ESR REVIEW

Economic and Social Rights in South Africa

Ensuring rights make real change

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Editorial

This is the third issue of the *ESR Review* for 2008.

The discourse on public participation is receiving increasing attention in South Africa. Public participation is essential in promoting good governance, human rights and socio-economic development. However, the lack of public participation in service delivery has been a major concern in the country, especially at the local government level, resulting in the recent demonstrations over service delivery. There is therefore a need to promote channels and structures through which individuals and communities can exchange views and influence decision-making and legislative processes. For public participation to be effective, such structures must be guided by the principles of openness, transparency, inclusivity, diversity, flexibility, accessibility, accountability and integration, among other things.

Siyambonga Heleba examines the question of public participation, focusing on how to secure community participation: can a municipality abandon a service delivery programme because of the problems encountered in getting community participation? Heleba thus takes the debate beyond just looking at the extent, nature and failure of the efforts of state institutions, especially local government, to involve the community in their processes. Heleba argues that a municipality should demonstrate flexibility and find alternative ways of ensuring that the views of individuals and communities are considered in public decisions.

Sisay Yeshanew looks at combining the minimum core and reasonableness models of reviewing socio-economic rights. Yeshanew examines the pros and cons of the two models as developed through adjudication as well as theoretical exposition,

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and concludes that a combined model is a good one. This conclusion is based on, among other things, the fact that a combined model involves both rights analysis and the evaluation of measures that states take to realise socio-economic rights and is suitable for monitoring both negative and positive obligations.

Lilian Chenwi examines the question of upgrading informal settlements and its impact on the rights of the poor, with particular reference to a South African High Court decision allowing the eviction of residents of Joe Slovo, an informal settlement in Cape Town, to make way for formal housing. Chenwi notes that the upgrading of informal settlements poses a number of challenges in relation to respecting and protecting the right to have access to adequate housing and ensuring the effective participation of communities in housing projects. Chenwi cautions that such upgrading should not result in the violation of the rights of the poor and vulnerable who live in these settlements.

Pierre de Vos and Siyambonga Heleba analyse a recent decision of the South African Constitutional Court on prescription and social security. De Vos and Heleba argue that simply ordering the provincial government to reinstate and reimburse all those whose grants had been illegally terminated will not remedy the anti-poor attitude of the government. They suggest that judges should be bold and hold the responsible officials personally liable for the waste of money and for the total disregard of the rights and dignity of ordinary South Africans, instead of awarding constitutional punitive costs against the state in general.

This issue also includes a summary of General Comment No 19 on the right to social security of the United Nations Committee on Economic, Social and Cultural Rights. The right to social security is of crucial importance in protecting the most vulnerable and marginalised members of society, especially those living in dire poverty.

Returning to the issue of public participation, Douglas Singiza reports on a conference on ensuring public participation in service delivery, hosted by the Socio-Economic Rights Project of the Community Law Centre.

Finally, John Williams comments on the same conference. Williams further suggests aspects of community participation that should be pursued in order to ensure that participation makes a visible and meaningful difference in the lives of ordinary people.

We acknowledge and thank all the guest contributors to this issue. We trust that readers will find it stimulating and useful in the advancement of socio-economic rights, especially the rights of the poor and most vulnerable groups of society.

Lilian Chenwi is the editor of the *ESR Review*.

Implications of the lack of community participation in service delivery

Siyambonga Heleba

Generally, the lack of public involvement in decision-making and legislative processes of government, as well as in service delivery, is a major problem in South Africa.

In addition, the current discourse on public participation often concerns the extent, nature and, importantly, the failure of efforts by state institutions, especially local government, to involve the community in its processes (Williams, 2007: 19). This paper deals with the problem of how to secure community participation.

The question is: can a municipality abandon a service delivery programme because of the problems encountered in eliciting community participation? Or should the municipality demonstrate flexibility and find alternative ways – if possible – of ensuring that the views of the community are considered in public decisions?

This paper uses the City of Cape Town's Hostels to Homes Project as a case study. It begins by looking at the legal framework for and the enforcement of public/community participation. It then proceeds to evaluate the implementation of this project against the backdrop of the City's obligation to implement housing programmes reasonably as well as its duty to protect access to adequate housing against interference by third parties. Importantly, the discussion relies on interviews conducted in the community in May 2008.

The legal framework for public participation

The duty to facilitate community participation at local government level finds expression in the Constitution and in various other pieces of legislation. Section 152(1)(e) of the Constitution states that one of the objects of local government is to encourage the involvement of communities and community organisations in local government matters. Section 195(1) states that public administration must be governed by the democratic values and principles enshrined in the Constitution, including the principle of responsiveness and public participation.

In addition, the Municipal Systems Act 32 of 2000 (Systems Act) is the most comprehensive piece of legislation on public participation at local government level. The purpose of the Systems Act is

> [t]o provide for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all; to define the legal nature of a municipality as including the local community within the municipal area … to provide for community participation …

The preamble to the Act provides that

> a fundamental aspect of the new local government system is the active engagement of communities in the affairs of municipalities of which they are an integral part, and in particular in planning … [and] service delivery …

Section 4(2) of the Systems Act states that it is part of the duty of the council of a municipality to encourage the involvement of the local community and to consult the local community about the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider, and about the available options for service delivery. Section 5(1) of the Act states that members of the community have the right, among others, to contribute to the decision-making processes of the municipality; to submit written or oral recommendations, representations and complaints to the municipal council; and to be informed of decisions of the municipal council affecting their rights.

Another piece of legislation making provision for community participation in local government is the Municipal Structures Act 117 of 1998. It requires that there be "category A" municipalities, with a subcouncil or ward participatory system, and "category B" municipalities, with a ward participatory system. It

further stipulates that the executive committee or executive mayor must annually report on the involvement of communities and community organisations in the affairs of the municipality. Section 19(2)(c) of the Act further provides that a municipal council must annually review its processes for involving the community.

Ward committees are an important means of achieving genuine community participation in local government processes. The draft National Policy Framework for Public Participation (Policy Framework) of 2007 provides for the establishment of a system of ward committees, hailing it as an "important and key feature of the new local government system" (DPLG, 2007: 8). A ward committee consists of the councillor representing the ward, who must also chair the committee, and no more than ten other persons. Ward committees are seen as a vehicle for deepening local democracy and an instrument for establishing a vibrant and involved citizenry. It is at the local level within wards that all development issues converge. Ward committees therefore have a crucial role to play as an interface between government and communities, not just local government (DPLG, 2007: 8).

Judicial enforcement of public participation

The Constitutional Court has handed down two major judgments on public participation: *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC) (*Doctors for Life*) and *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC) (*Matatiele*).

The first case concerned a constitutional complaint by an organisation called Doctors for Life, alleging that Parliament had failed to facilitate public participation when it passed four statutes on health-related matters (the Choice on Termination of Pregnancy Amendment Act 38 of 2004, the Sterilisation Amendment Act 3 of 2005, the Traditional Health Practitioners Act 35 of 2004 and the Dental Technicians Amendment Act 24 of 2004). It was argued that these statutes were passed by the National Council of Provinces (NCOP) and the provincial legislatures without public involvement as required by sections 72(1)(a) and 118(1)(a) of the Constitution. The Court held that the NCOP and the provincial legislatures had failed to facilitate public involvement in respect of two of the statutes and invalidated them accordingly.

Ward committees have a crucial role to play as an interface between government and communities, not just local government.

In the second case, the provincial legislatures of KwaZulu-Natal and the Eastern Cape proposed a constitutional amendment to redraw their boundaries. The Court found that the provincial legislature of the Eastern Cape had complied with its duty to facilitate public involvement by holding public hearings. However, the provincial legislature of KwaZulu-Natal had not held any public hearings or invited written submissions in considering and approving the part of the Constitution Twelfth Amendment Act of 2005 proposing to transfer the area that previously formed the local municipality of Matatiele from the province of KwaZulu-Natal to the province of the Eastern Cape. It held that the failure to conduct public hearings or invite written submissions was a "clear and unmistakable violation of section 118(1)(a) of the Constitution" (para 84). The Court ruled that the amending Act was invalid.

In both cases, the Court suspended its orders of invalidity for 18 months to enable the relevant legislatures to comply with the constitutional obligation to facilitate public involvement before the impugned Acts could be passed.

An important principle emerging from these two judgments is that Parliament (a state organ) has a broad discretion regarding the nature, scope and manner of involving the public in its affairs (*Doctors for Life*, paras 145-6; *Matatiele*, para 50). In reviewing the conduct of the legislature, the ultimate consideration for a court will be whether the legislature acted reasonably in discharging its obligation to facilitate public participation (*Doctors for Life*, paras 145-6; *Matatiele*, para 50). An inquiry into the reasonableness of the conduct of the legislature will take into account the following factors:

- the nature and importance of the decision;

- efficiency in decision-making;
- its impact on the public;
- what the legislature itself considers appropriate;
- urgency; and
- a meaningful opportunity to participate.

In *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC), the appellants argued before the Constitutional Court that the City of Johannesburg had failed to consult the residents adequately over its decision to evict them from "bad buildings". The Court held that engaging with the people who might become homeless because of an eviction was a constitutional obligation and in line with the idea of sustainable development. The City of Johannesburg was obliged to "encourage the involvement of communities and community organisations in matters of local government" (para 16). The Court made some important points about the nature of this engagement. It stated that engagement was a two-way process in which the municipality and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives (para 14). The engagement had to be tailored to the particular circumstances of each situation, and the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement (para 19). The Court added that the engagement process should not be shrouded in secrecy (para 21). In addition, the Court also affirmed that local authorities were obliged to consider the availability of suitable alternative accommodation or land in deciding whether to proceed with an eviction (para 46).

Background and living conditions at the hostels

According to the mayor of the City of Cape Town, Helen Zille (2007), there are about 600 000 beds in apartheid single-sex (migrant labour) hostels throughout South Africa.

The migrant labour single-sex hostels were built in the early 1960s (the Kick Hostels in Guguletu) to accommodate migrant labour flocking into the cities in search of jobs. They were designed for single men. A single room would accommodate up to three men, while a single block accommodated 16, with one communal kitchen, a large communal dining area, a single toilet and a cold shower.

Originally, women were banned from the hostels in line with the apartheid urban influx control policy. However, this policy was later relaxed and women could join their husbands in the cities. Living conditions soon became unbearable, as this meant that three families had to live in one room, and 16 different families in a block shared a single kitchen, toilet and cold shower.

Originally, women were banned from the hostels in line with the apartheid urban influx control policy, but this policy was later relaxed.

The following sums up the invasive and dehumanising living conditions in South Africa's apartheid single-sex hostels:

> [Ngethembi Myaka] is stuck in Jabulani Hostel, forced to share a room with 16 other people. Couples who try to have a bit of privacy can only draw a curtain around their beds. Ngethembi shares her bed with her two young children (*Mail&Guardian* online, 20 July 2007).

The living conditions in the hostels are at odds with the right to adequate housing. Writing in the context of evictions and interpreting the purpose of section 26(3) of the Constitution, Justice Albie Sachs describes what a home should be, stating that section 26(3) of the Constitution

> acknowledges that a home is more that just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world" (*Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC), para 17).

The living conditions in the hostels also constitute an affront to one of the important rights in the Constitution, the right to human dignity (section 10, *S v Makwanyane* 1995 (3) SA 391 (CC), para 26; *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), para 23 (*Grootboom*); *Minister of Health v Treatment Action Campaign* (1) 2002 (10) BCLR 1033 (CC), para 28 (TAC); *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC), para 40).

In an effort to put an end to the undignified living conditions at these hostels in the Western Cape, the City of Cape Town launched a

project called *Dibanisa Iintsapho* (Unite Families) aimed at converting single-sex hostels in the areas of Langa, Guguletu and Nyanga East into family units. Sadly, the project in Guguletu was stopped in 2005. From interviews conducted in the area, it emerged that the stoppage was connected to infighting among community leaders over the election of a new community forum.

The City had been using the community forum to coordinate the hostel conversion programme. The subsequent infighting left no community structure for liaison with the City. It is understood that the City issued the ultimatum: "Unless the community sorts out its affairs, the hostel conversion programme will not resume" (interview with hostel resident). The City did not respond to questions from the author regarding the reasons for stopping the programme in Guguletu. From the community's perspective, the failure of the community forum appears to have hindered the hostels project in Guguletu.

Three years have passed since the City's hostel conversion programme, aimed at delivering hostel dwellers from dehumanising conditions, was suspended.

An evaluation of the implementation of the City's hostel conversion programme

In keeping with constitutional obligations, the City had decided to involve the community in carrying out its hostel conversion programme. The method of community participation was through the community forum (leadership structure). The forum acted as the liaison between the City and the community. It played an important role in the execution of the programme. The forum assisted with the evacuation of hostel residents from the hostel about to be developed. It also assisted in temporarily placing residents in makeshift structures erected in open spaces in the area. The forum was also active in allocating the new family units (converted hostels) to the residents, ideally according to the waiting list.

According to the hostel dwellers interviewed, the infighting that broke out over the results of an election for a new forum resulted in the absence of a liaising structure, as a new forum could not be installed. The City then suspended the programme, ostensibly due to the lack of community forum participation. A question that arises from this is: is public participation accomplished by liaison with a community forum, or does it require consultation with the wider community? By halting the programme, the City seems to have decided that the participation required was that of the few individuals serving on the community forum.

Although the forum represented the community, when infighting broke out over seats in the newly elected forum, those fighting were no longer serving the interests of the community, but instead pursuing their own. Thus what was required in regard to the hostel conversion programme, in the absence of a standing community forum, was the participation and cooperation of the wider community. The City should have explored other mechanisms for involving and consulting the affected community.

The City's obligations continue well beyond the artificial hurdle posed by the absence of a community forum. In the cases of *Grootboom* and *TAC*, the Constitutional Court said that a state programme must be measured against the standard of reasonableness, and that a programme would only be reasonable if it was, among other things, "flexible", and as such capable of responding to the short-, medium- and long-term needs of the most vulnerable (*Grootboom*, para 43; *TAC*, para 68). This includes the duty on the state to review its programme, identify impediments and remove them (see Mbazira, 2006).

Three years have passed since the City's hostel conversion programme, aimed at delivering hostel dwellers from dehumanising conditions, was suspended. The City's programme has demonstrated no flexibility and innovation thus far. No attempts have been made to find alternative ways of executing the programme in the absence of the community forum. Flexibility on the part of the City would have included approaching the community directly, identifying the hostel block to be converted next, placing dwellers in temporary shelters and then returning them to the completed family units. This would not have been impossible

for the City to do, as all it required was the cooperation of the wider community. It is clear from interviews with hostel dwellers in Guguletu that the community is eager to cooperate with the City as long as this brings the dehumanising conditions in the hostels to an end.

Furthermore, the wider community supports the immediate resumption of the programme. The infighting by certain individuals is a barrier to access to housing for the community. This calls into question the City's compliance with its obligation to protect the right of access to adequate housing against interference by third parties, in terms of section 7(2), read with section 26, of the Constitution. Hence, in halting the hostel conversion programme at the instance of the self-serving individuals, the City clearly failed to protect the right of access to adequate housing of the rest of the community against interference by third parties.

Conclusion

Community participation is particularly vital to socio-economic development. The hostel development project is a classic case of competing obligations on the part of the City. On the one hand, the City is obliged to facilitate community involvement in its processes, including projects. On the other hand, the City has an obligation to ensure reasonable implementation of its social delivery programme. Both obligations have the socio-economic development of communities as their object. The City complied with its obligation to facilitate community involvement by using the community forum, but when there was no cooperation forthcoming from the forum, it suspended its housing programme indefinitely, as though that was the end of its obligations. It is argued that the City's approach to public participation is inflexible and has resulted in a failure to deliver adequate housing to vulnerable hostel dwellers. It should have employed other means of securing public participation when the community forum failed.

Finally, if infighting among a handful of individuals is put forward as the main reason for stopping the programme in Guguletu, it is also argued here that individuals in the community cannot and should not be allowed to hold social programmes to ransom. Section 7(2) of the Constitution imposes a duty on the City to protect the right of members of the wider community to access adequate housing against any hindrance by third parties. By halting the hostel conversion programme indefinitely, the City thus allowed third parties to hamper a service delivery programme and, consequently, the City breached its obligation to protect the wider community's right of access to adequate housing.

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Combining the "minimum core" and "reasonableness" models of reviewing socio-economic rights

Sisay Yeshanew

Monitoring the implementation of economic, social and cultural rights (hereinafter socio-economic rights) may be seen as a process by which judicial or quasi-judicial organs check whether legislative and executive decisions, at the level of both formulation and implementation, comply with certain standards contained in legal instruments that guarantee these rights. But there are objections in principle to the justiciability of socio-economic rights, mainly to the effect that the adjudication of this group of rights entails stepping into the legislative and executive terrains of governance. Among the responses to these objections are that "there is no single monolithic model of judicial enforcement for all human rights" (An-Na'im, 2004: 7) and that it is all a matter of adopting a proper model for reviewing the implementation of these rights.

Socio-economic rights entail both negative (abstention-bound and resource-barren) and positive (fulfilment-bound and resource-dependent) obligations, the adjudication of which differs greatly. More advanced models of review that suit the purposes of monitoring the wide array of positive obligations have yet to be developed. Important among the models of review already in place are the "minimum core" model of the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR or Committee) and the "reasonableness" model of the South African Constitutional Court.

This article attempts to show the pros and cons of these two approaches as developed through adjudication as well as theoretical exposition, and to argue for a model of review that combines them. On 18 June 2008, the UN Human Rights Council took a great leap towards the justiciability of socio-economic rights at the international level when it unanimously adopted the optional protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which establishes a communications procedure. The CESCR has also been making preparations for this optional protocol. In mid-2007, the Committee issued a statement in which it pretty much defined the approach it will follow in future in adjudicating socio-economic rights. This article also reflects on that model.

The minimum core model is one that would help evaluate whether a state has taken steps to realise the minimum essential levels of each right.

The "minimum core" model

In General Comment No 3 on the nature of states parties' obligations (UN doc. E/1991/23), the CESCR introduced the minimum core model for the first time. The Committee stated that it had developed this model based on an extensive examination of states parties' reports. Although it referred to the model as a basis of "assessment" of a state's action in discharging its obligation (para 4), it is arguably intended more for the examination of state reports submitted to the Committee than for adjudication. This can be seen from the example given by the Committee, in which the failure of a state to meet the core minimum is measured in terms of whether a "significant number of individuals" are deprived of necessary goods or services (para 10). It is a model which would help evaluate whether a state has taken steps to realise the minimum essential levels of each right. The Committee made it possible for a state to defend its failure to

meet minimum core obligations by demonstrating that every possible effort has been made to use all resources at its disposition to satisfy, as a matter of priority, the minimum obligations (para 10). While this is a very broad requirement that may be difficult to adjudicate, the Committee changed this position in later general comments in which it said that the minimum core obligations were non-derogable (General Comment No 14 on the right to health, UN doc. E/C.12/2004, paras 43 and 47; and General Comment No 15 on the right to water, UN doc. E/C.12/2002/11, paras 37 and 40).

The minimum core standard does not provide a mechanism for the identification of the minimum core obligations.

Although the minimum core standard was formulated with the purpose of identifying obligations of immediate effect that are directly justiciable, it appears to have elements that water down this quality. Primarily, it does not provide a mechanism for the identification of the minimum core obligations. While the Committee began with negative obligations, it kept expanding the minimum core elements of rights to include seemingly positive obligations such as the provision of essential drugs (General Comment No 14, para 43) and ensuring physical access to water facilities and services (General Comment No 15, para 37). The minimum core model has also been more a basis for the scholarly exposition of the contents of specific socio-economic rights than a model for the judicial or quasi-judicial application of the rights to concrete cases (Coomans, 1995: 16-22; Chapman and Russell, 2002). A common denominator of definitions and discussions of the model, however, is that it includes negative obligations and bodes well for the socio-economic rights of those in urgent need.

The minimum core model was put to judicial test by the Constitutional Court, which declined to take up the idea of directly justiciable minimum core obligations for three main reasons: that needs and opportunities for the enjoyment of the minimum core vary and are diverse, depending on the economic and social history and circumstances of a country; that it is impossible to give everyone access to a "core" service immediately; and that courts are not institutionally equipped to make the wide-ranging factual and political inquiries necessary for determining what the minimum core standards should be [*Government of the Republic of South Africa and Others v Grootboom and Others*, 2000 (11) BCLR 1169 (CC) (*Grootboom*), paras 29-33; and *Minister of Health and Others v Treatment Action Campaign and Others*, 2002 (10) BCLR 1033 (CC) (*TAC*), paras 26-39]. The Court said that it was not necessary to decide whether it was appropriate for a court to determine in the first instance the minimum core content of a right. This is where it significantly differs from the CESCR and the arguments of scholars, which make the identification of the core minimum of rights the starting point (Bilchitz, 2003: 1).

The Court also noted that it did not have information comparable to that of the CESCR, which developed the concept of minimum core over many years of experience examining states' reports, and that determining a minimum core involved difficult questions including whether it should be defined generally or with regard to a specific group of people (*Grootboom*, paras 32-3). However, the Court did not reject the minimum core model out of hand, as it said that it might take it into account in determining whether the measures adopted by the state were reasonable, rather than as a self-standing right conferred on everyone (*Grootboom*, para 33 and *TAC*, para 34). Although the Court did not explicitly mention the minimum core model as an element of its "reasonableness" test in finding the government's programme unreasonable for failing to provide for those in desperate need in the short term, one may argue that it is the failure to provide for the minimum core that led the Court to its conclusion.

The High Court of South Africa (Witwatersrand Local Division) reignited the minimum core debate in a recent case concerning the right to water [*Lindiwe Mazibuko and Others v The City of Johannesburg and Others* 2008, Case No 06/13865 (W)]. In answering the contention

that the Constitutional Court had disavowed the minimum core model, Judge Tsoka said that he understood the Constitutional Court's reasoning in *Grootboom* and *TAC* to mean only that determining the minimum core in the context of the right of access to housing posed difficulties and that it might be possible for a court to determine the core minimum if sufficient information were placed before it (para 131). The High Court went on to say that the difficulties presented did not amount to a rejection of the minimum core as part of South Africa's law and that the "diverse needs" difficulty presented by the right to adequate housing did not arise in the context of the right of access to water (paras 133-4).

The "reasonableness" model

In the first socio-economic rights case that the Constitutional Court considered [*Soobramoney v Ministry of Health, Kwazulu-Natal* 1997 (12) BCLR 1696 (Soobramoney)], the Court seemed prepared to evaluate a resource-rationing decision of hospital administrators on the basis of its rationality and bona fides only. It simply asked whether the policy had been rationally conceived and applied in good faith (paras 25-9). It subsequently developed the "reasonableness" model of review in the *Grootboom* and *TAC* cases.

As opposed to the minimum core model, the reasonableness test is based on the wording of the state's obligation in the Constitution of South Africa to "take reasonable legislative and other measures" [articles 26(2) and 27(2)]. This does not, however, mean that the model cannot be applied in settings where the measures that are required to be taken are not explicitly labelled "reasonable". In fact, apart from the word "reasonable", the relevant provisions of the Constitution follow the conventional formulation of obligations to realise socio-economic rights – to achieve the progressive realisation of the rights within available resources.

Apart from the word "reasonable", the relevant provisions of the Constitution follow the conventional formulation of obligations to realise socio-economic rights.

In *Grootboom* and *TAC*, the Court said that all that was possible and expected of the state was to act reasonably to provide access to socio-economic rights on a progressive basis (*Grootboom*, para 28; *TAC*, para 35) and used the following as key criteria for a reasonable programme:

- It must be comprehensive, coherent and coordinated.
- It must be balanced and flexible and make appropriate provision for short-, medium- and long-term needs.
- It must not exclude a significant sector of society, and must take account of those who cannot pay for services.
- Appropriate human and financial resources must be made available for the programme.
- It must be reasonable in both conception and implementation.
- It must be transparent, and its contents must effectively be made known to the public.
- It must provide relatively short-term relief for those whose situation is desperate and urgent.

The reasonableness approach escapes the legitimacy and competence objections to the justiciability of socio-economic rights because it engages the Court in scrutiny of programmes and policies of the government for reasonableness only, without dictating solutions or pre-empting policy choices by the executive and legislature (Brand, 2006: 227; Michelman, 2003: 27; Bilchitz, 2002: 495-6). It is also ideal in that the model can be employed for the review of positive obligations. In *TAC*, it was applied in relation to the failure of the state to provide life-saving medication to patients – a positive duty to fulfil the right to health. Being a model of assessing or reviewing a state's policies, the reasonableness test also works against the argument that socio-economic rights should be made part of the directive principles of state/social policy, for they cannot be justiciable fundamental guarantees (Davis, 1992: 475-90).

The reasonableness model is, in fact, an addition to the principled responses to the objections expressed against the justiciability

of socio-economic rights based on their general legal nature and the legitimacy and competence of judicial organs. While the objectors argue that these rights should be principles guiding the state's policies, the approach adopted by Constitutional Court shows that state policies intended to implement socio-economic rights (which are justiciable rights in the South African case) can be reviewed by courts. This takes us back to the general response to objections to the justiciability of socio-economic rights, namely that it is all a question of adopting a well-thought-out model of review.

The reasonableness model of the Constitutional Court is not without its pitfalls, though. First, it is not suitable for claims for direct individual rights to the provision of concrete goods and services, whereas it would apply to a demand that the state adopt a reasonable programme or to a challenge against the propriety of a state's programme to realise socio-economic rights.

Second, the approach throws the burden of proving the unreasonableness of the state's programme on litigants who may be those most in need and hence not have the means to hire the services of lawyers and cover the costs of introducing evidence.

Third, it has been argued that the reasonableness model lacks a clear and principled basis for decisions in socio-economic rights cases, as reasonableness seems to stand for whatever a court regards as desirable features of state policy (Bilchitz, 2003: 10). Finally, the approach fails to link the reasonableness standard with a more detailed elaboration of the content of specific rights (Pieterse, 2004: 407).

A combined approach

Both the minimum core model and the reasonableness test are possible approaches to the direct justiciability of socio-economic rights, and both have downsides. While the minimum core model seems to be best suited to the justiciability of negative obligations, the reasonableness model has characteristics and potentials that lend it to the review of positive obligations. The former, at least as developed by scholarly writings, more or less concentrates on the content of rights in order to identify minimum obligations, whereas the latter focuses on the obligations of states or measures in order to realise rights.

While the minimum core model seems to be best suited to the justiciability of negative obligations, the reasonableness model has characteristics and potentials that lend it to the review of positive obligations.

The minimum core model may be a helpful tool in defining the content of the rights and providing a principled basis for the evaluation of measures taken by the state. The reasonableness test, on the other hand, provides a model for the analysis and evaluation of states' obligations.

The approaches are not mutually exclusive. The characteristics of the two models make it logical to think of a model of review that combines them. This does not, however, rule out the adoption of other effective models of review, as the propriety of any model depends on the laws and socio-economic situations obtaining in any specific country or system, which obviously may differ substantially from one to the other.

The desirability of an approach that combines the minimum core and reasonableness models seems to have been recognised by the CESCR in a statement of mid-2007, in which it clarified how it would examine communications concerning the obligation to take steps to the "maximum of available resources" under an optional protocol to the ICESCR (CESCR, 2007). The Committee reiterated the minimum core obligations of states as defined in its General Comment No 3, emphasising the immediacy of obligations to guarantee the exercise of rights without discrimination and the duty to refrain from interfering in the enjoyment of rights (paras 3-7). Incidentally, the Committee in this statement reverted to its original position that a failure to meet core obligations was justifiable.

After noting that the obligations to protect and fulfil required

positive budgetary measures, the Committee developed a model of review with a list of criteria that effectively encapsulated features of both the minimum core and reasonableness models. It said that "[i]n considering a communication concerning an alleged failure of a State party to take steps to the maximum of available resources", it would assess whether the measures effectively taken by the state were "adequate" or "reasonable", taking into account, *inter alia*, the following considerations (CESCR, 2007: para 8):

(a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights;

(b) whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner;

(c) whether the State party's decision (not) to allocate available resources is in accordance with international human rights standards;

(d) where several policy options are available, whether the State party adopts the option that least restricts Covenant rights;

(e) the time frame in which the steps were taken;

(f) whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups, were non-discriminatory, and whether they prioritised grave situations or situations of risk.

In accordance with one of the criteria of reasonableness developed by the Constitutional Court, the Committee also places great importance on a transparent and participative decision-making process at the national level in its assessment of whether a state party has taken "reasonable steps" (para 11).

The Committee's new model of review offers a nuanced approach to the justiciability of socio-economic rights that carefully combines criteria that definitely involve the analysis of rights and obligations with the evaluation of measures taken by a state against standards to be derived from such analysis. While it examines the reasonableness of a state measure, which may take the form of a programme to realise a right, using criteria that include those of the Constitutional Court, it clearly employs the minimum core model in its evaluation of the measures. The Committee's new approach also responds to the objection to the justiciability of socio-economic rights, for it "always respects the margin of appreciation of States to take steps and adopt measures most suited to their specific circumstances" (para 11).

On another note, the proof and modality of adjudication of some of the criteria, such as whether measures are "deliberate, concrete and targeted" and whether a state adopted an option that restricts rights, may pose some difficulties, for they are not specific enough – even more so in relation to what the Committee calls "objective criteria" in the light of which a "resource constraints" defence to retrogressive steps may be considered, including the level of development and economic situation of a country, and the severity of breach (para 10).

However, it is a good thing that in the latter case the Committee makes its consideration on a country-by-country basis. Moreover, the minimum core content features prominently among the criteria. It is also fascinating that the Committee's model throws the burden of proof on the state party, at least in cases of failure to take steps or of the adoption of retrogressive measures (para 9). This, in a way, responds to the criticism of the reasonableness model as defined by the Constitutional Court, which places the burden of proof on applicants.

Conclusion

The combined model is a good one in that it involves both rights analysis and the evaluation of measures that states take to realise socio-economic rights. Moreover, it is suitable for monitoring both negative and positive obligations. It also meets the objections to the justiciability of this group of rights and answers the criticisms levelled against the reasonableness test. It seems that the CESCR will make use of the jurisprudence of the Constitutional Court with respect to the reasonableness test. However, the proof is in the pudding, and it remains to be seen how the Committee or any other judicial or quasi-judicial organ will apply the model in practice.

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Upgrading of informal settlements and the rights of the poor: The case of Joe Slovo

Lilian Chenwi

Thubelisha Homes and Others v Various Occupants and Others Case No 13189/07 (*Thubelisha Homes*)

The continued presence and growth of informal settlements with little or no access to services and infrastructure is a common feature in South Africa. There are an estimated 2.4 million households in informal settlements in the country (DAG, 2007a).

The reasons why these settlements are formed and why people live in them vary. Some have noted that the mushrooming of informal settlements is a result of the slow delivery of state-subsided low-cost housing (Huchzermeyer et al, 2006: 20). Others have cited economic growth in cities as a contributing factor to rapid urbanisation, leading to high levels of informality (DAG, 2007a).

Informal settlements are a manifestation of poverty, social and economic exclusion, social inequality, marginalisation and discrimination. Most households in informal settlements are poor and vulnerable, with generally low incomes, resulting in severe social problems such as crime, drugs, alcoholism, domestic violence, community conflict and dependence on welfare (Smit, 2006: 103, 111, 114). In addition, due to the conditions of socio-economic vulnerability in these settlements, HIV prevalence and AIDS impact are particularly severe (Ambert, 2006).

The government has responded to the rapid growth of informal settlements through, among other things, the development of programmes to eradicate these settlements. In October 2004, a national housing programme, "Upgrading of Informal Settlements" (UISP), was adopted in response to the policy called Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements policy (BNG), dated August 2004. Though the UISP aims to achieve the reduction of poverty, vulnerability and social exclusion, since its introduction the government has focused on an approach to eradicating informal settlements that results in evictions. Currently, hundreds of residents of Joe Slovo, an informal settlement that is in the process of being upgraded, face eviction to make way for formal housing. This has resulted in a number of riots and a case before the High Court and subsequently the Constitutional Court (*Thubelisha Homes*).

This article sets out the background to the case, including a description of the Joe Slovo informal settlement. This is followed by the arguments of the applicants at the High Court and the response of the Joe Slovo residents. The High Court's judgment is then considered, followed by some concerns about the judgment and its aftermath.

Background

In 2004, in order to accelerate the delivery of houses as a key strategy for poverty alleviation, the government introduced the BNG policy. It represents a holistic approach to housing development for the next ten years and requires the government to redirect and enhance existing mechanisms to move towards more responsive and effective housing delivery. The government has committed itself, under the BNG policy, to ensuring the availability of adequate housing to all. One of the objectives of the policy is the creation of well-managed housing projects involving the upgrading or redevelopment of informal settlements and the reversal of the conditions that many South Africans live under in these settlements. Hence the development of the UISP, directed at facilitating the structured upgrading of informal settlements.

The upgrading of informal settlements takes place through in-situ upgrading in desired locations and the relocation of households on a voluntary and cooperative basis where development is not possible or desirable.

The UISP supports the progressive eradication of informal settlements so as to address poverty by, among other things, enhancing tenure security, promoting healthy and secure living environments, empowerment and social and economic integration (inclusion). The upgrading of informal settlements takes place through *in situ* upgrading in desired locations and the relocation of households on a voluntary and cooperative basis where development is not possible or desirable.

One of the pilot projects identified to test the implementation of the BNG policy was the N2 Gateway housing project, which envisaged the provision of between 25 000 and 30 000 housing opportunities (*Thubelisha Homes*, para 55). The project was a joint initiative of all three spheres of government – national, provincial and local – targeting a number of informal settlements for upgrade including Joe Slovo.

Joe Slovo is one of Cape Town's biggest informal settlements, situated alongside the N2 highway, about 10km from the City Centre. It has approximately 4 500 informal dwellings occupied by about 18 000 to 20 000 people (*Thubelisha Homes*, para 7). The informal housing structures are built mostly of combustible materials, with odd assortments of wood, plastic and corrugated iron. In fact, overcrowding, fires, floods, unhealthy conditions and crime are characteristic of the area.

The government has chosen to do a "roll-over" upgrade in Joe Slovo as opposed to an "*in situ*" upgrade. Roll-over upgrades require the removal of residents from the settlement to be upgraded to temporary relocation areas (TRAs), while *in situ* upgrades do not necessarily require relocation and involve minimal disruption to the location of dwellings. In the case of Joe Slovo, the residents were to be relocated to Delft, on the outskirts of the city and far from livelihood opportunities. It was envisaged that once the

houses had been built, a significant number of residents who met the qualifying criteria would be given the opportunity to return to Joe Slovo to occupy the formal houses (*Thubelisha Homes*, para 57). The qualifying criteria were as follows:

- Those whose household income fell below R1 500 per month would get a house free of charge.
- Those whose household income fell between R1 500 and R3 500 per month would get a house against a once-off payment of R2 479.
- Those with household income in excess of R3 500 per month did not qualify for housing under the project and would have to buy other housing on the open market.

The residents of Joe Slovo opposed the relocation. This resulted in riots and violence, and an application to the High Court (Cape of Good Hope Provincial Division) for their eviction.

Arguments of the applicants

The first, second and third applicants in the case were Thubelisha Homes (a company charged with the responsibility of transforming the Joe Slovo informal settlement in terms of the BNG policy and developing proper formal housing in the area), the national Minister of Housing and the provincial Minister of Local Government and Housing in the Western Cape (the MEC), respectively. The applicants brought an urgent application for the eviction of the residents of Joe Slovo under section 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). Section 5 allows for urgent eviction proceedings instituted by the owner or person in charge of the land. The applicants also relied on section 6 of PIE, which regulates evictions instituted by an organ of state. They also sought an order interdicting the occupiers, following their eviction, from returning to Joe Slovo or from taking up residence there in any manner that undermined the implementation of the BNG policy and the achievement of the N2 Gateway project (para 3). The relief sought included periodic reporting to the court on the progress of relocation to adequate shelter in the TRAs. The Court said that this last relief "is a novel one, but certainly demonstrates that the State has become more sensitized to the constitutional values underpinning any development project" (para 16).

The applicants argued that the residents ought to be evicted to make way for formal housing, alleging that the residents were occupying the property unlawfully as consent had not been given to them for such occupation (para 1). The applicants also argued that an *in situ* upgrade was not feasible in Joe Slovo as the area was too densely populated with little free space and no waterborne sewerage. Hence, a roll-over development had to be implemented, as the residents had to be moved so that a large sewerage pipe could be laid across the area (para 58). They contended that none of the occupiers would be rendered homeless or without adequate access to shelter, and that efforts to persuade the residents to cooperate with an orderly move had been unsuccessful (paras 16 and 29). They also claimed that the TRA was a marked improvement on the quality of accommodation at Joe Slovo (paras 59-60).

Arguments of the residents

The respondents were the residents of Joe Slovo. The City of Cape Town (the City) and FirstRand Bank Limited joined as second and third respondents respectively, but did not file any opposing papers in court. The residents challenged the decision to evict them and brought an interlocutory application requesting the setting aside of various land availability agreements entered into between the City, the MEC, Thubelisha Homes and FirstRand regarding the land at Joe Slovo (para 4).

The residents argued that they were not unlawful occupiers in terms of PIE as they had the express or tacit consent of the City to occupy the land and their structures (para 37). They based this argument on the fact that they had been given "red cards" entitling them to remain in their houses and the City had been providing them with certain services (para 37). With regard to the urgency of the case, they argued that section 5 of PIE could not be relied on as it made provision for urgent interim relief pending the final order determined under sections 4 and 6 of PIE (para 32). They added, however, that Thubelisha Homes did not meet the requirements of section 6 of PIE as it was not an organ of state.

The residents also argued that they had a substantive and procedural legitimate expectation that at least 70% of the housing to be developed in Joe Slovo would be made available to them, but the applicants wanted to make the bulk of that housing available to others (paras 24 and 69). This argument was based on the promises and undertakings that had been made to them in this regard by representatives of the City Council at various meetings convened to deal with problems and challenges facing the Joe Slovo residents (para 24). Having a legitimate expectation implied that the houses could not be made available to other people without the Joe Slovo residents first being given a hearing in accordance with the common law rules of natural justice (para 69).

The respondents further contended that they had in fact acquired tenure rights in terms of the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) and the Extension of Security of Tenure Act 62 of 1997 (ESTA). This argument was based on the fact that they had the consent of the City of Cape Town to occupy the informal settlement (para 77), and a number of them had been in occupation of Joe Slovo since the early 1990s (para 78). As holders of informal land rights they could not be evicted, as section 2 of IPILRA stipulates that no person may be deprived of any informal right to land without his or her consent. "Informal right to land" is defined in IPILRA as "beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997" (section 1).

The decision of the High Court

The case was heard by Judge Hlophe and judgment handed down on 10 March 2008. The interlocutory application for the review of the land availability agreements was dismissed.

Judge Hlophe stated that he saw the case not as a mass eviction, but as a strategic relocation that would not result in homelessness as alternative accommodation had been provided by the state. He observed that the application was for an eviction order, structured over a period of time, with provision made for the applicants to report back to the Court as to the progress made in the implementation of orders granted (para 17).

Furthermore, the judge found the case to be one that required urgency based on the violence that had erupted and the fact that the housing crisis in South Africa remained one that had to be resolved with urgency so that people might live in dignity and the security of homes (para 16). The judge went on to find the respondents' argument that the applicants could not seek relief under section 5 of PIE to be weak, as eviction notices had been issued and served (paras 19-20 and 32). On 20 September 2007, the High Court had authorised the applicants to give notice to the residents in specified languages and in a manner that would allow for proper service of notice (para 18). The judge also held that the applicants had met the requirements of section 6 of PIE as Thubelisha Homes was "an organ of state" within the meaning of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), or alternatively a juristic person exercising a public function (para 36).

The respondents were also found not to have obtained consent to occupy the land. Judge Hlophe observed that even if the provision of services might have been construed as consent, the institution of the eviction proceedings implied that they no longer had such consent (para 38). The judge concluded that the respondents were unlawful occupiers as envisaged in PIE (para 41).

Judge Hlophe further held that the respondents had no substantive or procedural legitimate expectation because they were occupying Joe Slovo unlawfully (para 75). He noted that the requirements for legitimacy of expectation included the following:

- The representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification.
- The expectation must be reasonable.
- The representation must have been induced by the decision-maker.
- The representation must be one which it was competent and lawful for the decision-maker to make, without which the reliance cannot be legitimate (para 71).

With regard to the arguments of the respondents in relation to IPILRA and ESTA, the judge found them to be flawed, as the residents did not have consent and Joe Slovo was not rural land. Hence they had failed to establish any

rights under IPILRA or ESTA (paras 41 and 79).

Based on these findings, Judge Hlophe granted the eviction order and interdicted and restrained the residents, once evicted, from returning to Joe Slovo for the purpose of erecting or taking up residence in informal dwellings (para 85). The residents of Joe Slovo were to be evicted on a progressive basis. The Court also held that the residents were entitled to remove their informal structures upon leaving Joe Slovo, after which the applicants were authorised to demolish any informal housing remaining in the area. Thubelisha Homes was directed to assist those affected with the moving of their possessions. The Court further directed the applicants to report back to the Court at intervals of no less than eight weeks, but more frequently if need be, on the implementation of the order and the allocation of permanent housing opportunities to those affected by the order.

Some concerns about the judgment

This case no doubt poses the challenge of how to reconcile respect for the inadequate accommodation which poor people have managed to secure and the implementation of a project that is aimed at improved housing. Whatever the case may be, this judgment will result in the removal of poor people from the inadequate housing that they have managed to secure for themselves to a place further away from their livelihood opportunities. Contrary to Judge Hlophe's view, this is in fact an eviction and not a "strategic relocation" as he terms it. Judge Hlophe, unfortunately, interprets the right to have access to adequate housing in a restrictive manner. He equates the right with mere shelter, without having regard to other requirements of adequate housing, such as access to livelihood and employment opportunities, security of tenure and access to social services. Consequently, the judgment does not effectively consider the impact the eviction will have on the livelihoods of the residents.

As Smit (2006: 123) rightly points out, the upgrading of informal settlements should not just be about the eradication of shacks, but should include understanding people's existing circumstances and contributing to improving people's lives in a meaningful way. This is something the Court should have paid particular attention to. In fact, DAG (2007b) observed, based on research it had conducted in Delft (which formed part of the records in the case), that in social and economic terms, most households living in Delft are worse off than they had been when they were residing in the informal settlement at Langa. The Joe Slovo residents were not so much concerned about the quality of houses in Delft as about the limited employment opportunities and the severely limited access to public transport there. The Court failed to take this into account, and the fact that the relocation would destroy their established community networks and the support and security they provided. Moreover, it is not clear what will happen to the residents who do not get housing in Joe Slovo or who do not meet the qualifying criteria for housing. Where will they live after they have been removed from Delft?

The judgment does not effectively consider the impact the eviction will have on the livelihoods of the residents.

Also, the judgment does not deal adequately with the issue of meaningful consultation before an eviction. In *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC), the Constitutional Court dealt at length with the importance of "meaningful engagement" prior to a decision by an organ of state to evict people from their homes. The Court held that engagement was a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives and that the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement (paras 14 and 19). Despite this, and notwithstanding the large number of Joe Slovo residents that would be affected by its decision, the High Court failed to examine in adequate detail the nature of the consultation that had been undertaken in order to establish whether it was in fact "meaningful", before arriving at its conclusion that meaningful consultation had taken place.

Furthermore, the decision to develop the Joe Slovo informal settlement by means of roll-over upgrading and to relocate the residents to the TRAs in Delft amounts to administrative action in terms of both section 33 of the Constitution and PAJA. However, the judge did not examine the relationship between the duty to engage meaningfully and procedurally fair administrative action, or deal adequately with the rights of the residents of Joe Slovo and just administrative action under the Constitution and PAJA.

These issues, among others, form the basis of the appeal to the Constitutional Court.

The aftermath

Judge Hlophe's decision was not welcomed by the residents of Joe Slovo, who have appealed against the whole judgment and order of the High Court to the Constitutional Court (*Various Occupants v Thubelisha Homes and Others* CCT22/08). The Community Law Centre and the Centre on Housing Rights and Evictions were both admitted as *amici curiae* in the case. The *amici* submission deals with international law on housing and meaningful engagement and the impact the eviction will have on the livelihoods of the residents, among other things. The Constitutional Court heard the case on 21 August 2008 and judgment has been reserved.

Conclusion

Generally, the upgrading of informal settlements no doubt poses a number of challenges relating to, among other things, respect for and the protection of the right to have access to adequate housing and ensuring the effective participation of communities in housing projects. The upgrading of informal settlements should not result in the violation of the rights of the poor and vulnerable who live in these settlements. Moreover, they need to play a meaningful role in decision-making processes that affect their lives.

The Joe Slovo case raises two important issues in the realisation of socio-economic rights, which have been canvassed by the *amici* submission to the Constitutional Court. First, socio-economic rights concern more than simply the delivery of material goods: they also have a more intangible dimension which is critical to enabling them to fulfil their purpose as human rights guarantees. The second issue relates to the intersection between socio-economic rights and the rights of poor people to be consulted and have a say in decisions which fundamentally impact on their rights. Hence a number of issues have to be kept in mind when dealing with the upgrading of informal settlements. These include:

- the need to adopt an integrated approach aimed at addressing poverty;
- the necessity of meaningful community participation at all levels – from project development to implementation;
- the need for partnerships between government, community organisations and non-governmental organisations; and
- the need, over and above participation, for community involvement in the actual project implementation (Smit, 2005).

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Prescription and right to social security

Pierre de Vos and Siyambonga Heleba

The Department of Welfare in the Eastern Cape province has become notorious for its maladministration of social grants. Several decisions of the South Eastern Cape Local Division of the High Court, the Supreme Court of Appeal (SCA) and the Constitutional Court have criticised the department for wrongly and unlawfully cancelling social grants, delays in processing applications for these grants and reluctance to obey court orders.

Njongi v MEC, Department of Welfare, Eastern Cape 2008 (6) BCLR 571 (CC) (*Njongi*)

For example, Judge Cameron in *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza* 2001 (10) BCLR 1039 (SCA) (*Ngxuza*) stated that the behaviour of the department "speaks for a contempt of people and process that does not befit an organ of government under our constitutional dispensation" (para 15). Bearing this in mind, legal advisers in the Department of Welfare might have thought twice before deciding to go all the way to the Constitutional Court to argue that a debt of R5 800 had prescribed and was therefore not payable to a bona fide social grant recipient.

It is true that this judgment was the result of an appeal by the claimants from a judgment by the full bench of the High Court, and in a technical sense the department cannot be faulted for defending this appeal. However, the amount of money was so trifling, the decision of the full bench based on such a narrow legal technicality, and the jurisprudence of the Constitutional Court on similar matters of social policy so overwhelmingly stacked against them, that wise counsel might well have decided to settle the case before it came before the Constitutional Court.

Prescription is a situation where a debt which has become due and claimable lapses after a certain period of time, with the effect that the debt is no longer claimable.

This paper reviews the recent Constitutional Court's decision in the *Njongi* case. In particular, it seeks to address the question of how to ensure a pro-poor attitude in the administration of social grants, especially in the Eastern Cape. It suggests that one way of achieving this is by holding the MEC and state officials personally liable for the applicant's litigation costs. This should be done in cases such as in *Ngxuza* in which state officials are found to have been grossly negligent in the performance of their duties.

The facts and decisions of the lower courts

The applicant had been a recipient of a disability grant since 1987. The grant was cancelled in 1997 and reinstated in July 2000. The applicant went to the High Court to claim an amount of R5 800 as arrears following the illegal cancellation of her grant. The Department of Welfare (the respondent) argued that the amount claimed had prescribed in terms of the Prescription Act 68 of 1969 and that it therefore did not owe Ms Njongi anything.

The High Court found that prescription did not run in this case, arguing that the debt (arrears) could not be claimed before the administrative decision to terminate the applicant's grant had been reviewed and set aside by a court. The Court ordered the department to pay the applicant the outstanding arrears on her grant.

The department appealed against this ruling to a full bench of the High Court – three judges sitting (hereinafter Full Court) – which overturned the decision of the High Court. The Full Court found that the word "debt" must be given a wide meaning, and held that the obligation to pay a social grant was a debt within the meaning of the Prescription Act. It held that for prescription to begin to run, the debt must be due and immediately claimable. It found that the debt in this case became due the moment the grant was terminated. It therefore concluded that prescription began to run against the applicant when

the grant was cancelled, not after the cancellation was set aside by the Court.

Issues raised before the Constitutional Court

The applicant, in her application for leave to appeal, raised the following specific issues:

- whether prescription runs in respect of a claim for arrears on a disability grant (para 2); and
- under what circumstances the state can plead the defence of prescription.

The decision

The Constitutional Court overturned the decision of the Full Court and reinstated the order of the High Court. It ruled that the Full Court had erred when it concluded that the full debt had become due and immediately enforceable on the date of cancellation of the grant. It held that the period for prescription commenced from the moment the illegal decision to cancel the grant was reviewed and set aside or from the moment at which the provincial government admitted to the wrongfulness of its actions (paras 48, 50, and 54).

However, it warned that not every administrative action would have to be reviewed and set aside before a debt could fall due and become immediately enforceable for purposes of prescription. It stated that it was "always open to the Provincial Government to admit without qualification that an administrative decision had been wrong or wrongly taken and consequently to expressly disavow that decision altogether" (para 56). The Court went on:

> There are literally thousands of administrative decisions of this kind made every day and it would be quite untenable for each decision to be set aside by a court before the underlying obligation can be enforced. Prescription would begin to run (if it is indeed applicable in a case of this kind) as soon as the Provincial Government disavowed reliance on the administrative action concerned. For then the debt would become immediately enforceable (para 56).

Analysis of the decision and some suggestions

The Court declined to make a finding on the question of whether the government could raise the defence of prescription in respect of a debt arising from the non-performance or violation of its constitutional obligations. The applicant argued that the government was precluded from raising this defence because the debt in question arose from the right to social security. The Court agreed with the applicant in passing:

> I have doubts whether prescription could legitimately arise when the debt that is claimable is a social grant; where the obligation in respect of which performance is sought is one which the Government is obliged to perform in terms of the Constitution; and where the non-performance of the Government represents conduct that is inconsistent with the Constitution (para 42).

However, it refused to make a definite conclusion on this issue because the question had not been raised and argued in the lower court. The second reason was that to decide the issue in this judgment might result in "possible injustice ... upon a successful plea of prescription" (para 42).

The Court went on to decide the case as though the defence of prescription was available to government in cases of this nature. Had the question been raised and argued in the lower court, it would have addressed an important constitutional principle as to whether the government is precluded from raising the defence of prescription in respect of the non-performance or violation of its constitutional obligation.

Given the litany of cases brought before the courts dealing with the illegal cancellation of social grants in the Eastern Cape, the Constitutional Court should probably have used this case to send a signal that it would consider holding the political heads of the government departments or their officials personally liable for the cost of litigation where such litigation would prolong the agony of bona fide social grant recipients. There is evidence in this case that the court was considering this approach.

After conclusion of argument, the Constitutional Court issued further directions to the respondent, calling on it to show reason why the MEC (or others who had been involved in making the decision to oppose the case) should not be ordered to pay the applicant's cost in the application on the scale as between attorney and client. Such a move would have helped to address the systemic failures in the Department of Welfare in the Eastern Cape and would have helped to prevent the department and its officials from wasting time and money by opposing even the most worthy of claims – often lodged by very

poor and needy individuals with the help of non-governmental organisations. However, despite the strong language used and the obvious shock and exasperation of the judges of the Constitutional Court at this turn of events, the Court chose not to hold the officials or the political head of the department personally liable for the cost incurred in this litigation.

The applicant argued that the government was precluded from raising the defence of prescription because the debt in question arose from the right to social security.

Holding state officials personally accountable for the type of attitude witnessed in *Njongi* is an approach that is being increasingly considered by our courts. For instance, Judge Moses Mavundla is reported to have made scathing remarks when postponing an application before the Pretoria High Court brought by Johanna Combrink against the Minister for Safety and Security and the Commissioner for the South African Police Service, Louis Trichardt (Case No 28132/2008), to set aside the police's refusal to grant her a trading licence, because the minister had taken no steps to make a ruling on her appeal. The remarks were made in passing during the court proceedings and do not form part of the court record. Ilse de Lange, present during the court proceedings, reports that Judge Mavundla sharply criticised officials from the State Attorney's office for delaying the urgent application by Johanna Combrink, who had to close down her shop after she was refused a trading licence (De Lange, 2008). He said it was unacceptable to ignore urgent applications and that the State Attorney's office could not simply hide behind a heavy workload. He added: "Once functionaries have to start paying costs out of their own pockets maybe they will start doing their jobs. If the Minister of Safety and Security is assisted by dead wood, he must get rid of the dead wood." He added: "People (in government) simply don't care because they know they can't be fired, whether service delivery is up to standard or not." He went on:

> This type of conduct can simply not be tolerated by the court. At the end of the day it's the taxpayer who is being penalised because people don't do their work.
>
> We need to start showing some seriousness. It's just not right for State officials to go and sleep.
>
> We need to get our house in order. The struggle was not so we could take over and drag our feet (De Lange, 2008).

The Court decided not to make such a drastic order against the political head of the Department of Welfare in the Eastern Cape or his predecessor or any of the officials because it said this would not be just in the circumstances. However, it did not give cogent reasons for being so kind to those officials and politicians. This is perplexing, given the very strong language used by Justice Yacoob in rejecting the reasons given by the MEC and his officials for opposing the application. For example, the Constitutional Court noted, ironically, that this case would never have come to court if the officials had paid heed to the relevant judgments already handed down about this issue.

> In particular, it must be said that judgments of courts in relation to Provincial Government conduct are not meant simply to be filed away without being read. They contain important information that has a bearing on the conduct of the Provincial Government in issue. It is probable that the legal advisors to the Provincial Government did not read the various judgments which are referred to in this judgment with sufficient care. If they did read them however their conduct is worse. Court judgments were ignored by these lawyers. This is unsatisfactory (para 84).

The Court also called the decision to oppose the application by Ms Njongi "unconscionable" (para 87). The Court was obviously outraged by the characterisation of the case by one of the legal advisers (Mr Basson) as a case dealing with "the social issue of making payment of the balance of the [a]pplicant's claim", calling it a "grossly insulting understatement of the nature of the problem" (paras 86-7). The court also characterised the attitude of the department as "a cynical position devoid of humanity" (para 90). In the end, Justice Yacoob ordered the department to pay the cost of the application – which means that taxpayers will again have to pay for negligence on the part of officials and politicians.

This is – to use an understatement employed more than once in this judgment – regrettable. We are of the opinion that the Constitutional Court has mostly been quite wise in the way it has dealt with the problems of the separation of powers and has often shown the appropriate respect for the other branches of government. However, in this case, it might well be that the Court should have been more bold. Perhaps it has failed all the other claimants in a similar position to that of Ms Njongi in the Eastern Cape, who have suffered at the hands of bureaucrats. It might be argued that if the political head or officials of the department were personally held liable for costs, it would have sent a strong message deterring them from unnecessary and time-wasting litigation to avoid paying money legally owed by them.

The case highlights the inherent difficulties of fixing systemic failures of governance that lead to a disregard for the needs of ordinary people.

These issues are complex, and the Court did canvass opinion on the matter. Yet it declined to go this route, and did so without providing clear reasons, merely noting that it was not advisable to do so in this case. The result is that the MEC and his officials were not held personally responsible for this behaviour, and they are therefore highly unlikely to refrain from acting in a similar fashion in future. After all, as the Court pointed out, government officials do not read previous judgments of the Court, and even if they do, they often ignore them.

The case highlights the inherent difficulties of fixing systemic failures of governance that lead to a disregard for the needs of ordinary people. The Constitutional Court obviously toyed with the idea of addressing this problem by holding the MEC personally liable for the legal costs and, in an innovative step, invited the department to address it on the matter.

A cost order against the MEC or the officials might not have solved the problem entirely. Other remedies – such as structural interdicts – are, of course, also available to courts to deal with such systemic failures, although the Constitutional Court has so far shied away from employing such drastic remedies. However, it is contended that holding the MEC personally liable for the unnecessary and wasteful costs incurred in defending the illegal cancellation of social grants would have helped sensitise government officials to the plight of poor South Africans.

Conclusion

Social grants are generally accepted as the single most effective intervention by the government to alleviate poverty in South Africa. The maladministration of social grants in the Eastern Cape, one of the poorest provinces in the country, thus threatens to reverse the gains made in poverty alleviation in South Africa in general and in the Eastern Cape in particular.

The *Njongi* judgment puts the spotlight on the absolute disregard that the Eastern Cape provincial government has shown towards needy social grant recipients in that province. This lack of respect for human dignity manifests itself in the fact that the provincial government has always been prepared – as in the present case – to resort to "every stratagem and device and obstruction, every legal argument and non-argument" (paras 9–10) to deny social grants to those legally entitled to them. Even more disturbing, the Eastern Cape provincial government misled the Supreme Court of Appeal in *Ngxuza* by claiming that it had implemented an earlier court judgment in the case of *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government, and Another* 2000 (7) BCLR 728 (E) by fully reinstating all those whose grants had been terminated in a similar fashion, including Ms Njongi (para 22).

This offhand administrative conduct has caused "untold misery and suffering" (*Njongi*, para 46) to those whose grants were illegally stopped. Clearly, this anti-poor attitude cannot be remedied by simply ordering the provincial government to reinstate and reimburse all those whose grants were illegally terminated. Nor will it be remedied by the Court simply asking the provincial government officials to provide reasons why they should not be held personally liable for their conduct, as the Court has done in this case. Instead, a more drastic order is required.

We suggest that, when next such a case comes to the Court, the judges should be bold and hold the MEC

and the officials personally liable for the waste of money and for the total disregard for the rights and dignity of ordinary South Africans. We contend that such an approach would be in consonance with the Court's remedial jurisprudence, such as in *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC), where the Court stated that awarding punitive cost orders against the state (as opposed to individual state officials or MECs) further depleted the already cash-strapped public purse. The Court correctly pointed out, quoting an earlier judgment, that in a country such as ours, where there are

> multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform, it seems to me to be inappropriate to use these scarce resources to pay punitive constitutional damages ... with no real assurance that such payment will have any deterrent or preventative effect (para 72).

It is therefore perplexing that the Court still awards constitutional punitive costs against the state, and not personally against MECs or state officials, in cases such as in *Njongi*, as the money will invariably have to come from the resource-constrained public purse.

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Delineating the content of the right to social security

The right to social security is of crucial importance in protecting the most vulnerable and marginalised members of society, especially those living in dire poverty. Social assistance is essential in ensuring that persons living in poverty are able to access a minimum level of income that is sufficient to meet basic subsistence needs and prevent them from having to live below minimum acceptable standards.

General Comment No 19: The right to social security, adopted on 23 November 2007, UN doc. E/C.12/GC/19

The right to social security has been guaranteed at both the international and national levels. For instance, at the international level, the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), recognises the right to social security, including social assistance (article 9). Under the ICESCR states are also required to guarantee an adequate standard of living to everyone (article 11), which can be interpreted to mean that a state should provide social assistance and other needs-based forms of social benefits in cash or in kind to anyone without adequate resources (Van Rensburg and Lamarche, 2005: 213-4). At the national level, the South African Constitution, for example, guarantees to everyone the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance [section 27(1)(c)], and to every child the right to basic social services [section 28(1)(c)].

The United Nations Committee on Economic, Social and Cultural Rights (the Committee or CESCR) has elaborated on a number of socio-economic rights and the related obligations in a series of general comments. Though some of the general comments touch on social security issues and the Committee has addressed this right in its consideration of state reports and in various statements, it did not adopt a general comment specifically on social security until recently.

In November 2007, the Committee adopted General Comment No 19 on the right to social security. In it, the Committee

expresses its concern about the extremely low levels of access to social security, with about 80% of the global population lacking access to formal social security, 20% of them living in dire poverty (para 7).

Accordingly, the Committee recognises the important role social security plays in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion (para 3). Social security must be seen as a means to respond to levels of vulnerability, risk and deprivation deemed socially unacceptable within a given society. Hence measures taken by states to provide social security benefits cannot be defined narrowly and must guarantee everyone a minimum enjoyment of this right (para 4). Such measures include contributory or insurance-based schemes such as social insurance, non-contributory schemes such as universal schemes, privately run schemes and self-help schemes such as community-based or mutual schemes. The Committee notes that non-contributory schemes will be required in almost all states parties, as it is unlikely that every person could be adequately covered through an insurance-based system.

In General Comment No 19, the Committee identifies, among other things, the essential elements of this right as well as the obligations of states and non-state actors. The following paragraphs highlight some of the key points.

Essential elements of the right to social security

First, it is important to note that the right to social security, as pointed out by the Committee, "includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies" (para 9).

The Committee identifies five factors to be taken into account in determining whether the right to social security is being implemented effectively. These are availability, social risks and contingencies, adequacy, accessibility and relationship with other rights. The factors may vary based on the different conditions.

Availability

For the right to social security to be implemented effectively, a social security system must be available and in place to ensure the provision of benefits. The duty to ensure that the system is effectively administered and supervised is placed on public authorities. In addition to the requirement that the system must be established under domestic law, the schemes also have to be sustainable so as to ensure their long-term application (para 11).

Social risks and contingencies

There are nine principal branches of social security that any system of social security must provide coverage for. These are: health care; sickness; old age; unemployment; employment injury; family and child support; maternity; disability; and survivors and orphans (paras 12–21). These categories are also recognised by the International Labour Organization (ILO) Social Security (Minimum Standards) Convention, 1952 (No 102).

Adequacy

This relates to adequacy in amount and duration, irrespective of whether benefits are paid in cash or kind; and regular monitoring is required to ensure that beneficiaries are able to afford the goods and services they require to realise their rights. Of crucial importance to the adequacy criterion is the obligation on states to fully respect the principles of human dignity and non-discrimination in order to avoid any adverse effect on the levels of benefits and the form in which the benefits are provided. With regard to social security schemes that provide benefits to cover lack of income, there should be a reasonable relationship between earnings, paid contributions and the amount of the relevant benefit (para 22).

Accessibility

This includes issues of coverage, eligibility, affordability, participation and information, and physical access. The social security scheme should not discriminate in coverage, and non-contributory schemes are essential in ensuring universal coverage (para 23). Qualifying criteria have to be reasonable, proportionate and transparent and the withdrawal, reduction or suspension of benefits has to be limited, based on grounds that are reasonable, subject to due process and provided for in national law (para 24). The costs and charges associated with making contributions must

be affordable for all and not compromise the realisation of other rights (para 25). Beneficiaries must be able to participate in the administration of the scheme, and the rights of individuals and organisations to seek, receive and impart information on all social security entitlements must be ensured (para 26). Finally, accessibility also requires that benefits be provided in a timely manner, and that beneficiaries, especially those with disabilities, migrants and persons living in remote or disaster-prone areas and areas experiencing armed conflict, have access to social security services, including benefits and information (para 27).

Relationship with other rights

Though the right to social security plays an important role in facilitating the realisation of other rights, the adoption of other measures to realise these rights cannot per se be used as a substitute for the creation of social security schemes (para 28).

Obligations of states parties

Though the obligation of states to realise economic, social and cultural rights is subject to progressive realisation and the availability of resources, some are of immediate effect.

As observed by the Committee, states have immediate obligations in relation to the right to social security, such as the guarantee that the right will be exercised without discrimination of any kind (para 40). The prohibited grounds of discrimination include race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status including HIV/AIDS, sexual orientation and civil, political, social or other status.

States are also required to give the right to social security appropriate priority in law and policy due to its fundamental importance for human dignity. They are therefore obliged to develop a national strategy for the full implementation of the right to social security and to allocate adequate fiscal and other resources at the national level towards its implementation, including international cooperation and technical assistance (para 41).

In addition to the general obligations stated above, the Committee further outlines the specific legal, international and core obligations of states.

Legal obligations

Just like other human rights, three types of obligations apply to states parties in relation to the right to social security:

- The *obligation to respect* requires states to refrain from interfering directly or indirectly with the enjoyment of the right to social security. This includes refraining from engaging in any practice or activity that denies or limits equal access to adequate social security, or arbitrarily or unreasonably interferes with self-help or other social security arrangements or institutions that have been established by individuals or corporate bodies to provide social security (para 44).
- The *obligation to protect* requires states to prevent third parties from interfering with the enjoyment of the right to social security. This includes adopting the necessary and effective legislative and other measures to restrain third parties from denying equal access to social security schemes operated by them or by others, arbitrarily or unreasonably interfering with self-help and other social security arrangements or failing to pay required contributions for employees or other beneficiaries into the social security scheme (para 45). In addition, states have an obligation to prevent abuses by establishing an effective regulatory system that includes framework legislation, independent monitoring, genuine public participation and the imposition of penalties for non-compliance (para 46).
- The *obligation to fulfil* requires states to adopt necessary measures, including the implementation of social security schemes, directed towards the full realisation of the right to social security (para 47).

The Committee further divides the obligation to fulfil into the obligations to *facilitate, promote* and *provide*.

- *The obligation to facilitate* requires states to take positive measures to assist individuals and communities to enjoy the right to social security.

This includes recognising the right, adopting a national social security strategy and plan of action to realise the right, and ensuring that the system is adequate, accessible for everyone and covers social risks and contingencies (para 48).

- *The obligation to promote* requires states to take steps to ensure that there is appropriate education and public awareness on access to social security schemes, especially in rural and deprived urban areas or among minorities (para 49).
- *The obligation to provide* obliges states to make available social security where people are not able to realise the right themselves. States have to establish non-contributory schemes or other social assistance measures to provide support to people who are unable to make sufficient contributions for their own protection. Of particular importance is the duty to ensure that the social security system can respond in times of emergency (para 50).

International obligations

The international obligations of states in relation to the right to social security include the duty to:

- refrain from actions that directly or indirectly interfere with the enjoyment of this right in other countries (para 53);
- prevent their own citizens and nationals from violating this right in other countries (para 54);
- facilitate the realisation of this right in other countries – subject to the availability of resources – through, for instance, the provision of economic and technical assistance (para 55);
- ensure that the right to social security is given due attention in international agreements and consider the development of further legal instruments, with persons working temporarily in other countries covered by the social security schemes of their home country (para 56);
- take steps to ensure that international and regional agreements do not impact negatively on the right to social security (para 57); and
- ensure that their actions as members of international organisations take due account of the right to social security (para 58).

Core obligations

In General Comment No 3 on the nature of states parties' obligations (UN doc. E/1991/23), the Committee states that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party" (General Comment No 3, para 10). In General Comment No 19, the Committee notes states' obligation to satisfy the minimum essential levels of the right to social security. In this regard, states are obliged to:

- ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families, enabling them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs and the most basic forms of education (and if a state cannot provide this minimum level for all risks and contingencies within its maximum available resources, it should, after a wide process of consultation, select a core group of social risks and contingencies);
- ensure the right of access to social security systems or schemes on a non-discriminatory basis, especially for disadvantaged and marginalised individuals and groups;
- respect existing social security schemes and protect them from unreasonable interference;
- adopt and implement a national social security strategy and plan of action;
- take targeted steps to implement social security schemes, particularly those that protect disadvantaged and marginalised individuals and groups; and
- monitor the extent of the realisation of the right to social security (para 59).

A state is *prima facie* failing to discharge its obligations under the ICESCR if a significant number of individuals in that state are deprived of the essential levels of a right (General Comment No 3, para 10). Reiterating that view here, the Committee adds that for a state to be able to attribute its failure to meet the minimum obligations to a lack of available resources, "it must demonstrate that every effort has been made to use all resources that are at

its disposal in an effort to satisfy, as a matter of priority, these minimum obligations" (para 60).

Assessing states parties' compliance with their obligations

States are required to use "all appropriate means" to realise the rights in the ICESCR [article 2(1) of the ICESCR]. However, as observed by the Committee, states have a margin of discretion in choosing the measures that are most suitable for their specific circumstances (para 66).

Hence, in assessing whether states have complied with their obligation to take action, the Committee looks at whether implementation of the right is reasonable and proportionate, whether it complies with human rights and democratic principles, and whether it is subject to an adequate framework of monitoring and accountability (para 36).

It should be noted that deliberate retrogressive measures are prohibited under the ICESCR. However, where such measures have been taken, the state has the burden of proving that they were introduced after careful consideration of all alternatives and are duly justified by reference to the rights in the ICESCR. In assessing this, the Committee will look at the following:

- whether there was reasonable justification for the action;
- whether alternatives were comprehensively examined;
- whether there was genuine participation by affected groups in examining the proposed measures and alternatives;
- whether the measures were directly or indirectly discriminatory;
- whether the measures will have a sustained impact on the realisation of the right to social security or an unreasonable impact on acquired social security rights, or whether an individual or group is deprived of access to the minimum essential level of social security; and
- whether there was an independent review of the measures at the national level (para 42).

Violation of the right to social security by states

Generally, a state can violate the right to social security by not acting in good faith when taking steps to realise the right. Article 26 of the Vienna Convention on the Law of Treaties provides that "every treaty in force is binding upon the parties to it and must be performed by them in good faith".

In addition, the Committee notes in General Comment No 19 that violations of the right to social security can occur through acts of commission or through acts of omission (para 64).

"Acts of commission" relate to direct actions of states or other entities insufficiently regulated by states. Examples include the adoption of deliberate retrogressive measures incompatible with the core obligations stated above or active support for measures adopted by third parties that are inconsistent with the right to social security.

"Acts of omission", on the other hand, relate to the failure to take sufficient and appropriate action to realise the right to social security. Examples include the failure to enforce relevant laws, to take appropriate steps towards realising the right or to ensure financial sustainability for state pension schemes.

Obligations of non-state actors

Non-state actors referred to in General Comment No 19 include UN specialised agencies and other international organisations working on social security and trade issues. These non-state actors are obliged to cooperate effectively with states in relation to the implementation of the right to social security (para 82). To promote and facilitate the implementation of this right, especially among vulnerable and marginalised individuals and groups, international financial institutions are specifically required to incorporate the right to social security in their programmes and policies (paras 83-4).

Conclusion

General comments are important mechanisms for developing the jurisprudence of the Committee. Though not legally binding, they have considerable weight and are important and useful interpretative guides for the courts and other human rights bodies in states that have ratified or signed the ICESCR. In fact, the South African Constitutional Court has relied directly on, for example, General Comment No 3 when interpreting the right to have access to adequate housing [*Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46 (CC) at para 45]. General Comment No 19 will no doubt

be very useful in facilitating the realisation of the right to social security, especially in developing countries, as it addresses not only social risks but also endemic vulnerabilities like those associated with poverty. In addition, non-governmental organisations have an important role to play in the implementation of this right, through highlighting violations and participating in the identification of appropriate solutions.

This summary was prepared by **Lilian Chenwi**, the coordinator of, and senior researcher in, the Socio-Economic Rights Project.

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Conference on ensuring public participation in service delivery: Strengthening the realisation of socio-economic rights

Douglas Singiza

On 31 July 2008, the Socio-Economic Rights Project of the Community Law Centre hosted a one-day conference entitled "Ensuring public participation in service delivery: Strengthening the realisation of socio-economic rights".

Dissatisfaction with service delivery is evident throughout South Africa, as manifested in recent service delivery protests such as that in the Joe Slovo informal settlement. These demonstrations were sparked by, among other things, the lack of proper communication and meaningful engagement between government officials and the residents or communities and also between the different spheres of government. The failure to make use of the various structures that allow for public participation in service delivery decisions is also a contributing factor.

The Constitutional Court has already established a jurisprudential basis for promoting public participation in government, accountability, responsiveness and openness. What remains is how the different spheres of government, including local and provincial government, adhere to these constitutional principles in service delivery.

The conference brought together representatives from civil society (including community and non-governmental organisations), constitutional bodies like the South African Human Rights Commission and Commission on Gender Equality, academia and government to:

- discuss and reflect on the issue of public participation in service delivery;
- deliberate on participation in local governance;

- share experiences and highlight the implications and challenges of public participation, especially at the grassroots level; and
- explore the various ways or opportunities of ensuring that residents and communities participate in service delivery decisions and processes.

The conference was also aimed at raising awareness of the legislative and policy framework on public participation.

Useful presentations were made on topics including: the importance of public participation and making participation work; national legislative and policy frameworks for public participation; participation in law- and policy-making processes; the importance of access to information; the role of ward committees in enhancing public participation; the participation of civil society in local governance; the implications of the lack of public participation in local government projects; participation in the areas of access to water and access to housing; the content of the "right" to public participation and its impact on governance; and opportunities to promote and improve the practice of public participation. In addition, concepts such as accountability, responsiveness and openness, and how they relate to public participation, were discussed.

Public participation is grounded in the Constitution of the Republic of South Africa and protected by the courts, notably the Constitutional Court decisions in *Doctors For Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC) and *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC). However, the Constitution does not prescribe the form and extent of the participation.

The constitutional foundation is supported by a sound policy and legislative framework in the form of the White Paper on Local Government of 1998, the National Policy Framework for Public Participation of 2007, the Municipal Structures Act 117 of 1998, the Municipal Systems Act 32 of 2000, the Municipal Finance Management Act 56 of 2003 and the Municipal Property Rates Act 6 of 2004.

Various ways in which residents and communities can participate in service delivery decisions and processes were explored. Public participation implies that all persons take part in governance programmes and everybody is treated as an equal partner. Defects were identified in current public participation techniques, including decisions on who should participate, the terms of participation and the manner of participation. It was pointed out that if democracy is about popular participation, citizens should be able to choose their own priorities. This includes allowing citizens to hold their leaders accountable, as opposed to leaders coming up with the agenda. The "citizen should be seen as king".

The conference highlighted good practices that could be emulated and bad practices that defeat the spirit of public participation (see below). An example of good public participation practice is involving the public in the design of plans and programmes and introducing different typologies to ensure that the public "owns" a housing programme. However, this is to be contrasted with bad public participation practices such as those of the City of Johannesburg with regard to access to water, which led to the court case of *Lindiwe Mazibuko and Others v City of Johannesburg and Others* 2008, Case No 06/13865 (W). The community, in this case, was misled into consenting to the installation of prepaid water meters.

The need for strong social movements, strong constitutional commitments, enhanced municipal engagements and a commitment to enforcing court orders was highlighted. With regard to the latter, the situation of Mrs Irene Grootboom was noted as an example of ineffective compliance with a court order. She was best known for her legal battle to secure better housing for poor people in the celebrated case of *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC). However, she died recently, eight years after the winning this landmark case against the government , still living in a shack in Wallacedene

(Hweshe, 2008; Joubert, 2008). Interestingly, following her death, the government has decided to hand over a house to her family (Western Cape Anti-Eviction Campaign, 2008; InternAfrica, 2008).

Public participation is also linked to freedom of expression, underlining the interconnectedness of civil and political rights with socio-economic rights. Accountability, it was noted, leads to progress in socio-economic rights through freedom of expression, and the reverse leads to underperformance. Thus the ability to demand explanation and justification for actions guarantees the promotion and protection of socio-economic rights.

With regard to access to information, and echoing the concerns of most people protesting against housing, participants argued that some of the service delivery protests were not necessarily about poor housing delivery, but a demand for information about housing waiting lists. Waiting lists, it was suggested, should be made available to the public to ensure transparency.

The conference also identified a number of strategies to promote and improve public participation in service delivery. These included:

- drawing on the existing rights and legal framework to challenge decisions and processes;
- making use of accountability and information tools to increase public participation;
- participatory data collection initiatives to feed into local planning;
- challenging the allocation of key decisions to technical experts and drawing communities into formal processes, hence broadening the ambit of participation;
- taking cognisance of local centres of power, such as traditional and community leaders;
- making greater use of legal action to support the realisation of socio-economic rights and to access institutions and empower citizens;
- challenging and refining spaces for engagement, since current mechanisms and forums for public participation are not accessible (in terms of design and location);
- informing communities of service delivery policies, proposals and programmes;
- ensuring that information is accessible and adequately disseminated in accessible formats.
- involving the citizenry and making them "own" decisions and plans like social contracts; and
- engagement through a linkage strategy and conversation between organisations and power wielders.

It was concluded that in order to improve public participation, there is a need to give support to community structures so as to engage those outside the formal state structures. Some argued for the revival of the discarded Open Democracy Bill of 1998, which would provide a legislative framework for citizens' right of access to government information.

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Presentations made at this conference are available on our website: www.communitylawcentre.org.za/Socio-Economic-Rights/conferences.

Some comments on the conference on "Ensuring public participation in service delivery"

John Williams

The conference was very useful and, in my view, quite thought-provoking for two reasons: first, it provided an opportunity to share views on community participation; and second, it was attended by quite a number of people, illustrating, perhaps, the "relevance" of community participation both as an important "invited space" where civil society and state relations are regulated (and contested) and as a research domain for researchers interested in "deepening democratic processes at grassroots level".

Many presentations were made at the conference. This, perhaps, was both its strength and weakness, since it demonstrated, on one hand, that there are as many "concepts" about community participation as there are individuals and, on the other, that its empirical realisation as a mode of "deepening democracy" at grassroots level is at best anecdotal and at worst non-existent. Limited time, though, precluded a thorough debate of the conceptual/theoretical tensions emanating from the presentations.

Accordingly, allow me to suggest here that, analytically, the concept "participation" should be foregrounded, clarified and empirically validated in any discussion to appreciate its problematic nature in practice. It is in this regard that the presentation by Steven Friedman was refreshing, as he problematised the notion of "community participation" and provided a more nuanced understanding of its conceptual and theoretical dimensions. His reference to specific case studies to interrogate/transcend "official versions" of community participation appears to be promising.

Even so, methodologically, it still does not take care of all the tensions, contradictions and potential conflicts *vis-à-vis* participation in the South African reality. The South African Constitution, as the foundational text of this form of "society/state" interface, does not really tell us much about exactly what is community participation at local level, the terrain where communities and local authorities make sense of both of the differentiated forms of power relations, namely the institutional power to govern (that is the local authority, legitimated through elections) and the power to expect specific rights to be honoured in practice (eg the right to adequate housing as entrenched in the Constitution).

In this regard, the Constitution (section 152(1)(e)) refers to "the involvement of communities and community organisations in the matters of local government". Yet it does not tell us exactly what is meant by "involvement". Does it merely mean "talking to" communities and ignoring all subsequent proposals from them, or does it also mean to "engage" and "connect" with the needs and aspirations of local communities with a view to making a meaningful difference in the lives of ordinary people? Now, whilst the overall intent of the Constitution implies the latter objective, it should be quite clear from the conference, and my own related research (Williams, 2006; Williams, 2008), that this commendable goal is not necessarily being pursued during the official community participation exercises in local authorities (in post-apartheid South Africa).

Partly based on my personal research and the insights derived from the conference, it would seem that meaningful participation – that is, participation that

makes a visible and meaningful difference in the lives of ordinary people – will only come to pass if the following interrelated aspects of "community involvement" are pursued simultaneously, namely:

- Intervention by proposing specific policy frameworks – eg in relation to unemployment: that is, are citizens allowed to intervene through specific policies to ensure a better life for all, or is such intervention the preserve/prerogative of only councillors?
- Initiation of specific development programmes – eg the Reconstruction and Development Programme (RDP): that is, what is the origin and development of policies, and do they really reflect the interests of the broader society?
- Identification of specific policy issues – eg are citizens involved in policy design, the delineation of factors impacting on particular service delivery?
- Orientation or overriding perspectives – eg what are the ideals, frames of reference and intended beneficiaries with regard to specific planning policies or strategies?
- Authentication of specific development planning programmes – eg is there co-determination of service-related issues?
- Differentiation of context-specific issues that impact on human development – eg is there acknowledgement of diverse interest groups, competing claims, rights and responsibilities?
- Verification of development-related information (data) to corroborate the extent (that is, dimensions) of development problems – are communities "consulted" or "involved" in these planning processes?
- Documentation of "consultation" processes and development proposals to ensure the existence of a careful index of community needs (a directory of concerns to orient the trajectory of response to specific problems).
- Legitimation of the "involvement" of local communities and organisations to ensure that participation is inclusive, meaningful and regular during all phases of planning programmes.
- Incorporation of specific development proposals from the communities: that is, the alignment of statutory programmes such as integrated development planning with the basic needs of citizens at grassroots local level.
- Validation: that is, the endorsement, through public participation, critique and refinement, of policy directions for delivery programmes at local level.
- Implementation: that is, the careful, systematic monitoring of delivery/response programmes consonant with the expressed agreements between community and local authorities (reinforcing legitimate partnerships, accountability, transparency and a democratic ethos).
- Affirmation: that is, measuring success through the actual, lived experiences of people – eg in housing environments that make a qualitative difference to their lives.

From this list of substantive issues that impact on the form and content of community participation, it should be quite clear that community participation, in practice, is potentially conflictive as power relations are highly skewed and are often underpinned by, *inter alia*, economic, political, gender, ethnic or racial interests, perceptions or constructs. Even so, community participation, pursued vigorously and ethically, can still make a difference in the lives of those who continue to be marginalised in post-apartheid South Africa.

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