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Ensuring rights make real change

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COMMUNITY LAW CENTRE

Editorial

This is the second edition of the *ESR Review* for 2014 and it coincides with some important discussions on the post-2015 agenda. Some of the important goals being proposed for the post-2015 agenda will undoubtedly have implications for the enjoyment of socio-economic rights.

This edition of the *ESR Review* includes two features on the enjoyment of socio-economic rights in Nigeria and South Africa. The first, by Stanley Ibe, examines the possibility of enforcing socio-economic rights in Nigeria. While the Nigerian Constitution does not explicitly guarantee socio-economic rights, Ibe argues that opportunities exist to enforce these rights through national courts, regional and international human rights bodies. He notes that the entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights provides an additional avenue for realising the socio-economic rights of Nigerians. But, sadly, Nigeria has not yet signed or ratified this instrument.

The second feature by Akinola Akintayo analyses the Nigerian High Court decision in the *Bamidele Aturu* case. From a comparative approach he examines the effect of neo-liberalism for the enjoyment of socio-economic rights in South Africa and Nigeria. He discusses the differences in constitutional provisions relating to socio-economic rights in these countries. While the Constitution of South Africa explicitly recognises these rights, Nigeria's merely includes them as Directive Principles. Akintayo analyses a recent case in Nigeria in which the provisions under the Directive Principles are interpreted purposively to safeguard socio-economic rights. He concludes that there are some lessons South Africa can learn from this decision.

Gladys Mirugi-Mukundi examines a recent decision of the South African Constitutional Court, in which it found that an interim order could as well amount to an eviction order and may interfere with the constitutional right to housing.

Updates of events at regional and international levels are also included in this issue.

CLC uses this opportunity to congratulate Professor Philip Alston, who takes over from Magdalena Sepuvelda Carmona as the new UN Special Rapporteur on Extreme Poverty and Human Rights. We wish him all the best.

Dr Ebenezer Durojaye (Editor)

Expanding the space for economic, social and cultural rights in Nigeria

Stanley Ibe

Paul Farmer's 'rights of the poor' (Farmer 2003:159) represents the base minimum of rights that every individual should enjoy. Food, shelter and clothing are humanity's most essential requirements. Unfortunately, for many Africans, these are luxuries. Governments invest enormous resources in conducting elections but pay little attention to what makes life meaningful to the electorate.

In Nigeria, the struggle to recognise and enforce economic, social and cultural rights (ESCR) is a long-drawn one. Decades of unaccountable leadership in and out of military uniform and massive looting of state resources often means that many Nigerians remain too poor to access food, water, education and healthcare. Although frequently regarded as Africa's largest producer of crude oil and the world's sixth-largest exporter of that commodity, Nigeria is home to one of the largest concentration of poor people anywhere. It is estimated that 70% of its population (119 million people) survive on $2 or less a day.

Given this background, Nigeria should be a state whose citizens take a personal interest in demanding accountability for official expenditure, especially on ESCR. Regrettably, this is not always the case. Not only are residents not very invested in making demands, but the space for accountability is also shrinking by the day. Take the idea of non-justiciability of ESCR (Ibe 2007:230).

Justiciability refers to the limits on legal issues over which a court can exercise judicial authority. ESCR have been perceived as non-justiciable on account of the provisions of section 6(6)(c) of the 1999 Constitution (as amended), which merely echoes the 1979 Constitution. In effect, even though Nigeria's Constitution recognises ESCR in chapter II, titled *Fundamental objectives and directive principles of state policy*, it supposedly considers them aspirational and therefore bars courts from entertaining cases arising under the said chapter II. I have argued elsewhere (Ibe 2010:202) that this is not exactly correct because the Supreme Court of Nigeria has reasoned that once the federal Parliament makes a law on any of the subjects described in chapter II, courts can then legitimately entertain suits arising therefrom. Despite this unequivocally clear jurisprudence, violations of ESCR continue unabated. The big question is – are Nigerians powerless to access remedies for violations of ESCR? Clearly not.

The space for remedies may be shrinking within Nigeria, but it is certainly not doing so beyond its borders. For one, the Community Court of Justice of the Economic Community of West African States (ECOWAS) offers a unique opportunity for individuals to challenge violations of ESCR without having to 'exhaust local remedies' (Ebobrah 2008:18). This is crucial because some national jurisdictions only guarantee access to but not exit from the courts. So it is great that ECOWAS citizens can bring cases against their governments before this regional court, which has fortunately established a tradition of producing path-breaking decisions. An example is *The Registered Trustees of the Socio-Economic Rights & Accountability Project v Nigeria*, Judgment No: ECW/CCJ/JUD/07/10, which established that Nigeria has obligations under the African Charter and the Universal Basic Education Commission Act to provide free and compulsory basic education for its citizens. Although it costs money to hire a lawyer and present a case before this court, there are a number of non-profit organisations and lawyers committed to providing free legal services for indigent persons.

Another option is the African Commission on Human and Peoples' Rights, a quasi-judicial institution saddled with the responsibility of promoting and protecting human rights on the continent (Odinkalu 2013:854). The Commission has a communications mechanism through which victims of human rights violations can bring cases against offending governments. The mechanism was used in the famous case of the *Social & Economic Rights Action Centre (SERAC) v. Nigeria*, Com. No. 155/96 (2001), in reaching a decision that Nigeria violated the rights, including ESCR, of its citizens in the Ogoni area. The Commission also undertakes promotional and fact-finding visits as well as receiving periodic reports from states on implementation of the rights articulated under its founding charter, namely the African Charter on Human and Peoples' Rights, which was adopted in 1981 in Banjul, The Gambia. Bi-annual ordinary sessions of the Commission also provide a platform for victims and interested organisations to lodge complaints with it. Scholars have had mixed reactions about the Commission's performance but nearly everyone seems to agree that it is a useful mechanism, if for no other reason than that all 54 member states of the African Union have ratified the Charter and are therefore subject to the Commission's jurisdiction. There have been questions about implementation of the Commission's decisions, however. Although the Commission now has a follow-up mechanism for its decisions (International Service for Human Rights 2013:45), some argue that states implement them as they deem fit and so another mechanism was established to take care of this perceived gap.

The African Court on Human and Peoples' Rights, like the Commission, has jurisdiction to receive cases alleging violations of ESCR. However, unlike the Commission, ratifying the protocol that establishes the Court does not automatically give individuals or NGOs the right of access to

the Court. The ratifying state still needs to make a declaration allowing that access under article 34(6) of the protocol (Juma 2007:15). So far only seven of Africa's 54 countries – Burkina Faso, Cote d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania – have done so. By implication, the Court may only receive cases involving one of these countries. The other route to the Court is through the Commission, with the limitations already identified.

For a victim of Nigerian origin who is resident in Nigeria, the final platform is the United Nations system, more specifically, the Committee on Economic, Social and Cultural Rights (CESCR). The CESCR is an independent body of 18 experts responsible for monitoring implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which, together with the International Covenant on Civil and Political Rights (ICCPR), was adopted in 1966. Unfortunately, while the ICCPR empowered its implementing institution – the Human Rights Committee – to receive and process cases, the ICESCR did not. At the time of adoption, it was thought that ESCR were aspirational and therefore did not merit a communications mechanism. The international community has since realised that they do, hence the entry into force of the Optional Protocol on ICESCR (OP-ICESCR), which primarily introduces the communications procedure.

The OP-ICESCR is optional to the extent that only states that ratify or accept its jurisdiction can be subject to it, much like the African Court's protocol. Unlike the protocol, Nigeria has regrettably yet to sign and ratify the OP-ICESCR. Why should it do so?

Ratifying the OP-ICESCR provides citizens with another mechanism for redress in cases of violations of ESCR that are not achievable at the domestic level. It is not just the individual that benefits: states also stand to enhance ESCR implementation domestically in addition to elevating their reputations as responsible members of the international community. The OP-ICESCR helps to clarify obligations arising under the ICESCR, thereby assisting states to implement them. It also encourages states to strengthen national mechanisms as platforms of first choice for redress, as well as for developing jurisprudence for national judiciaries. Significantly, the OP-ICESCR gives expression to the indivisibility of all rights as espoused under the Vienna Declaration and Programme of Action, 1993.

Beside the individual complaint mechanism, the OP-ICESCR has two equally important mechanisms – the inquiry and the inter-state complaints mechanism. The OP-ICESCR empowers the CESCR to undertake an inquiry into systematic violations of ESCR. This procedure is available to individuals or groups who are unable to use the individual complaints mechanism for whatever reason. It provides an opportunity for the CESCR to intervene in cases of violations involving groups of people, while also allowing the state to put forward its explanation and give assurances about proposed reforms.

The inter-state complaints mechanism is the final avenue to redress ESCR violations under the OP-ICESCR. States have to opt in for this mechanism in order to be bound by it. As with the African Commission system, the inter-state mechanism is rarely used but could in fact be useful to hold states to account when triggered.

Although the CESCR has no mechanism for implementing its decisions, those decisions nonetheless offer guidance on ESCR implementation for the global community and complainants could use state peer review mechanisms like the United Nations Universal Periodic Review (UPR) to get states to make commitments regarding those decisions.

Any government committed to its primary function of ensuring the welfare and security of its citizens must embrace ESCR. There is no better proof of this commitment, especially for states like Nigeria where both are unfortunately imperilled.

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A good thing from Nazareth? Stemming the tide of neo-liberalism against socio-economic rights

Lessons from the Nigerian case of *Bamidele Aturu v Minister of Petroleum Resources and Others*

Akinola E. Akintayo

Introduction

During the 50th anniversary of the Universal Declaration of Human Rights (UDHR) in 1998, Baxi warned that contemporary human rights is being supplanted by '…a trade-related, market-friendly, human rights paradigm' (Baxi 1998: 125 at 163). According to him, the new paradigm requires states to pursue the 'three Ds' of globalisation (deregulation, de-nationalisation and disinvestment), in order to free as much space as possible for global capital (Baxi 1998: 125 at 164).

Baxi further argues that while the bourgeois supplanting of hard-won human rights for its own end may not be a new phenomenon, the present appropriation is, however, different in that it legitimises 'extraordinary imposition of human suffering in the cause and the course of the present contemporary march of global capital' and regresses the future of contemporary human rights in the process (1998: 125 at 168–169). Subsequent events appear to be proving Baxi right as neo-liberalism is today one of the biggest impediments to the realisation of socio-economic rights in most of the places that the rights are needed (see for instance, Pieterse 2003: 3 at 15–16).

It was at first thought that South Africa had charted a different course when it entrenched and made justiciable a catalogue of socio-economic rights in its 1993 Interim Constitution and later in the 1996 Final Constitution of the Republic of South Africa (the South African Constitution). This is because it is said that the tenor and true meaning of the South African Constitution require a a social democratic political vision rather than the dominant liberal democratic one (Klare 1998:146 at 164–165). One of the distinguishing features of the former type of political vision is the socio-economic transformation of the society, which was expected to trump neo-liberal ideals and policies where the two come into conflict. There is evidence, however, that both the South African government and the courts, especially the Constitutional Court, have declined to read the South African Constitution in that way. Both have instead subsumed the transformative ideals of the Constitution under neo-liberal laws and policies. Thus, while the South African government has been busy pursuing the neo-liberal 'three Ds' referred to above through laws and policies, the Constitutional Court has been busy aiding and abetting the government through its decisions. The resultant effect of this, of course, is the apparent deepening of poverty of South African citizens. The most conspicuous of such cases is the decision of the Constitutional Court in *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC) (*Mazibuko*).

Conversely, in Nigeria, which has a supposedly weaker form of socio-economic rights framework and protection, a court in the recent case of *Bamidele Aturu v Minister of Petroleum Resources* (Suit No: FHC/ABJ/CS/591/09) *(Bamidele Aturu)* struck down the Nigerian government's deregulation of the downstream sector of the petroleum industry as unconstitutional. This is because the policy violates the socio-economic objectives of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (the Nigerian Constitution).

The purpose of this short essay is to compare the two above-mentioned cases with a view to deducing what lessons South African courts could to learn from the Nigerian case.

Background to and the decision of the Constitutional Court in *Mazibuko*

That South Africa has a justiciable socio-economic rights regime is a notorious fact that needs no proof, recapitulation or restatement here. What needs to be emphasised here is that, despite the justiciable nature of socio-economic rights in South Africa, the face of neo-liberalism has always been vaguely discernible behind the mask of the Constitutional Court's socio-economic rights jurisprudence. This position stems from the Court's reluctance to impose any positive obligations to provide on the state in most of the socio-economic rights cases that have come before it, preferring to police only the state's negative obligations in relation thereto. That this is actually the case is clearly apparent from and confirmed by the Court itself in *Mazibuko*. One of the pronouncements of the Court in *Mazibuko* that is instructive in this regard is quoted below thus:

> In *Treatment Action Campaign No 2*, the Court did order the government to make Nevirapine available at clinics subject to certain conditions. But it did so because government itself had decided to make Nevirapine available, though on a restricted basis, and the Court found that there was no reasonable ground for that restricted basis. *Moreover Nevirapine was, at least for a period, being made freely available to government by its manufacturer. In a sense, then, all the Court did was to render the existing government policy available to all* (*Mazibuko*: para 64. Emphasis supplied).

The above pronouncement clearly confirmed that the Constitutional Court has been and is unprepared to impose on the state any positive obligation to provide basic necessities of life to those in dire need of it, contrary to the stipulations of the South African Constitution.

Thus, while neo-liberalism has hitherto peeped from behind the mask in most of the Court's previous socio-economic rights decisions, it is in *Mazibuko* that it fully bares its fangs. It is to this case that I now turn with a brief discussion of the facts, the decision of the Court and the implication of the decision for South Africa's socio-economic rights regime.

Mazibuko concerns the commercialisation by the state of the provisions of water in Phiri, one of South Africa's poorest suburbs. (A summary of this case is provided in *ESR Review* (10)4.)

The trial Court found for the applicants on both grounds of objections and declared the scheme unconstitutional. The Court held that six kilolitres of free water per household per month is insufficient for a dignified life and that the installation of prepaid meters was unlawful. The trial Court therefore ordered that the respondents provide the applicants and other similarly situated residents of Phiri with free water supply of 50 litres per person per day and the option of a metered supply of water that was to be installed at the respondents' cost, among other remedies. The respondents appealed against this decision to the Supreme Court of Appeal (the SCA). The SCA upheld the judgment of the trial High Court in substantially similar terms, save that the SCA held that 42 litres of water per person per day is sufficient water in terms of section 27(1)(b) of the South African Constitution. The SCA ordered accordingly.

Upon further appeal by the respondents, the Constitutional Court reversed the two lower Courts and found against the applicants. According to the Constitutional Court, both the trial High Court and the SCA erred in holding that the six kilolitres of water per month prescribed by the respondents and the installation of prepaid water meters were unconstitutional. The Court held, among others things, that the sufficiency or otherwise of the prescribed amount of free water by the respondents or any measures taken by the government to preserve a scarce commodity like water is exclusively within the competence of the government and cannot be questioned because the South African Constitution does not confer a right to claim sufficient water or impose any obligation on the state to provide sufficient water to anyone immediately or without more (*Mazibuko*: paras 56–57).

There are at least three implications of *Mazibuko* for South Africa's socio-economic rights regime. The first is that it legitimates and sanctions neo-liberalism. In effect, the Constitutional Court told the government in very clear language that it can forge ahead with neo-liberal laws and policies notwithstanding any negative impact on constitutionally guaranteed socio-economic rights.

The second implication is that *Mazibuko* has turned socio-economic rights in South Africa into a privilege, something that can only be enjoyed at the pleasure of the government. Granted, it may be argued that some of the provisions guaranteeing socio-economic rights in the South African Constitution contained internal limitation clauses making the enjoyment of the rights subject to the availability of resources. While this is true, the consistent and persistent reluctance of the Constitutional Court to question the discretion and policy decisions of the government in the allocation of scarce resources has converted the government into the final authority on the issue. The effect of this is to transform the government into an Alpha and Omega as far as realisation of constitutionally guaranteed socio-economic rights is concerned. This is contrary to all notions and conceptions of rights as entitlements.

The third implication flows from the first two. It is that *Mazibuko* has consequently converted South Africa's socio-economic rights into mere paper rights, existing in the texts of the South African Constitution without corresponding effect or impact on supposed right bearers.

The background to and decision of the Court in Bamidele Aturu

Nigeria is generally believed to have a non-justiciable socio-economic rights regime. Like the Indian Constitution, the socio-economic rights regime of Nigeria is contained in the Fundamental Objectives and Directive Principles of State Policy in Chapter II of the Nigerian Constitution (Chapter II). Like the Indian Constitution also, section 6(6)(c) of the Nigerian Constitution prohibits judicial enforcement of Chapter II of the Constitution. Nigerian appellate courts have confirmed this reading of the Constitution in several cases.

The implication of the foregoing state of the law for socio-economic rights enforcement in Nigeria is that no question as to whether any obligation under Chapter II is being complied with or given effect to can be raised before any court of law in Nigeria – let alone invalidating any law or policy of government as inconsistent with the provisions of the Chapter. It is against this backdrop that the case of *Bamidele Aturu*, delivered on 19 March 2013, becomes very important. The case declared the neo-liberal policy of deregulation of the downstream sector of Nigeria's petroleum industry as illegal and unconstitutional on the ground that it violates the obligation of the government of Nigeria to regulate and fix the prices of petroleum products in a manner that will secure the maximum welfare, freedom

and happiness of every citizen, pursuant to section 16(1) of the Nigerian Constitution and other existing statutes. The background to the case is briefly explained below.

Oil occupies a prominent and very important place in the socio-economic well-being of Nigeria and Nigerians – so much so that some scholars have rightly opined that: '[n]ational and personal dreams, hope and aspiration are built around oil' (Ering and Akpan 2012:12 at 13). This importance is evidenced by the fact that as at 2010, oil resources contributed about 99% of government revenues and about 38.8% of the country's GDP (Ering and Akpan, 2012:12). Consequent upon this centrality of oil resources to personal and national socio-political life in Nigeria, the pricing of petroleum products have always been a very thorny issue. While governments have always tried to maximise revenue through incessant increases in the price of petroleum products, individuals and civil-society groups have always resisted because of the prejudicial impact on the majority of the people, who are poor. Constitutional politics/litigation has recently become one of the means of resistance.

The *Bamidele Aturu* case was instituted by the applicant in the Federal High Court, Abuja (the Court) in 2009 to challenge the incessant fuel price increases and the Nigerian government's neo-liberal policy of deregulation of the downstream sector of the petroleum industry. The applicant argued that this policy of deregulation was illegal and unconstitutional in view of the combined provisions of section 16(1) of the Nigerian Constitution and sections 6(1) and 4(1) of the Petroleum Act and the Price Control Act, respectively. These, according to the applicant, oblige the government to regulate and fix, from time to time, the price of petroleum products in such a way as to secure the maximum welfare, freedom and happiness of every citizen of Nigeria. The defendants, for their part, opposed the claim of the applicant on three main grounds: firstly, that he had no *locus standi*; secondly, that the suit disclosed no cause of action; and thirdly, that the suit was improperly constituted. Although this is not the first time that Nigeria's policy of deregulation of the downstream sector of the petroleum industry was challenged in court, it was the first time that the constitutionality/legality of the policy was the primary subject matter of a constitutional challenge. It was also the first time that such a challenge was clearly articulated and that it met with a measure of success.

In finding for the applicant and dismissing the objections of the defendants, the Court held that on both the private rights and public interest view of *locus standi*, the applicant was properly before the court and had the requisite *standi* to maintain the action. In this regard the Court relied on the republican (communitarian) conception of democracy aspects of *Adesanya v President of Nigeria* [1981] 2 NCLR 358 and *Fawehinmi v The President of the Federal Republic of Nigeria* (2008) 23 WRN 65.

On the issue of whether the applicant's suit disclosed a cause of action, the Court held that the issue of *locus standi* is intertwined with that of cause of action and that since the *locus* of the applicant was already established, it necessarily meant the Court was satisfied that a cause of action was established by the applicant against the defendant. The Court also held that the suit was properly constituted.

> Deregulation of the downstream sector of Nigeria's petroleum industry was declared illegal and unconstitutional.

On the substantive issue of the legality/constitutionality of the government's deregulation policy, the Court held, agreeing with the applicant, that the combined reading of the provisions of section 16(1) of the Nigerian Constitution and sections 6(1) and 4(1) of the Petroleum Act and the Price Control Act respectively obliged the government to regulate and fix, from time to time, the price of petroleum products in Nigeria in such a manner as to secure the maximum welfare, freedom and happiness of Nigerian citizens. On the argument of the defendants that the economic objective of the state in section 16(1) of the Constitution is not justiciable, the Court, relying on the Supreme Court of Nigeria decision in *Attorney General of Ondo State v Attorney General of the Federation* (2002) 9 NWLR (Pt. 772) 222, held that the provisions of Chapter II of the Constitution can be made justiciable via legislation. The Court therefore held that the provisions of sections 6(1) and 4(1) of the Petroleum Act and Price Control Act respectively had made justiciable the non-justiciable provisions of section 16(1) of the Constitution.

What is clear from the Court's decision is that the Constitution and extant laws provide for a centralised/regulated economy in Nigeria. The true meaning and purport of this regulation, in the Court's view, is to secure for every citizen of Nigeria maximum welfare, freedom and happiness. This forbids or forecloses mercantilistic or neo-liberal agendas or policies, which do not take the maximum welfare, freedom and happiness of citizens into consideration in furtherance of section 16(1)(b) of the Constitution. The Court's message to the government in this regard is very clear: 'If you want to go the capitalist way you have to change the laws and the Constitution'.

An appeal against this decision is currently pending before the Nigerian Court of Appeal.

While the full implication of this decision for the Nigerian government's neo-liberal drive is still unravelling, it is submitted that the decision holds some very serious implications for the Nigerian socio-economic rights regime, some of which are considered below.

The first implication of *Bamidele Aturu* is the immediate transformation of the country's non-justiciable socio-economic rights regime into, at least, a quasi-constitutional one. This contention is based on the fact that the

> South African courts should take the welfare, happiness and socio-economic well-being of citizens as a foundational value.

African Charter on Human and Peoples' Rights (the Charter), which Nigeria has domesticated, did not make the traditional distinction between civil and political rights and socio-economic rights in its provisions. The effect of this is to make the provisions of the Charter part and parcel of the domestic law of Nigeria. This position of the law has been confirmed by Nigerian courts in many cases. There is, however, a continuing and raging controversy on whether the socio-economic rights in the Charter have also become part and parcel of the domestic law of Nigeria, notwithstanding the provisions of section 6(6)(c) of the Constitution (see generally Azinge 2010).

Be that as it may, if the reasoning of the Court in *Bamidele Aturu* on the justiciability of section 16(1)(b) of the Constitution through the combined provisions of sections 6(1) and 4(1) of the Petroleum Act and Price Control Act respectively is followed, it seems that the domestication of the Charter has made justiciable at least those socio-economic rights provisions in Chapter II of the Nigerian Constitution which have counterparts in the Charter.

The second implication is the humanisation of the Nigerian government's neo-liberal drive and capitalist policies. This is through the subjection of its neo-liberal programmes to the constitutional dictates of maximum welfare, freedom and happiness. As stated by the Court above, the underlying reasons for the government's economic policies and objectives, as contained in section 16(1)(b) of the Constitution, are to secure the maximum welfare, freedom and happiness for all citizens. Consequently, any policy that will negatively impact on these constitutional requirements will be null and void. This is specifically the case with regard to the Nigerian petroleum sector via the combined reading of section 16(1)(b) of the Constitution and sections 6(1) and 4(1) of the Petroleum Act and Price Control Act respectively. It can be argued that it is also generally the case in all other spheres of Nigeria's economy through the combined reading of section 16(1) of the Constitution and the relevant provisions of the Charter.

The third implication of the decision, and by far the most radical, is that it appears to implicitly outlaw neo-liberalism, which is probably the biggest enemy of the socio-economic rights of the poor. The Court is in this regard unequivocal that the Constitution provides for a regulated economy, the purpose of which is to secure the maximum welfare, happiness and freedom of the citizens, which seems to be the very anti-thesis of neo-liberalism. This means that either the former or the latter must give way. And since Nigeria is a constitutional democracy with a supreme Constitution, it is neo-liberalism that appears to be on its way out, at least until an appellate court overrules the decision or a Constitution that is more compatible with neo-liberalism is enacted.

Lessons for South African courts

To properly identify what lessons there are for South African courts from *Bamidele Aturu*, the distinguishing features of the case should first be pointed out. There are at least three features of the case that sets it apart from *Mazibuko*.

The decision, true to the character of fundamental objectives, regards the provisions of Chapter II of the Nigerian Constitution as the very basis of all laws and policies in Nigeria; ideals to which all laws and policies must aspire (see for instance De Villiers 1992: 29 for a detailed discussion of the nature and character of fundamental objectives).

The case humanises the neo-liberal policies and agenda of the government by taking the maximum welfare, happiness and freedom of citizens as the raison-d'etre of governmental exercise of power. That is, the decision takes human beings as the primary focus of economic development in tandem with the views of some eminent scholars who have in fact argued that the best route to robust and all-round economic development is the human focussed or human capability development strategies/approaches (Sen 2001; Nussbaum 2000). This appears to be the approach that the Court has taken.

The Court boldly assumed jurisdiction to interrogate the rational basis and policy decisions of government vis-à-vis its constitutional obligations to engage with social hardship.

There are thus at least three lessons that South African courts can learn from *Bamidele Aturu*.

South African courts should take the welfare, happiness and socio-economic well-being of the citizens as a foundational value, as is done in *Bamidele Aturu*. Granted, the South African Constitution has no provision identical to the provisions of section 16(1)(b) of the Nigerian Constitution, yet there are in fact ample provisions in the South African Constitution with similar effects. Section 7(1), for example, refers to the Bill of Rights as the cornerstone of South African democracy and affirms the democratic values of human dignity, equality and freedom; section 7(2) obliges the South African state to '...respect, protect, promote and fulfil the rights in the Bill of Rights'; and section 8(1) makes the provisions of the Bill of Rights applicable to all laws and binds all organs of state. Important in this regard also are the provisions of section 39(2) which mandate every court, tribunal or forum to promote the values and objects of the Bill of Rights when interpreting any legislation or developing the common law or customary law.

To all intent and purposes, therefore, the above provisions and similar ones in the South African Constitution seek to constitute the Bill of Rights as the ideal or end to which all laws and policies in South Africa must follow. Any law, policy and governmental exercise of powers not in tandem therewith ought to be null and void except regarding such limitations as can be justified as necessary in a

democratic society. Thus, the argument that South African courts should regard the socio-economic well-being of citizens as a foundational value appears to be even stronger in South Africa than in Nigeria having regard to the provisions referred to above.

South African courts should adopt interpretive approaches that humanise neo-liberal policies and laws. Absences of identical provisions still notwithstanding, there are also robust constitutional authorities for South African courts to adopt this approach. According to section 1(a) of the South African Constitution, human dignity, equality and human rights and freedoms are foundational values underlying the Constitution. This affirmation is reinforced through further providing for the rights of equality (section 9(1)), human dignity (section 10) and freedom and security of the person (section 12) in the Constitution's substantive provisions. The Constitutional Court itself has confirmed this reading of the South African Constitution (see for instance, *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 paras 23–25). The Court has also stated that the lack of the basic necessities of life, such as decent jobs, adequate shelter, adequate health services, an adequate social security system and access to clean water, among others, are a gross negation of these foundational values (*Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 8). There is robust literature in support of the fact that unbridled neo-liberalism is responsible in contemporary times for the lack or cessation of basic necessities of life in many parts of the world (Pieterse 2003: 3). From the foregoing, the humanisation of neo-liberal laws and policies appear in fact to be a constitutional imperative in South Africa.

Finally, South African courts should not fight shy of assuming jurisdiction to question the discretion of the governments in the allocation of resources or formulation of policies where socio-economic rights are in issue. This is because, contrary to the assumed position of the Constitutional Court, the literature indicates that courts are political institutions with policy making functions and capabilities (Dahl 1957: 279). Eminent scholars have also pointed out that judicial scrutiny of governmental policies and programmes in relation to socio-economic rights is in fact a constitutional imperative. According to Mureinik, a Bill of Rights is meant to spearhead efforts to bring about a culture of justification and accountability in governance (1994: 32). Reluctance by courts to question the discretion, appropriateness, sufficiency or methodology of governmental policies and allocation of scarce resources in socio-economic rights cases may well be an abdication of constitutionally imposed duties and an unjustified dilution of socio-economic rights in South Africa.

Concluding remarks

As seen from *Mazibuko*, neo-liberalism may well become the Achilles' heels of socio-economic rights enforcement and realisation in South Africa in spite of the transformative vision and ideals of the Constitution. This result is, however, not inevitable as *Bamidele Aturu* from Nigeria's supposedly weaker socio-economic rights framework has shown. The court in *Bamidele Aturu* recently declared the neo-liberal policy of the deregulation of the downstream sector of Nigeria's oil industry unconstitutional because the policy violates Nigeria's government's constitutional obligation to secure the maximum welfare, happiness and freedom of Nigerians.

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Jabulani Zulu and 389 Others v eThekwini Municipality and Others CCT 108/13

Gladys Mirugi-Mukundi

Introduction

On 6 June 2014, the Constitutional Court handed down judgment in the case of Jabulani Zulu and 389 Others v eThekwini Municipality and Others.

Fact and procedural history

Jabulani Zulu and 389 other people (Madlala Village residents) lived in informal homes on a property commonly known as Madlala Village in Lamontville Township, Durban. In September 2012, the eThekwini municipality land invasion control unit came to the property and evicted the residents and demolished their homes. The Madlala Village residents rebuild their homes soon after the control unit had left. The eThekwini municipality (the Municipality) carried out the evictions and demolitions without any court order. Subsequent to the demolitions in September 2012, the control unit regularly patrolled the Lamontville property and demolished the Madlala Village residents' shacks and homes, which the residents rebuilt on 24 occasions after each demolition.

The Municipality accused the Madlala Village residents of invading the Lamontville property in order to jump the queue of those waiting to be allocated houses, and pointed out that the Lamontville property had been earmarked for low-cost housing for a group of people who had already been identified (para 8).

The High Court

In March 2013, the Member of the Executive Council for Human Settlements and Public Works, KwaZulu-Natal (the MEC) sought and obtained an interim order from the KwaZulu-Natal High Court (Koen J) (case no. 3329/2013) restraining any persons from invading or occupying various properties that had been allegedly been earmarked for low-cost housing or were being developed (namely, 37 provincial housing department properties, presumably across 1,568 properties in total (para 58)), including the Lamontville property (para 10). In April 2013, the MEC and the Municipality approached the High Court to confirm the interim order.

The Madlala Village residents applied to be joined in the High Court proceedings as interested parties since they were subject to the interim order. They argued that the interim order sought by the MEC affected their property and therefore they had a direct and substantive interest in the proceedings. Further, they argued that the interim order authorised their eviction without compliance with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (19 of 1998) (PIE). The MEC opposed their application and claimed they were not 'genuinely homeless'and were not affected by the court order.

The Madlala Village residents' application to the High Court for leave to intervene was dismissed. No reasons were given by the Court. They then petitioned the Supreme Court of Appeal for the leave to appeal the High Court decision, but their petition was dismissed.

The Madlala Village residents then approached the Constitutional Court to determine whether the High Court erred in refusing them leave to intervene in the proceedings

On 13 January 2014, the Constitutional Court admitted Abahlali baseMjondolo as an *amicus curiae* in the appeal.

The Constitutional Court decision

The main judgment was written by Zondo J, with whom Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Jafta J, Khampepe J, Madlanga J, and Majiedt AJ concurred. The Constitutional Court found that the interim order authorised the Municipality and the Minister of Police, acting through South Africa Police Services (SAPS), to 'take all reasonable steps to prevent any persons from occupying, the Lamontville property'. This would amount to an eviction order (para 24–25).

The Municipality argued that the interim order did not apply to people who were already in occupation of the Lamontville property before the order was granted. However, it was later established that the Municipality relied on the interim order for its authority to carry out demolitions on 13 February 2014, the day after the High Court hearing, on no less than 272 structures, 93 of which were half built and the rest fully built. As such the interim order was effectively an eviction order.

The Constitutional Court found that the Madlala Village residents had a direct and substantial interest in the interim order proceedings in the High Court (case no. 3329/2013) (para 29) as the interim order affected their interests adversely. It found that the High Court therefore erred in dismissing their application for leave to intervene.

The general principle of law

As far as evictions are concerned, Section 25(1) of the Constitution states that no-one may be deprived of property, except in terms of a law of general application, and that no law may permit arbitrary deprivation. Section 26(3) further guarantees that, unless and until a court has issued an order after considering all the relevant circumstances, no

one may be evicted from their home or have their home demolished, and that no legislation may permit arbitrary evictions. PIE governs evictions to ensure the most vulnerable are protected. Section 4 of PIE prescribes some circumstances that have to be taken into account when an eviction of unlawful occupiers is carried out. Sections 4(6) and 4(7) specifically provide that a court hearing an eviction application 'may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs' of the most vulnerable, such as the elderly, children, disabled persons and households headed by women.

Minority judgment

A separate judgment by Van Der Westhuizen J, with which Froneman J concurs, agrees with the main judgment that Koen J's order is an eviction order that contravenes the protections in PIE, but goes further to find that it is unlawful and unconstitutional. Van der Westhuizen focused on the constitutionality of the interim order. He contextualised the matter squarely: in the 'country's history of colonialism and apartheid, dispossession of land and gross discrimination, as well as prevailing poverty and inequality, issues around housing are central to our constitutional democracy' (para 43). Further it was noted that the Madlala Village residents 'live in abject poverty [and] the interim order strips them of protection for the very little they have' (para 58).

He noted that the interim order was issued without due consideration of the impact it would have on the Madlala Village residents, who had nowhere else to live, which was in contravention with the provisions of PIE, and the underlying constitutional rights. The interim order was therefore unlawful and unconstitutional because it negated their rights under PIE and section 26(3) of the Constitution. PIE particularly offers protective measures that are intended to ensure due process and sufficient consideration of housing needs prior to an eviction order being issued.

Van Der Westhuizen further pointed out that since this was not an isolated incident, it was necessary for the Constitutional Court to 'establish legal certainty on orders like the interim order' (para 50). This is based on the legal principle that 'even where an issue does not have immediate impact on the parties' positions, a court may deal with an issue if its immediate resolution will be in the public interest' (para 51). An example of immediate resolution that was considered to be in the public interest was in *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another* [2004] ZACC 24, at para 22; and *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* [2009] ZACC 8, at para 40.

> The Constitutional Court established that an interim order had been used as an eviction order.

The interim order is squarely a constitutional matter dealing with Madlala Village residents' rights not to be arbitrarily evicted from their homes as guaranteed under section 26 of the Constitution. The Court also considered whether irreparable harm would result if leave were not granted (para 56). If irreparable harm cannot be shown, the request to appeal an interim order will generally fail. (See also *Treatment Action Campaign* (2002) para 12.) The Madlala Village residents alleged that each time their shelters were dismantled by the Municipality's control unit, the materials which had built their homes and shacks (informal structures) were either taken away or destroyed, 'stripping them of the very little they had, including their homes'.

Significance of this case

This case is significant because the Constitutional Court established that an interim order had been used as an eviction order. The Court noted that the interim order was crucial to the fate of the Madlala Village residents because it did not require the municipality to follow PIE, which requires that certain steps be taken before people can be evicted. As such the Court unanimously held that interim order issued by the High Court was an eviction order, which was unacceptable. Madlala Village residents were granted leave to intervene in the High Court proceedings.

Gladys Mirugi-Mukundi is a researcher at the Socio-Economic Rights Project, Community Law Centre, University of the Western Cape. She is the co-editor of the *ESR Review*.

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Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another [2004] ZACC 24; at para 22.

Zulu and Others v eThekwini Municipality and Others (CCT 108/13) [2014] ZACC 17 (6 June 2014)

Update from the African Commission

Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity

During its 55th Ordinary Session in Luanda, Angola from 28 April to 12 May 2014, the African Commission on Human and Peoples' Rights adopted a resolution relating to violence and the situation of people in same-sex relationships in Africa.

The Commission expressed concern about the acts of violence, discrimination and other human rights violations that continue to be committed against individuals in many parts of Africa because of their actual or imputed sexual orientation or gender identity. According to the Commission this amounts to a gross violation of the rights to life and dignity guaranteed in articles 4 and 5 of the African Charter on Human and Peoples' Rights. It therefore condemned such acts of violence in totality and called on African states to 'ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities'. The Commission further called on states to specifically end acts of violence based on gender identity or orientation and perpetrated by state and non-state actors, and to take appropriate steps to punish acts of violence including those targeted at persons on the basis of their imputed or real sexual orientation or gender identities.

This is a welcome development. It is the first time the African Commission is responding to human rights violations based on sexual orientation or gender identities. It will go a long way in addressing the human rights violations often experienced by people engaged in same-sex relationships or those who are transgender. More importantly, the resolution is crucial to HIV prevention programmes as sexual minorities and transgender people often encounter difficulties accessing HIV treatment and prevention programmes across Africa.

http://www.achpr.org/sessions/55th/resolutions/275/

Update from the United Nations Human Rights Council

Human Rights Council Resolution on the Question of the Realisation of Economic, Social and Cultural Rights

During its 25th Ordinary Session in March 2014, the Human Rights Council (HRC) adopted a resolution on the realisation of economic, social and cultural rights (ESCR) in all countries.

In this resolution the HRC calls on states to give effect to the realisation of ESCR by taking appropriate steps and measures to implement previous resolutions on this question. The resolution further calls on states that are yet to ratify the ICESCR to consider doing so and calls on states that have entered reservations about various provisions of the ICESCR to consider reviewing them. It welcomes the entering into force of the Optional Protocol to the ICESCR on 5 May 2013 and enjoins states that are yet to ratify or sign it to consider doing so. At present about 14 countries, (including two African countries – Gabon and Cape Verde) have ratified the OP-ICESCR and another 45 countries have signed it. The HRC also calls on states to consider making declarations in relation to articles 10 and 11 of the Protocol.

The resolution emphasises the importance of effective remedies for the realisation of ESCRs and access to justice in the realisation of ESCRs. In this regard, it calls on states to strengthen judicial, quasi-judicial and other avenues for the realisation of ESCRs of individuals and groups across the world. Furthermore, it emphasises the importance of the United Nations Social Protection Floor Initiative for the realisation of economic, social and cultural rights and, in this regard, acknowledges the adoption by the International Labour Conference of recommendation No. 202 (2012) concerning national floors of social protection.

http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/25/L.16

Roundtable on meaningful engagement

'Jumping the queue', waiting lists and other myths: Perceptions and practice around housing demand and allocation in South Africa

Usang Maria Assim and Agaba Daphine Kabagambe

On 13 and 18 June 2014, the Socio-Economic Rights Project of the Community Law Centre, University of the Western Cape, held roundtable discussions in Cape Town and Johannesburg on housing demand and allocation in South Africa.

The approximately 30 participants included members of civil-society organisations, policy makers, property developers, members of various communities and officials from key government departments, for e.g. the Departments of Performance Monitoring and Evaluation, The Presidency: Outcomes Monitoring and Evaluation, and the Evaluation and Research Unit. Participants also included the South African Human Rights Commission (SAHRC), the Housing Development Agency, Statistics South Africa, TopRoot Properties, Studies in Poverty and Inequality Institute, FinMark Trust, Socio-Economic Rights Institute of South Africa and the Council for Scientific and Industrial Research.

The discussions focused on recommendations in a research report by the Community Law Centre and the Socio Economic Rights Institute entitled *'Jumping the queue', waiting lists and other myths: Perceptions and practice around housing demand and allocation in South Africa*. It focuses on the Housing Demand Database system and housing allocation in Gauteng and the Western Cape. They were selected because of their volume of housing demands and because both provinces have their own housing databases in place.

During the open discussion, community members also shared their experiences and frustrations in attempting to access housing. Five main recommendations were made.

First, an integrated approach to housing allocation is needed. Having the provincial departments, ward councillors, accredited municipalities, community liaison officers and other government agents all involved in housing raises the danger of creating parallel systems that will further compound housing problems and create further confusion.

Second, Batho Pele (people first) principles should be fundamental elements in the delivery of housing as a public service, to ensure that the housing delivery process is not manipulated and that all relevant information is freely available. Third, research on housing allocation should include a gender dimension and examination of the role of gender in housing resources and allocation. Fourth, there is urgent need to assess the Housing Demand and Allocation Policy, the inception of which took place five years ago. Fifth, the participants acknowledged a need for continuous meaningful community engagement to translate housing policy into practice.

Kelly Stone from the SAHRC made a presentation on the importance of the right to information in the realisation of the right to access housing. She demonstrated how community members can use the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE), to obtain useful information on housing allocations.

A presentation by Hannah Dawson and Daniel McLaren from the Studies in Poverty and Inequality Institute was based on a study that monitors the right to housing in South Africa. It focused on the following three aspects of their study: government policies in relation to (constitutional) socio-economic obligations; the amounts of money spent on the realisation of the right (resource availability, allocation, and spending); and whether the money allocated and spent resulted in positive outcomes (progressive improvement). So far the study has unveiled that, despite optimal spending of the Human Settlements Development Grant by the provinces, there is massive under-delivery on houses as certain critical housing targets have not been met. While government generally meets the set target per year, the target is not in accordance with demand; only about a fifth of the existing demand is covered. Between 2003 and 2012, the number of people living in informal settlements increased by at least a million.

The roundtable ended on a good note, with officials from City of Cape Town who participated in one of the roundtable discussions committed to a follow-up meeting to facilitate meaningful engagement with communities in order to clarify existing housing allocation policies, processes, and systems. This will go a long way in educating the communities and fostering the spirit of transparency.

Usang Maria Assim is a post-doctoral fellow and Agaba Daphine Kabagambe is a doctoral researcher. Both are at the Community Law Centre, University of the Western Cape.

Reference

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Call for contributions to the ESR Review,2014

The Socio-Economic Rights Project of the Community Law Centre (University of the Western Cape) welcomes contributions to the *ESR Review*. The *ESR Review* is a quarterly publication that aims to inform and educate politicians, policy-makers, NGOs, the academic community and legal practitioners about key developments relating to socio-economic rights at the national and international levels. It also seeks to stimulate creative thinking on how to advance these rights as a tool for poverty alleviation in South Africa and abroad.

Contributions on relevant experiences in countries other than South Africa, or on international developments, are therefore welcomed. Contributions should focus on any theme relating to socio-economic rights, on specific rights or on socio-economic rights in general. In addition, we are currently seeking contributions on:

- the role of Parliament in advancing socio-economic rights;
- the African Commission and socio-economic rights;
- pursuing economic, social and cultural rights and combating inequalities and poverty, including in the context of the economic, food and climate crises;
- using international law to advance socio-economic rights at the domestic level; and
- South Africa's reporting obligations at the UN or African level, or both, in relation to socio-economic rights.

Contributions should be sent in electronic format (MS Word) to serp@uwc.ac.za or gmirugi-mukundi@uwc.ac.za.

Previous editions of the *ESR Review* and the complete guide for contributors can be accessed online: www.communitylawcentre.org.za/clc-projects/socio-economic-rights