ESR REVIEW
Economic and Social Rights in South Africa
vol 5 no 3 July 2004

Editorial

Sibonile Khoza

We have the pleasure of welcoming you to the third issue of the *ESR Review* for 2004.

In this issue we feature a range of interesting articles as well as case reviews of two important cases relating to socio-economic rights.

The feature article by Ida-Eline Engh addresses the critical issue of capacity development and its role in realising socio-economic rights. Using the experience of South Africa with HIV/Aids, she argues that formal commitment to international and national human rights obligations is insufficient to guarantee their realisation. The State must have the capacity and will to implement them.

South Africa has an interesting piece of legislation, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE), aimed at protecting the rights of vulnerable occupiers of land. The wide interpretation given to this legislation by the Supreme Court of Appeal in the *Ndlovu/Bekker* judgment has attracted spirited criticism from the business sector. In response to this, the State has proposed amendments to the Act to limit its application.

Annette Christmas examines the merits of the proposed amendments, arguing that they provide more protection to commercial interests than to certain vulnerable occupiers.

The Constitutional Court recently held in the *Khosa/Mahlaule* case that permanent residents (who are not citizens of South Africa) could also qualify for social assistance. This case has attracted a lot of attention and controversy given the financial implications it has for the government.

Julia Sloth-Neilson examines the merits and demerits of this decision and its implications for the protection of socio-economic rights in South Africa.

The second case reviewed in this edition is the *Modderklip* case. This is another controversial case, involving the often-conflicting property rights of landowners and the socio-economic rights of occupiers in the context of evictions. Annette Christmas provides an overview of

continued on page 2

CONTENTS

ESR REVIEW
Economic and Social Rights in South Africa

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

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ESR Review
ESR Review is produced by the Socio-Economic Rights Project of the Community Law Centre. The Project, through the Centre, receives supplementary funding from the Ford Foundation. It also receives funding from the Norwegian Agency for Development Co-operation (NORAD) through the Norwegian Centre for Human Rights (NCHR). The views expressed herein do not necessarily represent the official views of NORAD/NCHR or the Ford Foundation.

Production
Design and layout: Page Arts cc
Printing: Logo Print

from page 1

the judgment and argues that it will go a long way in compelling the State to fulfil its constitutional duties in relation to vulnerable occupiers while at the same time respecting the property rights of landowners.

Donor funding has always been regarded as a gesture of philanthropy with the result that the human rights implications it entails are suppressed. In the international development section, Sherry Ayres provides an insight into the proceedings and outcomes of the Gaborone conference on principles for assessing the safety of generic HIV/Aids drugs.

She demonstrates how the United States failed to mobilise support against generic drugs for HIV/Aids treatment and how the much-publicised US donor funding for HIV/Aids treatment might lead to denials of socio-economic rights.

We also provide an update on recent international events, namely the 35th Session of the African Commission on Human and People's Rights and the Oslo Conference on the politics of socio-economic rights ten years after apartheid.

We would like to thank all our guest contributors to this issue. We trust that our readers will find it stimulating and useful in advancing socio-economic rights.

Developing capacity to realise socio-economic rights

The example of HIV/Aids and the right to food in South Africa

Ida-Eline Engh

Over the last 20 years, capacity building or capacity development has become the dominant strategy in national policies and international technical co-operation.

The term 'capacity development' is increasingly being preferred to 'capacity building' as it embraces the fact that the challenge is not to build, but to further strengthen and develop the existing capacity.

There are many definitions of capacity development. However, their main focus is generally on the ability of individuals, groups, institutions and organisations to identify and solve problems over time. In human rights terms, the aim is to develop the capacity of rights-holders to claim their rights and the capacity of duty-bearers to meet their obligations. This requires the satisfaction of at least two conditions:

1. the achievement of a desirable outcome; and
2. the establishment of an adequate

process to achieve and sustain that outcome.

The connection between, and the politics of, HIV/Aids and the right to food in South Africa presents a useful illustration for unpacking the concept of capacity development in the realisation of socio-economic rights.

Capacity development in socio-economic rights realisation

It is important to focus on capacity development in the realisation of socio-economic rights for several reasons. Most importantly, we need to understand what capacity means, or should mean, in order to design appropriate policies for the realisation of these rights. In other words, we need to know which capacities exist in order to know what has to be developed.

The concepts of 'available resources' and 'progressive realisation' are important to capacity development and monitoring. Since the question of 'available resources' is hard to grasp, one needs to distinguish between lack of will and inability or capacity to realise the rights. This distinction can be made through an understanding of the concept of capacity in specific contexts and in relation to specific rights.

Progressive realisation focuses on process, which is in line with capacity development. While the desirable outcome for socio-economic rights is sustainable and full realisation, progressive realisation points to the importance of adopting a good process towards achieving that goal.

We need to understand what capacity means, or should mean, in order to design appropriate policies for realising socio-economic rights.

Monitoring the extent of the realisation of socio-economic rights has improved considerably during the past ten years. However, less progress has been made in monitoring the quality of the processes designed to fulfil the rights. This is largely because a 'good process' has very seldom been defined.

A framework for capacity development

In an attempt to define capacity the United Nations Children's Fund (Unicef) has suggested a capacity framework for realising human rights consisting of five components. These are discussed below with a particular focus on the realisation of the right to food in the context of HIV/Aids in South Africa.

The implications of HIV/Aids for food security are well documented for many African countries, including South Africa. According to the United Nations Food and Agriculture Organisation (FAO) estimates, South Africa had lost 4% of its agricultural labour force to Aids by 2000. By 2020, this loss may rise to 20%.

Aids impacts on food security as it reduces the labour force and causes changes in time and resource allocations, as well as in the division of labour within a household and community. Transfer of knowledge from one generation to the other is often interrupted when fathers or mothers die, which makes an impact on the next generation's ability to cultivate the land and prepare food.

In addition, food insecurity increases people's vulnerability to the transmission of HIV and may also enhance the development of Aids. Good nutrition is extremely important to HIV-positive people because it helps to slow down the progression from HIV to Aids. Also, Aids changes the nutritional requirements of infected persons, and at the same time seriously impairs their ability to access food.

Obligations, mandate and authority

The first aspect of capacity points to the State's formal and informal obligations, as well as any national and international conditions that have an impact on the State's actual authority. For example, the State's authority to act in a certain way might be limited or empowered by obligations arising from international treaties and domestic law.

At the informal level, State authority can be limited by donor conditions and terms arising from international trade agreements. It is therefore impossible to understand State capacity without considering international factors such as those relating to trade, food and drug prices and donor aid.

South Africa measures positively on the first test of capacity to realise socio-economic rights. It has one of the most progressive constitutions in the world. Although it has not ratified the International Covenant on Economic, Social and Cultural Rights (the Covenant), it has incorporated many of the socio-economic rights the Covenant lists into its Constitution. There are also specific references to international law in the Bill of Rights and various institutions have been established to monitor and strengthen the implementation of these rights.

Section 27(1)(b) of the Constitution states that "everyone has the right to have access to sufficient food". Furthermore, section 28(1)(c) states that "every child has the right to basic nutrition". In light of the implications of HIV/Aids for the realisation of the right to food, these sections may become increasingly important.

Leadership and commitment to obligations

Even where a state has formerly committed itself to socio-economic rights, it may lack the leadership and will to take action towards their realisation. It may not acknowledge or internalise its legal duties. For example, it may not comply with the reporting procedures to international and national monitoring bodies, let alone acknowledge publicly its socio-economic rights obligations or translate them into effective policies.

It is common knowledge that the South African government has long been resistant to calls for free anti-retroviral drugs for people infected with HIV/Aids.

President Mbeki's questioning of the linkage between HIV and Aids resulted in international criticism and public confusion. Although this questioning does not contain any specific reference to socio-economic rights, it is of relevance to the debate about poverty, food insecurity and HIV/Aids. There are many interpretations of Mbeki's statement. Some claim that while flirting with the possibility of denying that HIV causes Aids, the government could in turn accuse its critics of being in denial about HIV/Aids. Furthermore, claiming that HIV does not lead to Aids would mean there would be no need to lower drug prices.

It is indeed important to draw attention to socio-economic factors when dealing with vulnerability to HIV infection and the consequences of Aids. However, distinguishing medical and biological factors from socio-cultural and economic factors is crucial to avoid confusion. Many argue that it is inappropriate and even damaging for the President of one of the most Aids-affected countries in the world to question the generally established medical linkage between HIV and Aids. Posing that question should be left to medical researchers. This and other statements regarding this issue caused confusion and frustration among both activists and government officials. The statements are therefore commonly interpreted as a reflection of his lack of commitment to obligations and lack of willingness to deal with Aids.

When dealing with vulnerability to HIV infection, distinguishing medical and biological factors from socio-economic factors is crucial to avoid confusion.

Recently, however, as a result of pressures from various interest groups, in particular civil society organisations, the Department of Health has drawn up a national treatment plan. Following its adoption, the Minister of Finance announced that the government would spend more than R12 billion over the next three years on HIV/Aids. About R2 billion of this amount has been earmarked for the rollout of anti-retroviral drugs.

Ability to access capital

This component of state capacity refers to the availability and accessibility of various types of capital, such as human, financial and physical capital. It points to whether the necessary capital is available to and accessible by the State to enable it to carry out its duties. Lack of capital, especially financial capital, is a common argument used by states to explain their poor realisation of socio-economic rights.

A case study recently published by the FAO states that South Africa is food secure at the national level. Indicators reveal that South Africa has been meeting the food needs of its growing population from domestic sources during the last 20 years. The country produces its main staple foods, exports its surplus food and imports what it needs to meet its food requirements.

With a gross national per capita income of about US$3 200, it is the richest country in Africa. According to some, South Africa has the financial resource potential to provide a universally accessible 'package' of HIV prevention, care and support services.

Despite this potential, South Africa fares poorly on most social indicators: the maternal mortality rate is 340 per thousand live births and the infant mortality rate is 58 per thousand live births. The maternal mortality rate is considerably higher than in countries with comparable levels of income, such as Malaysia, Argentina and Mexico.

Furthermore, there are huge disparities between the rich and the poor and South Africa struggles with one of the highest HIV/Aids rates on

the continent. The epidemic kills an estimated 600 South Africans each day. Approximately 20-25% of pre-school children and 20% of primary school children are chronically malnourished. The FAO report claims that the government is investing progressively more resources to deal with the treatment and care aspects of HIV/Aids.

In addition to considering available funds and resource allocations, one also needs to assess the State's capacity to access and manage the funds efficiently. As an example, there have been instances of under-spending in some South African provinces. The government recognises that expansion cannot exceed the carrying power of the health system infrastructure. The strategy must also include a strengthening of health facilities and support services since there is "little point in overwhelming limited infrastructure with funding it cannot absorb and use productively".

Assessing the availability and accessibility of financial, human and physical capital is a challenging task, not least since HIV/Aids and the right to food policies cut across a number of sectors and departments.

The protocols have been criticsed for being too time-consuming for organs of state.

Decision-making ability

Decision-making and action-taking must be based on a thorough analysis of causes and consequences. In this process monitoring systems play an important role. The State must also seek information and input from research institutes and civil society to obtain a better understanding of the implications of HIV/Aids on people's ability to feed themselves at the local level.

The South African Human Rights Commission (SAHRC) plays a role in decision making as a constitutional body mandated to monitor the progressive realisation of human rights in South Africa. SAHRC collaborated with academics to develop a set of questionnaires, referred to as protocols, which include questions on measures taken by organs of state towards the realisation of socio-economic rights of socially and economically vulnerable groups. Persons living with HIV/Aids are included as a vulnerable group together with, for example, children and persons living in rural areas.

These protocols are potentially useful tools in the decision-making process. They provide information on the role of various governmental actors in the implementation process and may increase duty-bearers' capacity to make decisions based on an accurate assessment and in-depth understanding of HIV/Aids and the right to food.

However, they have been criticised for being too complicated and time-consuming for organs of state. The respective departments do not provide sufficient information, partly due to lack of economic and human resources.

Communication ability

Communication ability refers to the State's ability to communicate between government departments and between local and national government, as well as with rights-holders.

The South African National Health Council (SANAC) was launched in January 2000 after repeated calls for a multi-sectoral national Aids commission. SANAC consisted of representatives from government, business, the medical sector and civil society. However, more than 600 local Aids organisations had only one representative and SANAC excluded high-profile organisations such as the Treatment Action Campaign. There were no scientists, medical practitioners or representatives of the Medical Research Council. The Department of Health ran the day-to-day affairs of SANAC and became responsible for approving all South African applications to the Global Fund to Fight Aids, Tuberculosis and Malaria.

SANAC was a disappointment for those who had hoped for a strategic think-tank and a strong body that could take control of the national Aids programme. Its meetings were few and sporadic, which made it hard for the NGO representative to coordinate inputs from civil society and outputs from the meetings.

In November 2003 SANAC was reconstructed and reconstituted. Representation from civil society was strengthened and more sectors were included. The representatives were also chosen by the sectors themselves and no longer appointed by the government. Furthermore, SANAC was moved from the Department of Health to the Deputy President's office, acknowledging that it could not be both an implementer and referee of its own actions.

In order to realise the right to adequate food and nutrition in the context of HIV/Aids, communication

between various sectors, such as health, nutrition, food and agriculture, is crucial. SANAC is only one example of a cross-sectoral institution working on HIV/Aids in South Africa. It is an example that provides several indicators of a lack of ability to communicate within government and between government and civil society. However, the development and reconstruction of SANAC may suggest an improved ability to communicate and progress in the process towards the realisation of socio-economic rights affected by HIV/Aids.

Conclusion

The five capacity components discussed above are interlinked and interdependent. For example, leadership and commitment to obligations has an impact on all other aspects of capacity, such as communication and decision-making. However, the capacity framework has the potential to organise ideas into manageable categories. It may also help to identify entry points and critical processes in socio-economic rights realisation.

To grasp the meaning of each aspect of capacity, the development of indicators and benchmarks is important. A small number of qualitative indicators have been suggested here and many more are required to achieve a comprehensive understanding of state capacity to realise socio-economic rights.

Furthermore, capacity must be contextualised in relation to specific socio-economic and political conditions and in relation to specific rights. This may help to move away from the traditional cross-national comparisons towards monitoring progress and regression in one country. One may argue that all the above-mentioned aspects of capacity must exist in some form for a state to carry out its duties relating to socio-economic rights. However, the form they take and their relative importance may vary enormously from one country to another.

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Proposed amendments to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act

A setback for vulnerable occupiers

Annette Christmas

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), in addition to other land reform statutes, was promulgated to address the unfair eviction practices of the past. It provides vulnerable occupiers facing the prospect of eviction with both procedural and substantive protection in the course of eviction proceedings.

However, since its inception PIE has been viewed with disfavour by landowners who argue that it unduly interferes with their common law right to evict unlawful occupiers from their land summarily. Their contention is that the procedural and substantive requirements of PIE are 'cumbersome'. These requirements, they argue, in the context of increasing land invasions and the spread of informal settlements in South Africa, make it extremely difficult, if not impossible, for landowners to evict unlawful occupiers from their land.

The scope and application of PIE has consistently presented difficulties of interpretation for our courts, particularly with regard to who may benefit from its application. However, the recent Supreme Court of Appeal (SCA) judgment in *Ndlovu v Ngcobo; Bekker and Another v Jika*

2003 (1) SA 113 (SCA) (*Ndlovu/Bekker*) held that the provisions of PIE extended beyond unlawful occupiers (traditionally labelled as 'squatters') to include defaulting tenants and mortgagees who are in unlawful occupation of property. The effect of this judgment is that eviction procedures for a defaulting tenant or mortgagee are not only governed by the terms and conditions of the lease or mortgage agreement, but are also subject to the provisions of PIE.

In an attempt to address the concerns of landlords, banks and property developers the Minister of Housing published the Draft Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill 2003 (the Draft Bill) on 27 August 2003. The Draft Bill aims, among other things, to limit the application of PIE by narrowing the definition of 'unlawful occupier' to exclude defaulting tenants and mortgagees. This will have wide implications for those persons who stand to be excluded from the framework of PIE. The discussion of these amendments will be limited to evaluating how they impact on vulnerable tenants and mortgagees.

The purpose and scope of PIE

PIE repealed the Prevention of Illegal Squatting Act 52 of 1951 (PISA). PISA criminalised the act of 'squatting' and provided simplified eviction procedures for landowners. Unlike PISA, PIE attempts to bring the owner's common law right to evict in line with the constitutional principles governing evictions entrenched in section 26(3) of the Constitution. Section 26(3) provides that "no-one may be evicted from their home...without an order of court made after considering all the relevant circumstances".

The procedural requirements of PIE therefore aim to ensure the meaningful representation and participation of unlawful occupiers in eviction proceedings. Section 4(2) of PIE stipulates that, at least 14 days prior to eviction proceedings, the unlawful occupiers and the municipality in whose jurisdiction they fall must be informed of the eviction proceedings. The Act gives courts the discretion to order a specific manner of service that would ensure that, as far as possible, unlawful occupiers understand the contents of the notice of eviction. In addition to the date and time of court proceedings and the grounds for the proposed eviction, the notice must also state that the unlawful occupiers have the right to defend the case and to apply for legal aid where necessary.

The substantive provisions of PIE compel the courts to consider the broader socio-economic context in which each application for eviction is made. Section 4(6) of PIE stipulates that in reaching a "just and equitable decision" in respect of granting an eviction order, courts are compelled to consider relevant circumstances including "the rights and needs of the elderly, children, disabled persons and households headed by women". In addition to these factors, section 4(7) enjoins courts to determine "whether land has been made available or can reasonably be made available by a municipality or an organ of state or another landowner," where the unlawful occupiers have occupied the land for more than six months.

In a range of cases the courts have interpreted the term "relevant circumstances" in section 4(6) narrowly. For example, in *Brisley v Drotsky* 2002 (4) SA 1 (SCA), the Supreme Court of Appeal interpreted it to mean that only legally relevant circumstances could be considered in an eviction application concerning a lessee. The socio-economic circumstances of the occupier, regardless of whether he/she fell within a designated vulnerable group in terms of PIE, were not relevant.

However, by extending the protection of PIE to vulnerable tenants and mortgagees the *Ndlovu/Bekker* judgment now effectively enjoins the courts to consider the impact that an eviction order could have on these vulnerable groups of occupiers. This decision is in keeping with the reasonableness standard enunciated in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC). According to this standard, any measure instituted by the State cannot be considered reasonable unless it takes into account the needs of those in desperate circumstances and "whose ability to enjoy all rights are therefore most in peril".

The *Ndlovu/Bekker* judgment enjoins the courts to consider the impact an eviction order could have on vulnerable tenants and mortgagees.

Furthermore, courts, in reaching a "just and equitable" decision in eviction proceedings, must consider the interests of both the unlawful

occupiers and the landowner. The effect of PIE, as the court in *Ndlovu/Bekker* pointed out, is therefore not to expropriate land. It merely suspends the exercise of the landowner's full proprietary rights until an equitable decision on eviction can be made.

Landlords, banks and property developers received the *Ndlovu/Bekker* decision with great concern. They felt that extending the protection of PIE to defaulting tenants and mortgagees would unfairly disadvantage landlords and banks. It would give unscrupulous tenants and mortgagees a chance to abuse the protection offered by PIE. For instance, by taking advantage of the procedural requirements of PIE, they would make it difficult for landlords to evict them in the event of lawful termination of a lease or mortgage agreement.

Impact of the proposed amendments on vulnerable occupiers

If passed, the effect of the amendment will be that it will deprive vulnerable ex-tenants and ex-mortgagees of the protection of PIE irrespective of whether, upon eviction, they will be "people living in crisis situations, with no access to land, or roofs over their heads". Thus, while PIE will continue to protect occupiers who unlawfully took occupation of land, the same protection would be denied to those occupiers whose initial occupation was not unlawful. Occupiers who, through socio-economic circumstances, can no longer afford to meet the terms of their lease or mortgage agreements would therefore be excluded from the protection of PIE. An initial ability to pay for tenure, it is argued, does not necessarily make a person any less vulnerable than 'squatters'. It is also not a factor that would be likely to assist them in finding alternative accommodation where an eviction order renders them homeless.

In *Ndlovu/Bekker* it was argued that vulnerable tenants were afforded protection by other land reform statutes such as the Rental Housing Act 50 of 1999. However, this Act does not contain provisions that afford procedural protection for vulnerable tenants in eviction proceedings. Worse still, the protective measures which related to rent control and the limitation of eviction proceedings originally contained in the Rent Control Act of 1976 and retained in section 19 of the Rental Housing Act (which replaced the former), have since been removed.

Most vulnerable tenants, such as the aged and households headed by women, cannot afford even minimal market-related rent increases.

Section 19 of the Rental Housing Act requires the Minister to monitor and assess the impact that the phasing out of these rent control measures could have on poor and vulnerable tenants. It also requires the Minister to "take such action as he or she deems necessary to alleviate hardship that may be suffered by such tenants". The Minister must define criteria based on age, income or any form of vulnerability that applies to such tenants, for purposes of amending or augmenting policy frameworks on rental housing to accommodate them. This includes the creation of a special national housing programme which, informed by these criteria, could meet the needs of these vulnerable tenants.

These directives have not been implemented to date. The result is that many vulnerable tenants, particularly the aged, have no protection from rent increases and from eviction, which follows when they are unable to pay the increased rent.

The Rent Tribunals established by the Act have no regulatory rent-control powers. Only in the case of exorbitant or excessive rent increases can the Tribunal make an appropriate order. Most vulnerable tenants, such as the aged and households headed by women, cannot afford even minimal market-related rent increases, which are a common feature of the contemporary market-driven economic climate, making them particularly vulnerable to eviction.

Recent reports in the media have highlighted the spate of evictions of the elderly as well as indigent tenants since the Minister removed the rent-control protections in August 2003. The amendment, if passed, will only further erode these vulnerable tenants' already weakened security of tenure.

Conclusion

It is true that if the fears expressed by investors in the rental-housing sector are not allayed, banks and landlords may be discouraged from dealing with persons from disadvantaged backgrounds. The position in which the Department of Housing finds itself in trying to balance competing social and

commercial interests is, therefore, not an enviable one.

However, the State has a constitutional obligation to prioritise the needs of the most vulnerable people in society, which includes former tenants and mortgagees. As the Constitutional Court held in the case of *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC):

> *while legitimate commercial interests are important...the greater interests of society require the recognition of the inherent human dignity of every human being.*

Depriving tenants and mortgagees of the protection of PIE, in the absence of alternative protective measures, would constitute a failure by the government to give effect to the right of access to adequate housing and the right to human dignity. Any hasty amendment to PIE, without a proper evaluation of its consequences and adequate consultation with the public, would not serve the interests of the most vulnerable members of our society.

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CASE REVIEW 1

Extending access to social assistance to permanent residents

Julia Sloth-Nielsen

***Khosa and Others v Minister of Social Development and Another* (CCT 12/03); *Mahlaule and Others v Minister of Social Development and Another* (CCT 13/03) (both referred to as *Khosa/Mahlaule*).**

The *Khosa/Mahlaule* case involved a constitutional challenge to certain provisions of the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act 106 of 1997, including provisions of the latter Act that had not yet been brought into force. These provisions restricted access to social assistance to South African citizens only. The practical effect was that permanent residents – aged persons and children who would otherwise have qualified for social assistance but for the requirement of citizenship – were excluded.

As the minority judgment by Judge Ngcobo succinctly points out, this case is different from previous socio-economic rights cases, namely *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) and *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC)). In these cases, the Constitutional Court (the Court) had to evaluate the compliance of State programmes (or their contents) with the constitutional requirements. In *Khosa/Mahlaule*, it was specifically the exclusion of non-citizens from the programme that was at issue.

The question remains, nevertheless, whether the exclusion of potential beneficiaries of social assistance (for example, children who fall above the age specified for receiving the child support grant, or, as in this case, non-citizens) meets the test of reasonableness. The criteria the State chooses to limit benefits must be consistent with the Constitution as a whole.

Facts

The applicants in both cases were Mozambican citizens who had acquired permanent residence status in South Africa under the now repealed Aliens Control Act of 1991. All of them, except the second applicant in the *Khosa* case, had fled Mozambique in the 1980s as a result of the outbreak of civil war there.

All the applicants are destitute and would qualify for social assistance under the Acts but for the citizenship requirement.

The applicants based their challenge on several grounds. They relied, firstly, on the wording of section 27(1)(c) of the Constitution, which states that "everyone" has a right of access to social security. Secondly, they averred that their exclusion from the social security scheme amounted to unfair discrimination. They also contended that their rights to life and human dignity were unjustifiably infringed.

Furthermore, they argued that the exclusion of primary caregivers who were permanent residents from accessing the child support grant for the children in their care, especially where those children are South African citizens, constituted a violation of the children's rights in section 28 of the Constitution.

In an unopposed application, the High Court ruled that the impugned sections were invalid and issued an order (without giving reasons) striking them down. This order was referred to the Constitutional Court for confirmation.

The effect of striking the offending sections down and failing to replace them with any other limiting criterion, as the High Court had done:

> *placed an obligation on the State to provide social assistance to all indigent persons irrespective of their citizenship status – including both permanent residents and those temporarily within our borders.*

Clearly such far-reaching consequences went beyond the relief sought and this order could not be allowed to stand.

The State opposed the application and was granted a postponement to enable it to procure evidence on the resource implications a finding of invalidity might have upon the State social assistance scheme.

Child support grants and care dependency grants

The State conceded that children who are South African citizens should not be denied access to the child support grant and that a provision in legislation that denies them this access would be unconstitutional.

The Social Assistance Act provides for care dependency grants for the caregiver of a child under the age of 18 who receives permanent home care owing to a severe disability. Currently, this legislation does not require citizenship as a criterion for qualification. Although the regulations require possession of a bar coded identification document, this document can also be issued to permanent residents, not only to South African citizens.

However, provisions in the Welfare Laws Amendment Act will, when they come into effect, introduce into the Social Assistance Act the requirement that applicants for the care dependency grant be South African citizens. This brought the question of the future eligibility criteria for the grant to the fore.

Incidentally, foster care grants are not subject to a citizenship requirement. As the Court noted, this amendment would therefore create the anomaly that a child in foster care with non-citizen parents could benefit from the grant, while the same child would not have been able to access the grant had he or she been with their non-citizen biological parents. Put differently, a child of non-citizen parents would have to be removed from their families to join a foster family in order to benefit from the grant.

The Court confirmed that the exclusion of children from access to these grants amounted to unfair discrimination on the basis of their parents' nationality and that "the denial of support in such circumstances to children in need trenches upon their rights under section 28(1)(c)". It is not clear from the judgment which aspect of the rights enumerated in section 28(1)(c) the Court is referring to, but conceivably, the Court had the child's right to social services in mind.

The scope and content of the child's right to social services is not clear, but if this aspect of section 28(1)(c) is equated directly with an entitlement to social assistance, this might provide a powerful tool in the quest to ensure access to social security for all indigent children aged below 18 years.

It must be stressed, though, that the respondents did not defend the unconstitutionality of the exclusion of children from the social assistance system. The nuts and bolts of the judgment therefore really pertain to the question of access to old age grants.

Old age grants

For the majority, what was really at stake with respect to the limitation of old age grants to South African citizens was the prohibition against unfair discrimination. Citizenship is not a listed ground in section 9(3) of the Constitution. When a ground not listed in section 9(3) constitutes the basis for the allegation of unfair discrimination, unfairness must be established and no presumption of unfairness comes into play. The determining factor here is the impact that the discrimination has upon the person who is discriminated against.

In this regard, the majority

concluded that the applicants, as permanent residents, do indeed constitute a vulnerable group and that the laws that deny them access to the benefit of social assistance create the impression that they are in some way inferior to citizens. The impact of this discrimination is felt not only by the permanent residents themselves, but also by the families, friends and communities with whom they have contact and upon whose goodwill they may have to rely. This has a serious impact upon the dignity of the permanent residents concerned, "who are placed in the position of supplicants". Furthermore, the denial of the right is total, rather than temporary, enduring permanently while the applicants are not naturalised South African citizens.

According to the Court, sufficient reason for the "invasive treatment" of the rights of permanent residents was not established and the resource implications of extending the social security scheme to permanent residents did not, on the evidence before the Court, appear unduly harsh. The Court concluded that excluding permanent residents from social security was inconsistent with section 27.

The remedy

The Court found that reading in was the most appropriate remedy and refashioned the High Court order by reading in the words "or permanent resident" after "South Africa citizen" into the relevant legislative provisions, including the provisions that have not come into force.

Conclusion

This case raises interesting jurisprudential issues concerning the aims of a social security system, the legitimate concern of governments to limit social welfare costs and the principled policy of the immigration authorities to encourage self sufficiency amongst non-nationals admitted to the country. The issue of preservation of available limited resources for the benefit of citizens is also discussed, not to mention the legitimacy of a legislative goal of discouraging immigration that is motivated primarily by the availability of welfare benefits in the host country. This is an issue of special relevance in an African context where South Africa's neighbours are not able to provide comparable social assistance programmes.

There is, in addition, reference to the methodological difficulty of whether to adjudicate reasonableness as part of the enquiry into the internal limitation contained in section 27, or whether the enquiry should revolve around section 36, the general clause which governs the limitation of rights. This issue has merited some academic attention.

It is noteworthy, finally, that the weight of opinion of the Constitutional Court has come down firmly in favour of protecting long-term permanent residents from the degradation of poverty and dependency and this in the face of significant public xenophobia. This decision must thus be regarded as a positive portent for expanding access to socio-economic rights through constitutional litigation in the future.

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CASE REVIEW 2

Property rights of landowners vs socio-economic rights of occupiers

Annette Christmas

***Modder East Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd*, (SCA 187/03); *President of the Republic of South Africa, the Minister of Safety and Security, the Minister of Agriculture and Land Affairs, the National Commissioner of Police v Modderklip Boerdery (Pty) Ltd*, (SCA 213/03) (both referred to as *Modderklip*).**

On 27 May 2004, the Supreme Court of Appeal (SCA) handed down judgment in the *Modderklip* case. The Socio-Economic Rights Project through the Community Law Centre, together with the Programme for Land and Agrarian Studies (both of the University of the Western Cape), and the

Nkuzi Development Association, intervened as joint *amici curiae* in this case.

During the hearing, the *amici* were represented by Advocate Michelle Norton instructed by the Legal Resources Centre (LRC). Advocate Geoff Budlender, who was the legal representative of the *amici* initially, played an important role during the preliminary stages of this case, including the drafting of heads of arguments. At the time of the hearing, he was appointed acting judge of the Cape High Court.

The *amici*'s intervention was motivated by the continued vulnerability of unlawful occupiers facing the prospect of eviction in South Africa today and the potential impact that this judgment could have on millions of occupiers who find themselves in similar situations.

Of particular concern to the *amici* were the legal principles applicable to a mass eviction where it is known that the eviction would result in a community literally being left homeless. The housing obligations of the State to vulnerable occupiers were first laid down in the landmark case of *Government of the Republic of South Africa v Grootboom and Others* (1) SA 46 (CC) (*Grootboom*). The *Modderklip* case demonstrates how these obligations impact on the possible eviction of vulnerable occupiers from private land.

Facts

The *Modderklip* case dealt with two related matters. The first was an application for leave to appeal against an eviction order granted by the High Court against the Gabon Community (also referred to as the Modder East squatters) who invaded a portion of the farm owned by Modderklip Boerdery (Pty) Ltd. The occupation started in May 2000 and was a result of overcrowding and a shortage of land and shelter in the nearby Daveyton and Chris Hani informal settlements adjacent to the farm. The eviction order was granted on 12 April 2001 against 15 000 occupiers, who were ordered to vacate the land within two months. However, they failed to vacate the land within this period. Meanwhile their numbers continued to increase. At the time of the second matter, it was estimated that there were 40 000 occupiers on the farm.

The second matter, which originated in the Transvaal Provincial Division (TPD), centred on the landowner's attempts to get the State to assist in executing the eviction order. In attempting to do so, 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 eviction necessitated the assistance of private contractors. The landowner, who was unwilling and unable to spend this amount of money, then entered into lengthy correspondence with the various respondents in a futile attempt to get some form of assistance in executing the High Court order.

The TPD in evaluating the facts of this case held that the State had breached two of its constitutional obligations. By not assisting to enforce the earlier court order, the State breached its constitutional obligations to the landowner. Furthermore, the State breached its constitutional obligations to the unlawful occupiers by failing to realise their rights of access to adequate housing and land. It therefore ordered the State to devise a plan that would end the occupation of the land in question. The State appealed against this decision to the SCA. Since these matters were related, the SCA dealt with them jointly.

The Supreme Court of Appeal's decision

The SCA held that the State breached its constitutional obligations to both the landowner and the unlawful occupiers by failing to provide alternative land to the occupiers upon eviction. In respect of the occupiers' right of access to adequate housing entrenched in section 26(1) of the Constitution, it found that the State had not taken any steps to cater for those occupiers who were in "desperate need". It furthermore held that the State, at all three levels of government, failed to devise a plan for the "immediate amelioration of the circumstances of those in crisis".

Relying on the exception provided for in *Grootboom,* which stipulates that "it may be reasonable in the face of repeated land invasions for the State not to provide housing in response to such invasions," the State argued that it could not prioritise the Gabon community at the expense of other housing programmes. The SCA held, however, that the State has an obligation to ensure, at the very least, that evictions are executed humanely. The State could not be said to have discharged this obligation, it held, unless it provided land for the occupiers' relocation. It added that this factor could be taken into account without unfairly granting the residents priority.

In effect, therefore, the SCA consolidated the protection extended to vulnerable occupiers in

the *Grootboom* case, by stipulating that they were entitled to remain on the land until alternative accommodation was made available to them.

In respect of the landowner's rights, it emphasised that landowners should not be unduly prejudiced by the failure of the State to fulfil its obligations to vulnerable occupiers. As such, it held that it had a duty to "mould an order that would provide effective relief to those affected by a constitutional breach," and in doing so, it "should not be overawed by practical problems".

The order: A win-win situation?

The SCA dismissed the first application against the eviction order and upheld the second (enforcement order) in part. Thus, it made the following declaratory order:

- the State, by failing to provide land to the Gabon community, violated, *inter alia*, the property rights (section 25(1)) of the landowner (Modderklip Boerdery) and the occupier's rights of access to adequate housing in section 26(1) of the Constitution;
- the landowner was entitled to payment of damages by the Department of Agriculture and Land Affairs in respect of the land occupied by the community.
- the occupiers were entitled to occupy the land until alternative land was made available to them by the State or the provincial or local authority.

It also made a mandatory order directing that damages in respect of order (b) be calculated in terms of section 12(1) of the Expropriation Act 63 of 1975. In the event of disagreement in relation to the investigation and determination of damages, leave was granted to the parties to make application to the Court for directions.

At face value, this order represents a win-win situation for all the parties involved. The Court has successfully managed to balance the competing proprietary rights of landowners and the socio-economic rights of unlawful occupiers in the context of evictions. The rights of vulnerable occupiers, whose needs by *Grootboom* standards "are the most urgent," were upheld. The landowner will, if the State agrees, also rightfully get damages to compensate for the loss of use of his land. Whether the State sees this as a plausible solution to the problem will depend on the outcomes of the investigation and determination of damages.

Conclusion

The *Modderklip* judgment is one of the progressive judgments dealing with the thorny issue of the protection of property rights versus the socio-economic rights of unlawful occupiers in the context of evictions. While the facts of this case highlight the vulnerability of the latter, it also highlights the predicament of landowners who, in trying to vindicate their property, comply with legislation governing evictions without obtaining an effective remedy.

The judgment has therefore highlighted the need for government to implement programmes to address the broader social context of land invasions and homelessness, to fulfil the constitutionally protected rights of both landowners and vulnerable occupiers.

It is therefore hoped that this judgment will not only compel the State to fulfil its constitutional duties, but will provide legal certainty and tangible protection for both vulnerable occupiers and landowners who find themselves in similar situations in future.

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UPDATE

On 17 June 2004, the State lodged an application for leave to appeal against the Supreme Court of Appeal decision with the Constitutional Court.

For more information:

- **See *ESR Review* (Vol 4 No 3 September 2003, p 4), available online at: <www.communitylawcentre.org.za/ser/esr_review.php>**
- **The Supreme Court of Appeal judgment and heads of argument of the *amici* are available online at: <www.communitylawcentre.org.za/ser/amicus.php>**

The Gaborone conference

Principles for assessing the safety of generic HIV/Aids drugs

Sherry Ayres

A two-day conference on the use of generic HIV/Aids drugs was held in Gaborone, Botswana in May 2004. It was initiated by the United States (US) at the behest of their patrons in the pharmaceutical industry and was co-sponsored by the World Health Organization (WHO), UNAIDS and the Southern African Development Community (SADC).

It brought together regulators, health officials and HIV/Aids service providers, many of whom receive funding from the US government.

The conference was ostensibly convened to establish principles for assessing drug safety. For the US, however, it was intended to result in an international consensus opposing the use of generic HIV/Aids drugs. Fortunately this was not achieved.

Fixed drug combinations

Fixed drug combinations (FDCs) are simple, affordable and easy to administer. These are the basis for the WHO's '3x5' campaign to provide life-extending anti-retroviral treatment to five million HIV/Aids infected people (two million of whom are in Africa) by the end of 2005.

An FDC drug is a single tablet comprising separate drugs which, when taken in combination, are considered the most effective in combating a particular disease.

Currently the most effective anti-retroviral therapy for the suppression of HIV/Aids is considered to be the concurrent administration of three drugs, produced separately by GlaxoSmithKlein, Boehringer Ingleheim and Bristol-Myers Squibb. However, Indian generic drug manufacturers, who are not subject to US and European patent laws, have combined the three active pharmacological components of these brand name drugs into a single pill, drastically simplifying the treatment regimen. Patients thus need only one pill, twice a day, as opposed to the six pills per day required by brand name equivalents.

A convenient dosing regimen is critical in resource-poor settings as it enhances the ability of patients to adhere to their treatment regimens and delays the development of resistant strains of HIV. This simplified regimen may in part explain recent findings that HIV/Aids patients in sub-Saharan Africa are better at taking their medicines than those in North America and Western Europe.

Ease of administration is not the only reason generic FDCs are the WHO's recommended first line of treatment. The price of generic FDCs has been reduced from about R78 000 per person per year, to about R910. At this price simple and affordable generic FDCs could enable African countries to rapidly scale up treatment of HIV/Aids and save thousands more lives.

However, despite the two-year approval process for generic FDCs by the WHO, the US administration raised concerns about the drugs' safety and efficacy. They came to the conference pushing for further study of the generic FDC formulation. Conference participants, however, thwarted their agenda by affirming the WHO's widely-accepted drug pre-qualification process and the critical role of low-cost generic FDC anti-retroviral therapy in increasing access to treatment in Africa.

US policy on generics

In 2003 President Bush announced a five-year US$ 15 billion (R97.5 billion) initiative to fight Aids in Africa and acknowledged that drug price reductions had "placed a tremendous possibility within our grasp". Since that announcement, however, the White House has shifted to protecting industry interests. The first sign of the shift came with the appointment of Randall Tobias, a former pharmaceutical CEO with no public health or HIV/Aids expertise, as the head of the President's Emergency Plan for HIV/Aids Relief (PEPFAR). US pharmaceutical companies donated more than US$ 18 million (R 117 million) to Bush's campaign in 2000. Tobias' former company, pharmaceutical giant Eli Lilly, was among the President's strongest supporters.

The second sign was one of omission. While drafting their strategy for getting two million people on treatment by 2008, Tobias and other PEPFAR officials repeatedly claimed they would use "the lowest cost, highest quality drugs available" but refused to state whether generic HIV/Aids drugs, and specifically FDCs produced by Indian manufacturers, fitted that description.

Soon after, the US administration began making public remarks

questioning the "quality and safety" of generic anti-retrovirals. The WHO has rigorous, internationally accepted standards for assessing drug quality, efficacy and safety. Its review process took two years to approve the Indian-made generic FDCs. Despite this Tobias criticised generic FDCs before Congress, saying they:

> *...may well be totally safe...The problem is that there is no process, no principles, no standards in place today from a regulatory point of view to make that assurance.*

Maintaining that the WHO pre-qualification process was inadequate, the US administration further implied that those currently prescribing generic FDCs in developing countries were endangering patients' lives.

The conference outcomes

The conference's stated objective was to "establish international principles that need to be taken into account when considering the safety and quality of these drugs". The conference was soon at the centre of a global spotlight. Outrage by public health experts, medical professionals, lawmakers, and people living with HIV/Aids generated an enormous amount of publicity, legislative inquiry and public pressure about the possible drug company-driven agenda of the US.

Drug regulators and health service providers questioned whether the conference would contribute to the urgent task of expanding access to affordable essential medicines for Aids and other illnesses. The European Agency for the Evaluation of Medicinal Products, the largest drug regulatory authority in the European Union, refused to attend the conference altogether. Others felt compelled to attend to prevent the US from obtaining a consensus opposing generic FDCs.

Despite the US agenda, conference goers reasserted the importance, safety, and efficacy of generic FDCs, in particular, for rapidly expanding treatment in Africa and other developing regions. They agreed on the following points:

- fixed dose combinations of proven Aids therapies, such as first-line therapies recommended by the WHO, are a crucial component in the global fight against HIV/Aids;
- the WHO pre-qualification project uses stringent standards in their review of both single dose and combination dose anti-retroviral medications; and
- clinical trials are not necessary to determine generic FDCs' bio-equivalence to brand-name counterparts.

The US explicitly joined the conference consensus on the importance of FDCs and did not publicly oppose conference findings recognising the WHO's 'stringent' standards and setting regulatory approval measures for FDCs. However, the US Global Aids Co-ordinator Deputy Director, John Lange, reported that "the meeting reached no conclusions". Publicity, public pressure and participant solidarity at the conference forced US officials to shift tactics. Instead of pushing for heightened international standards, the US appears to have reserved its right to unilaterally disagree and pursue its own interests.

Concluding remarks

Despite the solidarity witnessed in Botswana, the principles drafted there are only a small first step in the larger struggle to secure generic FDCs through PEPFAR and other funding programs.

Unfortunately, given its sheer size, the US bilateral programme's purchasing power alone could make international recognition of the value of generic FDCs a moot point. The US funding of solely brand name drugs will result in the creation of differing but parallel treatment regimens in the same country and in many instances even in the same clinics. This would be administratively arduous, confusing for patients and potentially disastrous to fledging health systems.

Awareness of such consequences might discourage African Ministers of Health from purchasing generic FDCs for their own programs. This will squeeze out market competition from generic drugs resulting in a monopoly that would inevitably hurt developing countries. Most critically, if the US restricts the use of generic FDCs, desperately needed money will be wasted on overpriced products and fewer people will get the treatment they need to live.

Ultimately, the goals of the '3x5' campaign can simply not be reached with the use of complicated brand name anti-retroviral treatment, even at the most discounted prices. As the Director-General of the WHO, Dr Lee Jong-Wook, said:

> *Business as usual will not work. Business as usual means watching thousands of people die every single day.*

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The 35th Session of the African Commission on Human and Peoples' Rights, and the NGO Forum preceding the session

From 18 to 20 May 2004, the Non-Governmental Organisation (NGO) Forum preceding the 35th Session of the African Commission on Human and Peoples' Rights (the Commission) took place at Kairaba Hotel in the Gambia. It was followed by the Commission's session from 21 May to 4 June at the same venue.

The Forum brought together NGOs from within and outside Africa interested in the promotion of human rights on the continent. Its purpose was to discuss human rights issues in Africa and bring them to the attention of the African Commission. The issues discussed included the human rights and humanitarian situations in the Darfur region in Western Sudan, the Ivory Coast, Mauritania, the Democratic Republic of Congo and Nigeria and those pertaining to the role of the newly created African Court on Human and Peoples' Rights and the International Criminal Court.

Although socio-economic rights received negligible attention at this meeting, a representative of the Socio-Economic Rights Project (Community Law Centre, UWC), Christopher Mbazira, through the Human Rights Institute of South Africa (HURISA), made a statement on the role of the Commission in promoting and protecting socio-economic rights.

Among other things, the statement commended the African Commission for its landmark decision in *The Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria, Communication No.* 155/96, which entrenches the principle of indivisibility, interdependency, and interrelatedness of both civil and political rights. It pointed out some of the socio-economic hardships under which many people in Africa continue to live and appealed to the Commission to call upon States to respect, protect, promote and fulfil their socio-economic rights obligations as enshrined in the African Charter and the International Covenant on Economic, Social and Cultural Rights, as well as to ratify these instruments.

During the session, the chairperson of the Commission appreciated the need to promote socio-economic rights in Africa.

It was, however, notable that these rights did not feature on the Commission's agenda. It was also noted that civil and political rights dominated the proceedings of the NGO Forum. The effect was that no pressure was exerted on the Commission to push states to realise these rights. The session therefore highlighted the need to commit more efforts to the realisation of socio-economic rights in Africa.

The Oslo conference

From 8 to 9 June 2004, the South Africa Programme of the Norwegian Centre for Human Rights (NCHR) and the Network on Local Politics in Developing Countries of the University of Oslo hosted a conference celebrating South Africa's 10 years of democracy, with a specific focus on the politics of socio-economic rights.

The conference was attended by more than 50 South African and Norwegian-based academics, legal practitioners, economists and political scientists. They reflected on the progress made in realising socio-economic rights since 1994, the perceptions of democracy among various actors, as well as the strategies used and challenges faced in fulfilling socio-economic rights.

Among the South African speakers were Adam Habib of the Human Sciences Research Council (University of KwaZulu/Natal) and Judge Albie Sachs of the Constitutional Court. Both delivered keynote addresses on the political landscape and the judicial enforcement of socio-economic rights in South Africa.

The papers delivered covered a wide range of themes, including poverty and social policy, litigation, social mobilisation and social movements, labour and the politics of the alliance, land reform and rural development as well as the role of the socio-economic rights in strengthening democracy. Speakers included Siri Gloppen (University of Bergen and Christian Michelsen Institute), Julian May, Richard Ballard and Mandisa Mbali (University of KwaZulu/Natal), Liv Torres (Norwegian Research Council), Ben Cousins (PLAAS, UWC) and Paul Graham (Institute for Democracy in South Africa).

The discussants were Sibonile Khoza (Community Law Centre, UWC), Peris Jones (Norwegian Centre for Human Rights, University of Oslo) Einar Braathen (Norwegian Institute for Urban and Regional Research) and Tor Arve Benjaminsen (Noragric).

The conference was acclaimed as a great success. It is planned that the papers presented, including the commentaries by discussants, will be published in a book entitled *The Politics of Socio-Economic Rights in South Africa* (edited by Peris Jones and Kristian Stokke).

Detailed minutes of the conference proceedings are online at <www.humanrights.uio.no>