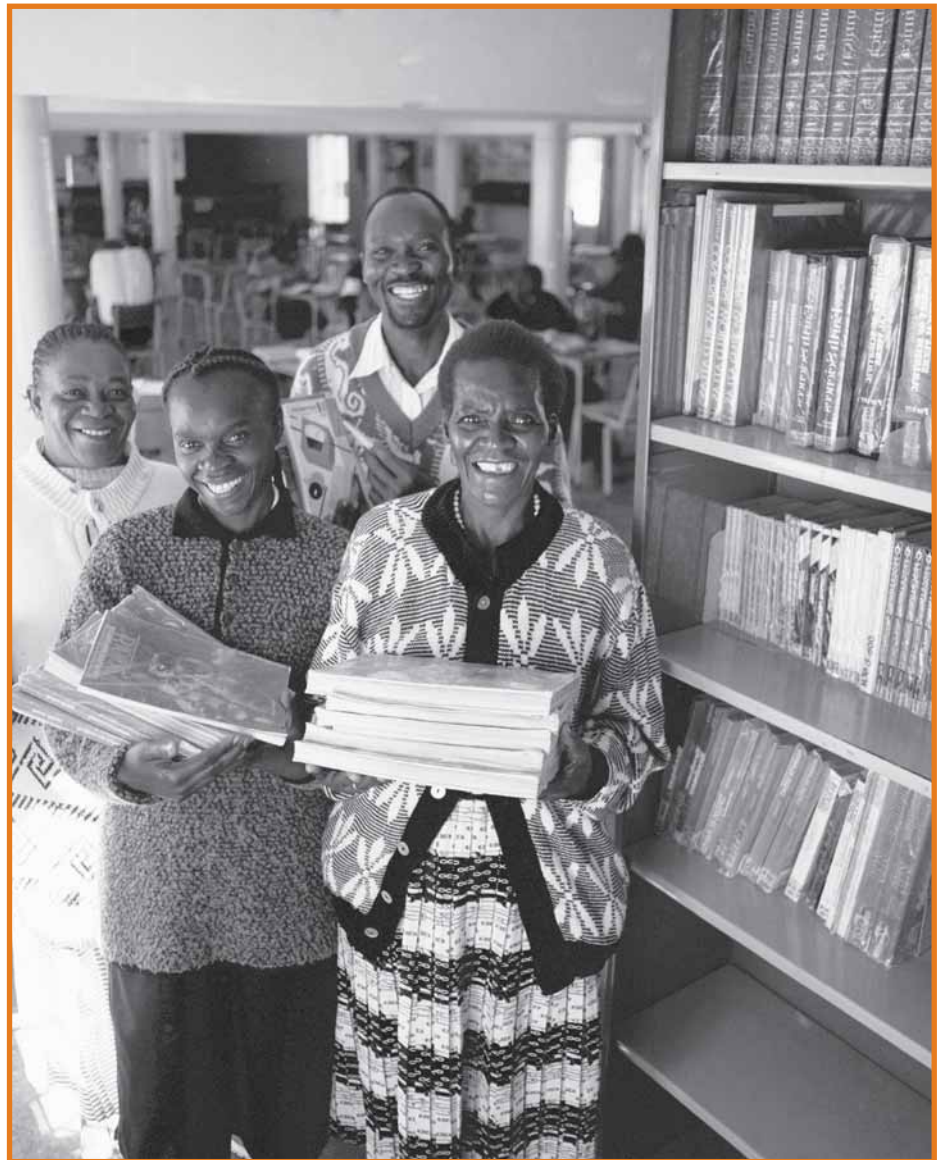


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# Advancing socio-economic rights in South Africa

## CHAPTER 2



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## KEY WORDS

Accountable	Being responsible for your actions and having to explain them to others, eg by reporting.
Administrative action	Action taken or not taken by an organ of State or public body, eg administrative action by a government department.
Administrator	Someone who manages a government agency or department.
Advance	To take forward and implement, eg advance socio-economic rights.
Advocacy	Mobilising and working for change, eg to a law.
<i>Amicus curiae</i>	Friend of the court – when an organisation joins a court case to assist the court with its knowledge of an issue.
Complainant	The person who complains or starts a case.
Compliance/Comply	Whether or not you obey a law, policy or court order.
Constitutionality	Whether or not a policy or law is in line with the Constitution.
Disclose	When you make something known or bring it out in the open, eg disclose personal or commercial information.
Dispute	A disagreement or argument.
Enforce	To take action, eg to claim your socio-economic rights.
Equitable	Fair and reasonable.
Information officer	A person responsible for interacting with the public and media, or with other people or bodies needing information.
Liable	Legally responsible.

Litigate/Litigation	Starting a court case and, if necessary, going to court to claim or defend your rights.
Lobbying	Persuade or influence a person or body to do something, eg make changes to a law.
Mandamus	An order by a court demanding performance of a particular act, eg directing government to develop a plan to ensure access to a grant.
Mediate	Try to solve a dispute by getting the two sides to talk and to agree to a solution to the dispute.
Organ of State	Government departments and public bodies carrying out State duties, but not including the courts or judicial officers (eg magistrates).
Public interest	In the interests of the general public.
Remedy	Order by a court or another body that prevents a human rights violation, or that compensates you when your rights have been violated; or finding solutions in other ways, eg negotiation.
Respondent	The person a claim or case is made against.
Review	Formal process to check if a judgment or decision followed the correct procedure.
Shadow report	An independent report written and published by non-governmental organisations that is often compared to an official report by government.
Spheres of government	National, provincial and local levels of government.
Statutory body	Body established under a law of Parliament.
Submission	An oral or written presentation, eg on laws or policies.
Subpoena	Formal legal procedure to get a witness to appear and give evidence.
Third party	Outside person or body, in other words, besides the two sides involved in a complaint, dispute or request for information.
Transparency	Openness
Unconstitutional	Not in line with the Constitution.

Unfair discrimination	A policy, law, condition or situation that unfairly disadvantages you, eg because you are a woman or living with a disability.
Violate/Violation	Abuse or not respect, eg violating your right to dignity.
Vulnerable groups	People that need special protection, eg people living with HIV, who may face abuse or unfair discrimination.

## Introduction

Our *Constitution (Act 108 of 1996)* provides a number of ways for claiming and defending basic needs, such as our socio-economic rights to housing, health care, food and water. It establishes a number of independent institutions to hold the Government accountable to its constitutional duty to respect, promote, protect and fulfil socio-economic rights recognised in the Bill of Rights. These institutions include courts to enforce these rights and bodies like the South African Human Rights Commission (SAHRC) to promote and monitor their implementation.

The various laws that have been passed to give effect to the socio-economic rights provisions in the Constitution provide guidelines and mechanisms for advancing and protecting these rights.

The spirit of the Constitution also allows for different groups, such as non-governmental organisations (NGOs) and community organisations, to play a role in realising socio-economic rights. These groups and communities can use different strategies to influence developing policies and laws that are responsive to the basic needs of the poor and of marginalised groups. This is how they can make the Government accountable to the public in its effort to assist people to meet their basic needs.

However, to be effective, these groups and communities need a favourable political environment. This can be achieved by ensuring that the State respects the courts and bodies like the Commission for Gender Equality (CGE). There also needs to be strong involvement by groups and communities in policy-making and law-making processes. Without groups and communities participating in these processes, very little will be achieved in improving the quality of life of the poor and of marginalised communities.

The courts have said that socio-economic rights often do not translate directly to material gains or immediate benefits. Rather, socio-economic rights impose a duty on the Government to create conditions for people to, for example, enjoy their rights to housing, food, education, water and health care services over time.

The fact that socio-economic rights have been included in the Constitution is a big change from the days of apartheid South Africa. But the real test lies in the manner that these rights are implemented and realised for ordinary people. Can ordinary people claim them and enforce them? These rights can only be meaningful if they actually improve the everyday lives of vulnerable people and people living in poverty.

In this chapter, we use the term *advancing* socio-economic rights to include *enforcing* socio-economic rights through the courts, together with other methods like campaigns.

## 2.2

# How can you advance socio-economic rights?

You, your organisation, group or community can take a range of different steps to claim and enforce socio-economic rights.

There are a number of strategies to enforce socio-economic rights. South Africa has a long history of mass action, stayaways and strikes to demand the delivery of basic services. Section 17 of the Constitution confirms the principle that anyone has the right:

“Peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions regarding the implementation of human rights, including socio-economic rights.”

But there are some limits on actions like stayaways, protests and strikes. The *Regulation of Gatherings Act 205 of 1993* deals with the procedures for getting permission to hold demonstrations, marches and strikes.

### GUIDELINES



### GETTING PERMISSION TO HOLD A GATHERING OR MARCH

The procedures and guidelines for getting permission to hold a gathering or march may vary from province to province. The general steps under the Regulation of Gatherings Act are:

- You must apply to the local authority and send a copy of the application letter to your local traffic department.
- Your application must reach the local authority at least seven days before the date of the intended gathering or march.
- Depending on the size of the march, the application letter must include:
  - What the purpose of the march is.
  - What routes (roads or streets) it will take – where it will start and end.
  - What will be the duration and times of the demonstration or march.
  - Who will be the responsible or lead persons during the demonstration.
  - How it will be led (eg a car with a loudspeaker facility or a group of people leading it).
  - Who will receive you at your destination.
- The local authority may decide that it is necessary to discuss the content of the application letter with you before deciding to grant or refuse permission.
- The local authority must reply within 24 hours to inform you whether or not your march or gathering is allowed.

The local authority has a right to grant or refuse permission for gatherings or marches, but must give reasons for the refusal. Permission may be refused:

- If the time for the march would cause serious traffic problems in the city or town (eg it will coincide with peak traffic hours).
- If there is reasonable suspicion that the gathering will result in lawlessness and damage to property (eg looting).
- If it is suspected that the march would cause injury to the participants in it.



Various organisations and institutions use different strategies to promote and protect socio-economic rights. These include research, lobbying, advocacy, campaigns, social mobilisation, marches, media and litigation. The impact of these strategies, individually or collectively, can contribute to the improved delivery of basic services and goods to the poor and to vulnerable groups.

In this chapter, we explore six strategy options to help you advance your socio-economic rights:

- Getting information
- Getting reasons
- Getting help
- Going to policy-makers and law-makers
- Mass action and campaigns
- Going to the courts.

You or your organisation can use these strategy options on their own or together to claim and defend your rights.

## 2.3

### Strategy option 1: Getting information

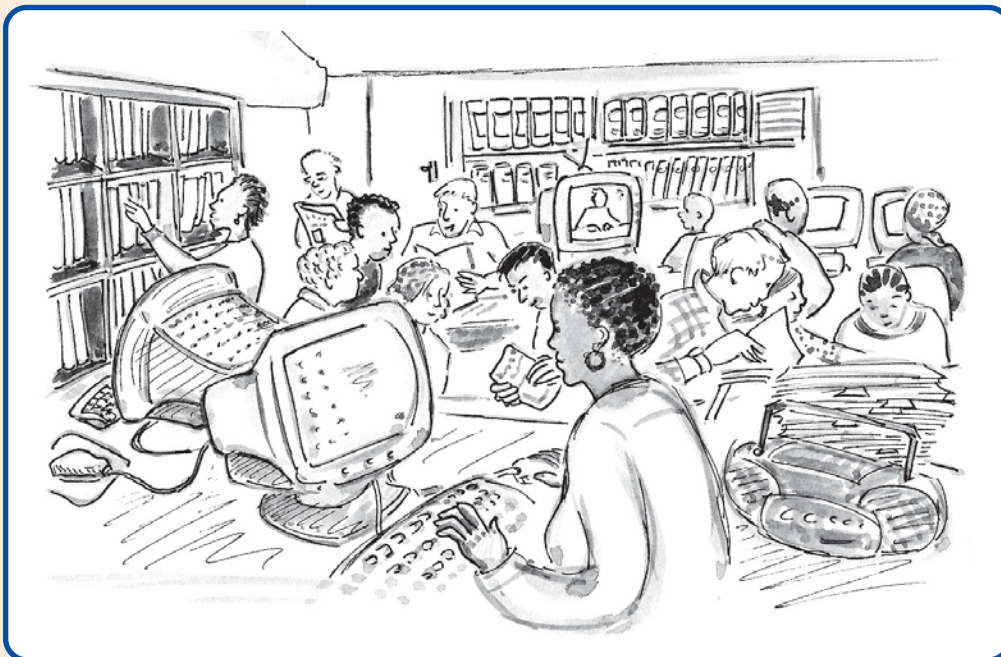
#### 2.3.1 The right to information

Having access to information is important for claiming and enforcing all human rights, including socio-economic rights. Section 32 of our Constitution says that everyone has the right to get:

- Any information held by the State.
- Any information held by another person or body that you need to exercise or protect your rights.

This means that you can get information on what the Government plans to do to improve your needs such as housing, health care, food and education. You can also ask private bodies such as companies for information on things that can harm your rights, for example, information about the pollution of water.

This information helps individuals and communities to engage meaningfully with



processes that will lead to implementing their rights. If people have access to information, they may be able to monitor and claim effective service delivery from the Government. They may also be able to understand why these services are not being delivered to them immediately.

#### EXAMPLE



#### STEPS TO ENFORCE A COURT ORDER

Four days after the Constitutional Court's judgment in the 2002 case of *Minister of Health and Others v Treatment Action Campaign and Others* (TAC case), the Treatment Action Campaign (TAC) wrote a letter requesting information on what steps the different provinces will take to implement the court's orders. The Constitutional Court had ordered that steps must be taken to enforce the prevention of mother-to-child transmission of HIV by providing nevirapine to pregnant mothers living with HIV. Through using the law around access to information, the TAC succeeded in getting responses from some provinces.

Heywood, 2003

The Constitution says that laws can allow organs of State or private bodies to refuse to give you information in some situations. For example, information may be refused if it:

- Leads to the unreasonable disclosure of personal information.
- Could endanger someone's life.
- Could harm or obstruct a criminal prosecution.
- Has a negative effect on the security of the State.

Section 239 of the Constitution says that an *organ of State* is:

- A department in national, provincial and local government, or
- An official or body exercising a power or carrying out a function under the national Constitution or a provincial constitution, or
- An official or body exercising a public power or carrying out a public function under another law.

But an organ of State does not include a court or a judicial officer, for example, a magistrate or a judge.

### 2.3.2 The Promotion of Access to Information Act

The *Promotion of Access to Information Act 2 of 2000* (PAIA) was passed to give effect to the right of access to information. This Act describes in more detail the information you are allowed to receive and how you can go about getting it.

PAIA says public and private bodies must make certain information available without being requested. Public institutions such as the SAHRC have to publish a guide in each official language setting out information you can reasonably request when exercising any right in the Constitution's Bill of Rights (*section 10 of PAIA*).

Public and private bodies must appoint information officers to facilitate requests for information, including the duty to refer requests to other appropriate bodies. PAIA also makes it possible to take action on behalf of vulnerable groups. A person or anyone acting in the public interest may approach a State department or any other institution for the information that they may need to enforce constitutional rights.

## GUIDELINES



## REQUESTING INFORMATION

When requesting information, you should:

- Get a form from the government department you wish to get information from.
- Submit the completed form to the information officer at their fax, telephone number or email address.
- Give sufficient details to enable the official to identify the requested information or record.
- Specify the language you wish the information to be given in.
- If the request is made on behalf of a person, submit proof of the capacity in which you are making the request.
- If you are unable to make a request because of illiteracy or disability, make a request for assistance personally to the government department.
- Keep records of all the communication between you and the information officer that helped you, for example, notes of telephone conversations.

PAIA has a more detailed list of “circumstances” where information may be refused. These include:

- Where the privacy of a third party will be endangered.
- Commercial information relating to a third party.
- Certain confidential information about the safety of individuals and information on the protection of property.
- Protection of privileged documents from production in legal proceedings, for example, communication between an attorney and a client.
- Economic interests and financial welfare of the country, and commercial activities of public bodies.
- Protection of research information of a third party and protection of research information of a public body.
- Operations of public bodies.
- Petty requests, or requests that will result in a substantial and unreasonable wasting of resources to give the information.

Even if information fits into one of these “circumstances”, it can be given if the disclosure of the information would show, for example, an immediate and serious public safety or environmental risk. If you feel that information was unreasonably refused, you can appeal against the decision to the High Court after you have tried any other internal processes to get the information.

## COURT CASE



## CLAIMING ACCESS TO INFORMATION

In the 2005 case of *The Trustees for the Time Being of the Biowatch Trust v The Registrar: Genetic Resources and Others*, Biowatch Trust is an NGO that aims to ensure civil society involvement in determining policy and the regulation of the use, control and release of genetically modified organisms (GMOs) in South Africa. Biowatch Trust approached the Transvaal Provincial Division for an order forcing the Registrar of Genetic Resources to give them certain information relating to GMOs.

Biowatch Trust wanted information on the precise location where field trials of GMOs are being conducted so that Biowatch Trust could assess the environmental impact of each field trial. Biowatch Trust was acting in the public interest, as it was concerned with the issues of pollinating neighbouring farmers' crops, reducing biological diversity, invading wild species, and the potential impact on non-target species.

The Court noted that Biowatch Trust did not follow all the procedures for requesting information in PAIA. However, the Court ruled that this was not enough to justify the refusal of access to the records requested. If the Registrar of Genetic Resources had any doubts about the validity of the request, he could establish what Biowatch Trust was looking for and assist them in achieving that. If the Registrar still doubted the good faith of the request, then he could have refused it.

The Court then ruled in favour of Biowatch Trust on the grounds that:

- It established that it had a clear right of access to some of the information requested.
- It had no other remedy to enforce this right.

## 2.4

# Strategy option 2: Getting reasons

### 2.4.1 The right to get reasons

You have a right to ask for written reasons why an authority took a particular decision that may have negatively affected your socio-economic rights.

Section 33 of the Constitution says that:

- All administrative action must be lawful, reasonable and follow fair procedures.
- Everyone whose rights have been negatively affected by administrative action, has the right to be given written reasons.



## 2.4.2 The Promotion of Administrative Justice Act

The *Promotion of Administrative Justice Act 2 of 2000* (PAJA) was passed to give effect to the right to get reasons. PAJA aims to promote and encourage the culture of accountability and transparency (openness) in exercising public power.

The Act creates procedures for people to follow when their rights are directly or indirectly affected by decisions taken by the State. PAJA thus allows any person whose rights have been significantly and negatively affected by *administrative action*, to ask for written reasons for the action. Reasons can be refused if it is reasonable and justifiable in the circumstances, but the official must then explain the refusal.

### Meaning of administrative action in PAJA

The meaning of “administrative action” in PAJA helps us to understand the kinds of decisions we can challenge and get reasons for.

#### *What is an administrative action?*

An administrative action is when a department or body takes or does not take a decision that negatively affects your socio-economic rights. For example, they:

- Cut off your electricity.
- Cut your water supply.
- Stop providing a social grant.

#### *Who can take an administrative action?*

- An organ of State or any of its officials or employees, when they:
  - Exercise a power under the national Constitution or a provincial constitution, or
  - Exercise a public power or perform a public function under any law.
- A natural person or a juristic (legal) person, such as a company, when exercising a public power or performing a public function under any law – for example, a company contracted to deliver water services on behalf of the State.

#### *What is not included in an administrative action?*

- The law-making functions of a law-making body and some of the executive functions of the national and provincial executives.
- The judicial functions of a judicial officer of a court, tribunal or traditional leader under customary law or any other law.
- A decision to start or continue a prosecution.

For example, this means that you cannot ask for written reasons for a decision not to prosecute a criminal case (*section 1(i)(b) of PAJA*).

## GUIDELINES



## GETTING REASONS

- Find out about the structure of an authority you contact for information or reasons – for example, will you write to the Chairperson or to a sub-committee?
- If there is a local, a provincial and a national body in your area dealing with the particular socio-economic rights you are trying to enforce, you can send similar requests for information and reasons to each of them. Their different replies may help you to challenge their decisions at a later stage in court.
- Always keep good records of things like:
  - Copies of letters demanding information and reasons.
  - Copies of faxes and confirmation slips.
  - Notes of discussions with any officials or elected representatives, including their names and contact details.

## 2.5

### Strategy option 3: Getting help

You or your organisation can get help to enforce your rights by making use of the State bodies that have been set up under the Constitution to help people protect their human rights. There are also many NGOs that can assist you in claiming your rights.



In this part, we look at getting help from:

- The South African Human Rights Commission.
- The Commission for Gender Equality.
- The Public Protector.
- Other commissions and institutions.
- NGOs and other bodies.

## 2.5.1 The South African Human Rights Commission

You can get help from the SAHRC, an independent institution set up to support constitutional democracy. The SAHRC works as a watchdog over the actions of government and private bodies that may affect human rights. Its main functions are to:

- Investigate and report on human rights violations.
- Assist people to get a remedy when their rights have been violated.
- Carry out research on human rights.
- Conduct human rights education.

The SAHRC does not only investigate complaints. It also assists in finding solutions to the issues raised in a complaint, for example, a complaint about unfair discrimination. Cases brought before the SAHRC must involve any of the rights in the Bill of Rights and rights violations must have happened after 1994.

The SAHRC does not usually deal with individual criminal cases, as these are handled by Justice Centres established under the *Legal Aid Board Act 20 of 1996*.

You can make a complaint to the SAHRC as an individual on your own behalf. You can also bring a complaint as:

- A group acting in the public interest.
- An individual or group representing someone who is unable to act independently.
- A group acting in the interests of its members.

By complaining to the SAHRC, your case may be resolved more quickly than if you went to court. The SAHRC uses various strategies to resolve disputes, such as mediation and negotiation.

## GUIDELINES



## COMPLAINING TO THE SAHRC

1. Send your complaint in a letter to an office of the SAHRC or complete a complaint form, available at any of the offices of the SAHRC, and return it to the office.
2. In the letter or on the form, you must:
  - Give your personal details (name, address, identity number and contact details) as the person complaining (the *complainant*).
  - Identify who has wronged you or violated your right (the *respondent*).
  - Set out a brief summary of the events leading to the violation of your rights.
3. Ask for help from the SAHRC's Registrar if you can't write the complaint on your own.
4. When receiving your complaint, the SAHRC will register it on their complaint register.
5. They will then check your complaint and accept it or reject it.
6. If they reject your complaint, you can request the reasons for this.
7. If the SAHRC rejects your complaint or refers you to another body, you can appeal to the Chairperson of the SAHRC within 45 days of the decision.
8. If they accept your complaint, the SAHRC may decide to use one or more of these methods:
  - Hold an investigation.
  - Negotiate or mediate to try and settle the dispute.
  - Hold a public hearing.
  - Deal with it as part of a group of similar complaints.
  - Litigate (go to court) on your behalf.
9. If the SAHRC takes the case to court, they may do this in their own name, or they can help you to take the case to court in your own name.

## EXAMPLE



## PUBLIC HEARING ON EDUCATION

After receiving many complaints, the SAHRC held a public hearing in October 2005 on the content and context of the right to basic education as part of their investigation mandate. Issues raised included:

- The accessibility and quality of education.
- The inability to afford quality education due to factors such as school fees, uniforms and transport costs.
- Challenges brought about by HIV/AIDS.
- The special needs of children living with disabilities.
- Lack of infrastructure in schools.
- Levels of violence and abuse in schools.

The SAHRC concluded that students in disadvantaged schools lack the necessary platform to claim their right to education as provided in laws and policies.

*SAHRC Report on the Public Hearing on the Right to Basic Education, 2006*



## SAHRC monitoring procedure

Section 184(3) of the Constitution places a duty on the SAHRC every year to get information from relevant organs of State on the steps they have taken towards realising the rights in the Bill of Rights: land, housing, health care, food, water, social security, education and environmental rights. Relevant organs of State must provide this information to the SAHRC who will then compile a report from it.

The SAHRC produced five socio-economic rights reports between 1997 and 2004, focusing on information given by government departments at all levels. However, the 6<sup>th</sup> Report of August 2006 includes experiences of communities to assist in verifying the progress claimed by government departments.

The SAHRC has overhauled its monitoring system. They will be reporting every three years, instead of every two years.

Once completed, the SAHRC presents their reports to Parliament and then makes them public. The SAHRC have focused on finding out:

- If government departments understand their duties to realise socio-economic rights.
- If they have taken reasonable steps towards realising these rights.
- What their future plans and goals are.

The SAHRC has also made recommendations on how government departments can improve on their efforts to realise socio-economic rights.

### EXAMPLE



### A FINDING OF THE SAHRC ON HOUSING

*“Although the National Department of Housing has realised its shortfalls and the effects on the lives of beneficiaries, in all the reported programmes, policies and projects, there is no express indication either by the various housing departments or other role players (such as banks) to rectify unsuccessful projects. Instead, the Department continues to introduce and implement new policies without any research as to why the current programmes and project are not successful. For example, the controversy associated with bonded house projects such as in Phumula Gardens in Johannesburg, which was developed in 1994, and the issues around habitability of RDP houses have not been mentioned. The fact is that beneficiaries – whose right to have adequate housing has allegedly been compromised – still live in those houses because they do not have any choice. Yet some of the houses do not come close to being permanent structures as contemplated in the Housing Act and the Housing Code.”*

*SAHRC, 5<sup>th</sup> Economic and Social Rights Report (2002–2003): The Right of Access to Adequate Housing, 51*

For SAHRC office details, see the contact list in the back cover pocket.

## 2.5.2 The Commission for Gender Equality

The CGE is another institution that supports constitutional democracy. The CGE has a mandate to promote respect for gender equality, and to help protect, develop and achieve gender equality. Its main functions are to:

- Investigate gender-related issues on its own initiative or after receiving a complaint.
- Investigate any government structure, statutory body, public or private institution, or individual.
- Develop information and educational programmes.
- Monitor respect for international agreements.
- Make recommendations on government policies and laws affecting gender equality.

For CGE office details, see the contact list in the back cover pocket.

You can approach the CGE to investigate your circumstances when you cannot get access to human rights on grounds such as sex, gender, pregnancy, marital status or sexual orientation. For example, the CGE can investigate the issue of the expulsion of girls from school when they are pregnant, or barriers experienced by women and girls in accessing housing, property and inheritance rights.

The CGE works together with the SAHRC to monitor gender equality in relation to socio-economic rights. There have been suggestions that the two bodies should be combined because of the overlapping nature of their work – for example, they can both assess progress made in identifying gender-related human rights discrimination and violations.

### GUIDELINES



### COMPLAINING TO THE CGE

1. Make a complaint by visiting a CGE office, or by writing to the CGE or phoning their office.
2. Make sure the issue you are complaining about is gender-related, such as sex, gender, pregnancy, marital status, family responsibility (sole parent status), sexual harassment or violence based on your sex. You may approach CGE, for example, if you are blocked from getting access to housing because you are a woman.
3. When you make your complaint:
  - Give your name and contact details.
  - Identify who has wronged you.
  - Say clearly what your complaint is, for example, why you think you have been unfairly discriminated against (eg as a pregnant woman at work).
  - You must also include all the dates and any other relevant details.
  - Indicate whether you have tried to resolve the issue in another way.
4. If you need help to make your complaint in writing, ask the CGE office for help with this.
5. If the CGE cannot deal with your complaint, they should refer you to another body for help – they should give you the name of the person to contact.
6. If the CGE takes on your complaint, they will investigate the complaint, and try to resolve the issue through mediation or litigation.

The *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* mandates the SAHRC to “consult” the CGE when dealing with the equality plans received from government ministers in promoting equality in South Africa (*section 25(5)(b)*).

As with the SAHRC, you can complain to the CGE as an individual on your own behalf or on behalf of someone who needs help. You can also complain as a group acting in the public interest, representing people who need help, or on behalf of your organisation’s members.

### 2.5.3 The Public Protector

The Public Protector is another institution that supports constitutional democracy. It investigates wrongful conduct in State affairs or in the public administration of national, provincial and local government. This includes all government employees, such as police officers, pension payout clerks or electoral officers. It can also investigate corporations or bodies performing a public function, for example, Eskom and Telkom. The Public Protector has powers to report on any wrongful conduct of a public institution and to take action to correct it.

The Public Protector thus protects citizens from unfair treatment by the State and its officials, as well as from inefficient administration and dishonesty to do with public money. You can complain to the Public Protector if, for example, you think that public officials are:

- Corruptly using money meant for socio-economic rights delivery.
- Abusing their powers or not allowing you access to claim your socio-economic rights.

There are circumstances where the Public Protector is not allowed to investigate an abuse of power. These are:

- Judgments of judges and magistrates, including the sentences they give.
- When the alleged abuse concerns private acts by individuals.
- When the wrongdoer is a private company.
- When the action is by doctors or lawyers who are not working for the State.

#### CASE STUDY



#### INVESTIGATION OF ABUSE OF PUBLIC FUNDS

In 2004, the Office of the Public Protector investigated a complaint of misappropriation of public funds in the Department of Housing of Gauteng. The allegation challenged the expenditure by the Head of the Gauteng Department of Housing authorising an advert in the *City Press* and another newspaper on 31 October 2004 about the death of the KwaZulu-Natal MEC for Housing.

The Public Protector:

- Decided that the amount used (R45 144) was unauthorised, fruitless and wasteful.
- Ruled that the expenditure had not followed the requirements of the *Public Finance Management Act 1 of 1999*.
- Recommended that the Gauteng Provincial Treasury investigate further to determine whether the Head of the Gauteng Department of Housing should be charged with financial misconduct.

*Report 29 of the Public Protector, 13 July 2005, 3*

## GUIDELINES



## COMPLAINING TO THE PUBLIC PROTECTOR

For Public Protector office details, see the list in the back cover pocket

1. The Public Protector encourages people to try to solve their complaints before approaching the Public Protector's office. For example, try to speak to the official or write to the person in charge.
2. If you are not satisfied with the answers you get, you should contact an office of the Public Protector.
3. You must bring your complaint within two years after the event you are complaining about.
4. Make your complaint by letter, telephone or on a form available from an office of the Public Protector.
5. Include in your complaint the contact details of everyone you have contacted and copies of any correspondence between you and officials.
6. A legal officer from the Public Protector's office will record your complaint and will let you know that they have received the complaint.
7. The Public Protector's office will then check your complaint, including:
  - The type of complaint.
  - The steps taken to solve the issue.
  - The reasons why the Public Protector should investigate the complaint.
8. The Public Protector will then investigate and try to solve the complaint informally.
9. If the informal approach does not work, there will be an official hearing.
10. The Public Protector can refer the complaint to another body if it falls outside the Public Protector's powers.
11. After the Public Protector's office has conducted an investigation and a hearing, the Public Protector makes a decision and recommendations.
12. The Public Protector has to report to Parliament on cases dealt with and recommendations coming out of these cases.

## 2.5.4 Other commissions and institutions

There are a number of other commissions and bodies that can have an effect on realising your socio-economic rights, for example:

- The Judicial Service Commission
- The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
- The Auditor General
- The Independent Communications Authority of South Africa
- The Public Service Commission
- The Magistrates Commission.

Legislation has given these institutions the power to investigate complaints you may have against any officer, institution or organ of State that falls within their area of focus.

Other institutions such as the Banking Ombudsman, the National Credit Regulator, the Pension Funds Adjudicator and various ombudspersons in the insurance industry, may be able to assist you in making powerful companies and other private bodies accountable for their actions, including violations of socio-economic rights.

### 2.5.5 NGOs and other bodies

NGOs and community-based organisations play a key role in advancing socio-economic rights in South Africa. You can get help from these organisations in taking up socio-economic rights campaigns and cases. These organisations use different strategies, for example, public exposure ('naming and shaming'), monitoring, advocacy, education, public awareness, social mobilisation, litigation, research and training to promote and advance socio-economic rights.

For example, there are a number of organisations that provide legal and paralegal assistance to communities and individuals whose socio-economic rights have been violated or threatened. Amongst these, the Legal Resources Centre, the Women's Legal Centre and the Centre for Child Law (University of Pretoria) take up legal action on socio-economic rights on behalf of groups and individuals.

The decision on which organisation you approach will depend on the nature of the problem you have.

## 2.6

### Strategy option 4: Going to policy-makers and law-makers



The Constitution allows for laws to be made by the national, provincial and local spheres of government. Each of these spheres has a duty to fulfil the rights in the Bill of Rights, including socio-economic rights. While these spheres have their own exclusive powers, they are also interrelated and interdependent:

- The national Government is mainly responsible for setting policy and national standards affecting socio-economic rights – it also has a large influence on the availability of resources for socio-economic rights.
- Local and provincial government will be directly responsible for

the delivery of socio-economic rights – although a particular function may fall within the responsibility of local or provincial government, they may not be able to deliver the service, because not enough funds are available from national government.

The Constitution makes local government the delivery engine of basic services. For example, section 152 says that the aims of local government are to:

- Ensure the provision of services to communities in a sustainable (lasting) way.
- Promote social and economic development.
- Promote a safe and healthy environment.

The Constitution also places a specific developmental duty on local government to give priority to the basic needs of the community, and to promote the social and economic development of the community (*section 153*).

Submissions on policy development and law reforms can be made to the various structures and departments of government. For example, submissions can be made to:

- The various portfolio committees in Parliament.
- Government departments at all levels.
- Agencies delivering services on behalf of government.

### **How can you get involved in these processes?**

Our Constitution encourages transparency and participation in policy-making and law-making processes. You can participate in these processes at different stages to ensure that your socio-economic rights are properly included and protected in policies and laws. You can do this by:

- Lobbying – persuading people or structures to change a policy or law.
- Advocacy – public campaigning and media pressure to bring about change.

#### **GUIDELINES**



#### **GETTING INVOLVED IN LOBBYING AND ADVOCACY**

1. Try to get involved at the policy stage – in other words, before the making of laws and regulations that will affect your daily life.
2. Look out for public hearings held by parliamentary portfolio committees.
3. Look out for calls from local and provincial government for public inputs and comments on policies and laws, including those affecting socio-economic rights.
4. Make contact with Members of Parliament, your local council, or other government officials to be aware of their programmes and agendas.
5. Read local newspapers and the Government Gazette (available at your local library) to know about public hearings on policies and laws.

For details of monitoring, lobbying and advocacy structures you can work with, see the list in the back cover pocket.

Many unions, NGOs and community organisations are involved in monitoring what is happening in Parliament and in government. You can link up with these organisations and ask them for help in approaching policy-makers and law-makers. You can also find out about how you can join or support campaigns run by organisations around socio-economic rights issues, like housing and health care.

## 2.7

### Strategy option 5: Mass action and campaigns

Mobilising groups of people to join forces in drawing attention to an issue can be a useful way of advancing access to socio-economic rights. These campaigns can be organised around local, provincial or national issues.

#### EXAMPLES



#### CAMPAIGNS

- *Local mobilisation around a particular environmental issue affecting a community, such as pollution or lack of access to nearby water.*
- *A provincial campaign when the province is responsible for the delivery of a particular right, such as education.*
- *A national campaign targeting the delivery of specific rights, such as access to antiretrovirals, or events, such as the day on which the budget is presented to Parliament, to draw attention to the resources government is making available for improved delivery of socio-economic rights.*

*For example, a wide range of civil society organisations founded the Basic Income Grant Coalition in June 2001 to coordinate efforts, to develop a common campaign and to build popular support for a basic income grant. Led by a National Steering Committee comprising the national leadership of the various sectors in the Coalition, high profile South African personalities were also approached to serve as patrons (Liebenberg, 2002 and Kallman, 2002).*

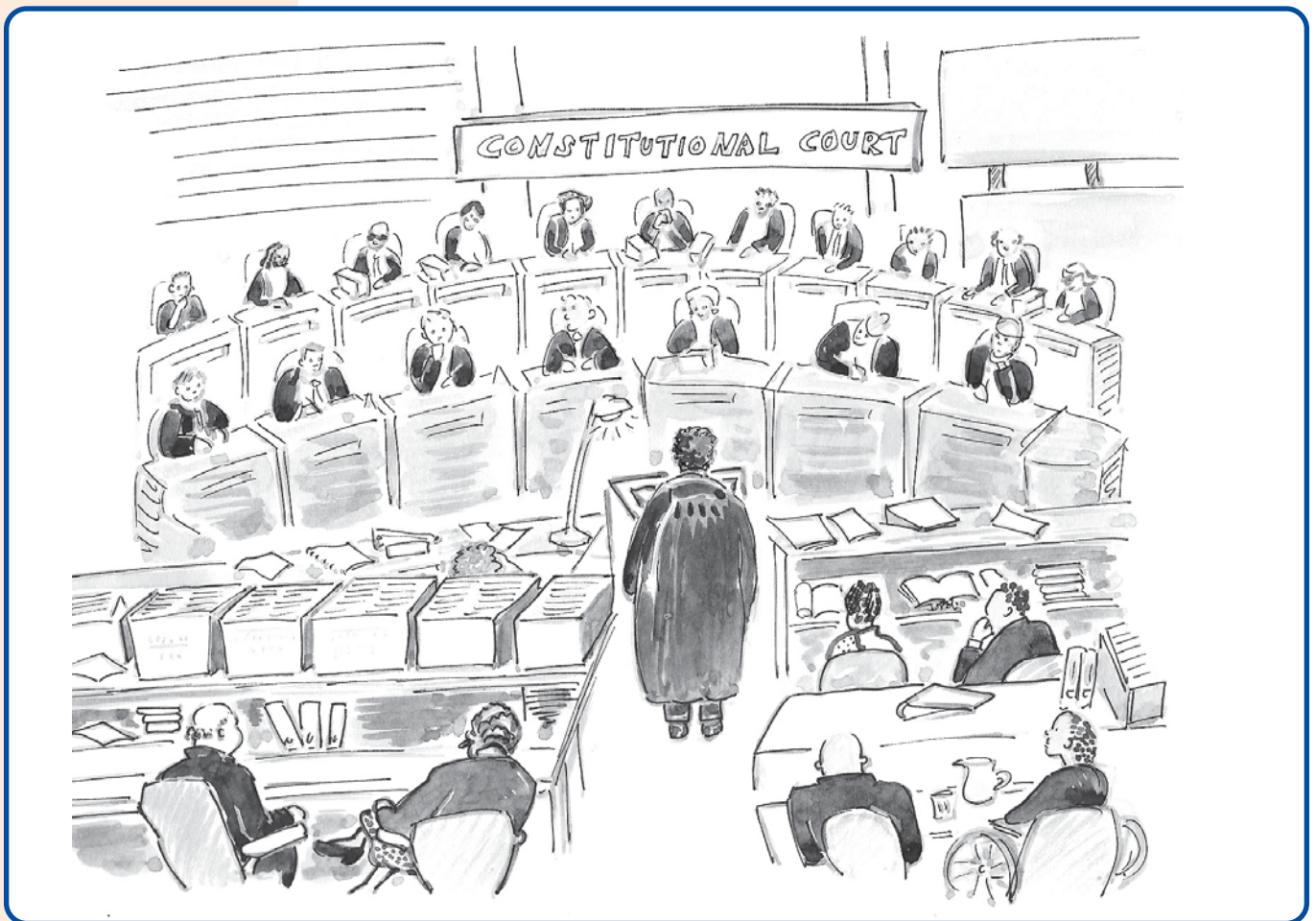
Peaceful mobilisation or mass action can involve a range of strategies, such as:

- Developing a catchy slogan for your campaign.
- Printing T-shirts carrying the message you are trying to get across.
- Making posters to publicise your cause.
- Holding mass meetings with prominent speakers supporting your campaign.
- Organising a petition with a large number of signatories to be sent to the relevant authority.
- Writing letters to the newspapers drawing attention to the issue you want to highlight.
- Using other media, such as community radio or street theatre.

## 2.8

### Strategy option 6: Going to the courts

After trying other ways to claim and defend your socio-economic rights, you may decide to go to the courts to enforce your rights. Section 34 of our Constitution says that you have the right to have all disputes about rights protected in the Bill of Rights decided in a fair public hearing before a court or another independent body.



## 2.8.1 Legal assistance

If you are considering the option of going to courts to enforce socio-economic rights, it is helpful to get the assistance and advice of a lawyer who has experience in public interest litigation and human rights cases.

While every person wishing to have a dispute resolved may have access to a court, this does not necessarily allow everybody to have a lawyer for free to assist in getting the dispute resolved. The Constitution says that people who face the risk of substantial injustice in criminal cases (eg a long prison sentence) and who cannot afford a lawyer, can get one at State expense.

Children have a broader right to legal assistance at State expense in civil cases affecting their interests if being without a lawyer will result in serious injustice, and thus may be able to get a lawyer through the State to enforce socio-economic rights.

In socio-economic rights cases, various legal institutions may be prepared to help you to pay for a lawyer in certain circumstances or to find you an affordable one. You can try legal NGOs such as:

- The Legal Resources Centre
- The Women's Legal Centre
- The Centre for Child Law (University of Pretoria)
- University law clinics
- Paralegal advice offices.



## EXAMPLES



## NGOs AND INSTITUTIONS HELPING IN THE PUBLIC INTEREST

- *The Legal Resources Centre (a non-profit organisation working for social justice and human rights in South Africa) provided legal assistance to the community of Wallacedene to take their case to the Cape High Court and the Constitutional Court in the 2000 cases of **Grootboom v Oostenberg Municipality and Others**, and **Government of the Republic of South Africa and Others v Grootboom and Others** (Grootboom case). This community was evicted and left homeless, and wanted an order forcing the State to provide them with access to adequate housing under section 26(1) and shelter for their children under section 28(1)(c) of the Constitution.*
- *The Women's Legal Centre (an advocacy and public interest group that works to promote women's rights) participated in the case involving young women who challenged the constitutionality of the rule of male primogeniture (that male heirs inherit) and other laws that supported this in the High Court and Constitutional Court in the 2004 and 2005 cases of **Bhe and Others v Magistrate Khayelitsha and Others**.*
- *The Legal Aid Board (a statutory body) paid for legal representatives of the litigant in the 2004 High Court case of **Daniel v Robin Grieve Campbell and Others** on protecting the inheritance rights of spouses in monogamous unions, who are married according to Muslim rites.*
- *The Centre for Child Law at the University of Pretoria (an advocacy and public interest body that works to promote the best interests of the child in South Africa) was involved as an applicant in the 2006 Witwatersrand High Court case of **Centre for Child Law and Others v MEC for Education and Others** on children's access to proper bedding while in the care of the State.*

## GUIDELINE



## IMPORTANT DOCUMENTS

When going to see a lawyer or paralegal, take all documents and records of your communication with any other bodies, as these will help to build your case.

Other statutory bodies, such as the SAHRC and the CGE, also have the power to take cases to the courts on your behalf.

## 2.8.2 Who can go to court?

### a) As a party

If your rights or your organisation's rights are violated or threatened, you can go to court to get a remedy. You then become a *party* or an *applicant* in the case.

In addition, you or your organisation can go to court in any one of these ways:

- On behalf of someone who cannot take up a case in her/his own name, eg a minor.
- On behalf of a group of people, eg people living in an informal settlement.
- On behalf of a class of people, eg a person brings a case on behalf of

herself and all the other people whose social grants were discontinued without notice or warning (in other words, people who are in a similar situation).

- In the public interest, eg to get a court order to set school fees at an affordable level for poor people.
- As an association acting in the interest of your members, eg trade unions, civic organisations, sports clubs.

Public interest actions are very important for enforcing socio-economic rights because most poor people do not have the capacity to go to court on their own to advance their rights. Our Constitution now allows you, your organisation, your street committee or your union to go to court on behalf of other citizens and residents.

#### GUIDELINES



#### ACTING IN THE PUBLIC INTEREST

Before an organisation or committee is allowed to act in the public interest, you must meet two requirements:

1. The organisation or committee must show that it is acting in the public interest. For example, it must show that:
  - There is no other reasonable and effective way to bring the case.
  - The remedy will benefit a wider group of people.
  - The affected group or people belong to vulnerable parts of society.
  - The consequences of the violation of the right are very serious for the affected groups or people.
2. The organisation or committee must show that the public has a sufficient interest in the remedy they want to get. For example, it must bring enough evidence and argument to enable the court to decide the issue.

### b) **As an *amicus curiae***

You or your organisation may participate in a case that is already before the court on the grounds that you have an interest in the issues that will be raised. The rules of the High Court, Supreme Court of Appeal and

Constitutional Court allow a person or an organisation with an interest in a case before the courts to be admitted as an *amicus curiae*, meaning a 'friend of the court'.

An *amicus curiae* is not a party in the case. It only assists the court to arrive at its decision. It joins the case because of its special expertise or interest in the case before the court, and because it believes that the decision may affect its interests.

#### EXAMPLE



#### PARTICIPATING IN COURT CASES AS AN *AMICUS CURIAE*

*An organisation with a lot of research and advocacy experience in housing rights can present a study they have conducted on evictions and homelessness in the City of Johannesburg.*

## GUIDELINES



### ADMISSION AS AN AMICUS CURIAE

To be admitted as an *amicus curiae*, an organisation or person must show that the submission it wants to put before the court:

1. Is relevant to the case.
2. Will be useful to the court.
3. Is different from the submissions of other parties.

To be admitted as an *amicus curiae*, you also need:

- To get the written consent of all the parties in the case.
- To apply to the court for admission as an *amicus curiae* and provide supporting documents to show that all the parties have agreed to your participation.

Even if you have the consent of the parties, you still have to apply to the court because it has the final discretionary power to decide whether to admit or not to admit you or your organisation.

## COURT CASE



### BRINGING ISSUES COVERED BY ANOTHER PARTY

The Institute for Security Studies (ISS) had applied to be admitted as an *amicus curiae* in the 2005 case of *Institute for Security Studies In re State v Basson*. The Constitutional Court acknowledged ISS's interest in international criminal law, a subject matter in the case. However, it refused to admit ISS as an *amicus curiae* because the central issues it wanted to raise were already covered by the State.

The Constitutional Court also said that the fact that a person or organisation applying to become an *amicus curiae* has obtained consent from all the parties or was admitted as an *amicus curiae* in a lower court, does not automatically mean that the Constitutional Court has to admit them. The Court has a discretion to decide whether or not to admit a person as an *amicus curiae* (paragraphs 7 and 8 of judgment).

## 2.8.3 The different courts

These are the different courts that you can use to enforce your socio-economic rights:

- **The Constitutional Court** – the highest court for interpreting your constitutional rights.
- **The Supreme Court of Appeal** – the highest court for dealing with appeals, except in constitutional cases.
- **The High Courts** – the highest courts in each province.
- **The Magistrates' Courts** – the courts dealing with issues in your town or neighbourhood, and sometimes with socio-economic rights (eg complaints of unlawful eviction from land or housing).
- **Specialist courts and tribunals** – these, for example, deal with:
  - Labour cases in the Labour Courts.
  - Land issues in the Land Claims Court.
  - Water resources and services in the Water Tribunal.

For more on PAIA, see page 58, and on PAJA, see page 61.

- Equality cases in the new Equality Courts created by the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*, together with PAIA and PAJA. These laws give the Magistrates' Courts powers to hear equality cases, to review unreasonable administrative action, and to decide on disputes on access to information.

## 2.8.4 Remedies

In socio-economic rights cases, it is very unusual for a court to make an order that results in giving you as an individual direct material gain, for example, ordering that the Government must build a house for you.

The Bill of Rights in the Constitution gives the courts broad powers when deciding constitutional cases, including socio-economic rights:

- Section 38 says that a court may grant appropriate relief, including a declaration of rights if there is a violation of a right.
- Section 172(1) says that a court must declare the law or conduct that is inconsistent with the Constitution unconstitutional to the extent that it is inconsistent.
- Section 172(2)(b) says that a court may make any order that is just and equitable.

A court may declare that a law, part of a law or conduct that goes against the Constitution, is invalid. A court can also make any order that is "just and equitable", including deciding to delay declaring an action invalid in order to give the Government a chance to correct the problem.

There are different kinds of orders that the court can make, including:

- Declaratory orders
- Mandatory orders
- Damages
- Structural interdicts
- Reading in words
- Contempt of court orders.

### a) Declaratory order

#### COURT CASE



#### GOVERNMENT NOT MEETING ITS HOUSING DUTIES

In the Grootboom case, the Constitutional Court declared that the State housing programme for the Cape Metropolitan Council did not meet constitutional requirements. This was because it did not make reasonable provision for people with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations (*paragraph 99 of judgment*).

This is an order where the courts declare something lawful or unlawful, or a law or policy constitutional or unconstitutional.

## b) **Mandatory order**

This is a court order forcing the other side to do something, also called a *mandamus*.

### COURT CASE



### ORDERING THE STATE TO DO SOMETHING

In the 2002 case of *Minister of Health and Others v Treatment Action Campaign and Others* (TAC case), the Constitutional Court ordered the Government to:

- Remove the restrictions that prevent nevirapine from being made available for reducing mother-to-child-transmission (MTCT) of HIV at public hospitals and clinics that are not research and training sites.
- Provide, where necessary, for the training of counsellors that are based at public hospitals and clinics that are not research and training sites on the use of nevirapine.
- Extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and speed up the use of nevirapine for preventing MTCT of HIV (*paragraph 135 of judgment*).

## c) **Damages**

This is an order where the court tells the authority that caused the harm or violated your right to pay you money to compensate you.

### COURT CASE



### GRANTING CONSTITUTIONAL DAMAGES

In the 2005 case of *President of South Africa and Others v Modderklip Boerdery (Pty) Ltd and Others*, the Constitutional Court granted an order stating that:

- Modderklip Boerdery Pty Ltd (a private land company) has a right to be paid compensation by the Department of Agriculture and Land Affairs for the loss of use of its land during the period in which it had been occupied by the Gabon community. This was because the occupation was a result of the failure of the State to provide alternative land for the occupiers.
- The compensation should be calculated under section 12(1) of the *Expropriation Act 63 of 1975*.
- If the parties are unable to agree on the compensation, they are granted leave to approach the High Court for direction (*paragraph 68 of judgment*).

## d) **Structural interdict**

A structural interdict (also called a *supervisory order*) is an order where the court orders a party (the violator) to submit a report to it within a specified period of time setting out what steps it has taken or what future steps it will take to correct a wrong. The wronged party will be given an opportunity to respond to the report.

If you do not obey the obligations set out in the court order, you can be guilty of *contempt of court*. The High Courts have used the structural interdict as a form of relief in socio-economic rights cases.

For more on contempt of court, see page 79.

## COURT CASE



## REPORTING TO THE COURT

In the 2006 case of *EN and Others v The Government of South Africa and Others* (EN case), the Durban High Court ordered the respondents to:

- Remove the restrictions that prevent the 12 applicants (prisoners) from accessing antiretroviral (ARV) treatment they have a right to get under the National Department of Health's *Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa*.
- Immediately provide ARV treatment to the applicants according to the Government's Operational Plan.
- Submit affidavits to the Court, within 15 days, setting out what it will do to obey the court order.

The Court also said that the applicants may also comment on the Government's affidavits within five days, and that the Government could reply again to the applicants' comments.

## Debate: structural interdicts in socio-economic rights cases

The Constitutional Court has been reluctant to grant a structural interdict. This has led to heated public debate. In the TAC case, the Court said that this kind of order should only be made in appropriate cases where it would be necessary to secure compliance with the court order. For example, the Court may order a structural interdict where the Government has disobeyed declaratory orders or other orders granted by a court in a particular case.

The courts may be reluctant to order structural interdicts because of the burden these orders place on the courts to supervise them. By issuing these orders, the courts may feel they are becoming involved in political struggles around complex issues. The Constitutional Court has been criticised for its refusal to order structural interdicts, because there have been many cases of government officials disobeying court orders. These are some of the advantages of structural interdicts:

- They empower the court to monitor the implementation of its own orders.
- They make the Government account to the court on its failures to meet its obligations.
- They are potentially more effective in ensuring that litigants get services (such as shelter, social grants or medical drugs) as promised by court judgments.
- They offer an opportunity for successful litigants to participate in forming policies or other measures to carry out court orders.

## e) Reading in words

A court may insert missing words (normally in legislation) in order to bring the law in line with the Constitution. This is done after the court has found that an Act or regulation is inconsistent with the Constitution.

### COURT CASE



### READING IN MISSING WORDS

In the 2004 case of *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* (Khosa case), the applicants (a group of permanent residents in South Africa) challenged certain provisions of the *Social Assistance Act 59 of 1992* and the *Welfare Laws Amendment Act 106 of 1997*. These laws restricted access to social grants to South African citizens only. This excluded permanent residents, aged people and children, who would otherwise have qualified for social assistance.

The Constitutional Court said that the words “or permanent residents” must be read in after the words “South African citizens”.

## f) Contempt of court order

A court may hold an authority or person criminally liable for not obeying a court order (often a mandatory order or a structural interdict). In these cases, the court would normally call on the person charged with contempt of court to show why he/she should not be held ‘in contempt of court’. If the person is found guilty of contempt of court, they may be fined or imprisoned.

### Debate: contempt of court

Some courts, for example in the Eastern Cape and KwaZulu-Natal, believe that making contempt of court orders against government officials is the only effective way of ensuring that the State complies with court orders to pay money.

However, the Supreme Court of Appeal disagrees with this approach. They argue that it will be unfair to hold a government official in contempt of court when a person in the same position cannot be held in contempt of court for not paying his/her own debts (*Jayiya v Member of Executive Council for Welfare, Eastern Cape Provincial Government and Another, 2004*).

In the 2006 EN case, the Durban High Court reopened this debate and stated that:

- The Government’s failure to comply with court orders seriously undermines the role of the courts and brings about a “grave constitutional crisis” (*paragraph 33 of judgement*).
- Unless section 3 of the *State Liability Act 20 of 1957* is declared unconstitutional, there will be no mechanism such as imprisonment to enforce court orders (*paragraph 32*).

To date, this issue has not been raised in the Constitutional Court in relation to socio-economic rights cases. Yet, contempt of court orders have the potential to ensure compliance with court orders. By trying to get contempt of court orders in socio-economic rights cases, you can help the courts develop this remedy into a powerful weapon for enforcing socio-economic rights.

## 2.8.5 Obeying court orders

Our Constitution values law and the orders of the courts very highly. If court orders are not obeyed, then anybody disobeying them should be called to account and face some punishment or consequences. This is one of the reasons why some courts are arguing for the State Liability Act to be declared unconstitutional to allow for the possibility of sending government officials to prison for contempt of court.

There are a number of cases involving socio-economic rights (especially on social grants in the Eastern Cape and KwaZulu-Natal) where national, provincial and local government officials have ignored court orders, or have delivered later than ordered by the court. The courts are struggling to develop effective and fair punishment responses in these cases.

A number of judges have expressed dissatisfaction with often having to deal with the same type of cases because of poor administration in some provinces.

### COURT CASES



### NON-PAYMENT OF SOCIAL GRANTS

In the 2000 case of *Vumazonke and Others v MEC for Social Development*, the Eastern Cape High Court dealt with a number of cases of people whose social grants had not been paid to them by the Eastern Cape administration. The Court ruled against the Department of Social Development, and then made the judgment available to the SAHRC and Public Service Commission so that they could play a monitoring role.

The 2004 case of *Q.T. Machi and Others v MEC for the Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* involved poor handling of applications for social grants. The Durban High Court ordered the MEC for Social Development to pay costs from his own pocket for acting negligently and unreasonably in defending the case in court. However, the order was suspended to allow the MEC to satisfy the court by a specified date that the backlog in the applications had been properly dealt with.

## 2.9

## Conclusion

Even with our Constitution's Bill of Rights, enforcing rights and getting a remedy when your rights have been violated is often not so simple. There is a range of possible strategies available to use to advance your socio-economic rights.

Choosing which strategy to follow will depend on a wide variety of factors, and can be influenced by:

- Whether there is a 'built-in' procedure for complaining, for example, legislation or a government department sets up a complaint hotline.
- Whether a statutory body such as the SAHRC or the CGE can possibly assist to resolve your complaint.
- Whether there is a group of people facing similar hurdles in realising their socio-economic rights, who can get together to form a joint strategy.
- Whether going to court is a viable option, and whether a court order is likely to produce the result that you aim to achieve.



- What resources are available to you to implement your chosen strategy.
- Whether an NGO or public interest legal centre is able to assist you.

The strategies suggested in this chapter should be read together with Chapters 5 to 12 that explain specific socio-economic rights. You may decide to use different strategies for advancing different rights. For example, an appropriate strategy for enforcing environmental rights (where big companies, local governments and provincial governments are often the targets of complaints) may differ from the strategy to follow in advancing education rights, where you may start with a complaint at school or governing board level.

Finally, we should remember that our constitutional democracy is a young one, just over a decade old. We have a strong foundation for increasing access to socio-economic rights and to prevent rights violations, but there is still a great deal of work to be done. We have to work together creatively and strategically, using democratic principles and the limits of the law, in efforts towards ensuring that everyone's access to their socio-economic rights is eventually fulfilled.

## Discussion ideas



Discuss these practical situations in one group or in smaller groups in a workshop:

### TALKING POINT 1

Mrs Calata, aged 72, was wrongly declared and registered dead by the Department of Home Affairs. For about 13 years, she has been struggling to get this corrected by the Department. As a result, she couldn't access her pension when she reached the minimum age required. She approached the Department and they promised her that her case would be attended to. After a long wait, she approaches you as an advice office worker in your community.

- *Which strategies can you use in helping Mrs Calata?*

### TALKING POINT 2

You are the coordinator of a service organisation that deals with the protection of the rights of children. On 25 November 2003, three children were involved in a car accident. Their parents approach your organisation to assist them in making a claim against the Road Accident Fund. The children do not have Birth Certificates. You write letters and make telephone calls.

- *What can you and your organisation do to help the families?*

## TALKING POINT 3

The Demarcation Board issued a statement that it was considering changing the existing structure of municipal demarcations (the way the city and surrounding areas are divided up into local councils). On radio and in the weekend newspapers, it calls for people to come forward and make submissions on the advantages and disadvantages of this proposal. You hear this on the radio and strongly oppose the proposal.

- *What steps can you take to bring your feelings on this issue to the attention of the Demarcation Board and to make your voice heard more widely?*



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