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Editorial

Sibonile Khoza

Welcome to the fourth issue of the *ESR Review* for 2004.

In this issue, Sandra Liebenberg takes stock of the jurisprudence on children's socio-economic rights and analyses its implications for government policy. She argues that addressing childhood poverty eradication effectively requires solutions to the broader problem of poverty in the society. She suggests different levels at which the State's duty to ensure children's socio-economic rights should operate.

Although the Communal Land Rights Bill has been signed into law, the controversies and criticisms it sparked remain unresolved. Ben Cousins provides a narrative account of the various stages of the Bill and the criticisms laid against it in each of those stages. He also points out that the continued dissatisfactions with this piece of legislation might lead to a con-stitutional challenge.

The Constitutional Court has recently held in the *Daniels v Robin Grieve Campbell* case that surviving partners in *de facto* monogamous union, who are married according to Muslim rites, can inherit and claim maintenance from their partner's deceased estates. Michelle O'Sullivan provides an overview of the case and examines the implications of its decision for the protection of property rights and other related socio-economic rights of women in these unions.

Judith Oder examines the merits and demerits of the recently adopted Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa in realising women's socio-economic rights on the continent. While she applauds its potential to further the protection of women' rights, she points out that a lack of political will is hampering its ratification.

Micheal Windfuhr reports on the outcomes of the last stage of the negotiations on the voluntary guidelines on the right to food.

We would like to thank all the contributors to this issue. We trust the readers will find it invigorating and useful in advancing socio-economic rights in South Africa and abroad.

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Taking stock

The jurisprudence on children's socio-economic rights and its implications for government policy

Sandra Liebenberg

The majority of children in South Africa live in families, households and communities that are hard hit by poverty. According to the 2003 United Nations Development Programme Report on South Africa, 48.5% of the population (21.9 million people) currently lives below the national poverty line (the equivalent in 2002 of R354 per month per adult). Children are part of a larger community living in poverty and the disadvantages they experience are largely the direct result of their parents, grandparents or other care-givers living in poverty.

Addressing childhood poverty effectively will thus require solutions to the broader problems of poverty in our society. An exclusively child-centred approach will not be sufficient.

On the other hand, as with gender and disability, poverty has a disparate impact on children because of their special characteristics as children. To ensure that children benefit from government's policies of poverty eradication, it is essential that these policies are designed and implemented to take account of their special needs and circumstances.

Children are a vulnerable group owing to a number of factors intrinsically connected to their childhood. These include their physical characteristics, special emotional and developmental needs, lack of legal capacity and inability to access many government services without adult assistance. A number of studies have shown that this vulnerability is exacerbated by poverty. For example, malnutrition in early childhood can severely impede children's life, health and future physical and mental development. A lack of access to early educare undermines the future educational potential of children and is likely to have knock-on effects on their whole lives, including their ability to find employment.

It is time to take stock of our embryonic constitutional jurisprudence on children's socio-economic rights. Does it support an approach to poverty-eradication programmes that is sensitive to the special needs and circumstances of children?

Children's socio-economic rights in the Bill of Rights

Children's socio-economic rights should be seen in the context of the Bill of Rights as a whole, particularly the other provisions protecting socio-

economic rights. There are two main drafting styles used in respect of the inclusion of socio-economic rights in the Constitution. Firstly, the rights of "everyone" to have access to adequate housing, health care services, food, water and social security, in sections 26 and 27. Also relevant in this regard are the rights to further education in section 29(1)(b). In respect of this group of rights, the Constitutional Court (the Court) has affirmed that the first subsection imposes a negative duty on the State and private parties to "desist from preventing or impairing" the right of access to socio-economic rights [*Government of the Republic of South African and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), (hereafter *Grootboom*), para 34].

An exclusively child centred approach will not be sufficient.

Secondly, the Court has affirmed that these sections also impose positive duties on the State to extend access to socio-economic rights to those who currently lack such access. However, this duty is limited by provisions requiring the State to take "reasonable legislative and other measures" to achieve the progressive realisation of the rights within its available resources (*Grootboom*, at para 38).

The children's socio-economic rights in section 28(1)(c) are neither described as a right of 'access to' the relevant rights, nor are they qualified in a similar form to the second subsections of sections 26 and 27.

Section 28(1)(c) reads: "Every child has the right to basic nutrition, shelter, basic health care services and social services." The right to basic education in section 29(1)(a) is similarly unqualified.

The absence of qualification led many commentators to conclude that these rights imposed a direct duty on the State to ensure that those children who lacked these basic necessities of life are provided with them without delay.

It was inferred from these provisions that the scope of the rights was confined to a rudimentary or 'basic' level of the various social goods referred to in section 28(1)(c). The more direct nature of the duty owed by the State to children was justified on the basis that children living in poverty are particularly vulnerable and not in a position to meet their own socio-economic needs. Arguments relating to resource and capacity constraints as a justification for not meeting these basic obligations towards children were arguably relevant in terms of the general limitation clause (section 36).

This interpretation gives rise to the difficulty that vulnerable children have a direct claim to material assistance under the Constitution while equally vulnerable adults do not (for example, impoverished mothers and other primary care-givers of children, persons living with disabilities and the elderly).

Further, this interpretation does not do justice to the inter-dependence of the welfare of children and their care-givers. The *amici* in *Grootboom* attempted to resolve this difficulty by arguing for the recognition of a minimum core obligation under sections 26 and 27.

This would oblige the State to provide relief to everyone experiencing severe socio-economic deprivation. On this reading, section 28(1)(c) is a specific manifestation of the minimum core obligations under sections 26 and 27. Its purpose is to place beyond doubt the core socio-economic entitlements due to vulnerable children.

The High Court in *Grootboom* adopted a different approach by holding that a joint reading of section 28(1)(b), (c) and (2) creates a derivative right for parents to shelter with their children. The Court reasoned as follows:

> *As the family must be maintained as a unit parents of the children who are granted shelter should also be entitled to such shelter. The bearer of the right now becomes the family. The justification for such a conclusion is that a failure to recognise the parents would prevent the children from remaining within the family fabric. This would penalise the children and indeed their parents who, to a considerable extent owing to the ravages of apartheid, are unable to provide adequate shelter for their own children.* (*Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C) at 289 C-D.)

The Court endorsed neither the approach of the High Court nor that of the *amici*.

The Constitutional Court's approach in *Grootboom*

Having assessed the State's housing programme in terms of section 26, the Court in *Grootboom* considered the applicability of the right of children to shelter in terms of section 28(1)(c).

According to the Court:

> *(the) carefully constructed constitutional scheme for the progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the State on demand* (at para 71).

It went on to hold that section 28(1)(b) and (c) must be read together. The former provision defines those responsible for giving care, while the latter "lists various aspects of the care entitlement" (at para 76). Thus, the primary duty to fulfill a child's socio-economic rights rests on that child's parents or family:

> *It follows that section 28(1)(c) does not create any primary State obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families* (at para 77).

This implies that a direct entitlement by children to the provision of the socio-economic rights in section 28(1)(c) only arises when children lack family care – that is, if they have been orphaned, abandoned or removed from their family's care. As the children in *Grootboom* were in the care of their parents or families, they were not entitled to any relief in terms of section 28(1)(c) (at para 79).

The Court is reluctant to interpret socio-economic rights in the Constitution as allowing individual claims for direct material assistance from the State.

The Court felt obliged to point out that the State nevertheless incurred obligations towards children who are being cared for by their parents or families. In the first place, the State is obliged to "provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28" (at para 78). This obligation would:

> *normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children mentioned in section 28* (at para 78).

Secondly, the Court referred to the State's obligation under sections 25, 26 and 27 to provide access to the relevant socio-economic rights protected by these sections "on a programmatic and co-ordinated basis, subject to available resources" (at para 78). It mentioned the provision of maintenance grants and other material assistance to families in need as "[o]ne of the ways in which the State would meet its section 27 obligations" (at para 78).

The Court's reasoning suggested that the socio-economic claims of children living in families who are too poor to provide them with the basic necessities of life fall to be determined in terms of sections 26 and 27. As previously noted, these sections do not impose any direct obligation on the State to provide socio-economic goods and services to anyone. They impose a qualified obligation on the State to adopt a reasonable programme.

The Court's analysis illustrates its reluctance to interpret the socio-economic rights provisions in the Constitution as allowing individual claims for direct material assistance from the State.

Children's socio-economic rights in *Minister of Health v TAC*

In *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (10) BCLR 1033 (CC) (*TAC*), the Court clarified that the State's duties to provide children's socio-economic rights were not only triggered when children were physically separated from their families.

Thus, children are entitled to the protection contemplated by section 28 when "*the implementation of the right to parental or family care is lacking*" (author's emphasis) (*TAC*, at para 79). The Court went on:

> *Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the State to make health care services available to them* (at para 79).

This approach suggests that the State's direct duties to provide the socio-economic rights in section 28(1)(c) are also triggered when parents are too poor to provide for their basic needs and where the provision of these services is a State function, e.g., health care services and education.

However, the Court in *TAC* adhered to its reasoning in *Grootboom* and did not conclude that children had a direct, individual entitlement to basic health care services in circumstances where their

parents were too poor to afford these services. Instead, the Court relied on the right of children to basic health care services in section 28(1)(c) to support its finding that the government's rigid and restrictive policy on Nevirapine was "unreasonable" because the policy excluded and harmed a particularly vulnerable group (at para 78).

This conclusion was consistent with the Court's central enquiry throughout the case, namely whether the constitutional standard of reasonableness in section 27(2) had been met (at para 93).

Providing for those in desperate need

A key component of the reasonableness test adopted in *Grootboom* and *TAC* is that government programmes to improve access to socio-economic rights must make provision for those whose situation is urgent now and who will suffer serious harm if their needs are not met. Such programmes must be designed and implemented "without delay" given the urgency of the needs concerned. According the Court in *Grootboom*:

> *This must ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately* (at para 68).

In applying this to children living in poverty in the *TAC* case, the Court described their precarious position as follows:

> *Their needs are 'most urgent' and their inability to have access to Nevirapine profoundly affects their ability to enjoy all rights to which they are entitled. Their rights are 'most in peril' as a result of the policy that has been adopted and are most affected by a rigid and inflexible policy that excludes them from having access to Nevirapine* (at para 78).

The implications of the jurisprudence for policy formulation

The current jurisprudence has not resolved whether children have a direct entitlement to the socio-economic services in section 28(1)(c).

Grootboom suggests that the State is under a direct duty to ensure basic socio-economic provisioning for children who lack family care, for example, abandoned children and orphans. These children are clearly in an especially vulnerable position and experience great difficulty in accessing a range of social services such as medical treatment and social grants. Government programmes must expressly cater for them and ensure that their basic needs are met.

Regarding children who live with poor families or care-givers, these cases suggest that the State also has a responsibility to ensure that they benefit from vital socio-economic rights programmes. The Court will review these programmes for their reasonableness.

The fact that children will suffer irreparable harm – such as threats to their life, health and future development – should be a compelling ground for finding that a given programme is unreasonable.

Kenneth Creamer has suggested that a "higher standard of reasonableness" review is approp-riate in assessing the State's programmes impacting on children socio-economic rights. He has argued for this higher standard on the basis of a reading of the Constitution that requires children's needs to be prioritised. The higher standard of reasonableness review should include factors such as the rapid implementation of relevant programmes and "the requirement that the programmes are effectively constructed to reach all children in need" (K. Creamer, 'The impact of South Africa's evolving jurispudence on children's socio-economic rights in budget analysis' (2002) IDASA. Occasional Papers, at 17). This would imply placing the State under a high standard of justification as to why relevant programmes do not benefit children in need.

From the perspective of formulating programmes, the State is under a clear duty in terms of *Grootboom* and *TAC* to adopt and implement reasonable programmes catering for those in desperate need on an expedited basis.

In identifying the groups in desperate need and in designing relevant policies, the State must take into account the special needs of children and the particularly severe impact on them of the denial of basic socio-economic rights.

The fault could lie broadly in one of these areas:

- There may be no programmes, or existing programmes may be inadequate in, catering for particularly vulnerable groups of children (e.g. children with disabilities) or providing services of particular relevance to children (e.g. early childhood development programmes).
- Programmes may exist that are intended to benefit children, but do not reach vulnerable children because of poor design or implementation. For example, there is evidence that certain aspects of the child support grant administration (particularly documentation requirements such as

identification documents and birth certificates) create barriers that impede access to the grant by care-givers on behalf of poor children.

Conclusion

The real question remains: how should the constitutional commitment to children's socio-economic rights guide government policy? Based on the above analysis, I suggest that the State's constitutional duty to ensure these rights should operate on four interrelated levels:

1. It should influence the adoption of particular programmes catering to all the basic needs of especially vulnerable groups of children (such as those living without adult care-givers).
2. Children's particular circumstances and needs should both be 'mainstreamed' in general anti-poverty programmes. This will require sensitivity in programme design and implementation to the special needs and circumstances of children. For example, consideration should be given in the State's Public Works Programme to its linkages with the provision of quality child care for participants.
3. The fact that the consequences for children of suffering a deprivation of basic needs are particularly severe (both for their development as people and for the society as a whole) should inject a sense of urgency in the State's response. In practice, this means that the must State adopt and implement programmes that will ensure that children's basic needs are met as a matter of priority and at an accelerated pace.
4. The Court's reluctant to define basic standards of socio-economic provisioning for children should not deter the executive and parliament from doing so. The Court's reluctance has stemmed primarily from its institutional concern not to intrude upon the terrain of the legislature and executive. The former branches of government have the primary duty to respect, protect, promote and fulfil the rights in the Bill of Rights. These standards should be the product of a transparent and participatory process in which the voices of children's advocacy and service organisations, as well as children themselves, are heard. There have been examples of the executive and legislature defining standards for the delivery of socio-economic rights in areas such as basic water services, primary health care and basic education.

Naturally, it will always be open to litigants to test these standards in court against the Constitution. The benefit to children and to society as a whole of having clearly defined standards for the provision of socio-economic rights to children and their care-givers cannot be overstated. It has the added advantage of creating a benchmark against which the government itself, civil society and such public institutions as the South African Human Rights Commission can monitor the meeting of the State's constitutional commitments to the children of South Africa.

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The continuing controversy over the Communal Land Rights Bill of 2002

Ben Cousins

The Communal Land Rights Bill (hereafter the Bill) was published for public comment in August 2002. It provided for the 'transfer of title' in communal land from the State to its current occupants. The latter are defined as communities whose rights derive from shared rules determining access to land, which is 'beneficially occupied,' in the ex-TBVC (Transkei, Bophuthaswana, Venda and Ciskei) States, the former 'self-governing territories', the old South African Development Trust, land to which the KwaZulu-Natal Ingonyama Trust Act applies and that acquired for communities through land reform.

Complex procedures for transfer included a rights enquiry, community meetings and the adoption of community rules on tenure. Registration of these rules would convert the community into a 'juristic person' capable of owning land. Once the rules were registered a land administration committee could be elected, made up of community members. Traditional leaders had to be on the committee in an *ex-officio* capacity, but could comprise no more than 25% of members.

Civil society organisations and members of rural communities were highly critical of the Bill. A key flaw was its underlying paradigm of a transfer of freehold title, requiring clear boundaries to be drawn between communities. This could open up and exacerbate boundary disputes and ethnic differences.

In addition, community representatives, particularly elected councillors, feared that transferring title would effectively 'privatise' communal land. Since gov-ernment refuses to provide services and infrastructure on privately owned land, the effect would be to insulate poor rural areas from local government develop-ment programmes.

Although the President has recently signed it into law, the Bill sparked spirited criticisms and controversies that remain unresolved to date.

Criticisms and further amendments

In response to mounting civil society criticism, the Bill was amended several times. A legal opinion for the South African Local Government Association (SALGA) indicated that the privatisation of communal land via titling would create difficulties in service provision by local government. A June 2003 draft of the Bill introduced the provision that a 'communal general plan' (i.e. a land use plan) must be registered with the Surveyor-General before any transfer of title. This would allow the Minister of Agriculture and Land Affairs (the Minister) to reserve part of the land for the State for the provision of infrastructure and municipal services.

Other changes resulted from attempts to shorten and simplify the Bill. Critics pointed out the absence of community consultation on whether or not they desired the transfer of title or on the form and content of land rights. The Minister was given sweeping powers in relation to a range of key decisions, including the boundaries of the land to be transferred to 'communities'.

The latter saw the new clause as the imposition of structures dominated by un-elected traditional leaders.

The rights of women to land were not adequately secured. For example, the Bill provided for the registra-tion of existing rights, which generally vest in men, without any proviso that women's rights could also be asserted or registered.

The status of people's land rights prior to transfer and registration remained unclear. This brought into question the con-stitutionality of the Bill.

Government drafters paid little heed to these concerns. In November 2003, Cabinet ap-proved a 13th draft containing a highly contentious new provision. This draft focused on the land administration committees that the Bill required all communities to establish. These committees would have ownership and administrative powers conferred on them by the rules of the community. The new provision stated that where a community has a 'traditional council,' the functions and powers of the land administration committee "must be performed by such a council".

This provision cross-referred to the Traditional Leadership and Governance Framework Bill (TLGFB) then being debated in parliament. The final version of the TLGFB required that 40% of the members of the traditional councils be elected and that 30% be women. These requirements were the government's efforts aimed at 'transforming' traditional leadership to bring it in line with the country's democratic dispensation.

The TLGFB also contained a provision for a transitional arrangement that deems existing Tribal Authorities, created in terms of the Bantu Authorities Act of 1951, to be traditional councils and gives them a year to 'transform'. However, no sanction is specified for failure to do so.

The proposal that land ad-ministration committees, wherever they existed, be traditional councils, was greeted with jubilation by the traditional leaders' lobby but with dismay by non-governmental organ-isations (NGOs) and community groups. The latter saw the new clause as the imposition of structures dominated by un-elected traditional leaders, undermining fundamental democratic rights.

NGOs and community groups were also extremely angry that there had been so little consultation with rural communities and that the new clause on traditional councils had

been introduced so late in the process. It seemed to them that the Bill was being rushed through parliament at the last possible moment because of wider political dynamics and 'deal making' in the run-up to the general election of April 2004.

Parliamentary debates

A total of 34 submissions on the Bill were made to the Portfolio Committee on Agriculture and Land Affairs in the last two weeks of November 2003. These included 13 by community groups and 12 by NGOs. Thirty-one submissions were highly critical of the Bill and called for its withdrawal.

The critics argued that the Bill was deeply and fundamentally flawed and was probably unconstitutional in a number of respects. They made the following arguments:

The Minister's discretionary powers

The nature and content of the 'new order rights' created in the Bill are not clearly defined. Instead, the Minister is given wide and sweeping powers to determine these rights on a discretionary basis.

These powers are probably unconstitutional, insofar as the Bill of Rights requires the law to define clearly the extent of the land rights to be secured. No clear criteria and factors are provided to guide the Minister's decisions and few opportunities are provided either to participate in making these crucial decisions or to challenge them.

Equal land rights for women

The Bill leaves decisions on equal land rights for women to the Minister's discretion. The measures for achieving gender equality in relation to land rights are weak and unconvincing. Many of the 'old order rights' that the Bill seeks to secure, such as Permits To Occupy, vest exclusively in men. Moreover, their upgrading to registered 'new order rights' will be at the expense of the informal use and occupation rights of women.

Community participation in the land rights enquiry

Guided by the report of a land rights enquirer, the Minister will make determinations on who has land rights, on what these land rights will be and on the boundaries of the 'community' that will have ownership of communal land transferred to it.

However, the people whose rights are to be decided in this manner have no right to view or challenge the land rights enquirer's report and no opportunity to agree or disagree with a decision to transfer title. The terms of community participation in the land rights enquiry are not made clear.

Community rules for land use and administration

Communities are required to adopt community rules to govern land use and administration that will set out who can hold 'new order rights'. However, there is no requirement that the community must agree to the content of the rules and no procedure is provided for adopting them. In addition, democratic and accountable institutions for land administration are not adequately provided for in the Bill.

Provision for comparable redress

The Bill does not meet the constitutional requirement that tenure legislation must provide for comparable redress in the event that land rights cannot be secured due to overlapping rights [see section 25(6) of the Constitution]. Instead, the Bill devotes only two clauses to this issue. Not only does it fail to define the extent of such redress, it also fails to provide any clear basis for doing so.

Property rights and private ownership

The Bill undermines the existing property rights of communities who own communal land historically or through trusts and Communal Property Associations. Some of these have had their land restored to them through the restitution component of the land reform programme. Others do not even support or recognise traditional leaders imposed on them in the apartheid era.

Furthermore, despite attempts in the Bill to address the problem of municipal service delivery on communal land transferred from the State into private ownership by communities, the problem will remain where undivided blocks of land are transferred. This is because, according to the law, ownership of infrastructure and buildings attaches to the owner of the underlying land.

Land for development and communal general plan

Where land for 'development' by local government is excluded from the transfer of title, there will be long delays in compiling a communal general plan while detailed and long-term land use planning is carried out. This is likely to occur well in advance of any actual development projects being implemented and in the absence of clear guidelines from the Integrated Development Plan for the area.

In addition to the above substantive issues, most submissions were highly critical of the non-consultative nature of the process through which the Bill was developed. Also contentious were the financial implications of the new law.

The passage of the Bill and the continued controversy

The portfolio committee deferred further discussion of the Bill until January 2004 and officials began to draft a number of amendments. Before its final passage through parliament, the Bill continued to be dogged by controversy and intense behind-the-scenes lobbying over issues of both substance and procedure.

Final amendments

The final amendments sought to address a number of issues. Firstly, a provision was made that 'old order rights' are to be deemed held by all spouses in a marriage, not by the husband alone. However, no provision was made for securing the current use and occupation rights of single women (widows or unmarried women). Nor was any requirement included that land administration committees allocate land to women on the same basis as men.

Secondly, certain sections of the Bill were redrafted in an attempt to give effect to section 25(6) of the Constitution, which requires that land tenure must be legally secure. However, the new sections might still be inadequate.

The third amendment related to decisions and determinations of the Minister. For example, there are provisions requiring a land rights enquiry to seek to establish the majority views of a community and that these views must inform the making of community rules. However, there is still no requirement that majority consent is necessary for the decision to transfer title or when a land administration committee is established or prior to the Minister reserving part of communal land for the State.

The fourth amendment was a provision that the Minister may not make a determination on land rights until outstanding disputes have been resolved. Again, no definition of 'dispute' is provided, nor is there clarity on who determines whether or not a dispute exists.

The final Bill also contains a definition of land administration committees, which does not specify whether traditional councils will perform the functions of these committees. Further, the Bill does not make an explicit provision for an alternative structure (such as an elected committee) to administer communal land, and is open to competing interpretations in this regard.

No definition of 'dispute' is provided, nor is there clarity on who determines whether or not a dispute exists.

Is the draft legislation a section 76 Bill?

There was also controversy over whether or not the Bill should have been tagged as a section 76 Bill, leading to further public hearings by the National Council of the Provinces. The Constitution requires laws affecting functional areas of 'concurrent competence' between national and provincial governments, of which traditional leadership is one, but land is not. In the end the Bill was *not* re-tagged and was passed unanimously by both houses of parliament.

The response of the traditional leaders' lobby

The traditional leaders' lobby was outspoken in public – but in support of the new law. Phathekile Holomisa, an African National Congress Member of Parliament and chairperson of Contralesa, wrote:

> *The Bill confirms the long-standing historical fact that African land belongs to the African communities jointly with their African traditional leaders. The three entities – land, people, and traditional leaders – are inextricably bound together* (Business Day, 11 February 2004).

However, Aninka Claassens, a critic of the Bill, argues that the law could:

> *cut the nexus that keeps traditional leaders responsive to their 'subjects'... control over land administration provides traditional leaders with a guaranteed power and resource base, regardless of whether their 'subjects' support them or not* (Cape Times, 19 February 2004).

Controversy over the role of traditional leaders in land administration continues.

A constitutional challenge looms

Unprecedented public interest in the Bill saw wide media coverage, editorials calling for it to be

scrapped or substantially amended, articles by gender activists and a statement by the Commission for Gender Equality that it had "taken an executive decision to challenge the Bill constitutionally".

Constitutional challenges will be also mounted by the Legal Resources Centre, acting on behalf of some of the communities that presented submissions to parliament.

In the meantime, the government is busy commissioning studies on a number of aspects of implementation. The most recent estimate of the cost of implementation is R5 billion over five years.

The Act is available at www.dla.pwv.gov.za

Submissions on the Bill can be accessed on www.contacttrust.org.za

For Prof. Cousins' previous discussion on the Bill, see (2002)*ESR Review* Vol 3 No 3, pp 7–9, at www.communitylawcentre.oeg.za/ser/esr_review.php

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CASE REVIEW

***Juleiga Daniels v Robin Grieve Campbell and others* (CCT 40/03), unreported.**

Upholding the property rights of women married according to Muslim rites

Michelle O'Sullivan

The decision of the Constitutional Court in *Juleiga Daniels v Robin Grieve Campbell and others* (CCT 40/03) (hereinafter *Daniels*) was handed down on 11 March 2004. The judgment goes a long way towards protecting inheritance rights of spouses in a *de facto* monogamous union who are married according to Muslim rites.

Facts of the case

Mrs Juleiga Daniels married her now-deceased husband, Mr Daniels, in 1977, in accordance with Muslim rites. The marriage, which was at all times monogamous, was not solemnised by a marriage officer appointed in terms of the Marriage Act (Act 51 of 1961). However, it was solemnised by an *Imam* pursuant to the established practice in the Muslim community.

Mr Daniels died without a will in 1994. The main asset of his estate is a house in Hanover Park, where Mrs Daniels has lived for nearly 30 years. In 1976, after she and her first husband were divorced, the City of Cape Town allocated the dwelling to her as a tenant. She and her children were in occupation of the property when she married Mr Daniels in 1977. She informed the City of Cape Town of her second marriage. In accordance with the policy of registering the principal breadwinner of the family as the tenant, which had the effect of unfairly discriminating against women, the City of Cape Town registered Mr Daniels rather than his wife as the property's tenant.

In 1990, Mr Daniels entered into an instalment-sale agreement with the City of Cape Town to purchase the house in terms of a policy that gave tenants the option to purchase their rented dwellings. (*Daniels v Campbell NO and Others* 2003 (9) BCLR 969 (C) at 973F-G.)

Although Mrs Daniels consented to the sale, she did not participate in it as she was no longer registered as a tenant. When Mr Daniels died the

balance owing on the purchase price of the property was written off in terms of a State policy. As a result, the property was transferred to his deceased estate in 1998.

Mrs Daniels approached the Master in order to assert her inheritance rights over the property. However, the Master advised her that since she was married according to Muslim rites, she was not a 'surviving spouse'. She could therefore not inherit anything from her husband's estate. A claim for maintenance against the estate was similarly rejected.

She approached the Cape High Court for an order declaring that she was a spouse of the deceased in terms of the Intestate Succession Act 81 of 1987 (Intestate Succession Act) and that she was his survivor under the Maintenance of Surviving Spouses Act 27 of 1990 (Maintenance of Surviving Spouse Act). In the alternative, she asked for both these Acts to be declared unconstitutional to the extent that they discriminated unfairly against spouses in monogamous Muslim marriages on the grounds of religion, culture and marital status. These Acts confer certain rights on surviving spouses in respect of their deceased spouses' estates. However, they do not define 'spouse'. Mrs Daniels asked the Court to interpret this word to include spouses to monogamous Muslim marriages.

The High Court declared both the Intestate Succession Act and the Maintenance of Surviving Spouse Act unconstitutional to the extent that they excluded spouses in Muslim unions and read words into the Acts to cure the unconstitutionality. The order made by the High Court was referred to the Constitutional Court (the Court) for confirmation in accordance with the constitutional requirement that the Court should confirm any orders on constitutionality made by the High Court and the Supreme Court of Appeal.

(For an overview and anaylsis of the High Court judgment, see *ESR Review*, Vol 4 No 3, 2003, pp8–10.)

The Constitutional Court's decision

The central issue before the Court was whether the words 'spouse' and 'survivor' in the Intestate Succession Act and Maintenance of Surviving Spouse Act included spouses in *de facto* monogamous unions married according to Muslim rites.

The Court held that 'spouse' in its ordinary meaning includes parties to a Muslim marriage. It also said that it would be awkward from a linguistic point of view to exclude parties to a Muslim marriage from the word 'spouse'. This exclusion emanates from a linguistically restrained use of the word flowing from a culturally and racially hegemonic appropriation of it. In the light of the Constitution, it was held that such a discriminatory interpretation against Muslim spouses is no longer tenable (at para 19). The Court recognised that the two statutes were enacted to provide relief to widows, a particularly vulnerable section of the population who were not protected at common law:

> *The Acts were introduced to guarantee what was in effect a widow's portion on intestacy as well as a claim against the estate for maintenance. The Acts were to ensure that widows would receive at least a child's share instead of their being precariously dependent on family benevolence. The purpose of the Acts would be frustrated rather than furthered if widows were to be excluded from the protection the Acts offer, just because the legal form of their marriage happened to accord with Muslim tradition and not the Marriage Act* (at para 23).

It went on to state that the central question was not whether the applicant was lawfully married to the deceased, but whether the protection that the Acts intended widows to enjoy should be withheld from relationships such as hers (at para 25).

The order

The Court declared that:

1. the word 'spouse' as used in the Intestate Succession Act includes the surviving partner in a monogamous Muslim marriage; and
2. the word 'survivor' as used in the Maintenance of Surviving Spouse Act includes the surviving partner in a monogamous Muslim marriage.

The effect of the order is that surviving partners in a monogamous Muslim marriage can claim maintenance from their deceased partner's estates and inherit as intestate heirs if their deceased partner dies without a will.

The retrospective effect and impact of the order

In the first place, the order of the Court is retrospective. This case was decided under the Interim Constitution and the order may therefore apply to all deceased estates where the deceased died after 27 April 1994.

The Court held that it was not

necessary for the purposes of this case to deal with the possible retrospective effect of the order and that problems concerning retrospectivity should be dealt with on a case by case basis. It is suggested that this would be on a just and equitable basis through an enrichment action. Thus, in practical terms, if the assets of a deceased estate have already been distributed, a widow could commence an unjustified enrichment claim for her share of her husband's deceased estate in terms of the Intestate Succession Act and also for reasonable maintenance under the Maintenance of Surviving Spouse Act.

However, as prescription applies to enrichment claims, any such claims would have to be brought within three years of the date of the Court's decision, being the date when most creditors could be deemed to have acquired the knowledge of the enrichment. Where the estate has yet not been distributed its devolution would be governed by the terms of the Court's order.

In the second place, the order has very far-reaching consequences. If properly implemented, it has the potential to ameliorate the harm caused in the past to widows because of the failure to recognise Muslim marriages and the impact of this lacuna on women's property rights.

The implication of the decision for socio-economic rights

Although the cause of action was grounded on unfair discrimination on the basis of religion and culture, this case also concerned housing rights and gender discrimination. The previous housing policy of the City of Cape Town also resulted in the negation of Mrs Daniel's housing rights. The culturally chauvinistic interpretation given to the word 'spouse' in the two statutes had the effect not only of unfairly discriminating against women but also of rendering widows of marriages other than those under the Marriage Act (1961) homeless. As this case demonstrates, the issues of inheritance also has implications for the right to property.

The Court's judgment indirectly upheld the socio-economic right to housing by ensuring Mrs Daniel's socio-economic well-being through protecting her right to a share in her deceased husband's property.

The concurring judgment of Ngcobo J emphasised that statutes must be interpreted bearing in mind our context and the constitutional goal of establishing a society based on democratic values, social justice and fundamental human rights. Such an approach presents wider opportunities for interpreting legislation in a manner that gives effect to socio-economic rights.

This ruling is important for poor people who receive inadequate legal advice and fail to enforce their constitutional rights as a result.

Consequences of obtaining inadequate legal advice in respect of constitutionally protected rights

Although it was not an issue in the Constitutional Court confirmation proceedings, the respondents relied on *res judicata* and issue estoppel as a defence to the application in the High Court. Mrs Daniels had previously sought to enforce her property rights and her legal representatives had obliquely raised her constitutional rights as a last resort during the hearing.

In the High Court, Van Heerden J dismissed both defences on the ground that the constitutional issues in respect of the Intestate Succession Act were not fully canvassed by both sides in the earlier application. Nor did the High Court make a pronouncement on such an issue in that application.

This ruling is important for poor people who receive inadequate legal advice and, as a result, fail to enforce their constitutional rights. The ruling is particularly important in relation to socio-economic rights cases. Litigants should not be estopped from bringing correctly formulated further claims based on constitutional rights.

However, Mrs Daniels problems are not over: her legal representatives in the earlier case were paid for by Legal Aid and there is an order for costs against her because of their failure to properly raise the legal issues in her case.

Conclusion

Spouses in marriages other than those under the Marriage Act have long suffered from insufficient legal protection. This case goes some way towards reversing this situation. Furthermore, it has far-reaching consequences for women who are similarly situated and have outstanding claims for maintenance

and inheritance. It is thus important that information about this decision is disseminated as widely as possible.

Perhaps legal practitioners should consider providing free legal assistance to resolve such claims.

Michelle O'Sullivan is the Director of the Women's Legal Centre.

The judgment is available at www.wits.law.ac.za

Heads of arguments by the Women's Legal Centre can be accessed at www.wlce.co.za

Calls for contributions to legal costs

The Women's Legal Centre is fundraising in order to recover the costs awarded against Mrs Daniel's in her previous unsuccessful application to the High Court. Until Mrs Daniels pays the costs in full, she cannot take transfer of her house without risking it being sold in execution. If you would like to make a contribution, please deposit the money, marked Juleiga Daniels, into the following trust account:

The Women's Legal Centre Trust
Standard Bank, Cape Town
Account number: 07 009 3164
Branch number: 020 009

Any funds that remain after settling the full amount of the order for costs will be treated as a contribution to the Women's Legal Centre.

Reclaiming women's social and economic rights in Africa

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Judith Oder

At its second meeting in Maputo on 11 July 2003, the African Union (AU) adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereafter referred to as the Protocol).

The Protocol is a response to the daily human rights abuses and political discrimination experienced by many women and their families in Africa.

These women have to contend with physical violence, poor educational opportunities and facilities, life-threatening diseases such as tuberculosis and HIV/Aids and legal and cultural barriers to the enjoyment of their human rights.

These obstacles affect their ability to contribute fully to the economic and social life of the continent.

The African Charter's inadequacies in protecting women

Before the adoption of the Protocol, the African Charter on Human and People's Rights (the Charter) was the main instrument recognising and protecting the rights of women in Africa.

Relevant provisions include article 2, which prescribes that everyone is entitled to enjoy the rights and freedoms enshrined in the Charter without distinction of any kind

including on the grounds of sex, religion, origin, fortune and birth.

Article 3 states that everyone shall be equal before the law and shall be entitled to the equal protection of the law.

Article 18 guarantees family protection. It also prohibits discrimination against women in the context of the family.

However, despite these provisions, the Charter is significantly inadequate in offering protection for women.

The Charter emphasises traditional African values without addressing customary law practices that are harmful to women.

Firstly, it defines human rights standards in terms of discrete violations of rights in the public realm, whereas most infringements of women's rights occur in private relations. For instance, in many African countries constitutional guarantees to equality do not apply to customary, personal and family laws, which are considered to fall within private law.

Secondly, it places an emphasis on traditional African values without addressing such customary law practices, which are harmful to women, as female genital mutilation, forced marriages and male-biased rules of inheritance.

Thirdly, it does not contain any express provisions guaranteeing the right of consent to marry or the equality of spouses during and after marriage. For example, in many cultural and religious systems, women must have the consent of a household male in order to dispose of property acquired during marriage. In situations of divorce and separation, husbands often retain ownership of the property. As a result, widows are often evicted from their homes by property-grabbing relatives, who then fail to provide for the widows' needs. Women are also discouraged from leaving violent marriages.

HIV/Aids has worsened this situation. When property is grabbed from women living with HIV/Aids they not only lose assets, which could be useful in obtaining medical care, but are also deprived of the shelter needed to withstand this incapacitating illness.

Fourthly, human rights guarantees such as the right to life and bodily integrity and the freedom from torture and cruel, inhumane and degrading punishment have not been interpreted to include domestic violence, rape, female genital mutilation, forced sterilisation or forced childbirth.

Finally, many domestic housing policies and laws in many African countries discriminate against women: land and housing titling systems as well as housing allocation policies and laws are typically biased in favour of household heads, who are usually men.

The Protocol

The Protocol addresses the weaknesses of the African Charter and provides a comprehensive framework for the optimal protection of women's rights in Africa.

Property rights

The Protocol provides that women have the right to acquire, administer and manage property during marriage [article 6 (j)]. In cases of separation, divorce and annulment of marriage, they have the right to an equitable share of joint property deriving from the marriage [article 7(d)].

The property rights of widows are also expressly recognised: they have the right to live in and retain ownership of the matrimonial home [article 21(1)].

Women are also accorded the same inheritance rights as men [article 7(c) and 21(1) as read with article 8].

Article 16 grants women the right of equal access to housing and to acceptable living conditions in a healthy environment. It does not, however, specifically address the effect of customary law on housing rights.

Education

Article 12(1)(a) requires States to take appropriate measures to end discrimination and promote equal opportunity in the sphere of education and training.

It also urges States to eliminate all stereotypes that perpetuate discrimination from textbooks, syllabuses and the media [article 12(1)(b)].

Although the Protocol requires States to take specific positive action to increase literacy among women, promote education and training among women and retain girls in schools and other training institutions [article 12(1)(a-c)], it is silent on the obligation to provide basic education.

This omission may have been to avoid duplicating the Charter's provision granting everyone the right to education.

Labour and social security rights

Article 13 requires States to guarantee women equal employment opportunities. It extends its protection to women employed in both the formal and informal sectors. It is notable that article 13(h) requires States to recognise the economic value of the work of women in the home. The Protocol also enjoins States to establish a system of labour rights protection and social insurance for women working in the informal sector [article 13 (f)].

The practical implementation of these measures would require that the bureaucratic processes involved in accessing social security are shortened and simplified, that adequate resources are deployed to labour tribunals and industrial courts, and that gender training is provided for officials involved in resolving labour rights disputes.

Health and reproductive rights

The Protocol calls upon States to respect and promote women's right to health, including their sexual and reproductive health [article 14]. It states that women have the right to control their fertility [article 14(1)(a)], the right to decide whether to have children, the number of children and their spacing [article 14 (1)(b)] and the right to choose a method of contraception [article 14(1)(c)]. It requires that abortion be made available to women as a reproductive choice in cases of rape or incest or where continued pregnancy endangers the health of the mother [article 14(2)(c)].

Article 14 therefore implies that States should increase their budgetary allocations to the health sector to enable them to provide adequate, affordable and accessible health care.

This will in turn enable women to have access to quality facilities, acquire the necessary knowledge for reproductive health and make informed decisions in this regard.

The right to food

Unlike the Charter, the Protocol expressly recognises the right to nutritious and adequate food in Article 15.

It extends States' obligations to protect the means of food production, such as land, water or domestic fuel.

Article 14(2)(b) recognises the right of women to nutritional services while they are pregnant and while breastfeeding.

Lack of political will is hampering the ratification of the Protocol.

The status of ratification

The Protocol needs to be ratified by 15 countries before it comes into force. Currently, a year after its adoption, only three countries (Comoros, Libya and Rwanda) have ratified it and 31 of the 53 AU member States have signed the instrument.

When the Protocol comes into force, States will have to:

1. submit periodic reports to the African Commission on the legislative and other measures taken to ensure the full realisation of the rights recognised in the Protocol;
2. integrate a gender perspective into their policy decisions, development plans and activities; and
3. include the fundamental principles enshrined in the Protocol in their national constitutions and legislative instruments and ensure their effective implementation.

Lack of political will is hampering the ratification of the Protocol. Article 10(3), which requires States to reduce their military expenditure in favour of social spending, could be a contributing factor. So too are the property provisions, which have given rise to controversy involving fiscal commitments of States to law reform and the dismantling of established societal norms.

In the weeks leading up to the July 2004 AU Summit in Addis Ababa, an alliance of human rights organisations collected sig-natures for a petition to the various Heads of State urging them to ratify the Protocol.

The African Commission's Special Rapporteur on the Rights of Women in Africa has also initiated measures to encourage its ratification.

Judith Oder is a Legal Officer for Africa at the International Centre for the Legal Protection of Human Rights (Interights).

The Protocol can be accessed at http://www.africa-union.org

No masterpiece of political will

The last stage of negotiations on voluntary guidelines on the right to food

Michael Windfuhr

Since March 2003, the United Nations (UN) Food and Agricultural Organisation through the Intergovernmental Working Group on the Right to Food (IGWG) has been working on developing Voluntary Guidelines for the Progressive Implementation of the Right to Food (hereafter the Guidelines).

At the third session of the IGWG in Rome (5-9 July 2004), negotiations began on the IGWG's draft Guidelines. About 90% of the draft document was agreed upon though some provisions are still open for negotiation at both a smaller 'friends of the chair' meeting (20 and 22 September) and at the fourth IGWG session (25-26 October).

The Guidelines process is a major development in the field of economic and social rights, marking the first time that an international document on one of these rights has been negotiated among governments as opposed to the UN expert committees.

However, the process has also been difficult. It reopened the debate about, for example, justiciability of the right to food and the nature of the obligations it imposes on States.

Positive reactions

The text after negotiations (the text) caused positive and negative reactions among observing civil society and non-governmental organisations (NGOs). Positive reactions are that it reflects the central concepts of interpretation of economic and social rights as developed by the Committee on Economic, Social and Cultural Rights in its latest General Comments (12-15). The agreed definition of the right to food reflects not only access to food, but also access by individuals and groups to productive resources.

The text reaffirms States' obligations to respect the existing access to food and protect people from being deprived by economically more powerful actors. States must also implement the right by using the maximum of available resources to progressively achieve its full realisation and by taking immediate targeted steps to achieve this goal. However, such steps must also aim to address the needs of marginalised groups as a matter of priority.

Moreover, it recognises that implementing the right to food must begin with a careful analysis of the causes of hunger and an evaluation of existing legislative and policy frameworks.

These achievements will allow civil society to use the Guidelines as a reference document in scrutinising governments' performance with regard to their commitment to combatting hunger and malnutrition.

Weak language

While the text sets good standards, its language is disappointingly weak, particularly given the fact that these standards are voluntary and have no binding effect on States. The text is filled with discretionary wording, such as "States, as appropriate, should consider adopting...". So far there is no consensus on a language related to human-made emergencies, specifically problems with the right to food in situations of foreign occupation. Developing countries objected to a paragraph with strong language on the protection of human rights defenders and the right to legal assistance, particularly for marginal groups. Thus, the NGO and CSO community has referred to the text as""no masterpiece of political will".

Sticking points

It remains unresolved whether there will be a guideline on the international dimension in the final text. While developing countries would support its inclusion, developed countries only wish it to be an annexure to the Guidelines.

Another sticking point is the provision of legal assistance to marginal groups and the protection of human rights defenders. The working group of the 'friends of the chair' is currently investigating a compromise that they will submit before the IGWG in September 2004.

Conclusion

It is planned that the text will be finalised in two additional negotiation days during the October 2004 session. Even if parts remain imperfect, the Guidelines process has contributed considerably to the mainstreaming of a human rights framework on hunger and malnutrition among governments and within the FAO. The eventual adoption of the Guidelines in October or November 2004 will be an important step in this direction.

Lastly, the final value of the Guidelines will depend on governments' political will and the good monitoring work of CSOs and NGOs at the national and international level.

Michael Windfuhr is the Executive Director of FIAN International.

For more on the guidelines process, see *ESR Review* (2004) Vol 5 No 1, pp 11 and contact Michael at windfuhr@fian.org