures to prevent and combat the spread of Covid-19, GNR 430 in GG 43182 of 30-03-2020.

74 Clause 6(d) of the DSD Directions.

75 Department of Health “COVID-19 Infection Prevention and Control Guidelines for South Africa - Draft V1” (31-03-2020); Western Cape Department of Health “Guidelines for PPE Use during the Coronavirus Disease 2019 (Covid-19)” (25-03-2020).

facilities) or not issued in terms of the DMA regulations.<sup>76</sup>

The coordinated approach within and between departments and provinces required by the DMA was absent.<sup>77</sup> For instance, in the Western Cape detailed guidance on measures to prevent and manage COVID-19 infection<sup>78</sup> was only provided some six weeks after the lockdown started. What the provincial government's approach lacked in urgency,<sup>79</sup> it made up for in detail. The relevant circular contains provisions on educating staff and residents on COVID-19; regular communication to residents' families on measures to prevent transmission of COVID-19; daily screening of staff and residents; restriction on visitation; enforcing physical distancing of at least 1.5 metres between residents; cancellation of group activities and limitations on the use of communal areas; and use of Personal Protective Equipment (PPE) by staff and residents.<sup>80</sup> In addition to these measures to prevent COVID-19 transmission, the circular also contains guidelines for the management of residents who have COVID-19 symptoms or tested positive. In particular, the circular requires staff members who have come into close contact with ill residents to be quarantined. Staff members working in the COVID-19 area of the residential facility are required to be kept separate from staff working in the rest of the facility.<sup>81</sup>

The department's approach was successful to some extent and by July 2020, fewer than expected COVID-19 outbreaks had been reported in residential facilities;<sup>82</sup> however, where they did occur they had serious effects.<sup>83</sup> It was more difficult for smaller independent facilities to obtain appropriate PPE and afford the high costs associated with infection control measures than it was for facilities forming part of larger groups.<sup>84</sup> Care work requires close contact with older persons, which, in the context of a pandemic, requires PPE and for staff to have the time to act with care.<sup>85</sup> Insufficient PPE for all caregiving staff translates into less staff members being able to provide care to residents and therefore has a direct impact on the standard of care residents receive.

Another factor that impacted the standard of care to residents during the pandemic was the number of staff members in residential facilities testing positive for COVID-19 and having to quarantine or isolate, leading to less staff available to perform care tasks.<sup>86</sup> Moreover, during the initial national lockdown, only essential workers were allowed to report for duty. Non-essential staff were either working from home or placed on "temporary lay-off" for their own safety and to reduce the number of people in facilities and thereby the risk of infection.<sup>87</sup> This state of affairs not only increased the work load of essential staff, but also impacted on services to residents and facilities' ability to comply with the prescribed ratio of caregiving staff to residents.<sup>88</sup>

The drastic changes in operations at residential facilities in order to contain the pandemic may have been successful in most instances in protecting residents against contracting the virus. However, steps to protect older persons' lives and physical health came at a cost to their mental health. Social isolation and not being able to receive visitors or socialise with other residents led to many residents feeling lonely and vulnerable and becoming withdrawn.<sup>89</sup> Despite older persons' statutory right to access to information,<sup>90</sup> insufficient information

76 For example, WHO "Infection Prevention and Control guidance for Long-Term Care Facilities in the Context of COVID-19. Interim Guidance" (21-03-2020).

77 Jacobs *et al* (2020) 21.

78 Western Cape Department of Health "WCG Circular H 70 of 2020: Preventing and Managing Coronavirus Infection in the Workplace" (06-05-2020).

79 See *IOL* "Old-age Home's Desperate Pleas".

80 Part C13 of Circular H 70 of 2020.

81 Part C 13.2.

82 Jacobs *et al* (2020) 10.

83 At one retirement village, 75% of residents in the frail care centre were infected – *Netwerk24* "16 by Othello-aftreeoord met Virus Besmet" <https://www.netwerk24.com/ZA/Tygerburger/Nuus/16-by-othello-aftreeoord-met-virus-besmet-20200519-2> (accessed 20-01-2021).

84 Jacobs *et al* (2020) 14.

85 Geffen <https://www.groundup.org.za/article/how-we-are-dealing-covid-19-care-homes/>.

86 As reported by Jacobs *et al* (2020) 14–15.

87 As reported by Jacobs *et al* (2020) 12–13.

88 As prescribed in clause 2.5.3 of the National Norms and Standards.

89 See Chipps and Jarvis "Social Capital and Mental Well-being of Older People Residing in a Residential Care Facility in Durban, South Africa" (2016) 20 *Ageing & Mental Health* 1264–1270 for the vital link between residents' mental well-being and their access to their primary social networks such as family and friends.

90 Regulation 20(1)(e).

about the pandemic and restrictions caused stress and anxiety among residents.<sup>91</sup> The WHO guidelines recommend measures aimed at minimising the effects of infection control measures on the mental health of residents.<sup>92</sup> However, in many facilities management had to prioritise infection control measures and health and basic care for residents to the detriment of the residents' mental health.<sup>93</sup>

The appreciable risk that infection with COVID-19 could prove fatal to older persons precipitated the need for special measures beyond what could be provided for in the OPA and its regulations. The state was compelled to take these measures to protect the right to life of older persons (and other vulnerable persons), by dealing decisively with the threat to life that the pandemic poses. As with the other measures designed to curb the spread of the virus, the lockdown of residential facilities and infection control measures resulted in the limitation of existing constitutional and statutory rights; in the case of older persons in residential facilities, their rights to freedom of movement, privacy, access to health care and access to social security.

More importantly, according to the United Nations Department of Economic and Social Affairs, the pandemic and resultant infection control measures have significantly hampered efforts to safeguard the dignity of older persons.<sup>94</sup> This global trend manifested in South Africa as well, as none of the intergenerational and social activities and opportunities for volunteering that allow for ageing with dignity, provided for in the OPA, were allowed to continue during the lockdown. The question becomes how the State should balance the right to life with the right to dignity and other rights. In *S v Makwanyane*, the Constitutional Court, per O'Regan J, underscored the centrality of the right to life as follows:

The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values.<sup>95</sup>

This fundamental connection between the rights to human dignity and life means that the right to life is "more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished." However, O'Regan J also noted that "without life, there cannot be dignity."<sup>96</sup> One can therefore argue that older persons' right to dignity should be a major consideration when the State takes measures aimed at protecting older persons and other vulnerable groups against a life-threatening virus, but that prioritising the containment of the virus remains both reasonable and justifiable. The rights to life, dignity and the socio-economic rights of older persons should not be regarded as competing rights in the context of the pandemic, but instead as intersecting rights that all have immense human and practical significance in a society founded on the constitutional values of human dignity, equality and freedom.<sup>97</sup>

91 Geffen <https://www.groundup.org.za/article/how-we-are-dealing-covid-19-care-homes/>.

92 WHO Interim Guidance (2020) 4.

93 See IOL "How Old Age Homes are Striking a Balance between their Senior Citizen's Physical and Mental Health" 07-08-2020.

94 UN DESA "Promoting the Rights and Dignity of Older Persons during COVID-19 and Beyond" (2020) <https://www.un.org/development/desa/ageing/uncategorized/2020/10/promoting-the-rights-and-dignity-of-older-persons-during-covid-19-and-beyond/> (accessed 03-02-2021).

95 *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 326.

96 Paragraph 327.

97 *Khosa v Minister of Social Development* 2004 (6) BCLR 569 (CC) para 40.

At first glance, it seems as if the abovementioned rights were legitimately restricted in accordance with section 36 of the Constitution. The initial lockdown measures were in terms of a "law of general application", that is, the DMA and the related regulations and directives. It is also difficult to argue convincingly that the limitations of the abovementioned rights were not reasonable and justifiable in the context of a national medical emergency. Given that the lives of older persons were at stake, less restrictive measures to achieve the purpose of the limitations were not apparent immediately. However, the lack of guidance and assistance by national and provincial government to mitigate the hardship suffered by older persons in residential care during the pandemic and resultant restrictions cannot be justified as easily.

COVID-19 has reminded us that global pandemics (and other global disasters) cannot necessarily be averted. It therefore is crucial that the lessons learnt from the COVID-19 pandemic be applied in planning for future pandemics and disasters that may affect older persons, as older persons are always going to count among the most vulnerable during states of disaster. The constitutional and statutory rights and needs of older persons should be central to disaster management plans,<sup>98</sup> which should include targeted responses tailored to mitigating the effect of disaster management plans on older persons in residential facilities. The statutory guidelines to the implementation of the OPA expect no less.<sup>99</sup>

Rosa Kornfeld-Matte<sup>100</sup> has remarked that "older persons have become highly visible in the COVID-19 outbreak but their voices, opinions and concerns have not been heard."<sup>101</sup> Therefore, it is imperative that older persons and the elder care sector be represented on the official bodies coordinating the responses to disasters.<sup>102</sup>

Finally, to ensure that, when most of the focus is on infection control measures, the emotional and mental health needs of staff and residents are not neglected, pre-emptive measures to monitor and support the mental well-being of residents and staff in residential facilities during a pandemic should be developed. The OPA, regulations and the norms and standards for residential facilities already provide the statutory basis for such measures and future disaster management measures should not be developed in isolation from older persons' rights in terms of the OPA.

## 4.2 Community Care

South African government policy, which regards the care of older persons as primarily a family responsibility, coupled with limited access to and availability of residential care, has led many older persons to rely on community-based services.<sup>103</sup> The OPA formalises this shift of emphasis from institutional care to community-based care in order to ensure that older persons remain within their community for as long as possible.<sup>104</sup> The pandemic and resultant lockdown regulations have severely curtailed community-based programmes' ability to provide services to older persons, as older persons were no longer allowed to travel to care centres. However, many community care programmes adapted quickly and started offering home-based services to older persons.

The organisations providing community care to older persons rely heavily on the State for funding. These organisations have been playing a vital role during the pandemic and the resultant lockdown in providing care to older persons who had no-one else to provide for them. It therefore could be expected that the DSD would support these organisations and their activities, given that care services provided to older persons are designated as essential services in terms of the lockdown regulations.<sup>105</sup> Unfortunately, for some organisations, such as the Imbumba Association for the Aged (Imbumba), this support did not materialise. Imbumba, an association of non-profit organisations that provide community-based care to older persons, had to approach the Eastern Cape High Court (Grahamstown) for urgent relief when the Eastern Cape Social Development department ("the Department") repudiated the service

98 UN DESA "Promoting the Rights of Older Persons" (2020).

99 Section 5 OPA.

100 The Independent Expert on the enjoyment of all human rights by older persons, Office of the United Nations High Commissioner on Human Rights.

101 See UN DESA "Promoting the Rights of Older Persons" (2020).

102 Jacobs *et al* (2020) 21–22.

103 Lloyd-Sherlock "Long-term Care for Older People in South Africa: The Enduring Legacies of Apartheid and HIV-AIDS" (2019) 48 *Journal of Social Policy* 147.

104 Section 2(c).

105 DMA Regulations 25-03-2020.



level agreements between Imbumba members and the Department. The *Imbumba* case<sup>106</sup> merits a detailed discussion, as it demonstrates that the pandemic, the resultant restrictions, and the limited resources available to the State during the pandemic were not necessarily to blame in all instances where older persons could not access community-based services. In some instances, the very officials tasked by the OPA with promoting and protecting older persons' rights were taking actions aimed at denying them access to social services.

Imbumba members entered into service level agreements (SLAs) with the Department for the period 1 April 2020 to 31 March 2021. In terms of the SLAs the members would receive funding from the Department to provide community-based care and support services to older persons, including the provision of nutrition, administration and recreation services, and nursing care. For many of the older persons receiving the services by Imbumba members, this support is crucial as the financial support they may have received from their adult children who were working away from home was negatively impacted by the pandemic and resultant restrictions. The older persons therefore rely on the meals provided by the members.<sup>107</sup>

Unfortunately, the Department did not honour its obligations in terms of the agreements and the members did not receive the funding due to them. Instead, on 5 June 2020 the Head of Department, Social Development Eastern Cape ("HOD") notified all non-profit organisations with which the Department had concluded SLAs for community-based care for older persons, that payments in terms of SLAs would be restricted to stipends for caregivers.<sup>108</sup>

During full lockdown and level 2 restrictions, older persons were not allowed to travel to the care centres where some of the services were to be provided. The members of Imbumba therefore continued to provide the services deemed to be essential services to older persons at their homes, at no extra cost. The applicants argued that although the beneficiaries of the services by Imbumba members were living independently, their health, psychological and emotional well-being depended on the uninterrupted and continuous provision of services by the Imbumba members.<sup>109</sup> Without these home-based services, older persons may be compelled to leave their homes to purchase food and or go to the hospital or clinic to collect medicine, thereby putting themselves at risk. Without the subsidies payable in terms of the SLAs, the members could not provide the services.<sup>110</sup> It was argued on behalf of the applicants that the members would have to close if they do not receive the payments due, as they had incurred staffing and other costs in providing the services to the older persons. The closure of the services would impact not only the beneficiaries, but also the members and their staff.<sup>111</sup>

On 3 July 2020, Imbumba's attorneys informed the Department that the unilateral reduction of subsidies was contrary to the requirement of notification of reduction of subsidies contained in the SLAs and put the Department on terms to pay the outstanding subsidies by 14 July. The HOD of the Department responded that, in her view, the SLAs did not cover subsidies for the home-based care that the members provided, as home-based care is seen as more expensive and therefore there was no budget for it. She even claimed that providing funding for the type of home-based services that the members provided would constitute "unlawful and wasteful expenditure" in terms of the Public Finance Management Act. She pointed out that the Department, the South African Social Security Agency (SASSA), the Department of Health and local government authorities were better placed to provide the services that the Imbumba members provided. In her view, the members took a unilateral decision to change the services they were to provide in terms of the SLAs from services to independent older persons at care centres to home-based care, which was not part of the agreements.<sup>112</sup> Finally, she categorised the pandemic and the resultant lockdown as *force majeure* in that older persons were prohibited from moving around and could not attend the care centres. She argued that the Department was therefore entitled to terminate the SLAs.<sup>113</sup>

The court provided a scathing judgment on the Department's stance in this matter.

106 *Imbumba Association for the Aged v MEC for Social Development, Eastern Cape* (1789/2020) [2020] ZAECGHC 112. The respondents in this case were the Member of the Executive Council (MEC) for Social Development, Eastern Cape and the Head of Department: Social Development (HOD), Eastern Cape.

107 *Imbumba* case para 9.

108 Paragraph 4.

109 Paragraphs 12 and 13.

110 Paragraph 13.

111 Paragraph 14.

112 Paragraph 21.

113 Paragraph 22.

Roberson J labelled the argument of the HOD that the application lacked urgency as “a vexatious and futile point when one is dealing with the welfare of people in need, during a life threatening pandemic” and added that “one would not expect it to be raised by an organ of state mandated to provide social services, and especially when no SLAs have been concluded for home based care because there is no budget for such services.”<sup>114</sup> The fact that elderly and vulnerable beneficiaries would be deprived of the services rendered by the members, were the members to close down because they did not receive the subsidies owed to them, rendered the matter inherently urgent.<sup>115</sup>

Roberson J’s starting point in determining whether the Department’s actions repudiated the SLAs was the Department’s constitutional duty to provide social services in terms of section 27 of the Constitution. The Department is permitted to acquire the services of organisations such as the Imbumba members to carry out its constitutional obligations. However, providing access to social services remains the Department’s constitutional duty.<sup>116</sup> Therefore, when decisions taken by the Department, such as non-payment of subsidies to service providers, impact on access to social services by older persons, it infringes the section 27 and statutory rights of the older persons affected by the closing down of the services.<sup>117</sup>

The court found the HOD’s reliance on the Public Finance Management Act and the fact that there was no budget for home-based services “at best, cynical”.<sup>118</sup> Roberson J questioned what services the Department envisaged would be delivered in terms of the agreements, signed only after the lockdown commenced, to older persons who were not allowed to leave their homes during lockdown. To the points raised by the court, one could add that the limited resources available to the Department during the pandemic were a non-issue, as the Imbumba members provided the home care services at no additional costs to what was already agreed upon. The limitation of the State’s duty to provide social care “within its available resources” does not amount to *carte blanche* to a particular department to prioritise its business plan over service delivery.

The court agreed that the members provided an essential service in terms of the disaster management regulations and that they were providing a public service on behalf of the Department.<sup>119</sup> Roberson J, choosing substance over form, held that the underlying purpose of the SLAs – to fulfil the constitutional obligation of the State to provide social services to the older persons – should take precedence over the question whether the members derogated from the letter of the SLAs in terms of the services they provided.

Finally, the court found the argument by the defendants that both parties were not able to perform in terms of the SLAs as a result of *force majeure* to be “an extraordinary stance in circumstances where older persons are in need of social services, and even more so in the midst of a pandemic.”<sup>120</sup> Both parties were in the position to perform in terms of the agreements: the members did provide services and the Department had the budget to pay for the services. The Department could therefore not rely on the *force majeure* clause in the SLAs.

The biggest take away from the *Imbumba* case is the emphasis in the judgment on substance over form – on the provision of services to vulnerable older persons over the manner in which they are performed. The judgment confirmed that it is the State which has the obligation to ensure access to social services, even when other parties are contracted to perform some of the services. It cannot avoid this obligation during times of crisis such as the pandemic by taking issue with service delivery modalities; doing so would be denying the affected older persons their right to access social services. The limitation of older persons’ access to social services can also not be justified in terms of section 36 of the Constitution, as the decision taken by the HOD constitutes administrative action. Although the decision to close community centres was by a law of general application, the subsequent actions by officials were not.

The Eastern Cape Social Development department chose a different approach to funding community-based services than other provinces, contrary to section 3 of the OPA, which requires all levels of government to take an integrated, coordinated and uniform approach to providing services to older persons. All efforts should be made post-COVID-19 to ensure that

114 Paragraph 27.

115 Paragraph 27.

116 Paragraph 29.

117 Paragraph 30.

118 Paragraph 30.

119 Paragraphs 31 and 33.

120 Paragraph 39.

a uniform approach to social services is developed and enforced.<sup>121</sup>

Although the *Imbumba* judgment is a remarkable and important development, it seems as if it was not in itself a sufficient breakthrough to convince the Department to meet its constitutional obligations. Officials in the Department have reportedly reacted to the judgment by coercing the boards of some Imbumba members to sign addendums to the SLAs to reduce the money owed to them.<sup>122</sup> As a result, some organisations have had no other option than to start contempt of court proceedings.<sup>123</sup> In these instances, the actions of officials not only constitute contempt of court, but also contempt of the Department's constitutional obligations to promote, protect and respect the affected older persons' right of access to social services.

## 5 PROTECTING AND PROMOTING OLDER PERSONS' RIGHT TO ACCESS SOCIAL CARE AND SERVICES DURING GLOBAL AND NATIONAL DISASTERS

The COVID-19 pandemic has returned the older population to the forefront of national attention. One of the main justifications for the severe restrictions imposed on South Africans in the context of the pandemic was the protection of older persons. Unfortunately, the dire warnings identifying older persons as a vulnerable group confronting higher risk from COVID-19 have not translated into the prioritising of government social care programmes and services to older persons, which represents a crisis not only for the current functioning, but also the longer-term sustainability of the elder care sector.<sup>124</sup> The lesson to be learnt from this is that older persons are most likely going to confront higher risks during future pandemics or other disasters, and policy and programmatic interventions "must be targeted towards raising awareness of their special needs."<sup>125</sup> The rights-based approach of the OPA should form the basis for any future interventions aimed at protecting older persons.

Many of the hardships suffered by older persons in residential facilities can be linked to the DSD not complying with its general duties in terms of the OPA. It has to deal decisively with unregistered facilities, as monitoring and supporting unregistered homes poses difficulties in the best of times, let alone during a pandemic. The standards for residential facilities set in the OPA will also only be meaningful if registered facilities are monitored and inspected regularly.

The *Imbumba* case confirmed that the State is not absolved of its obligations in terms of section 27 of the Constitution, even where legislation allows the government to make use of service providers for delivery of care and social services to older persons. Decisions taken by government officials which lead to the reduction, cancellation or suspension of services affect the extent to which the State is able to meet its constitutional obligations. Such decisions should therefore not be taken before the consequences for the rights of older persons are considered carefully. The decision of government officials in this case to reduce payments to the organisations providing services to older persons proves the significance of the constitutional guarantee of access to social security; had the organisations been forced to close down because of the decision to cut funding, the older persons served by these organisations would not have been able to access the services that were essential for their survival.

The rights-based approach in the OPA was not adequately employed in the face of a national disaster, causing hardship to many older persons. The OPA requires "all organs of state and all officials, employees and representatives of organs of state" to respect, protect and promote the rights of older persons contained in the act.<sup>126</sup> Older persons' rights deserve more protection during pandemics and other national (or global) disasters, not less. Future disaster management plans issued in terms of the DMA<sup>127</sup> must take the constitutional and

121 The issue of the lack of a uniform social development approach across provinces is currently under investigation by the South African Law Reform Commission, *Project 145: Investigation into a Model to Enforce Decisions of MINMEC for Social Development*.

122 *Daily Maverick* "Caring for the Elderly during Lockdown was 'Fruitless and Wasteful' Expenditure" 22-11-2020 <https://www.dailymaverick.co.za/article/2020-11-22-caring-for-the-elderly-during-lockdown-was-fruitless-and-wasteful-expenditure/> (accessed 03-02-2020).

123 *Daily Maverick* "Social Development Head Suspended on Eve of Contempt of Court Application" 10-11-2020.

124 Jacobs et al (2020) 1.

125 UN DEPA "Pandemics: Do They Change How We Address Age and Ageing?" (2020) <https://www.un.org/development/desa/ageing/news/2020/09/unidop/> (accessed 03-02-2021).

126 Section 4.

127 Section 25 DMA.

statutory rights and needs of older persons into account.<sup>128</sup> Both the DMA<sup>129</sup> and the OPA<sup>130</sup> require coordinated approaches within and between departments and organs of State. It is the responsibility of the DSD to coordinate with other departments and organs of State, as well as with private sector stakeholders, to ensure that disaster management plans reflect older persons' rights and needs. The DSD must also coordinate with residential facilities to ensure that facilities' own disaster management plans take the residents' rights and needs into account. Disaster management plans should include targeted responses tailored to mitigating the effect of not only disasters, but also the measures to be implemented in terms of the disaster management plans, on older persons in residential facilities and on programmes providing services to older persons.

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128 UN DESA "Promoting the Rights of Older Persons" (2020).

129 Preamble and s 9 DMA.

130 Section 3(1).