ESR REVIEW

Economic and Social Rights in South Africa

Volume 11
No. 1 2010

Ensuring rights make real change

Contents

20 Years of Excellence promoting human rights and democracy
COMMUNITY LAW CENTRE
1990-2010

A publication of the Community Law Centre
at the University of the Western Cape

ESR REVIEW

Editorial

ISSN: 1684-260X
A publication of the Community Law Centre
(University of the Western Cape)

Editor-in-Chief: Lilian Chenwi
External editor: Danwood Mzikenge Chirwa

Contact the Socio-Economic Rights Project
Community Law Centre
University of the Western Cape
New Social Sciences Building
Private Bag X17, Bellville, 7535
Tel: (021) 959 2950
Fax: (021) 959 2411
Email: serp@uwc.ac.za
Website:
www.communitylawcentre.org.za
ESR Review online
www.communitylawcentre.org.za/clc-projects/socio-economic-rights/esr-review-1

ESR Review
The ESR Review is produced by the Socio-Economic Rights Project of the Community Law Centre, with the financial assistance of the European Union and with supplementary funding from the Ford Foundation and the Norwegian Embassy through the Norwegian Centre for Human Rights. The contents of the ESR Review are the sole responsibility of the Socio-Economic Rights Project and can under no circumstances be regarded as reflecting the position of the European Union, the Ford Foundation or the Norwegian Embassy/NCHR.

Production: Page Arts cc
Printing: Tandym Print

The first half of this year has seen positive developments in the area of socio-economic rights. At the international level, a positive development has been in the ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), with Ecuador and Mongolia becoming the first countries to ratify the instrument.

At the national level, the South African government has made a number of commitments aimed at promoting the effective realisation of socio-economic rights. In his state of the nation address on 11 February 2010, President Jacob Zuma committed his government to, among other things, improving the quality of education and the health system; lower maternal and infant mortality rates and HIV infections and effective treatment of HIV and tuberculosis; improving the provision of basic services including housing, water, sanitation and electricity; and addressing corruption in the administration of social grants. In the budget speech that followed on 17 February 2010, the Minister of Finance allocated R3 billion for broadening access to anti-retroviral treatment for those co-infected with tuberculosis and women and children with CD4 counts lower than 350; R105 billion for national and provincial health spending; R165 billion for education; R2.7 billion for improving literacy and numeracy levels; R6.7 billion to help municipalities cushion poor households from the rising costs of water and electricity; and R89 billion to be spent on social grants.

We hope that the government will honour its commitments and ensure continuous improvements in the realisation of socio-economic rights in line with its obligations. As some of the articles in this issue illustrate, the latter has been a challenge.

We acknowledge and thank all the guest contributors to this issue. We trust that readers will find it stimulating and useful in the advancement of socio-economic rights, especially the rights of the poor and most vulnerable groups of society.

Lilian Chenwi, editor-in-chief

Electronic distribution of the ESR Review: Final notification

In January 2010, we sent out first notification letters of our move towards electronic distribution of the *ESR Review*. Future issues will be distributed electronically. When a new issue is available, subscribers will be notified by email and can then download FREE copies (in PDF format). Please provide us, if you have not already done so, with an email address through which you or your organisation can be sent such a notification. Very few printed copies will be produced. Subscribers who need hard copy because they do not have an email address, or are based in a rural area without access to the internet, should let us know by post or phone. Public and university libraries will also continue to receive printed copies, unless they indicate a preference for the electronic version.

Promoting socio-economic rights in South Africa through the ratification and implementation of the ICESCR and its Optional Protocol

Lilian Chenwi and Rishi Hardowar

The effective implementation of socio-economic rights not only requires the recognition of these rights as justiciable or enforceable rights and the development and implementation of policies to give effect to them at the national level. It also necessitates the ratification and implementation of international treaties. This underlines the need to consider the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), and its Optional Protocol, 2008 (OP-ICESCR), in augmenting domestic efforts. The United Nations (UN) Committee on the Rights of the Child, for instance, has stated that the ratification of the ICESCR would strengthen the efforts of South Africa to meet its obligations in guaranteeing the rights of all children under its jurisdiction (Concluding observations on the initial report of South Africa, UN doc. CRC/C/15/Add.122, para 11).

Considering the far-reaching commitment to socio-economic rights in the Constitution of South Africa, 1996 (the Constitution), it was hoped that the country's signing of the ICESCR on 3 October 1994 would, without any substantial delay, be followed by ratification. However, close to 16 years later, South Africa still has not ratified the ICESCR. This is of concern as the ICESCR clearly was a major source of inspiration for the drafting of the provisions on socio-economic rights in the Constitution. Also, in interpreting and enforcing the socio-economic rights in the Constitution, the Constitutional Court has referred to the interpretation of the rights in the ICESCR by the UN Committee on Economic, Social and Cultural Rights (CESCR). However, although the Constitutional Court's jurisprudence has been progressive, its decisions, in some respects, are not developing in harmony with the normative standards set by leading international treaty bodies such as the CESCR.

Furthermore, the ultimate court of appeal for victims of socio-economic rights violations in South Africa is the Constitutional Court. If it grants no adequate remedy, their only recourse is to the African Commission on Human and Peoples' Rights (the African Commission), as South Africa ratified the African Charter on Human and Peoples' Rights, 1981 (the African Charter), on 9 July 1996. The OP-ICESCR gives claimants who are unable to get justice at the domestic level a choice between the regional system and the UN system. This choice is not available to claimants in South Africa, however, as it is yet to ratify the ICESCR and the OP-ICESCR.

The ICESCR and its Optional Protocol

The ICESCR forms part of the International Bill of Rights and is the most important international treaty on socio-economic rights. The ICESCR aims to enhance local and global social justice. It recognises different levels of economic development and identifies the important role of international cooperation and development assistance in the realisation of socio-economic rights.

The rights protected in the ICESCR include those to work, health, education, social security (including social insurance) and an adequate standard of living (including adequate food, clothing and housing, and the continuous improvement of living conditions) (articles 6–15). The CESCR is responsible for monitoring the implementation of the ICESCR, something that was initially undertaken mainly through a reporting procedure, but will include complaints and inquiry procedures once the OP-ICESCR comes into force. As at June 2010, the ICESCR had been ratified by 160 states, and signed but not yet ratified by six others.

The OP-ICESCR ensures that, like victims of civil and political rights violations, victims of socio-economic rights violations have access to remedies at the international level where they have not been able to obtain them at the national level. The OP-ICESCR has been discussed in detail in previous issues of the *ESR Review*: 7(1), 8(4), 9(1) and 9(2). As at 9 July 2010, it had been ratified by Ecuador and Mongolia, and 30 other states had signed but not yet ratified it.

Distinguishing the rights and obligations in the Constitution and the ICESCR

The Bill of Rights in the Constitution is renowned for its extensive commitment to socio-economic rights. It enshrines almost all the socio-economic rights protected in the ICESCR and goes even further, incorporating other rights, such as access to water and to a clean and healthy environment, not explicitly stated in the ICESCR. However, most of the socio-economic rights in the Constitution are phrased differently from those in the ICESCR, with the Constitution providing for 'a right of access' in relation to

> Ratifying the ICESCR will bring several benefits, especially in advancing the implementation of socio-economic rights at the national level.

most of the socio-economic rights and the ICESCR for 'a right to', implying that the obligation on the South African government is to facilitate access to the relevant rights.

Like the ICESCR, the Constitution, in sections 26 and 27, requires the state to take action, using its available resources, to progressively realise socio-economic rights. The obligation is not formulated in the same way, however. While article 2(1) of the ICESCR requires every state to use the 'maximum of its available resources', the Constitution uses the phrase 'within available resources', implying that the obligation placed on the government does not require more than its available resources. The ICESCR adopts a firmer stance in relation to the use of resources.

Despite several similarities between the Constitution and the ICESCR, such as the recognition of the fundamental value of equality and dignity in the realisation of socio-economic rights, the Constitution is lacking when it comes to the provision of some rights, particularly the rights to work and education. While the Constitution does not explicitly guarantee the right to work, but instead a right to freedom of trade, occupation or profession and fair labour practices (sections 22 and 23), the ICESCR not only provides for the right to seek employment freely, but also imposes a specific obligation on the state to work towards achieving that right, including having in place technical and vocational guidance and training programmes, policies and techniques (articles 6 and 7; see also article 8). Also, the scope of the right to education in the ICESCR (article 13) is far more extensive than that in the Constitution.

Why ratify the ICESCR?

The Constitution recognises the value of international law by requiring courts to consider it when interpreting the rights in the Constitution (sections 39(1) and 233). Also, the Constitutional Court has seen international law as providing a framework within which the rights in the Constitution can be evaluated and understood (see *S v Makwanyaye and Another* 1995 (3) SA 391 (CC), para 35, and *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169, para 26). The ICESCR would thus be relevant in promoting the effective implementation of socio-economic rights in South Africa. Several states, human rights bodies, special procedures and civil society organisations have, in fact, called on South Africa to fast-track the process of ratifying the ICESCR. (With regard to states, see generally Report of the Working Group on the Universal Periodic Review: South Africa, UN doc. A/HRC/8/32.)

Ratifying the ICESCR will bring several benefits, especially in advancing the effective implementation of socio-economic rights at the national level. Previous issues of the *ESR Review* have highlighted some of these benefits (Mashava, 2000; Pillay, 2002).

First, ratification of the ICESCR will not only reaffirm South Africa's commitment to socio-economic rights but will also signal its commitment to the eradication of poverty and promotion of development through both domestic and international means. The government has often indicated its commitment to ensuring access to socio-economic goods and services and to addressing discrimination and poverty. Ratification would be an ideal opportunity to reaffirm this commitment.

Second, the state reporting procedure under the ICESCR will provide an opportunity for introspection in relation to the implementation of socio-economic rights in South Africa, and will promote the very culture of accountability to national and international human rights standards that the South African Constitution encourages. Article 16 of the ICESCR requires states parties to submit reports on the measures that they have adopted and the progress made in achieving the realisation of socio-economic rights. Through that reporting procedure, the CESCR engages constructively with each state on the implementation of these rights and then informs the state of its concerns and recommendations in the form of 'concluding observations', which provide a clearer vision of the normative contents of the rights and obligations in the ICESCR. South Africa would benefit from the input of the international experts in the CESCR. Civil society groups could also use the concluding observations to advocate for the improved realisation of rights. The reporting procedure would complement the efforts of the South African Human Rights Commission (SAHRC) in monitoring the implementation of socio-economic rights, which has thus far been beset with challenges, especially in relation to the approach and methodology adopted (Jacobs, 2009; Klaaren, 2005).

Third, ratification of the ICESCR will help ensure that South Africa's jurisprudence on socio-economic rights develops in harmony with the normative standards set by the CESCR. The Constitutional Court, in developing its socio-economic rights jurisprudence, has made reference to the provisions of the ICESCR and the interpretive approach adopted by the CESCR. While interpretive guidance, which is one of the benefits of ratification, has already to some extent been achieved, the courts (the Constitutional Court in particular) have simultaneously embraced and rejected principles of international law aimed at the vindication of socio-economic rights, resulting in a jurisprudence that seems rather paradoxical (Pieterse, 2004: 902). The Constitutional Court has been reluctant, for example, to endorse the minimum core approach developed by the CESCR, which caters adequately for the needs of the poor in providing more specific and effective remedies.

The Court's 'departure from international law principles associated with the theoretical development and effective implementation of social rights' has been ascribed partly to the non-ratification of the ICESCR (Pieterse, 2004: 903). Ratification would not only serve to align government

practices with the ICESCR but also force the courts to take relevant international law principles more seriously.

Fourth, ratification of the ICESCR will correct any distortions that may arise from South Africa's currently incomplete recognition of some rights or from any legislation and policies that are not in line with international human rights standards. An objection by South Africa to ratifying the ICESCR has been that the constitutional Bill of Rights provides sufficiently for socio-economic rights. However, as mentioned above, the scope of some of the rights such as education is quite restrictive. Ratification of the ICESCR would result in South Africa extending the scope of benefits, for instance, in relation to the right to education and work, in order to better provide for the poor, marginalised and vulnerable.

Furthermore, the ratification and subsequent implementation process involves the inspection of all existing legislations and policies in order to align them with the provisions of the ICESCR. As a consequence, laws and policies that run counter to the spirit and purpose of the ICESCR and subsequent interpretations by, for instance, the CESCR will have to be repealed or amended.

Why ratify the OP-ICESCR?

In addition to bringing greater coherence to the international human rights system, the OP-ICESCR promotes the culture of accountability and helps empower poor, vulnerable and marginal groups, and both of these objectives are encouraged by the South African Constitution. The OP-ICESCR opens up avenues for combating poverty by providing a mechanism through which accountability for poverty can be strengthened and abuses linked to poverty can be identified and addressed.

South Africa played a crucial role in the adoption of the OP-ICESCR, making significant efforts to ensure that it affirmed and built on the African experience and did not weaken it by setting a lower standard of review at the international level. During the discussions on the OP-ICESCR, South Africa presented its experience in enforcing socio-economic rights through the courts, and this informed the text of the OP-ICESCR, particularly article 8(4). Considering South Africa's role in the adoption of the Protocol and its enforcement of socio-economic rights at the national level, it is logical for South Africa to become a party to the OP-ICESCR. However, South Africa will only be able to ratify the OP-ICESCR after it ratifies the ICESCR. As a result, ratification of the OP-ICESCR has not really been an issue in the South African context. Notwithstanding this, it is important to point out some of the benefits of such a step.

First, ratification of the OP-ICESCR would serve to strengthen the domestic protection of socio-economic rights through policy, legislation and jurisprudence. Article 3 of the OP-ICESCR requires the exhaustion of all available domestic remedies (judicial and quasi-judicial) before a complaint can be heard by the CESCR. This encourages the use, development and strengthening of mechanisms at the national level for the enforcement of these rights. Though socio-economic rights are already justiciable in South Africa, it is important to provide victims with the choice of approaching an international body where they have not been able to obtain an appropriate remedy from the courts. Moreover, ratification of the OP-ICESCR would illustrate South Africa's acceptance of enhanced accountability by giving the CESCR the authority to receive complaints and give its views and recommendations on addressing the challenges identified.

> The OP-ICESCR facilitates international assistance for states with serious resource constraints.

Second, the OP-ICESCR enhances states' compliance with the ICESCR. Through the communications and inquiry procedures, the government would be encouraged to take steps towards the full incorporation of the ICESCR into domestic law and policies and the effective implementation of the rights contained in it. Individual complaints mechanisms at the international level have been associated with rights improvements. 'The possibility that an individual right of standing before a body of experts helps improve rights outcomes on average provides a strong rationale for ratification' (Simmons, 2009: 66, 81).

Third, the OP-ICESCR facilitates international assistance for states with serious resource constraints. The South African Constitution, like the ICESCR, recognises that the full implementation of socio-economic rights is dependent on resources. The OP-ICESCR encourages and facilitates international assistance and cooperation and also provides for the establishment of a fund. These would assist states facing serious resource constraints in implementing the CESCR's views and recommendations. Also, as the CESCR pointed out in General Comment 2 on international technical assistance measures (UN doc. E/1990/23, para 10), states have the opportunity under article 22 of the ICESCR to identify in their reports any particular needs they might have for technical assistance or development cooperation.

Fourth, ratification of the OP-ICESCR will enable South Africa to assume a leading role in human rights at the African regional level. Failure to ratify the OP-ICESCR would detract from the gains made thus far in the African region and by South African courts in protecting socio-economic rights as justiciable rights.

Post-ratification

Three months after South Africa deposits its instrument of ratification or accession to the ICESCR and the OP-ICESCR, they will enter into force (article 27(2) of the ICESCR and 18(2) of the OP-ICESCR). However, if South Africa's ratification of the OP-ICESCR occurs before it enters into force, its entry into force for South Africa will be three months after the deposit of the tenth instrument of ratification or accession (article 27(1) of the OP-ICESCR). It is important to note that an international treaty becomes law in South

Africa when it is enacted into law by national legislation (section 231(4) of the Constitution).

Following ratification and entry into force, the next critical step will be to give effect to the treaty provisions in domestic policies and legislation. Because the Constitution's Bill of Rights is modelled on the ICESCR, and the country already has significant legislation and policies relating to socio-economic rights, South Africa's ratification would require few changes in the domestic legal order. This should serve as an added impetus for ratification. South Africa will then have to take steps, reasonably soon after the coming into force of the ICESCR, to ensure that the domestic legal framework is in line with the standards in the ICESCR.

South Africa will also have to start working on its initial report immediately following ratification in order to ensure that it meets the timeline set for reporting. States must report initially within two years of the entry into force of the ICESCR for the state concerned, and thereafter every five years. In addition to the measures adopted and progress made, the reports may also indicate factors and difficulties affecting the degree of fulfilment of obligations under the ICESCR (article 17). Civil society organisations could play a crucial role in this regard, either by contributing to the preparation of the state reports, if such an opportunity is provided, or by submitting 'shadow' (alternate) reports that highlight deficiencies in implementation that are absent in the state's report. Parliament can also play an important role, through its oversight function, by ensuring that government meets its reporting obligation in a timely and effective way.

Conclusion

It must be emphasised that ratification of the ICESCR and its Optional Protocol will not change the implementation of socio-economic rights overnight. However, the crucial role of the ICESCR and the OP-ICESCR in promoting socio-economic rights implementation at the national level, even if only in the medium to long term, cannot be ignored. This article has outlined a number of benefits that would arise from South Africa's ratification of the ICESCR and the OP-ICESCR. It is therefore in South Africa's interests, and especially in the interests of the poor, vulnerable and marginalised, that it ratifies these instruments. Moreover, ratification would encourage other states to do same. The benefits of ratifying a treaty depend, however, on its implementation and on the strength of civil society groups in holding government accountable and forcing it to translate the provisions into concrete benefits.

Lilian Chenwi is the coordinator of, and senior researcher in, the Socio-Economic Rights Project. Rishi Hardowar is a pupil at Citilaw Chambers Attorneys and Barristers in Mauritius, and also a part-time law lecturer at the University of Mauritius.

For further information and resources on the ratification of the ICESCR by South Africa and how to get involved, visit the following websites:

Campaign for SA's ratification of the ICESCR:
www.blacksash.org.za/index.php?option=com_content&task=view&id=1410&Itemid=187

Parliamentary Programme of the Community Law Centre:
www.peopletoparliament.org.za

References

Hardowar, R 2009. Improving domestic enforcement of socio-economic rights through international law: Ratification of the International Covenant on Economic, Social and Cultural Rights by South Africa. Unpublished LLM Dissertation, University of Pretoria. Available at www.up.ac.za/dspace/bitstream/2263/12677/1/hardowar.pdf [accessed: 20 June 2010].

Jacobs, C 2009. Demystifying the progressive realisation of socio-economic rights in South Africa. Paper presented at the Public Seminar on Monitoring ESC Rights, Australian National University, 19 October. Available at http://acthra.anu.edu.au/PESCR/Publications/ Cameron%20Jacobs_ESR%20presentation.doc [accessed: 9 March 2010].

Klaaren, J 2005. A second look at the South African Human Rights Commission, access to information, and the promotion of socioeconomic rights. 27(2) *Human Rights Quarterly:* 539.

Mashava, L 2000. Time to ratify the International Covenant on Economic, Social and Cultural Rights. 2(3) *ESR Review:* 18.

Pieterse, M 2004. Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience. 26(4) *Human Rights Quarterly:* 882.

Pillay, A 2002. The International Covenant on Economic, Social and Cultural Rights: Time to ratify. 3(1) *ESR Review:* 3.

Simmons, B 2009. Should states ratify? Process and consequences of the Optional Protocol to the ICESCR. 27(1) *Nordic Journal of Human Rights:* 64.

Reaffirming the social security rights of children in South Africa with particular reference to the child support grant

Gladys Mirugi-Mukundi

While South Africa has one of the most progressive constitutions in the world, the realisation of socio-economic rights remains a mirage for the majority of its population. Widespread poverty and unemployment present significant challenges to the capacity of families to care for their children. Historical inequalities in education, health care and basic infrastructure have contributed to poor service delivery to children and aggravated the vulnerability of children from poor families.

It is against this background that the need for an effective mechanism for the protection and care of children becomes apparent. Empirical research and data (Berry, 2003) illustrate that the implementation of basic social services for children is imperative to poverty alleviation in South Africa.

The United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) has recognised that social security plays an important role in poverty alleviation, preventing social exclusion and promoting social inclusion (CESCR General Comment 19, UN doc. E/C.12/GC/19, para 3). This is true in South Africa too. The former Minister of Finance, Trevor Manuel, acknowledged in his 2009 budget speech that the child support grant (CSG) had 'contributed significantly to reducing child poverty' in South Africa (Manuel, 2009).

This paper examines the role of social security in advancing children's rights in South Africa, focusing on the CSG. It advocates the enhanced implementation of this right to give meaning to other socio-economic rights of children.

South African legal standards

The right of access to social security and social assistance is crucial to the realisation of other human rights. According to section 27 of the South African Constitution, this right belongs to 'everyone', which includes children. In addition, section 28(1)(c) guarantees every child the right to social services. The term 'social services' refers to a group of services such as basic nutrition, shelter, basic health care, education, social security and social welfare services, and family care or alternative care.

The Social Assistance Act 13 of 2004 provides the legislative framework for the realisation of the right to social security. It lays down the eligibility criteria and access procedures for social grants for the elderly, children living in poverty, people with disabilities, children in need of foster care and people in social distress. As of 1 April 2006, the South African Social Security Agency (SASSA) has managed and administered social assistance grants (see South African Social Security Agency Act 9 of 2004).

At a policy level, the White Paper for Social Welfare of 1997 is the main policy document on social security. Its main areas of concern are 'poverty alleviation, social compensation and income distribution'.

In relation to jurisprudence, most cases related to social assistance have been dealt with at the lower court level. However, the Constitutional Court dealt with social security in the case of *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) [*Khosa*]. The Court noted in this case that

> [t]he right of access to social security, including social assistance, for those unable to support themselves and their dependants is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational (para 52).

Realisation of the right to social security for children

The Social Assistance Act provides for three types of social grants intended for the benefit of children: the CSG, the foster child grant (FCG) and the care dependency grant (CDG). For children from poor families, these grants are important to ensure their basic survival and their enjoyment of such other rights as the rights to education, to an adequate standard of living and to be protected from exploitative labour practices.

The CSG was introduced in 1998 with the sole purpose of helping children acquire basic sustenance. Since its inception, the CSG has been rolled out rapidly and now reaches more than eight million children. The cash value of the CSG is currently R250 a month.

Eligibility for the CSG

To qualify for the CSG, an applicant must be a primary caregiver of a child. A 'primary caregiver' includes a biological parent or relative, or a non-related person primarily responsible for the child. Initially, the CSG was available to South African citizens only. However, in the Khosa case, the Constitutional Court found it just and equitable to extend social grants to permanent residents. Again, in *Scalabrini Centre of Cape Town and Others v Minister of Social Development and Others* Case No 32056/2005, the

> Potential beneficiaries are sometimes prevented from accessing social grants by their own socio-economic circumstances

High Court held that refugees may also apply for disability grants and social relief of distress.

Secondly, the applicant and spouse must meet the means test, which determines whether the applicant is poor enough to qualify for the grant. The formula currently used to link the threshold to the grant amount ensures that the calculation of the income threshold keeps pace with inflation. Thirdly, a person receiving a CSG cannot qualify for another social grant. Fourthly, the child and the caregiver must be resident in South Africa and the child cannot be cared for in a state institution such as in a child and youth care centre.

Fifthly, the applicant must submit his or her own identity documents and a valid birth certificate for the child. The issue of documentation, particularly birth certificates, has been one of the most formidable challenges to accessing the CSG, especially in remote villages and towns where the nearest Department of Home Affairs office is miles away and mobile units do not operate. In *Alliance for Children's Entitlement to Social Security (ACESS) v Minister of Social Development* Case No 5251/2005, the High Court ordered the Department of Social Development to allow alternative forms of identification and to give a detailed statistical report on its progress in giving the CSG to children and caregivers without identity documents. Although the acceptance of alternative forms of identification is laudable, the government is wary of corruption and determined to guard against undeserving individuals accessing the CSG.

Lastly, as from January 2010, the child for whom the grant is sought must be under the age of 16 years. This age limit will be extended to 17 in 2011 and 18 in 2012. The qualifying age limit was the subject of a challenge in *Mahlangu v Minister of Social Development and Minister of Finance* Case No 25754/05, where the High Court was asked to order the government to extend the grant to all poor children under the age of 18 years. Judgment is still pending in this case. Meanwhile, the government went ahead with extending the grant on a progressive basis as set out above. (See 2009 amendments to Regulation 6: Social Assistance Act.)

General challenges to accessing social grants

In the last decade, the social security system and access to social assistance grants have faced many hurdles that have led to several committees being set up to address deficiencies: the Lund Committee on Child and Family Support, 1996; the Ministerial Committee on the Abuse, Neglect and Ill-treatment of Older Persons, 2001; and the Committee of Inquiry into a Comprehensive Social Security System (Department of Social Development, 2002). One of the key recommendations from these committees has been that access to social security and social assistance grants must be streamlined.

There continue to be several impediments to access to social assistance grants, including administrative problems, poor levels of service delivery, lack of knowledge about grants, the unilateral withdrawal of grants, and corruption and fraud, to mention but a few.

The administrative problems include a lack of documentation and poor conditions at grant pay points (Bonthuys, 2008: 340). Administrative inefficiencies prevent many eligible applicants from receiving assistance timeously. In many cases, the courts have held that delays in processing grants have been unreasonable. Examples include *Vumazonka and Others v MEC for Social Development and Welfare for Eastern Cape* 2005 (6) SA 229, in which the High Court found the delay in dealing with a disability grant application to be unreasonable. Also, in the case of *Kebogile Lobisa Ngamole v South African Social Security Agency* Case Nos 1033/08, 1025/08, 1024/08, 1038/08 and 1039/08, the High Court decried the conduct of the SASSA in respect of delays in processing applications for grants and noted that applications should have been timeously communicated to avoid unreasonable delays.

Corrupt and unhelpful officials add to the incessant delays in the process, discouraging grant applicants from pursuing their claims. According to the SASSA 2008-2009 annual report presented to the National Assembly's Portfolio Committee on Social Development, the agency brought 3 930 fraud cases to court in 2008–2009, of which 3 605 resulted in convictions. In 2009–2010, there were 2 110 cases producing 1 838 convictions.

Potential beneficiaries are sometimes prevented from accessing social grants by their own socio-economic circumstances. Some cannot even afford the cost of transport to government offices. Others do not know about the existence of grants, let alone the correct procedures for application. There is inadequate dissemination of information to communities about the social grants and the conditions of eligibility. Illiteracy, particularly in the rural areas, exacerbates the situation.

In order to address the challenges in the administration of social grants, the government is currently reviewing the payment system to reduce fraud and corruption (Gordhan, 2010).

Conclusion

The South African government is legally obliged to provide for social security and assistance to children. However, the realisation of this right through the CSG, as with other social grants, faces challenges in implementation, administration and logistics. Social assistance enables people living in poverty to meet basic subsistence needs, so it is imperative for the government to deal adequately with the challenges of effectively implementing social grants. Realising this right will not only ensure the realisation of

other socio-economic rights such as education, but also contribute to stemming the poverty cycle that affects children and people living in poverty in South Africa.

Gladys Mirugi-Mukundi is a former research consultant to the Socio-Economic Rights Project.

References

Berry, L 2003. *Rapid assessment: The situation of children in South Africa*. Children Institute, University of Cape Town.

Bonthuys, E 2008. Realizing South African children's basic socio-economic claims against parents and the state: What courts can achieve. 22 *International Journal of Law, Policy and the Family*: 333.

Department of Social Development 2002. *Transforming the present: Protecting the future.* Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa. Available at www.sarpn.org.za/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming_the_Present.pdf [accessed: 8 July 2010].

Gordhan, P 2010. Budget Speech 2010 by the Minister of Finance, Pravin Gordhan. 17 February. Available at www.info.gov.za/speeches/2010/10021715051004.htm [accessed: 8 July 2010].

Manuel, T 2009. Budget Speech 2009 by the Minister of Finance, Trevor A Manuel. 11 February. Available at www.info.gov.za/speeches/2009/09021114561001.htm [accessed: 8 July 2010].

South African Social Security Agency. Annual report 2008/2009: Presentation to the Portfolio Committee on Social Development. Available at www.pmg.org.za/files/docs/091103sassa.ppt [accessed: 8 July 2010].

Government's obligation to unlawful occupiers and private landowners

Lilian Chenwi

Blue Moonlight Properties 39 (Pty) Limited v Occupiers of Saratoga Avenue and Another Case No 2006/11442 (2010) ZAGPJHC 3 [Blue Moonlight case]

On 4 February 2010, the South Gauteng High Court ordered the City of Johannesburg (the City) to pay rent to a property owner whose building was occupied by squatters. The Court also found the City's housing policy to be unconstitutional to the extent that it discriminated against people occupying privately owned land. The Court's order will compel the City to reassess its housing programme in accordance with its constitutional obligations.

The facts

Blue Moonlight Properties, a private landowner, launched the application in 2006 after the occupiers failed to abide by two notices to vacate the premises so that the landowner could redevelop the property. The applicant relied on its rights as the registered owner of the property and also on a warning notice issued by the City of Johannesburg regarding the dangerous state of the building (para 21). It filed a motion requesting that the eviction be granted and that the City provide emergency housing to the occupiers or pay an amount equivalent to fair and reasonable monthly rental for the premises (paras 5 and 38).

At the time the application was launched, the occupiers were 62 adults and nine children, most of whom had lived at the property for over two years (para 13). Some had an average household income of R790 per month while others had no income at all (para 13). The occupiers argued that they were entitled to protection under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and that the City was thus under an obligation to provide them with alternative temporary accommodation from the date of their eviction until it was able to provide them with adequate and more permanent housing (paras 1 and 22–23).

The occupiers also relied on their constitutional rights to housing, dignity, equality and security of the person, and the rights of children to basic shelter and protection against degradation, as well as the Housing Act 107 of 1997 and Chapter 12 of the National Housing Code, the Emergency Housing Programme (EHP) (para 24). They further sought an order requiring the City to report on its ability to provide temporary adequate shelter to them, and also, progressively, to adequate housing (para 23). They also argued that the City's policy of not providing alternative

The Court reiterated the link between the right of the unlawful occupiers to have access to adequate housing and their entitlement to dignity.

accommodation to poor people who faced eviction from privately owned land was arbitrary and unfairly discriminatory (paras 3, 4 and 36).

The City was joined in the application in 2007 (paras 23 and 25). It argued that the occupiers were obliged to join the provincial government because, among other reasons, it was responsible for emergency housing under the EHP (paras 37 and 51). The City alleged that the provincial government had refused to allocate funds to the City under the EHP. It could therefore not be asked to provide emergency housing to the unlawful occupiers.

The issues

The key questions raised in the case were

- whether private landowners have the obligation to provide housing to unlawful occupiers indefinitely (para 6); and
- whether local government can join any other sphere of government when faced with the prospect of an order to provide accommodation or pay constitutional damages (para 8).

Other legal issues considered included the obligations of the City to unlawful occupiers of privately owned land and to landowners whose property had been occupied illegally (para 91). The Court was also asked to consider whether the City was obliged to provide at the very least emergency housing and possibly temporary housing (para 92).

The decision

The rights of private landowners

In line with the Constitutional Court's jurisprudence in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC) [Modderklip], the High Court emphasised the importance of the right to property and the right not to be deprived of property enshrined in section 25 of the Constitution (paras 93–94). It observed that section 26 of the Constitution, which protects the right of access to adequate housing, did not impose an obligation on the private sector to give up its property for the purpose of ensuring that everyone enjoyed this right. It also did not permit the state to relinquish its duty to provide access to adequate housing and leave it to the private sector (para 97). The obligation of the private sector, the Court added, was to provide the necessary revenues through taxation or other means in order to enable the government to meet its obligations under section 26 (para 96). Private landowners could not be compelled to provide housing without compensation (para 97).

The Court also noted that the government's obligation under section 26(2) to adopt reasonable measures did not envisage laws that would indefinitely require the private sector to be deprived of its rights to use and occupy its own land (para 98). Section 26(3), on the other hand, allowed for the eviction of people who were not entitled to occupy private land but were doing so (para 99). Indefinite deprivation of the rights of the landowner, the Court held, constituted a contravention of section 25 of the Constitution (para 194). Blue Moonlight Properties was thus entitled to an eviction order (para 191).

In granting the eviction order, the Court considered a number of factors, including the inability of the occupiers to afford rented accommodation or any basic accommodation without subsidisation, the degree of movement of the occupier, the purpose for which Blue Moonlight Properties had acquired the property (ie development) and the prospect of gaining possession of its property without an eviction (para 190).

The right of unlawful occupiers of private land

The Court reiterated the link between the right of the unlawful occupiers to have access to adequate housing and their entitlement to dignity. It held that the right to dignity was severely compromised where people did not have a basic roof over their heads (para 118). In line with the Constitutional Court's decision in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), the High Court held that those in desperate situations and faced with eviction, like everyone else, were entitled to have access to adequate housing on a progressive basis, and all spheres of government had to ensure that this happened. This did not imply a 'right to look to private landowners for indefinite continued accommodation at no cost' (para 127).

The City's obligation in relation to housing

The Court reminded the City of several Constitutional Court, Supreme Court of Appeal and lower court decisions stating that

> local government [is] directly responsible for implementing the constitutional and statutory obligations regarding the provision of adequate housing on a progressive basis and to take active steps to provide accommodation for the most desperate by reference not only to the socio-economic rights identified in the Constitution and in housing legislation, but also by reference to the entrenched rights to dignity under Section 10 of the Constitution (para 58; see also paras 59 and 61–67).

The Court noted that section 152(1)(b) and (d) of the Constitution further required local government to ensure the provision of services to communities in a sustainable manner and to promote safe and healthy conditions. Local government had a primary responsibility to give priority to the basic needs of the community. It also had positive obligations in relation to the right to have access to adequate

housing and under the Housing Act (para 62). The Court therefore disagreed with the City's contention that the provincial government should be joined on the basis that the City had no greater obligation than to seek financial assistance from the province and was confined to the role of a bystander (para 68). This was because local government had the primary responsibility to make provision for housing on a progressive basis having regard to its availability of resources (para 81). The Court did not therefore find it desirable to join the provincial government even if it had an interest in the outcome (para 82).

It is worth emphasising that the Court's finding on the joinder of the provincial government should not, however, be seen by the provincial government as an escape hatch in relation to its duty to ensure that it allocates the necessary resources to local government to enable local government meet its obligations to unlawful occupiers. Local government must in turn ensure that it not only brings to the attention of the province its housing needs, but also follows up to ensure that these are included in the budgeting and planning processes.

The City's obligation to unlawful occupiers of private land

The Court reiterated the general obligation of the City to ensure that desperately poor people were not rendered homeless (para 128). The City was required to take reasonable measures through a coherent housing programme towards the progressive realisation of the right to have access to adequate housing (para 129). This included facilitating access to temporary housing for people living in intolerable conditions with no roof over their heads (para 130).

The City had failed to justify its policy of not providing emergency housing to indigent occupiers of private land who were threatened with eviction (para 140). The Court thus attributed the lack of budgetary allocation for this group to their exclusion, which it found to be unjustifiable (para 141). It also found that the exclusion was in violation of the right of the occupiers to equal protection and benefit of the law under section 9(1) of the Constitution. The exclusion further limited their enjoyment of the right to have access to emergency or temporary housing under section 26 of the Constitution (para 144).

The Court then concluded that this amounted to unfair discrimination, which in turn rendered the City's policy and its implementation constitutionally flawed, irrational and unreasonable (paras 144–145). The City was therefore found to have breached its constitutional and statutory obligations towards the occupiers by precluding them from accessing emergency and temporary housing programmes for a period of at least four years (para 172). The Court stressed that the City was constitutionally obliged to include indigent people occupying private land and facing eviction in its housing programmes and budget (para 177), and should avoid disrupting the lives of the occupiers by relocating them (para 181). The Court then ordered the City to provide the occupiers with, at least, temporary accommodation in a location as near as possible to their present location (para 196). In its order, the High Court required the City to report back on the steps it had taken and would take in future and the time frames within which the steps would be taken (para 196).

The City's obligation to private landowners

The Court reiterated that it was unreasonable for a private entity to bear the burden that should be borne by the state of providing occupiers with accommodation (para 132). By unfairly discriminating against the unlawful occupiers, the City had also breached the right of Blue Moonlight Properties to be treated equally (paras 151 and 154) and deprived it of its entitlement to use and develop its property (paras 153 and 162). With regard to an appropriate remedy for this breach, the Court observed that it would be inappropriate to order expropriation in this case (para 159). As had been held in the Modderklip case, the High Court found that constitutional damages were appropriate in this case. Consequently, it ordered the City to pay Blue Moonlight Properties damages up to the date when the eviction order was effected and the occupants vacated the premises (para 171). The amount was to be determined by agreement between the occupiers and the City. Additionally, the City had to provide the occupiers with at least temporary accommodation or, alternatively, pay each occupier R850 a month for rent (para 196).

Conclusion

The judgment illustrates the relationship between subsections (1), (2) and (3) of section 26 of the Constitution. It further recognises not just the importance of housing rights, but also the importance of a landowner's right to the use of and benefit from its property. It reiterates the importance of taking both these interests into consideration in eviction cases. The decision also provides guidance and clarity on the obligations of organs of state, particularly local government, in private evictions. It emphasises that local government cannot deny its duties towards unlawful occupiers in private eviction applications. In addition, the judgment is part of an emerging trend of courts increasingly issuing supervisory orders requiring the government to report on the implementation of court orders.

Lilian Chenwi is the coordinator of, and senior researcher in, the Socio-Economic Rights Project.

The full judgment is available at http://www.saflii.org/za/cases/ZAGPJHC/2010/3.pdf.

Old age pension decision

Out of sync with legal developments

Lilian Chenwi and Siyambonga Heleba

Christian Roberts and Others v Minister of Social Development and Others Case No. 32838/05 (TPD) [*Christian Roberts* case]

On 17 March 2010, the North Gauteng High Court finally handed down judgment in the Christian Roberts *case, which the Court had heard on 11 and 12 September 2007. It concerns a constitutional challenge to section 10 of the Social Assistance Act 13 of 2004 and the relevant regulations, which set the age for accessing the old age grant at 60 for women and 65 for men.*

The facts of the case and the arguments of the applicants and respondents were stated and discussed in detail in an earlier issue of the *ESR Review* (Heleba, 2007). Basically, the applicants (who were four males above the age of 60 but below 65 at the time of the application) challenged the differentiation on the ground that it violated the equality clause and the right of access to social assistance, both guaranteed by the Constitution (sections 9(3) and 27(1)(c), respectively). The government argued that the differentiation was not unfair as it was aimed at addressing inequalities faced by women in general, and particularly African women during apartheid, such as race, class and social discrimination (para 17). The Community Law Centre, the Centre for Applied Legal Studies and the South African Human Rights Commission intervened jointly as friends of the court (*amici curiae*) in the case.

Following the hearing of the case, the government made a dramatic legislative change to progressively equalise the age at which men and women receive their old age pension. The Social Assistance Act was amended so that men aged above 60 years would access social grants at progressively lower ages from 2008 until 2010: namely, at 63 by April 2008 and 61 by April 2009, ultimately achieving equality with women, at 60, by April 2010. The government thus responded positively to the applicants' claims over two years ago.

The issues

The following questions were put to the Court:

- whether the discrimination referred to above was reasonable, fair and justifiable in a democratic system;
- whether to amend the discriminatory statute if it found the discrimination to be unfair; and
- whether the government could afford to extend social grants to men between the ages of 60 and 64.

The decision

In respect of the first question, the Court held that there was no doubt that the challenged provisions were discriminatory, as they favoured women and discriminated against men (para 26). In answering the question, the Court relied on the Constitutional Court's decision in *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) [*Jooste*], where the Court had outlined an approach to follow in dealing with claims alleging an infringement of section 9(1) and (2) of the Constitution. In the *Jooste* case, it was stated that the first question to ask was whether there was a rational relationship between the differentiation and a legitimate government purpose (para 28). If no such relationship could be established, then the differentiating scheme was in breach of the provisions mentioned. But if such relationship did exist, then the next question to ask was whether the differentiation (discrimination) was unfair. Finally, if the differentiating scheme was found to be unfair in terms of section 9(3), it had to be asked whether the impugned measure could be saved by section 36 of the Constitution (the limitation clause).

According to the Court, Africans had generally suffered under the apartheid regime. Women in particular had been further marginalised by social structures and stereotypes (para 29). Consequently, because women had suffered the most disadvantage, it was imperative that government preferred women over their male counterparts aged 60, in its efforts to rid society of the legacy of apartheid (para 30).

The Court sought further guidance from the Constitutional Court's decision in *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC), arguably the leading authority on equality. In that case, the Court outlined a three-pronged inquiry in answering a constitutional challenge based on section 9(1) and (2). The questions to ask were, firstly, whether the challenged measure targeted persons or categories of persons previously disadvantaged by apartheid; secondly, whether the measure was designed to protect and advance such disadvantaged persons or class of persons; and, thirdly, whether the challenged scheme promoted the achievement of equality. In the present case, the Court found the discrimination to be fair on the basis that it was necessary and reasonable to address and protect women since they had been the most disadvantaged and marginalised during apartheid (paras 35–37).

Regarding the second question put to the Court in the *Christian Roberts* case – namely, whether it should amend the discriminatory statute if it found it to be unfair – the Court simply held that courts should refrain from stepping

into the legislative jurisdiction to create or amend statutes, and must respect the separation of powers (para 39).

Regarding the third question, and in response to an argument by the applicants and *amici* that the government could afford the financial burden resulting from equalising the old age pension, the Court held that it was the prerogative of government to determine its financial resources and the deployment thereof (para 40). Furthermore, the Court accepted the government's contention that it could not afford the equalisation (para 40).

The Court then dismissed the application with costs against the applicants and the *amici* (para 41).

Some concerns with the decision

This is a troubling decision, because it seeks to uphold a dead legislative scheme. Moreover, the decision seeks to give effect to rights in the Constitution, yet ignores a legislative development that seeks to give effect to constitutional rights. The case was heard nearly three years ago. Since then, there has been a fundamental legislative development that effectively renders the key challenge moot. The government, after the hearing, decided to amend the contentious legislation so as to extend access to old age grants to the excluded class of persons on a progressive basis. This development essentially made the judge's task so much easier. It is very likely that the amended legislation was not subsequently put before the Court by any of the parties, which thus explains the Court's overlooking of it. However, a court should not ignore relevant legislation when giving effect to the Constitution. It is therefore unfortunate that the Court did not take it upon itself to consider the legislative development.

An important aspect of the decision, and perhaps the most negative one, is the Court's costs order against the applicants and the *amici* without hearing them on the issue and without the government seeking costs against the *amici* in its submissions. This was not entirely unexpected, given the court's rather strong language: 'The *amici curiae*, in essence, had ganged with the applicants against the respondents ... and they should be regarded as having failed in their quest, thus attracting costs against them' (para 41). The decision ignores constitutional jurisprudence from several cases providing that as a general rule in constitutional matters, costs should not be issued against private litigants who raise constitutional claims against the state, or against an *amicus curiae*, regardless of the side it joins. (See, among other cases, *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC) para 32; *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) at paras 22–25; *Mohunram and Another v National Director of Public Prosecutions and Another* 2007 (4) SA 222 (CC) at para 105; *Hoffman v South African Airways* 2001 (1) SA 1 (CC) at para 63.); The government should therefore as a general rule bear its own costs when resisting a constitutional challenge.

> The decision is a very negative contribution to the jurisprudence on socio-economic rights in South Africa.

Quite correctly, the *amici* and applicants have submitted applications for leave to appeal against the court's cost order.

Conclusion

Based on legislative developments after the hearing of the case that extended old age grants to the aggrieved class of persons progressively, the case has effectively been rendered inconsequential. The decision is a very negative contribution to the jurisprudence on socio-economic rights in South Africa and especially the jurisprudence on who bears costs in constitutional litigation. The Court appears to be raising a red flag to socio-economic rights adjudication in general, and public interest litigation in particular, by awarding a punitive costs order against the *amici*. The approach of the Court in relation to costs is unfortunate in a country where litigation is beyond the means of its poor majority and public interest litigation fills a crucial void and remains the poor's best hope of a better life.

Lilian Chenwi is the coordinator of, and senior researcher in, the Socio-Economic Rights Project. Siyambonga Heleba is a lecturer in the Law Faculty, University of Johannesburg.

The full judgment is available at http://www.community-lawcentre.org.za/court-interventions/ archive-of-court-interventions/OAP_HC_judgment.pdf.

Reference

Heleba, S 2007. Towards equalising the age for accessing pensions. 8(4) *ESR Review*: 14.

Developments at the United Nations

Draft guiding principles on human rights and extreme poverty

The United Nations (UN) Independent Expert on Human Rights and Extreme Poverty is currently developing draft guiding principles on human rights and extreme poverty (DGPs), aimed at providing guidance on the implementation of existing human rights norms and standards in the context of the fight against extreme poverty.

In October 2009, the HRC requested the Independent Expert to pursue further work on the DGPs and present a progress report to the HRC, with recommendations on how to improve them, in September 2010 (resolution 12/19, UN doc. A/HRC/RES/12/19(2009)). This would enable the HRC to take a decision on the way forward with a view to a possible adoption of guiding principles by 2012.

The resolution also required the Independent Expert to consult states further, including through relevant regional organisations, and other relevant stakeholders in the course of this process. Accordingly, one of the consultations was in May 2010, during which an expert meeting was held to discuss revised DGPs and their application and relevance for human rights and development practitioners. Following this meeting the Independent Expert would then further revise the DGPs and submit a report to the HRC.

The DGPs do not define new standards but state how existing standards can be effectively utilised in addressing the situation of people living in extreme poverty. They recognise that extreme poverty and exclusion from society are violations of human dignity. Vulnerable and marginalised groups, especially women, children, disabled persons, older persons, migrants and orphans, receive particular attention.

For further information on the development of, and progress in relation to, the DGPs, as well as other background documents in relation to the DGPs, see www2.ohchr.org/english/issues/poverty/expert/draft_guiding_principles.htm.

Social protection, gender and MDGs

The next report of the Independent Expert on Human Rights and Extreme Poverty to be to be presented to the UN General Assembly in October 2010 will focus on the relationship between the Millennium Development Goals (MDGs), gender and social protection. The Independent Expert plans to examine how the MDGs framework can best be applied to promote the strengthening of social protection; and how gender dimensions of poverty should be reflected in social protection schemes.

In the process of preparing the report, the Independent Expert has sent a questionnaire to states inviting detailed information on the different social protection schemes as they relate to the various MDGs. Civil society organisations and relevant stakeholders have also been invited to make submissions on the issues addressed in the questionnaire.

The questionnaire is available at www2.ohchr.org/english/issues/poverty/expert/docs/QuestionnaireMDG_en.pdf.

Information can be submitted electronically to ieextremepoverty@ohchr.org.

For further information on this thematic focus, see www2.ohchr.org/english/issues/poverty/expert/mdg.htm

Developments in the African region

Draft principles and guidelines on economic, social and cultural rights

The Working Group on Economic, Social and Cultural Rights of the African Commission on Human and Peoples' Rights is currently developing draft principles and guidelines (DPGs) on economic, social and cultural rights in the African Charter on Human and Peoples' Rights. The first draft principles and guidelines, which elaborate on the obligations of states and the content of specific socio-economic rights in the African Charter, were circulated for public comment in 2009. The working group is still developing the document based on comments received.

The working Group was established as per resolution 73(XXXVI)04 of 2004 in which the African Commission decided to establish a working group composed of members of the African Commission and non-governmental organisations with a mandate to, among other things, develop and propose to the African Commission a draft principles and guidelines on economic, social and cultural rights and elaborate a draft revised guidelines pertaining to economic, social and cultural rights, for state reporting (para 4). The Commission's decision was based on a number of considerations, including the fact that economic, social and cultural rights remain marginalized in their implementation. The Commission also considered the inadequate recognition by states parties of economic, social and cultural rights, which further marginalizes them and excludes the majority of Africans from the full enjoyment of human rights, several constraints that limit the full realisation of economic, social and cultural rights in Africa, and the ongoing and longstanding conflicts in the sub-regions of Africa, which impede the realisation of economic, social and cultural rights.

For further information on the working group and on progress in relation to the DPGs, visit www.achpr.org/english/_info/index_ECOSOC_Under_en.htm.

Roundtable discussion on meaningful engagement in the realisation of socio-economic rights

Genevieve Mannel

On 4 March 2010, the Socio-Economic Rights Project of the Community Law Centre (CLC), University of the Western Cape, and the Socio-Economic Rights Institute of South Africa (SERI) hosted a Roundtable Discussion on Meaningful Engagement in the Realisation of Socio-Economic Rights. Meaningful engagement is an innovative mechanism for realising socio-economic rights and is central to their enforcement. It is important to promote it, especially as it recognises the core importance of fostering public participation in policy development and implementation.

The roundtable discussion was attended by 43 participants from government (local and provincial) and civil society (communities, community organisations, social movements, legal practitioners and academics). The objectives of the roundtable discussion were

- to promote dialogue on meaningful engagement and how it can be made more effective, including identifying challenges to making meaningful engagement a reality;
- to present findings of the civil society workshop on meaningful engagement hosted by the Centre for Applied Legal Studies;
- to gain insight into current attitudes and practices regarding meaningful engagement;
- to consider what the key questions are for decision-makers and policy-makers;
- to discuss the need and feasibility of a housing indaba in 2010; and
- to introduce a booklet on meaningful engagement.

At the centre of the discussion were three recent constitutional court cases that dealt with meaningful engagement, namely: *Occupiers of 51 Olivia Road and 197 Main Street, Johannesburg v the City of Johannesburg and Others* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape, v Thubelisha Homes and Others* (2009) (9) BCLR 847 (CC); and *Abahlali baseMjondolo and Another v the Premier of KwaZulu-Natal and Others* (2009) ZACC 31.

It was acknowledged that meaningful engagement had to go beyond the legal framework, and that strong emphasis had to be placed on 'meaningfulness' to ensure that engagement was more effective. The discussion emphasised the importance of government and concerned communities finding a mechanism to continue meaningful engagement when there was a lack of cohesion within communities.

The meeting established that the government and civil servants were still grappling with the meaning and implications of the concept. Government representatives indicated that service delivery depended on a budget allocation and a specific time frame. They stressed that engagement happened throughout their project process. It was reiterated that project steering committees and integrated development planning (IDP) facilitated engagement with communities. The challenges government faced were that communities did not speak with one voice and there was no national policy or programme to guide and fund civil servants in engaging with communities. The absence of clear guidelines on the extent and length of the engagement process, how individual engagements should operate, the role of private developers in evictions, and the monitoring of the engagement process were highlighted as key challenges.

The importance of communities being consulted before policies or projects were finalised and implemented was emphasised. However, participants observed that communities were not always involved in the decision-making process, and it seemed government did not want to engage with communities in an open and transparent manner. Moreover, it was noted that power imbalances between government and the community made engagement difficult. It was further noted that budgetary issues were important, but not so much in relation to identifying roles during the engagement process.

It was suggested that there was a need for further discussion on understanding meaningful engagement and the role of the various spheres of government. In summary, the roundtable discussion highlighted the following issues, among others:

- the need to understand meaningful engagement (in a broader, not restrictive, sense);
- the need to develop clear strategy on meaningful engagement at all stages of project implementation;
- the importance of political will in the engagement process;
- the need for follow-up discussion within government at all levels and for intergovernmental relations to be strengthened;
- the need to examine implications in previous cases dealing with meaningful engagement and how to address them;
- the need for engagement processes to be conducted in a reasonable, transparent and flexible manner, and for these processes to be closely monitored;
- the importance of community cohesion to ensure that communities speak with a single voice;

- the need to establish outreach programmes to improve awareness of policy developments and service delivery projects among communities and facilitate their participation; and
- the need to address power imbalances in the engagement process.

Genevieve Mannel is a graduate lecturer assistant at the Faculty of Law, University of the Western Cape.

The full report of the roundtable discussion is available at www.communitylawcentre.org.za/clc-projects/socio-economic-rights/conference/files-for-2010-conferences-seminars-workshops/roundtablereport.pdf.

The booklet on meaningful engagement, entitled *Engaging meaningfully with government on socio-economic rights: A focus on the right to housing*, by Lilian Chenwi and Kate Tissington (Community Law Centre, 2010) is available in English and isiXhosa and can be downloaded from our website: www.communitylawcentre.org.za/clc-projects/socio-economic-rights/ser-publications.

New publication

Sandra Liebenberg, 2010. *Socio-economic rights adjudication under a transformative constitution*. **Juta**

This book provides an in-depth and thorough analysis of South African socio-economic rights jurisprudence. It explores how the judicial interpretation and enforcement of socio-economic rights can be made more responsive to the conditions of systemic poverty and inequality characterising South African society. The work marries legal analysis with perspectives from political philosophy and democratic theory. The author develops a nuanced conception of substantive reasonableness review in the context of socio-economic rights and further argues for a reconstruction of private law doctrines in the light of the normative purposes and values implicit in socio-economic rights.

See the next issue of the *ESR Review* for further information on the book and its contents.

To order copies of the publication, contact Juta Law Customer Services on 021 763 3500 or cserv@juta.co.za, or Hanlie Wroth, International Sales Manager, Juta & Company on 021 659 2584 (tel), 021 659 2662 (fax), 083 450 2789 (cell) or hwroth@juta.co.za.

To order online, visit www.jutalaw.co.za/catalogue/itemdisplay.jsp?item_id=11894.

Call for contributions to the ESR Review

The Socio-Economic Rights Project of the Community Law Centre (University of the Western Cape) welcomes contributions to be published in the ESR Review.

The ESR Review is a quarterly publication that aims to inform and educate politicians, policy makers, NGOs, the academic community and legal practitioners about key developments relating to socio-economic rights at the national and international levels. It also seeks to stimulate creative thinking on how to advance these rights as a tool for poverty alleviation in South Africa and abroad.

Contributions should focus on any theme relating to socio-economic rights, on specific rights or on socio-economic rights in general. In addition, we are currently seeking contributions on:

- The African Commission and socio-economic rights.
- Using international law to advance socio-economic rights at the domestic level.
- South Africa's reporting obligations at the UN or African level or both in relation to socio-economic rights.

Contributions should be sent in electronic format (MS Word) to serp@uwc.ac.za or lchenwi@uwc.ac.za.

Previous editions of the ESR Review and the complete guide for contributors can be accessed online: www.communitylawcentre.org.za/clc-projects/socio-economic-rights/esr-review-1