1 Creating an Enabling Environment for the Right to Adequate Housing for Persons with Special Needs: Expediting the Special Housing Needs Policy and Programme (SHNP, 2015)

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Introduction

In October 2015, the MEC for Health in Gauteng, Qedani Mahlangu, announced the termination of the contract between the Department of Health and Life Esidimeni. Some 1,300 people who were receiving highly specialised chronic psychiatric care were to be moved out of Life Esidimeni to families, non-governmental organisations (NGOs) and psychiatric hospitals providing acute care. This was part of what the MEC termed 'deinstitutionalisation'. But between March and December 2016, 94 mental health-care patients died under the auspices of 16 NGOs and three hospitals. The Minister of Health requested that the Health Ombud which is located in the Office of Health Standards Compliance investigate '[t]he circumstances surrounding the deaths of mentally ill patients in the Gauteng Province' and advise on the way forward.

Among the many disconcerting findings was that the NGOs concerned were inadequate to the task of providing for the special needs of persons with mental disabilities because they were 'unstructured, unpredictable [and] sub-standard' (Office of the Health Ombud 2007). The Health Ombud found that of the 27 validly licensed NGOs to which patients were transferred, most of them lacked appropriate infrastructure; some were in the process of renovating buildings as patients were being transferred to them, while others discontinued building or renovating their facilities, even though such renovations were a prerequisite for patients to be transferred into those facilities (Office of the Health Ombud 2007).

A recurring issue in the Health Ombuds's report was the insufficiency of the funding the Gauteng Provincial Department of Health allocated to NGOs for delivering housing that caters to the special needs of patients and for subsidising the operational costs of running facilities of this kind effectively (Office of the Health Ombud 2007).

Challenges in accessing state-assisted housing for persons with special needs arise mainly because the national housing policy and other relevant policies do not make provision for capital funding of special needs housing. Because of this lack of provisioning, NGOs and non-profit organisations (NPO) that respond primarily to the demand for special needs housing are severely hamstrung by a lack of financial resources and unable to access state assistance or capital funding to build new infrastructure.

In an attempt to fill this policy gap, the Department of Human Settlements had developed, prior to the Esidimeni tragedy, a policy on special needs housing the Special Housing Needs Policy and Programme of June 2015 (SHNP 2015). However, despite the desperate need for a policy that provides clear direction on the provision of housing to special needs persons, the SHNP has yet to be finalised and implemented.

Special needs housing in context

The SHNP defines special housing needs as housing opportunities for persons who for a variety of reasons are unable to live independently in normal housing or require assistance in terms of a safe, supportive and protected living environment and who therefore need some level of care or protection, be it on a permanent or temporary basis.

'Special needs housing' is thus any form of housing for individuals, who due to their specific vulnerabilities, require adjustments to their housing or are unable to live independently and require care in state-funded or state-assisted housing.

Although the government has made various commitments to prioritise the needs of vulnerable people in housing delivery, vulnerable persons and those with special needs – including women, people living with HIV/AIDS, the elderly, children, people with disabilities, and poor people – still face numerous obstacles in accessing housing (Special Rapporteur on Adequate Housing 2008).

Statistics South Africa (StatsSA), in its report entitled Social profile of vulnerable groups in South Africa, 2002–2011, assessed the situation of children, the youth, the elderly, and women over time, finding that, in 2012, 11 per cent of child-headed households 9 per cent of children, 23.5 per cent of youth-headed

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households, 11.2 per cent of youth, 11 per cent of female-headed households, 9.1 per cent of females, 4.3 per cent of elderly-headed households and 3.3 per cent of the elderly lived in informal dwellings.

Evidently, then, the current national housing framework is failing to meet the demand of these vulnerable groups as identified by StatsSA – let alone the special needs of a range of other vulnerable persons who are excluded from being considered residents of informal dwellings and, consequently, the situational analysis conducted by StatsSA.

Special needs housing takes different forms and a distinction is made between individual housing and group housing. The former is housing for individuals with special needs who are poor and can indeed live independently; in this case, adaptations need to be made to the houses of, for instance, the aged and persons with disabilities. The latter refers housing for persons with special needs who are poor and have vulnerabilities that render them unable to live independently; such persons require group care provided by registered and approved NGOs.

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The international and national legal framework

The right to adequate housing is well recognised in international human rights instruments. Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes protections for the right of everyone to an adequate standard of living and the right to housing. In General Comment 4, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) elaborates on the meaning of article 11(1) in relation to the right to housing, while General Comment 7 of the CESCR deals with the question of forced evictions.

General Comment 4 provides among its entitlements that the special needs of vulnerable groups should be taken into account in policy making and implementation.

In the same Comment, the CESCR notes the importance of the term 'adequacy' in relation to housing, and identifies various factors that have to be in place for housing to be considered 'adequate'. Among them are legal security of tenure; accessibility; affordability; habitability; location; availability of services, materials, facilities and infrastructure; and, finally, cultural adequacy. The fact that it was necessary to refer to such a wide range of factors demonstrates how hard it is to define what exactly constitutes 'adequate housing'.

In addition, article 28 of the Convention on the Rights of Persons with Disabilities (CRPD) recognises the rights of persons with disabilities to housing. Similarly, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) recognises the right of rural women to adequate living conditions in relation to housing and other rights; in the same vein, CEDAW General Recommendation 27 concerns the protection of rights of older women and requires states to ensure access to adequate housing for this group.

The national regulatory framework

Section 26 of the Constitution of South Africa provides that the state must take reasonable legislative and other measures to progressively provide everyone with access to adequate housing. Other sections relevant to special needs housing include section 28(1) (the right to shelter for children), section 9 (the right to equality), and section 10 (human dignity). Section 26 refers to everyone and implies that the state is duty-bound to adopt an approach to housing that addresses special needs as well. Consequently, it is a constitutional obligation to create a national comprehensive special-needs housing policy, as failure to do so would mean a deviation from the principles set out in constitutional jurisprudence on housing rights.

The Housing Act 107 of 1997 requires that all spheres of government provide for the special needs of vulnerable groups in all housing policies and programmes. The Housing Act states that '[n]ational, provincial and local spheres of government must … promote the meeting of special housing needs, including, but not limited to, the needs of the disabled'. Section 2(1)(a) of the Housing Act establishes the 'general principles applicable to housing development' and creates an obligation on the government 'to give priority to the needs of the poor in respect of housing development'; to 'promote the meeting of special housing needs, including but not limited to, the needs of the disabled'; and to promote 'the housing needs of marginalised

women and other groups disadvantaged by unfair discrimination'.

In addition, the Social Housing Act 16 of 2008 prescribes that priority must be given to low- and medium-income households in social housing development. It obliges the government and social housing institutions to ensure that their 'respective housing programmes are responsive to local housing demands and that special priority must be given to the needs of women, children, child-headed households, persons with disabilities and the elderly'.

In the case of Government of the Republic of South Africa and Others v Grootboom & Others 2001, the Constitutional Court held that the state's positive obligation under section 26 of the Constitution is primarily to adopt and implement a reasonable policy, within its available resources, that ensures access to adequate housing over time.

Existing housing policy and programmes

The national housing policy framework does not currently make provision for capital grant funding to NGOs that provide housing to persons with special needs. However, the National Housing Code, 2009, makes provision for an institutional subsidy. Selected provinces have used a variation of this to access capital funding for the provision of special needs housing.

However, the objective of the Institutional Housing Subsidy Programme is to provide capital grants to social housing institutions that construct and manage affordable rental units. Three provincial Human Settlements departments (Kwazulu-Natal, Eastern Cape and Gauteng) have special-needs housing policies in place, and the NGO sector has used these successfully to access funding for infrastructure.

The remaining provinces, however, do not have similar policies or programmes, thus unfairly limiting access to special needs housing in these provinces. In other words, this lack of uniformity in the application of housing policy across provinces negatively impacts on the right to equality of persons with special needs in provinces where there is no policy on special needs housing. Due to the way in which the relevant provincial Human Settlements departments interpret the national housing policy, individuals in provinces that do not have a policy on capital funding for special needs housing may be unable to access state-assisted housing to the same extent as their counterparts in KwaZulu-Natal, Gauteng and the Eastern Cape. In addition, there is uncertainty about how appropriate it is to use the institutional subsidy mechanism as a means to access state funding to build infrastructure for special needs housing.

The SHNP

Civil society organisations have been advocating since as long ago as 1995 for a national policy framework that makes provision for capital funding to NPOs for special needs housing. The SHNP recognises that NGOs that in the main provide 'accommodation/housing' and related services to special needs persons require a source of capital funding to be able to provide facilities. However, at the moment there is no national housing programme through which NGOs can access capital funding for special needs housing.

The SHNP aims to fill this vacuum in the government's national housing programme. Its main objective is to provide capital grants to approved and registered NGOs 'for the acquisition/ development of new and/or the extension of and/or upgrading/ refurbishment of existing special housing needs facilities for persons/households with special housing needs'.

To date, the SHNP has not been approved by cabinet and is hence not yet in the implementation phase.

A rights-based assessment of the SHNP

In the Grootboom judgment, the Constitutional Court took note of the many and varied circumstances of individuals and households, as well as the importance of location, and acknowledged the near-impossibility of defining what, in normative terms, constitutes 'adequate housing'. The Court nonetheless held that the state has an obligation to develop and implement a 'reasonable policy' and went on to outline the components of such a policy.

In addition, it stipulated that, in developing such a policy and its programmes, the state has to take a human rights-based approach and keep the principles of transparency and public participation in mind.

In other words, according to the Court, a number of essential requirements had to be adhered to, including meaningful public participation; the inclusion of vulnerable persons in this process; transparent decision-making; enabling sufficient access to information; accountability; continuous monitoring; appropriate complaints or grievance mechanisms; and non-discrimination.

As such, the discussion below looks at the extent to which the SHNP meets the requirements of a human-rights based approach and can be considered a reasonable policy measure.

The Grootboom judgment requires that a reasonable policy prioritise the needs of the poorest and most vulnerable – specifically, that it responds with care and concern to the needs of the most

desperate, and that the government adequately considers the social economic and historical context of widespread deprivation. At its most fundamental level, the SHNP seeks to respond to the housing needs of vulnerable and marginalised persons; however, in certain respects, it does not respond adequately to the realities on the ground. For instance, in relation to housing for persons with disabilities and orphans, insecurity of tenure remains a concern.

An important objective of the SHNP is to target persons who are historically disadvantaged. In an interview with the South African Human Rights Commission, a representative of the national Department of Social Development (DSD) explained that existing facilities tend predominantly to be in former 'white areas'; in response to this deficiency, the SHNP will provide funding to emerging NGOs to establish facilities in predominantly 'black areas' in order to meet the special housing needs of people who are previously disadvantaged and still experience deprivation. In relation to its oversight function, the DSD intends to be more engaged and 'hands-on' in how it supports emerging NGOs.

The SHNP articulates the roles and responsibilities of the DSD, Department of Human Settlements (DHS), Department of Health, Department of Child Services and corresponding provincial departments and regional offices, as well as those of NGOs and other entities, such as traditional leaders, Transnet and the departments of Rural Development and Land Reform and Public Works (DPW).

In a study conducted by the South African Human Rights Commission (South African Human Rights Commission 2018) on the reasons for the SHNP's delayed implementation, the majority of the NGOs that were interviewed said that, given the cross-cutting nature of special needs and different vulnerabilities, effective intergovernmental cooperation will be an important factor in the successful implementation of the SHNP. The study noted, though, that while the SHNP recognises this need and makes sufficient provision for it, there were concerns around intergovernmental cooperation among different government departments and levels of government with the implementing departments.

In terms of the SHNP, the DHS and DSD will cooperate at provincial level, but whereas the provincial DHS can grant final approval of funding applications, the provincial DSD must refer the application to the national DSD for such approval. This allocation of responsibilities may present an institutional stumbling block. NGOs contend that that the SHNP is overly complicated because it requires to ensure its effective implementation, the SHNP makes it incumbent on the DHS and oversight departments to provide information and guidance to provincial departments and municipalities, and to train officials on the policy. The division of functions, roles and responsibilities between government levels is critical in the light of the Esidimeni tragedy and the need to avert such occurrences in the future.

Lessons must be learnt from this tragedy, particularly in view of the ultimate objective of the SHNP. to make provision for housing of people with special needs who are unable to live independently and meet their own needs. Consequently, it can be argued that although they may come across as bureaucratic and onerous, the institutional arrangements described in the SHNP are indeed coherent and reflect an awareness of interdepartmental capabilities at different government levels of government in relation to correct policy interpretation and decision-making.

The SHNP was developed on the premise that the primary responsibility to deliver special needs housing lies within the mandate of the DHS. Presently, these departments have policies and norms and standards in place that relate specifically to the operational aspects and long-term oversight of facilities. What is required, though, is a strengthening of the oversight mechanisms that national departments utilise to monitor policy interpretation and implementation by provincial departments. The DHS should have primary responsibility for the implementation of the SHNP, with oversight departments providing implementation support, as outlined in the SHNP. Although the DSD provides funding to build residential facilities, it does not currently have the large-scale budget allocation or capacity to implement a policy of this nature. Evidence for this observation is found in a DSD report on its audit of residential facilities for older persons (DSD 2010).

Indeed, the report recommends that assistance to provide funding to NGOs for basic infrastructure could be sourced from the DHS or the DPW. The implication is that it would be very difficult to implement the SHNP if the DSD is given the responsibility do this without having sufficient budget allocation from the National Treasury or the additional capacity to implement the SHNP.

To help NGOs access funding in the short term, the national DHS will be required to issue a directive to provincial DHSs enabling them to use the institutional subsidy for the provision of special needs housing without fear of reproach from the national DHS or adverse findings from the Auditor-General on the use of this mechanism. In the medium term, the department identified as the mandate-holder for special needs housing should put the necessary institutional mechanisms in place, and if necessary, conduct pilot projects and, on the basis of their outcomes, revise its implementation plans in the interests of making implementation more effective in the long term.

Conclusion

The provision of special needs housing falls primarily to the NGO sector, which presents two problems. First, there is no standardisation of norms for NGOs that will provide special needs housing. Secondly, no specific government department has taken ownership of the policy, and therefore the chain of accountability remains broken, which makes matters especially difficult for the implementing government departments.

Although the concerns that have been raised about the SHNP are valid, the unfortunate result of the delay in finalising and implementing the policy is that scores of people with special needs are unable to access housing. The government department primarily responsible for the delivery of special needs housing, the DHS, needs to take ownership of implementing this policy and outline a clear set of norms, informed by a human rights-based approach, for providers of special needs housing.

Reference

Committee on Economic, Social and Cultural Rights., 1994, General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), E/1992/23.

Department of Social Development., 2010, Audit of Residential Facilities, https://social.un.org/ageing-working-group/documents/FINAL%20REPORT%20DSD%20Audit%20of%20Residential%20Facilities%20April2010.pdf.

Office of the Health Ombud., 2017, The Report into the Circumstances Surrounding the Deaths of Mentally ill Patients: Gauteng Province, The Office of Health Standards Compliance, South Africa.

Special Rapporteur on Adequate Housing., 2008, 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context,' Miloon Kothari: Addendum: Mission to South Africa, UN Doc A/HRC/7/16/Add.3.

South African Human Rights Commission., 2017, Creating an Enabling Environment for the Realisation of the Right to Adequate Housing for Persons with Special Needs: Expediting theSpecial Needs Housing Policy and Programme, https://www.sahrc.org.za/home/21/.

2 Economic and Social Rights as Constitutional Guarantees, Compared to Privileges under the Welfare State System: An Assessment of the Case of Mauritius

Amar Roopanand Mahadew

Introduction

Mauritius celebrated 50 years of independence on 12 March 2018, a date which coincided with the fiftieth anniversary of its Constitution. At the time of this writing, a number of celebratory events were under way to commemorate these milestones, but there has been debate, too, about the status of economic and social rights (hereafter, socio-economic rights) in the country. Their complete absence in the Mauritian Constitution has raised several critical questions from different quarters about the effectiveness of their protection.

These questions become all the more pertinent when one considers that Mauritius is one of the strongest welfare states in Africa and provides citizens with a plethora of social and economic benefits without there being constitutional guarantees of socio-economic rights. Is there hence any real need to enshrine the rights in the Constitution when the country is faring relatively well as it is? Would constitutional protection of socio-economic rights genuinely improve the social and economic conditions of Mauritians?

This article addresses these questions in the light of the wide-ranging discussion currently taking place in Mauritius on the possible review and amendment of the Constitution. After providing an overview of the history of the Constitution, the article assesses the Bill of Rights contained in it and demonstrates the absence of socio-economic rights in the Constitution; it is the case instead that Mauritius has relied on the concept of the welfare state to ensure and enhance its citizens' social and economic conditions.

It is argued, however, that while welfare statism has both necessary and succesful in Mauritius, the picture remains incomplete without the constitutional entrenchment of socio-economic rights. Socio-economic privileges conferred by the welfare state remain volatile and subject to the risk of being taken away from the citizens.

An overview of the Mauritian Constitution

The Constitution was granted by the representatives.

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