Vol 4 No 3 September 2003 • ISSN 1684-260X

ESR REVIEW
Economic and Social Rights in South Africa

A publication by the Community Law Centre (University of the Western Cape)

EDITORIAL

Sandy Liebenberg

This is the third edition of *ESR Review* for 2003.

The case reviews of the *Rudolph* and *Modderklip* cases (by Ashraf Mahomed and Annette Christmas respectively) highlight the implications of the landmark *Grootboom* judgment for situations where disadvantaged communities are facing eviction. A key issue in both cases is the failure of provincial and national governments to adopt a comprehensive policy framework for providing relief "for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations" (para 99, *Grootboom* judgment). Although provinces are currently required to set aside 0,5%-0.75% of their annual budget housing allocation for emergency projects, any such project must be undertaken in terms of existing housing programmes. These programmes have not been designed to specifically address the relevant circumstances envisaged in the *Grootboom* judgment.

However, as Annette Christmas highlights in her article on the *Modderklip* case, a promising development is the Housing Department's development of a draft policy, the *Programme for Housing Assistance in Situations of Exceptional Housing Urgency*. The adoption of this draft policy will go a long way towards meeting the state's obligations in terms of the *Groootboom* judgment. It will also provide a safety net in situations where communities are faced with evictions that will leave them in a crisis situation.

A global perspective on the growing phenomenon of forced evictions is provided by the press release of the Centre on Housing Rights and Evictions (COHRE) arising from their global survey on this issue.

The article by Coriaan de Villiers on the Cape High Court case, *Daniels v Campbell,* illustrates how the right to non-discrimination on the grounds of religion and culture can indirectly protect women's access to socio-economic rights. The court held that the provisions of the Intestate Succession Act and Maintenance of Surviving Spouses Act unfairly discriminate against women like Mrs Daniels, in *de facto* monogamous Muslim marriages, on grounds of religious belief and culture. Because Muslim marriages are not recognised under South African Law, "a woman such as Mrs Daniels is deprived of the protection afforded to most Christian and Jewish marriages and to all civil marriages for the purposes of the economic protection accorded by the law to surviving spouses". In this particular case, if the Constitutional Court confirms the judgment it will enable Mrs Daniels to regain ownership of the principal asset in the estate, her home.

Another area of focus of this edition is the issue of access to medical treatment and social grants in cases where children have been orphaned. In her article Liesl Gertholtz explores the legal barriers currently facing orphans in gaining access to HIV testing and treatment. The article by Annette Christmas and myself explores some of the conclusions that emerged from a workshop on the theme of access to social assistance by children living without adult care givers. This issue is critical in the light of the growing number of child-headed households in South Africa due to the AIDS epidemic.

The focus of the final article is on the South African Human Rights Commission's *Fourth Economic and Social Rights Report*.

We hope that this edition will be stimulating and assist in a range of strategies to improve access to socio-economic rights by disadvantaged groups in South Africa. The fourth edition of *ESR Review* will involve a special focus on privatisation of basic social services and socio-economic rights.

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ESR Review
ESR Review is produced by the Socio-Economic Rights Project of the Community Law Centre. The Centre receives supplementary funding from the Ford Foundation. The views expressed herein do not necessarily represent the official views of the Ford Foundation.

Production
Design and layout: Page Arts cc
Printing: Creda Communications, Cape

Grootboom and its impact on evictions

Neville Rudolph and Others v City of Cape Town

Ashraf Mahomed

The government's 'market centred' approach to housing poses many challenges for human rights, development and governance lawyers, academics, activists and officials.

In the case of *Government of the Republic of South Africa and Others v Grootboom and Others* (1) SA 46 (CC) (hereafter *Grootboom*), the Constitutional Court had to decide whether section 26 of the Constitution imposes a duty on the state to provide temporary housing or shelter to persons in desperate need. This precedent-setting housing case inevitably began to chart a new course for the judiciary in South Africa as it sought to give substantive meaning to the socio-economic rights in the Constitution. It allows for the evolution of constitutional thinking that impacts on the economic and social disparities between the rich and the poor. However, the extent to which individuals can rely on the judgment to obtain individual relief when faced with situations of homelessness is still an open question.

It could be argued that the Constitutional Court in fact interpreted the right of access to adequate housing to be imperfectly justiciable. This concept is sourced in the provisions of section 26(2) of the Constitution. It suggests that as long as the government can justify its response to this right in terms of a programme rationally conceived and implemented, the Court cannot 'question' the suitability of a programme. Of course, the declarator handed down by the Constitutional Court in *Grootboom* is now well known. But the critical question that remains is whether the poor and marginalised are entitled to more than a general reasonable housing programme. If they are, what precisely are they entitled to within the framework of the South African Constitution?

The *Rudolph* case

The above question arose pertinently in the case of *Neville Rudolph and Others v City of Cape Town* (CPD, Case No: 8970/01, unreported) in the context of eviction proceedings. Section 26(3) of the Constitution provides:

> No-one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

This constitutional provision gave rise to the enactment of the *Prevention of Illegal Eviction From and Unlawful Occupation of Land Act* (PIE) that regulates the rights enjoyed by land owners and occupiers (who do not have consent to reside on land) in an urban context.

The Cape Town Office of the Legal Resources Centre, with the assistance of it's Constitutional Litigation Unit represented 83 families of Valhalla Park, Cape Town, who were living in intolerable circumstances or were truly homeless (two of them had been living in motor cars).

The waiting list for state-funded housing in Cape Town is approximately 10

years, and is increasing. Consultants to the City of Cape Town identified a vacant piece of land in Valhalla Park as a possible site for 'infill' housing. This means that the municipality intended to accommodate the needs of people in the specific area. However, because of a lack of funds, the municipality would only be able to give it consideration in two years' time. The 83 families from Valhalla Park then occupied the open space in the face of opposition from the Council. They built homes there, in a well-organised manner.

The Council applied to the High Court for an order for the eviction of the occupants of the land and the demolition of their homes. It contended that the provisions of the PIE are not applicable to this situation and sought to invoke the common law remedies of the *mandament van spolie*. Alternatively, they argued that if the Act is applicable, the Council is entitled to urgent interim relief under section 5 of the Act. In the futher alternative, they argued that if the Council is not entitled to relief under section 5 of the Act, then a declarator should be made that the relevant provisions of the Act are unconstitutional.

Section 5 of PIE allows an owner or person in charge of land to institute urgent proceedings for the eviction of an unlawful occupier pending the outcome of proceedings for a final order. The court must consider a number of factors before granting such an order, including the likely hardship to the respective parties if such an order is granted or refused.

The counter-application

The residents opposed this application, and brought a counter-application for an order declaring that the Council's housing policy fails to comply with its constitutional obligations as set out by the Constitutional Court in the *Grootboom* case.

The basis of this counter-claim was that the municipality has still not made special provision for truly desperate or homeless people, despite the judgment handed down in October 2000. It continues to insist that they must simply wait their turn on the housing waiting list.

The counter-application raised major issues of significance that include questions relating to:

- the housing list and the efficacy thereof;
- integrated development planning processes;
- the rapid release of land;
- the state's obligations in respect of people living in intolerable conditions; and
- the state's positive obligation in respect of people who are homeless and landless.

The judgment

Argument was concluded during the week of 25 November 2002, and judgment handed down on 7 July 2003 by Justice Selwyn Selikowitz of the Cape High Court. The Order handed down dismissed the main application (for eviction) with costs and granted the counter-application with costs.

The Court declared that the housing programme of the City of Cape Town fails to comply with its constitutional and statutory obligations in that:

- it did not make short-term provision or any form of relief for people in Valhalla Park who are in a crisis or in a desperate situation;
- it fails to give adequate priority and resources to the needs of the people in Valhalla Park who have no access to a place where they may lawfully live;
- in the allocation of housing, it fails to have any or adequate regard to relevant factors other than the length of time an applicant for housing has been on the waiting list, and in particular does not have regard to the degree and extent of the need of the applicants; and
- it has not been implemented in such a manner that the right to access to housing of residents of Valhalla Park is progressively realised.

The Court declared that the housing programme of the City of Cape Town fails to comply with its constitutional and statutory obligations in several respects.

The Court ordered the City to comply with its obligations as declared in the above Order. It also went further and required the City to produce a report(s) within four months stating what steps it has taken to comply with its legal obligations as declared in the Order, what future steps it will take in that regard and when they will be taken.

After the parties have had an opportunity to comment on and reply to the report, the matter is to be set down for consideration and determination.

***The basis of the counter-claim was that the municipality has still not made special provision for truly desperate or homeless people, despite* Grootboom.**

Modderklip

Evictions and the right of access to adequate housing

Annette Christmas

The Rudolph case illustrates how the Grootboom jurisprudence can practically assist people who are homeless or living in intolerable conditions.

Poverty is a deeply entrenched feature of the South African landscape. One of the fundamental concerns of the South African government consequently centres on the need to provide housing and a secure place to live for the majority of its citizens.

Despite the early successes achieved by the government in ameliorating the housing backlog, the phenomenon of overcrowded informal settlements, homelessness and the occupation of private land is still prevalent. The recent spate of eviction cases highlighted in the media highlights the lack of security of tenure of many South Africans.

Grootboom

The landmark *Grootboom* judgment made an invaluable contribution to constitutional jurisprudence on socio-economic rights by defining not only what the ambit of the s 26 right of access to adequate housing is, but also the corresponding duties that it imposes on government.

The Court, in interpreting the terms "reasonable legislative and other measures", "progressive realisation" and "available resources" established the criteria against which government's efforts in fulfilling this right can be evaluated.

Government programmes that fail to make provision for the short-term housing needs of the "most vulnerable in society", or persons in "crisis situations" cannot be considered to be "reasonable".

Furthermore, the Court held that s 26 (1) imposes, at a minimum, a negative obligation "upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing". This negative right is further spelt out in subsection 3 which prohibits arbitrary evictions (para 34).

The City of Cape Town has given notice of its intention to appeal the decision.

Grootboom II?

The case of *Neville Rudolph* may become *'Grootboom II'*, in that it seeks to apply and develop the principles established in both the *Grootboom* case and the case of *Minister of Health v TAC* 2002 (5) SA 721 (CC) on the rights of access to adequate housing and health care services. These cases require government to have in place and implement a reasonable programme to give effect to socio-economic rights. The *Rudolph* case illustrates how this jurisprudence can practically assist people who are homeless or living in intolerable conditions.

Ashraf Mahomed, formerly of the Cape Town office of the LRC, was the attorney for the residents (the Legal Aid Board also represented some of the residents). Geoff Budlender of the Constitutional Litigation Unit and Peter Hathorn of the Cape Town Bar (formerly of the LRC) appeared on behalf of the LRC's clients.

While national housing programmes have yielded significant results (approximately 1.5 million houses delivered since 1994) they have not been able to maintain this momentum. The housing backlog, currently estimated at 2.3 million houses nationally, is expected to increase by approximately 200 000 households per year (Budget Speech by the Minister of Housing: 19 May 2003). Consequently the increase in the housing backlog, together with the new housing demands placed on the system, makes it increasingly difficult for government to meet its projected outputs. In 2001 it was estimated that that there were approximately 1 088 informal settlements in South Africa, accommodating 1.6 million households. An example of the tremendous burden that this places on provincial housing departments can be demonstrated by the average waiting period of 7.5 years for applicants who place their names on the housing waiting list in Gauteng.

Ashraf Mahomed is an Attorney and Western Cape Provincial Co-ordinator of the South African Human Rights Commission

Evictions

The formation of settlements on privately owned land is more often than not attributable to the scarcity of available land and housing. Sometimes such settlements constitute a 'spillover' from existing, overcrowded informal settlements and townships. Our courts have acknowledged that in the past, the eviction of those occupying land illegally often occurred in an arbitrary fashion that was incompatible with the underlying values of respect for human rights as enshrined in our Constitution. This resulted in the promulgation of legislation aimed at providing unlawful occupiers with some form of procedural and substantive protection in relation to eviction proceedings. The Extension of Security of Tenure Act 62 of 1997 (ESTA) together with the Interim Protection of Informal Land Rights Act 31 of 1996 are aimed at providing protection for unlawful occupiers who previously had some form of consent or right to occupy the land in question. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (better known as PIE) provides substantive and procedural protection for all unlawful occupiers who are not afforded protection in terms of the aforementioned Acts.

Slow implementation of *Grootboom*

The sad reality of the current housing situation in South Africa is that despite our justiciable Bill of Rights and the progressive *Grootboom* judgment, government has still not instituted a comprehensive programme to meet the short-term housing needs of people who find themselves in 'crisis situations'. A substantial proportion of households in South Africa today do not have access to land, nor do they have roofs over their heads, and they live in intolerable conditions as described by the Court in *Grootboom* (para 44). Almost three years after the *Grootboom* judgment, the South African Human Rights Commission (SAHRC) has reported that none of the national housing programmes make specific provision for the homeless or provide relief for those who find themselves in 'crisis situations'. The Commission concludes that while government has taken steps towards the realisation of the right of access to adequate housing, its programmes cannot be said to be reasonable or comprehensive as they neglect significant members of our society. (See the SAHRC's *Fourth Economic and Social Rights Report 2000/2002*, p 62.)

A promising draft policy, the *Programme for Housing Assistance in Situations of Exceptional Housing Urgency*, was considered by the Housing MINMEC in August 2003.

When adopted, this programme will form part of the National Housing Code. Its timely adoption would go a long way to meeting the obligations imposed on the state by the *Grootboom* judgment.

The failure to adopt such a nationwide programme to date, however, is clearly exacerbating the situation where people living in intolerable conditions seemingly have no other alternative but to occupy private land.

Our courts are thus placed in the uncomfortable position of having to balance landowners' constitutional rights to property (s 25) against unlawful occupiers' rights against arbitrary eviction (s 26 (3)) as well as their rights of access to adequate housing (s 26 (1)).

Two recent related cases that have highlighted this tension revolve around the development of an informal settlement on privately owned land in the East Rand. The first case, *Modderklip Boerdery (Pty) Ltd v Modder East Squatters and Another* 2001 (4) SA 385 (W) resulted in an eviction order against the community in terms of PIE. The second case, *Modderklip Boerdery (Edms) Bpk v President van die RSA en Andere* 2003 (6) BCLR 638 (T) arose as a result of the landowner's quest for state assistance to execute the eviction order.

Almost three years after the Grootboom judgment, the South African Human Rights Commission has reported that none of the national housing programmes make specific provision for the homeless or provide relief for those who find themselves in 'crisis situations'.

The eviction judgment

This case arose from the occupation by a group of people of a portion of the farm Modder East in the East Rand, which falls within the jurisdiction of the Ekurhuleni Municipality jurisdiction. The occupation started in May 2000, as a result of overcrowding and a subsequent shortage of land and shelter in Daveyton and the Chris Hani informal settlement adjacent to the farm.

By the time the landowner, Modderklip Boerdery (Pty) Ltd, applied to the court for an eviction order against this community in terms of s 4(6) of PIE, the number of occupiers had increased to approximately 36 000.

Section 4(6) of PIE stipulates that:

> If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings were initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disa-

Should an eviction order be upheld if the unlawful occupiers will be left homeless as a result of the execution thereof?

bled persons and households headed by women.

Marais, J held that, in determining what 'just and equitable' considerations would entail, stated that while PIE imposes "a limitation on the common law right of the owner to eject unlawful occupants from his or her land, it does not take that right away. The use of the term 'just and equitable' relates not only to what is just and equitable to the unlawful occupants but also the owner" (at 390-G).

He further stated that in balancing the competing constitutional rights of the landowner and that of the right of access to adequate housing of the unlawful occupiers, s 26(1) of the Constitution is not enforceable against private landowners (at 394-395 C-D). He stated that PIE does not make s 26(1) enforceable against the owner but merely seeks to regulate the rights of the owner to eject the unlawful occupier. The Court further held that the applicant, in placing relevant considerations before it, could not be expected to raise and deal with circumstances that did not reasonably fall within the realm of his knowledge.

Consequently, if the unlawful occupiers wished to raise equitable considerations to support why they should not be evicted, it was incumbent on them to do so. Equitable considerations could include factors like their gender, age, occupation (or lack thereof), state of health, or whether alternate accommodation was available to them.

In considering the factors raised by the respondents in their affidavits, the Court was of the opinion that there were obvious gaps in the information that was placed before it. In respect of their contention that an eviction order would leave them homeless, the Court stated that they had failed to show that all of them would indeed be homeless.

In addition to this, they had not shown whether any concerted effort had been made to persuade the second respondent or any other organ of government to provide land upon which they could settle (at 394).

The Court therefore held that it was entitled to accept that the parties had placed before it what they considered to be relevant circumstances, and then proceeded to deal with the matter on that basis (at 392 G-H). The court subsequently granted the eviction order and stipulated that the respondents vacate the property within two months, failing which the Sheriff was duly authorised to evict them.

Enforcement of the eviction order

The enforcement of the eviction order proved to be problematic as the occupiers failed to vacate the property within the allocated period. In attempting to execute the eviction order, the landowner was informed by the Sheriff that a deposit of R1.8 million (which later increased to R2.2 million) had to be paid, as the execution necessitated the assistance of private contractors.

The applicant was not prepared to pay this deposit. He then entered into lengthy correspondence with the various respondents including the President, the Minister of Safety and Security, the Minister of Agriculture and Land Affairs, the Minister of Housing and the Ekurhuleni Metropolitan Municipality in an attempt to gain state assistance in his efforts to evict the community, but to no avail.

The applicant then took the step of applying to the Court for an order against the relevant organs of state obliging them to protect his property rights by assisting him in executing the eviction order handed down by Marais, J. The state argued that it was not obliged to assist in the execution of the eviction order as the execution of judgments was regulated in terms of civil proceedings (at 658-G). It also contended that the applicant had the duty of administering his assets at his own expense. Agri-SA, which was admitted as *amicus curiae* in this case, argued that the government had the necessary infrastructure to find a feasible solution that would not only result in the enforcement of the order of the Court, but would also allow for the alternate accommodation of the unlawful occupiers (at 656-C).

In response to the argument that it had a duty to provide alternative accommodation for the unlawful occupiers, the state argued that the issue of finding alternative accommodation for the community was not relevant in this matter (at 658-I).

The state also expressed its opposition to land invasions as they had the effect of undermining official land reform and housing programmes.

It argued, furthermore, that prioritising the settlement of this community at the "expense of the existing and well-publicised priorities of the Local Authority" would send the message that unlawful occupations are compensated with the expedited allocation of land and housing (at 660-F).

The judgment

In his judgment, de Villiers, J upheld the applicant's contention that its constitutionally protected right to property (s 25(1)) had been violated. The Court also held that the government had an obligation in terms of ss 26(1) and (2) read together with s 25(5) of the Constitution to give effect to the rights of the unlawful occupiers to land and housing in terms

of the *Grootboom* judgment.

The Court ordered the state to produce a comprehensive plan within three months that would provide for:

1. ending the unlawful occupation of the applicant's land within a reasonable timeframe, by means of expropriation of the land in question or by alternate means;
2. fulfilling the duty of protecting the independence of the courts by giving effect to its orders in terms of s 165(4) of the Constitution;
3. prioritising a programme which would give effect to the community's right of access to land and housing;
4. providing alternative accommodation for those unlawful occupiers who do not qualify for housing subsidies; and
5. monitoring the implementation of this comprehensive plan.

The appeal

The state has been given leave to appeal the judgment of de Villiers, J to the Supreme Court of Appeal (SCA). The state disagrees with the contention of the Court that the Constitution requires the Executive to become actively involved in the execution of an eviction order in civil proceedings.

Furthermore, the state argues that the Court erred in ordering the government to provide alternative accommodation for the unlawful occupiers as the applicant had failed, in both its founding papers and heads of arguments, to pray for this specific relief. In the absence of evidence that the existing housing policies and programmes are inadequate, the state argues that in this case the issue of alternative accommodation for the unlawful occupiers does not arise.

The community has also been given leave to argue their petition to the SCA for leave to appeal against the original eviction judgment. At the time of writing, it is uncertain whether the community will succeed in obtaining leave to appeal, and if they are successful, whether the two appeals will subsequently be consolidated.

Proposed *amicus* intervention

The issues raised on appeal in this case may have far-reaching implications for how similar eviction cases are dealt with by the courts in future. The Nkuzi Development Association, together with the Community Law Centre (UWC) and the Programme for Land and Agrarian Studies will be applying for leave to intervene as *amici curiae* in this matter. The main concern of the proposed intervention relates to whether an eviction order should be upheld if the unlawful occupiers will be left homeless as a result of the execution thereof.

If admitted, the *amici* will seek to argue that it would be anomalous if the courts placed a duty on the state to assist landowners in executing eviction orders without also ordering it to comply with its *Grootboom* obligations in relation to the persons to be evicted. The reality that these occupiers currently face is that there are no programmes that serve the short-term housing needs of people in crisis situations living within the Ekurhuleni Municipality's jurisdiction. The execution of the eviction order would leave this community homeless, and in a crisis situation.

The speedy adoption of the *Programme for Housing Assistance in Situations of Exceptional Housing Urgency* could go a long way to alleviating the plight of not only the Modder East community, but all vulnerable communities who find themselves in urgent need of land and housing. It is hoped this policy will also fulfill the promise of the landmark *Grootboom* judgment.

Annette Christmas is a research assistant with the Socio-Economic Rights Project, Community Law Centre, UWC

Seven million left homeless as forced evictions double in two years

Press release, 19 June 2003

Centre on Housing Rights and Evictions
Geneva, Switzerland

The worldwide rate of forced evictions has practically doubled in the last two years, leaving nearly seven million people ejected – often violently – from their homes, according to new research by the Centre on Housing Rights and Evictions (COHRE) in Geneva, Switzerland.

This alarming trend has emerged despite a strengthening of international law provisions condemning forced evictions as violations of human rights. The vast majority of forced evictions, many of which are a direct result of government-led development projects, violate human rights laws which most of the world's governments have formally agreed to respect.

COHRE Executive Director, Scott Leckie said: "Although we now have a situation where international institutions such as the UN, the World Bank, and even some large corporations are much more wary about supporting projects which may involve forcibly evicting people, it seems governments simply haven't got the message yet. They cannot be allowed to sign up to international law which forbids forced evictions on the one hand, while flagrantly violating it on the other."

COHRE's Global Survey of international forced evictions in 60 countries found that 6.7 million people were

Our research exposes this silent epidemic of forced evictions which is taking place day and night across the world.

evicted from their homes between 2000-2002. This compares to 4.2 million during the years 1998-2000. Moreover, it found that 6.3 million people across the world are currently under threat of forced eviction compared to 3.6 million people in the period 1998-2000. COHRE's Global Survey is aimed at increasing awareness of the often-unknown scale of this practice.

"Our research exposes this silent epidemic of forced evictions which is taking place day and night across the world. Millions of people, who of course tend to be poor, are being thrown into deeper misery, without any recourse to justice, rehousing or compensation. At this rate, nearly 20 000 people will face eviction every day in coming months. Forced evictions are illegal and must stop", Leckie added.

This latest issue of COHRE's Global Survey includes a special section on forced evictions in countries hosting mega-events such as the Olympic Games or International Conferences. This section examines cities from Athens to Beijing where thousands of people are being forced from their homes as urban centres are beautified and new sporting facilities and conference halls built.

International law concerning forced evictions

The United Nations has repeatedly declared forced evictions a violation of human rights.

Forced evictions are also outlawed in the International Covenant on Economic, Social and Cultural Rights and other international treaties. Forced evictions, which can be the result of development schemes, war or polices of ethnic discrimination, violate a number of human rights, including the right to adequate housing, property rights, the right to respect of the home, the right to security of the person, and the right to the enjoyment of possessions.

Global Survey No. 9 – Forced Evictions, Violations of Human Rights **can be downloaded from www.cohre.org**

For hard copies contact the COHRE International Secretariat in Geneva, Switzerland at + 41 22 734 1028

COHRE is now running a Global Forced Eviction Project aimed at preventing and documenting forced evictions wherever they occur.

For more information on this project write to evictions@cohre.org

Daniels v Campbell N.O. and Others

The long battle of a woman married according to Muslim personal rites to acquire ownership of her home

Coriaan de Villiers

On 24 June 2003, the High Court of South Africa (Cape of Good Hope Provincial Division) handed down a judgment with far-reaching consequences for the protection of spouses married according to Muslim rites in a *de facto* monogamous union.

The relief granted in the case paved the way for the applicant, Mrs Daniels, who was married according to Muslim rites and whose husband is deceased, to inherit the principal asset in his estate, being a house in Hanover Park, Cape Town.

Intersecting grounds of discrimination

This case has its roots in the discriminatory housing policies of the apartheid era and is the story of Mrs Daniels' struggle to own the home in which she has been living for some 28 years. It poignantly illustrates the interplay between discrimination on the grounds of sex and gender and discrimination on the grounds of religious belief, and how such discrimination impacts on women's rights to housing. It is also an illustration of the critical need for all lawyers, when building a case, to consider whether any of the

client's fundamental human rights have been infringed.

Mrs Daniels approached the High Court for relief on two separate occasions, and was represented by different attorneys. In both cases, Mrs Daniels was ultimately seeking to acquire ownership of the house where she has lived since 1976. The causes of action in the two applications were entirely different. In the end, a cause of action unrelated to the house itself has secured the client her home.

Set out below is the factual background, followed by the court's findings, to capture the intersection of gender and religious discrimination and to highlight the manner in which excellent public interest lawyering can make a difference to women such as Mrs Daniels.

During the course of her first marriage Mrs Daniels submitted a written application to the City of Cape Town to rent a Council dwelling. By the time the Council dwelling was allocated, Mrs Daniels was divorced from her first husband, and the house was accordingly allocated to her in her own name. At that stage the house was 'hers'. She first occupied the property during October 1976 and has done so continuously since then.

Discriminatory housing policy

In March 1977, Mrs Daniels married a Mr Daniels, who is now deceased, by Muslim rites. However, due to the discriminatory housing policies in force at the time, Mrs Daniels was required to transfer the Council dwelling to her husband's name. The reason for the transfer of the tenancy is stated on the application form filled in by Mrs Daniels and her husband at the time as "transfer of tenancy – new husband".

Even though Muslim marriages were not then (and are still not) recognised as valid under South African law, it was nevertheless recognised by the City of Cape Town as a 'marriage' for the purposes of effecting a transfer of the tenancy of the Council dwelling from the applicant's name into the name of her husband. A married female could only be the tenant if she was the breadwinner of her family and had dependents residing with her. No such restrictions were imposed upon letting Council dwellings to married men. At that stage, therefore, Mrs Daniels lost the title to her home simply because she got married. The assumption that a married woman would cease being a breadwinner and stay at home to look after any children once she got married clearly underpins the discriminatory policy. In a sense sex and gender discrimination 'trumped' the then-prevailing religious discrimination against Muslim marriages.

Mr Daniels subsequently purchased the house in terms of the National Sales Campaign. Because Mrs Daniels was not the tenant, she was precluded from purchasing the house in terms of this scheme. It is noted in the judgment that Mrs Daniels appears to have contributed to household expenses, including the rental and later the price of the property and the service charges levied on it.

When Mr Daniels passed away, the house was accordingly an asset in his estate. He died without a will. The estate fell to be distributed in terms of the Intestate Succession Act, No. 81 of 1987 and not the Muslim Law of Succession because the latter is not recognised under South African law.

Although the legislation makes provision for spouses to be included in the scheme of distribution, Muslim marriages are also not recognised as valid marriages under South African law and, accordingly, the estate fell to be distributed in terms of that Act to the deceased's children.

These children were not born of the union with Mrs Daniels. After his death, Mr Daniels' children threatened Mrs Daniels' continued occupancy of the house.

This case illustrates the interplay between discrimination on the grounds of sex and gender and discrimination on the grounds of religious belief, and how such discrimination impacts on women's rights to housing.

The inequities are such that if the children were born of a Muslim union, they would inherit under the Intestate Succession Act but Mrs Daniels, a spouse under a Muslim union, would not.

Turning to the courts

In 1998 Mrs Daniels commenced the legal struggle to reclaim her home. In the first application brought on behalf of Mrs. Daniels, an order was sought declaring that she was entitled to the property. In the court papers, Mrs Daniels averred that the deceased had indicated that if he died before her the immovable property would be exclusively hers and that "die ontroerende eiendom nie syne is nie omdat hy my en die kinders daarin kom kry het".

Mr Daniels himself appears to have recognised the injustice of the housing policy which secured him tenure and ultimately ownership of the property even though Mrs Daniels had prior tenancy rights in the property which she lost simply because she married him.

Unfortunately, oral agreements to transfer property are not valid in our law in terms of the Alienation of Land Act, No. 68 of 1981 and the application was therefore dismissed. It appears from the judgment that references were made to possible constitutional causes of action from the Bar

The constitutional cause of action was a claim of unfair discrimination on the basis of religious and cultural beliefs as opposed to a claim based on housing rights or sex/gender discrimination.

in support of an application for a postponement, which was ultimately not granted. It is a pity that proper regard was not given to the application of the Constitution from the outset.

Fortunately Mrs Daniels was able to turn to the Women's Legal Centre, an NGO focusing on public interest in gender litigation, for assistance. Although Mrs Daniels was ultimately seeking to remain in her home, and although the cause of her dispossession of tenancy rights to the home was discrimination on the basis of sex/gender, the constitutional cause of action which secured this end result for the Applicant is a claim of unfair discrimination on the basis of religious and cultural beliefs (as opposed to a claim based on housing rights or sex/gender discrimination).

Mrs Daniels claimed that the protection afforded to spouses under the Intestate Succession Act and Maintenance of Surviving Spouses Act should extend to spouses in monogamous unions married according to Muslim rites. The first claim was that, for the purposes of the two pieces of legislation, Mrs Daniels was a spouse at the time of Mr Daniels death and is an heir to his estate. It was argued that the line of cases refusing to recognise Muslim marriages because they are potentially polygamous is incompatible with the values of contemporary South Africa. The second claim, in the alternative, was that the omission of the following definition from the legislation is unconstitutional and invalid: "*spouse* shall include a husband or wife married in terms of Muslim rites in a *de facto* monogamous union".

Excluding Muslim women from economic protection

The Court was alive to the anomalous consequences of the state having recognised Mrs Daniels' Muslim marriage for the purpose of transferring the tenancy of the property to her husband, but now failing to recognise her Muslim marriage for purpose of affording her the protection given to spouses in terms of both the Intestate Succession Act and the Maintenance of Surviving Spouses Act, No. 27 of 1990.

The Court held that the statutory provisions in these two pieces of legislation do unfairly discriminate against persons in the position of Mrs Daniels on grounds of religious belief and culture.

Because Muslim marriages are not recognised under South African Law, a woman such as the Applicant is deprived of the protection afforded to most Christian and Jewish marriages and to all civil marriages for the purposes of the economic protection accorded by the law to surviving spouses.

The counter-argument

Counsel representing the estate of the deceased advanced a counter-argument, also based on an infringement of religious rights.

They argued that the constitutional relief sought by the Applicant would have the effect of negating the system of inheritance law practiced by those who adhere to Islamic personal law in South Africa.

However, as the Court held, the Islamic Law of Succession is not yet recognised by South African law and any 'rights' thereunder are not enforceable in a South African court. The question was therefore not whether the estate on intestacy should devolve according to common law or Islamic law, nor did it concern 'weighing' the equality clause in the Constitution against the constitutional imperatives of recognising cultural and religious pluralism.

By not recognising the Applicant as a spouse, the estate of the deceased would be distributed in a manner that was both inconsistent with Muslim Personal Law and that would unfairly discriminate against the Applicant by ignoring the reality of her *de facto* monogamous marriage to her late husband.

The Court held that the omission of the words "shall include a husband or wife married in accordance with Muslim rites in a *de facto* monogamous union" in the relevant provisions of the Intestate Succession Act and Maintenance of Surviving Spouses Act was unconstitutional. The Court ordered that the words should be 'read in' to the legislation.

The matter has been referred to the Constitutional Court for a confirmation hearing following the finding of unconstitutionality. It is hoped that the ultimate outcome will be that Mrs Daniels acquires ownership of her home, which is the principal asset in Mr Daniels' estate.

In this manner her constitutional right to equality will be upheld and her socio-economic right to housing protected, albeit indirectly.

For more about the work of the Women's Legal Centre visit their website at http://www.wlce.co.za

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HIV testing and treatment, informed consent and AIDS orphans

Liesl Gerntholtz

In a research report commissioned by the Henry J Kaiser Foundation, *How households cope with the impact of the HIV/AIDS epidemic*, researchers concluded that children "are the worst affected". They are affected by the epidemic in many ways – they are orphaned by it, they live with HIV/AIDS, they experience stigma and discrimination (whether or not they have HIV/AIDS), they live in households that are poorer than those that are not affected and they are more vulnerable to abuse and exploitation. The epidemic is eroding many of the gains made for children in South Africa since 1994 and is undermining their rights to, among other things, equality, education, social security, nutrition and, particularly, health care.

A vulnerable and marginalised group

Children who have been orphaned or abandoned by HIV/AIDS form a particularly vulnerable and marginalised sub-group. South Africa faces the problem of a growing number of children who have been orphaned by the epidemic. Research conducted by the Ministry of Health in 1998 suggested that by 2000, there would be between 197 000 and 250 000 AIDS orphans in KwaZulu-Natal alone. The Actuarial Society of South Africa suggests that there will be two million orphans living in South Africa by 2010. Although there is no research on the impact of HIV/AIDS on the number of children that are being abandoned, anecdotal evidence suggests that the numbers of abandoned children, particularly newborn babies, has increased significantly. In an article published in *The Star* on 28 May 2003, it was reported that 200 babies were abandoned in 2001 in Gauteng, rising to 268 in 2002. Other provinces have reported similar increases.

Service providers and care givers report that the child protection system is critically under-resourced and is failing to cope with large numbers of orphaned and abandoned children. Many children, after the death of a parent or after being abandoned, do not find themselves in formal care settings. Instead they live in informal kinship care arrangements, in unregistered children's homes, on the streets and as members of child-headed households.

Shifting concepts of minors' capacity

The law still makes the somewhat artificial distinction between an infant, a child below the age of seven years and a minor – a child between the ages of seven years and majority. In general, the law regards infant children as legally incapable of concluding any juristic act. For minor children, a limited capacity to act is acknowledged, but the law requires that a parent or legal guardian, in almost all instances, assists the minor. The law vests the right to assist children in their parents, and in their absence, the law assumes that provision will be made for the appointment of a guardian to the child. Once a child attains the age of 21, she assumes majority and has full legal capacity to act on her own behalf. The common law traditionally concentrated on the rights of parents, giving them a wide discretion to make decisions about and on behalf of their children.

The focus of the law has, however, changed during the latter part of the twentieth century, shifting away from protecting the rights of parents to a consideration of the best interests of the child and to allowing the child to participate in decisions about her life, where she has the maturity to do so. This shift, particularly noticeable in international jurisprudence, has influenced South African law. Section 28 of the Constitution states that the child's best interests are "paramount in every decision concerning the child". The eroding of parental power can be seen in a number of examples in our statutes:

- the Choice on Termination of Pregnancy Act 92 of 1996 permits a minor child to seek and undergo a termination of her pregnancy without the knowledge or consent of her parents or guardian;
- women above the age of 16 may lawfully have sexual intercourse;
- children above the age of 18 may consent to surgery in terms of the Child Care Act 74 of 1983.

Despite this, the requirement of parental consent or consent from a legal guardian before a child can enter into agreements, purchase property and make many other decisions relevant to her life and well-being is still an established part of the law and is viewed as an important mechanism to protect vulnerable children against abuse and exploitation.

A serious barrier

In terms of the Child Care Act, children below the age of 14 may not receive medical treatment without the consent of a parent or legal guardian. This requirement, instead of protecting children, has begun to pose a serious barrier to the constitutional

The epidemic is eroding many of the gains made for children in South Africa since 1994 and is undermining their rights to, among other things, equality, education, social security, nutrition and, particularly, health care.

rights of orphaned and abandoned children to access health care.

Section 39 of the Child Care Act states that a child above the age of 14 is permitted to consent to medical treatment without obtaining the consent of her parents. This provision has been interpreted to include HIV testing. For children below the age of 14 parental consent is required, or the Minister of Social Development may be approached to give his permission.

In urgent cases, the medical superintendent of the hospital where the child is being treated may substitute his consent for that of the parent or guardian. Urgent treatment is defined relatively narrowly as treatment that is necessary to preserve the life of the child or save her from serious and lasting physical injury or disability. The need for the treatment must be so urgent that it cannot be deferred until permission can be obtained from a person able to provide legal consent. It seems unlikely that the provision of anti-retroviral therapy would fall within the definition. In the case of HIV testing after rape or sexual assault, a case for urgency could be made out where there is a need to act within the 72-hour period required to provide post-exposure prophylaxis.

Ex parte Nigel Redman N.O.

A recent case, *Ex parte Nigel Redman N.O.* (unreported, case no. 03/14083, WLD), brought by the AIDS Law Project, starkly illustrates the manner in which the requirement of informed consent is acting, not as a mechanism to protect vulnerable children, but rather as a barrier to their access to treatment. The Harriet Shezi Paediatric HIV Clinic is a public sector clinic at the Chris Hani Baragwanath Hospital that provides medical care to children with HIV/AIDS in Soweto. The clinic obtained funds to treat ten children with anti-retroviral therapy and identified ten children from among the patients who attend the clinic. The clinic, mindful of the need to begin to build capacity in the public sector to use anti-retroviral therapy, elected to provide treatment to the children in the context of a research study that would assess the operational challenges of providing treatment to children with HIV and their families. Accordingly, permission to conduct the research was sought from the University of the Witwatersrand's Ethics Committee. The Committee gave permission for the study to proceed, provided that informed consent was obtained from the legal guardians of all child participants.

The children that were to receive treatment were identified in accordance with the international and national clinical guidelines of the World Health Organisation and the HIV Clinicians Society of Southern Africa. Three of the children were maternal orphans and one had lost both parents to HIV/AIDS. All lived in informal care settings. None had been legally placed in the custody of their care givers. It was therefore impossible to obtain informed consent, as currently defined, on behalf of the children.

In consultation with the paediatricians at the clinic, it was agreed that it was both unethical and a further violation of the rights of the children to exclude them from participation in the study, and ultimately from access to potentially life-saving medication, solely on the basis that there was no-one legally able to provide informed consent on their behalf. An attempt was made to obtain permission from the Minister of Social Development. The Gauteng Department of Social Development seemed to be unaware of the provisions of the Child Care Act. An urgent application was then brought before the High Court (Witwatersrand Local Division), requesting the court to appoint a *curator-ad-litem* on behalf of the children, or alternatively to grant permission for the children to receive anti-retroviral treatment. On 10 June 2003, Judge Nigel Willis granted an order authorising the treating doctor to immediately commence anti-retroviral treatment.

It is important to note that although the case dealt specifically with the requirement of informed consent to participate in therapeutic research, the same consent would be required for a child to receive medical treatment and to undergo an HIV test.

Despite the success of the application, the legal circumstances of the children remains unchanged, and there is still no person able to provide consent on their behalf should it again become necessary. Since the conclusion of the case, the clinic has obtained funds to treat an additional four children. One child is a maternal orphan and lives in similar circumstances to those described above. A second urgent application was brought to ensure that this child was able to access anti-retroviral therapy. Acting Judge Fevrier granted the order for treatment to commence on 19 August 2003.

Although both applications have been successful in facilitating access to treatment, the costs of applications such as these are prohibitive and it is clearly impractical and inconvenient to bring applications to the High Court every time a child without a legal guardian or parent requires access to HIV testing or treatment.

Re-examing informed consent in the context of AIDS

These cases illustrate the urgent need to re-examine the requirement of informed consent and who may provide it, in the context of a catastrophic AIDS epidemic and a growing orphan population. At the time of writing, the government had announced that it planned to introduce anti-retrovirals in the public sector. This move, however welcome, may not benefit the large numbers of already orphaned and abandoned children who require treatment, care and support. It is likely that, unless the definition of who may consent on behalf of children below the age of 14 is widened, there will be many more cases like the *Redman* case. It is even more likely that there will be many children who do not have access to legal representation and who will simply fall through the cracks created by this law.

Innovations in the Children's Bill

The May 2003 working draft of the Children's Bill will remedy some of these problems. The Bill recognises that the context within which many South African children live has been dramatically altered by the epidemic. It contains several helpful provisions.

A key innovation is the recognition that children live with care givers who are not their parents and who may not have been legally appointed to care for them. Section 1 contains definitions of both care givers and primary care givers. Care givers are defined as "any person other than the biological or adoptive parent who factually cares for a child, whether or not that person has parental responsibilities or rights in respect of the child".

This definition includes a kinship care giver (defined in the bill as a family member of the child who has court-ordered kinship care of a child), a family member who cares for a child in terms of an informal (non-legal) kinship care arrangement, a staff member at a child and youth care center where a child has been placed, a person who cares for the child while the child is in temporary safe care, a primary care giver who is not the biological or adoptive parent of the child, and the child at the head of a child-headed household to the extent that that child has assumed the role of primary care giver.

A primary care giver is defined as:

(a) a person who has the parental responsibility or right in caring for the child and who exercises that responsibility and right:
(b) a person who cares for a child with the implied or express consent of a person referred to in paragraph (a);
(c) a foster parent;
(d) a person who cares for a child whilst the child is in temporary safe care.

The definition specifically excludes any person who receives remuneration for caring for a child. The first part of the definition seems to suggest that a primary care giver is a parent or someone who cares for a child with the permission of the parent.

Section 146 of the Bill lowers the age of consent for medical treatment to 12 if the child is of sufficient maturity to understand "the benefits, risks, social and other implications of the treatment or operation".

In cases of children below the age of 12 or where older children do not possess sufficient maturity, the parent or primary care giver must give permission for the provision of medical treatment or an operation to the child, subject however to the provisions of section 44.

Section 44 deals with the care of children by persons who do not have parental responsibilities and rights over the child. It places an obligation on such care givers to "safeguard the child's health, well-being and development" and permits them to consent to any medical treatment or examination of the child if consent cannot be obtained from the child's parent or primary care giver.

It is clearly impractical and inconvenient to bring applications to the High Court every time a child without a legal guardian or parent requires access to HIV testing or treatment.

This section, if included in the final version of the legislation, recognises the need to ensure that children who require medical treatment should not be prevented from doing so because there is no-one able to provide legal consent.

The Bill also deals specifically with HIV testing of children and states that consent for an HIV test may be given by a child above the age of 12, a child below the age of 12 if the child is sufficiently mature to understand the benefits, risks and social implications of the test, the child's parents or care givers if the child is below the age of 12 and cannot understand the benefit, risks and social implications of the test, a designated child protection agency that is arranging the placement of the child and the superintendent of a hospital in certain defined circumstances.

The Children's Court can also give permission if the consent is being unreasonably withheld or if the child, parent or care giver are incapable of giving consent.

HIV testing may only be conducted if it is in the best interests of the child or if it is necessary to establish whether

a health worker may have contracted HIV during the course of a medical procedure involving contact with any substance from the child's body that may transmit HIV. Any other person who believes that they may have contracted HIV as a result of contact with any substance from the child's body that may transmit HIV, may apply to court for permission to have the child tested for HIV.

The Bill has not yet been tabled, but the Department of Social Development, has indicated that it enjoys a high level of priority. There is, however, no indication when it will become law and recent reports indicate that it has yet to be costed. In the interim, many of the most vulnerable children in South Africa will not be able to access medical treatment or HIV testing unless the permission of the Minister of Social Development or the High Court is first obtained.

In light of the announcement made by Cabinet on 11 August 2003, concerning its intention to provide antiretroviral therapy in the public sector as soon as possible, this will have calamitous and even fatal consequences for many children. There is therefore a need to ensure that the provisions of the Child Care Act pertaining to consent and common law are urgently amended in the interim period to ensure that all children, whatever their circumstances, are catered for.

It is suggested that the definitions of care giver and primary care giver be incorporated in the existing Act, along with the powers of section 44 of the Bill. Alternatively the Department of Social Development must streamline the process for obtaining consent from the Minister of Social Development so that it can be used in obtaining consent in the types of cases described above.

Adv. Liesl Gerntholtz is head of the Legal Unit at the AIDS Law Project, Centre for Applied Legal Studies (Wits)

Workshop on children without adult caregivers and access to social assistance

Annette Christmas and Sandy Liebenberg

It has become increasingly clear that the way that the social assistance grants programme is currently administered effectively excludes many children living without adult care givers, particularly children living in child-headed households. The Alliance for Children's Entitlement to Social Security (ACESS), and the Children's Institute in collaboration with Black Sash, the Gender Advocacy Programme and the Community Law Centre (UWC) hosted a workshop on 20-21 August 2003 aimed at finding feasible solutions to allow this particularly vulnerable group of children to access social grants, particularly the child support grant. The presenters and participants in this workshop represented a broad spectrum of non-governmental organisations, research-based and academic institutions as well as representatives from government, the Human Rights Commission and the South African Law Reform Commission, with expertise and experience in the area of children rights and socio-economic rights.

Follow the child

In terms of the Social Assistance Act 59 of 1992, the child support grant is paid to the primary care giver of a child. The child support grant is aimed at ensuring that children living in poverty receive the basic necessities of life. The Act defines the "primary care giver" as "a person, whether or not related to the child, who takes primary responsibility for meeting the daily care needs of the child".

This is based on the underlying philosophy in the Lund Committee's Report, which recommended the introduction of the child support grant, that the grant should "follow the child" and not depend on formal definitions of the family and legally recognised duties of support.

Although this Act and the regulations promulgated thereunder do not specify a particular age for the primary care giver, in practice the Department of Social Development only accepts applications from primary care givers of 16 years and older.

This is based on the eligibility requirement in the regulations that the primary care giver must produce an identity document. It is evident that this practice excludes many children younger than 16 years who have themselves assumed the role of primary care giver both in respect of themselves and either their own biological children or younger siblings. Government intends to introduce an amended Social Assistance Bill in Parliament which will expressly state that the primary care giver must be 16 years or older.

The consensus of the workshop was that the social reality of child-headed households must be acknowledged. The South African Law Reform Commission has already taken this step in its discussion paper and report on the *Review of the Child Care Act*, and this has been taken up in recent drafts of the Children's Bill. Further, the constitutional rights of equality and access to social assistance for people living in poverty make it imperative that legislative changes are made to ensure that children living in child-headed households can receive the benefit of the child support grant.

Direct access and mentorship

Most workshop participants agreed that where children in fact perform the functions of a primary care giver, they should be able to access the child support grant on behalf of both themselves and the children in their care. In cases where the children concerned were too young or immature to perform the functions of a primary care giver, or where for any other reason it is not in the best interests of the children concerned that they access the child support grant directly, the grant should be paid to a 'household mentor' as proposed by the South African Law Reform Commission. The mentor would also be able to provide the household with emotional support in addition to ensuring that their material needs are met.

It was agreed that a combined strategy of advocacy in relation to both the Children's Bill and amendments to the Social Assistance Act, as well as possible test case litigation, should be embarked upon to ensure that this particularly vulnerable group of children are not deprived of a crucial state benefit.

For more information about this workshop and follow-up activities, contact Solange Rosa at the Children's Institute (UCT) at solange@rmh.uct.ac.za

Sandy Liebenberg of the Socio-Economic Rights Project, Community Law Centre, and Beth Goldblatt of the Gender Research Project, Centre for Applied Legal Studies, presented a paper at the workshop entitled "The state's constitutional obligations to provide social assistance to child-headed households".

The SAHRC releases its Fourth Annual Economic and Social Rights Report

Sandy Liebenberg

In April 2003, the South African Human Rights Commission (SAHRC) released its Fourth Annual Economic and Social Rights Report (hereafter the Report) based on its mandate in terms of section 184(3) of the Constitution. The Report covers two financial years: 2000-01 and 2001-02. As in previous years, it is compiled on the basis of responses from relevant organs of state to a comprehensive questionnaire ('protocol') sent out by the Commission.

The protocols are designed to provide the Commission with information on policy, legislative, budgetary and other measures adopted by the organ of state during the reporting cycle toward realising socio-economic rights. They have been developed to also include questions relating to vulnerable groups, the problems encountered by state departments in giving effect to socio-economic rights and the measures undertaken to address such problems, indicators of progress and budgetary measures. The principles established by the Constitutional Court for the interpretation of socio-economic rights in the landmark *Grootboom* decision informed the design of the protocols.

The Report is a summary of key measures instituted by relevant organs of state, and identifies some of the shortcomings of these measures.

A key feature is the section in each chapter containing a summary of recommendations and conclusions reached by the Commission on these measures.

The release of this Report attracted substantial press interest, more so than in previous years. This is undoubtedly because the Commission has tried to identify key barriers to poor people's access to socio-economic rights: policy and legislative gaps, the implementation of government programmes (e.g. complex regulations and administrative procedures), a lack of capacity in the public service, and budgetary allocations and spending.

The Report's key recommendations are outlined on the following page.

Challenges

The Commission's recommendations are far reaching and seek to ensure that human rights principles are infused in the process of socio-economic development. The Report has been tabled in Parliament and sections of it have been referred to relevant Portfolio Committees. It is hoped that members of Parliament will use the Report as a valuable source of information and guidance in exercising their oversight function.

A challenge for the Commission is to enhance knowledge and participation by a wide range of civil society organisations in the monitoring process. Further, the Commission should be involved in following up its recommendations through tracking legislative and policy developments, gathering information concerning the implementation of programmes, making submissions to relevant organs of state, and where appropriate, supporting litigation around socio-economic rights.

Key critiques and recommendations to organs of state by the SAHRC	
Housing	**There is a need to adopt adequate mechanisms to address underspending, and the lack of comprehensive measures to address significant numbers of people living in peril as contemplated in the *Grootboom* judgment.**
Land	**The slow place of land reform needs to be addressed through building capacity to speed up delivery, and the allocation of more funds toward land reform.**
Health	**The lack of universal access to anti-retroviral drugs by people living with AIDS was identified as a major deficiency in government's health programme.**
Food	**A comprehensive review of food-related programmes and projects is required to ascertain whether these programmes afford everyone the right to sufficient food, and the Food Security draft Bill must be enacted into law.**
Social security	**The state should enable children in child-headed households and refugee children to access social security. The state should introduce a basic income grant "or any other measure, which will enable the poorest of the who are excluded from social security and social assistance to escape poverty and have some form of income" (p 229).**
Education	**The closure of 795 Adult Learning Centres in Limpopo in 2000 "constituted a serious violation of the right to adult basic education" (p 286).**
Environment	**A fragmented approach to environmental legislation and policies impacts negatively on the realisation of the right. Most of the three tiers of government are still not committing themselves to sufficient civic capacity building, awareness and education.**
Water	**The information provided indicates that free basic water has not been provided to everyone, especially the poor. The state must ensure both the physical and economic accessibility of water to everyone, especially the vulnerable and marginalised.**
Public finance	**The national parliament has the power to amend the budget, and should use this power more to "at least advocate the channeling of more financial resources into economic and social rights-related programmes" (p 521). The need for the budget system to be based on a costed norms approach, which would entail determining the cost of constitutionally mandated basic services, was also highlighted.**
The SAHRC's *Fourth Annual Economic and Social Rights Report* can be accessed on-line at www.sahrc.org.za/esr_report_2002_2002.htm	

This and previous issues of the *ESR Review* are available online.

Please visit our website at:
http://www.communitylawcentre.org.za/ser/esr_review.php