ESR REVIEW

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# Ensuring rights make real change

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**Editor:** Samantha Waterhouse

**Co-editor:** Gladys Mirugi-Mukundi

**External editor:** Lilian Chenwi

**Contact the Socio-Economic Rights Project**
Community Law Centre
University of the Western Cape
New Social Sciences Building
Private Bag X17, Bellville, 7535
**Tel:** (021) 959 2950
**Fax:** (021) 959 2411
**Email:** serp@uwc.ac.za
**Website:** www.communitylawcentre.org.za

**ESR Review online**
www.communitylawcentre.org.za/clc-projects/socio-economic-rights/esr-review-1

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# Editorial

**This is the second issue of the ESR Review for 2011. It hails the adoption of the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights by the African Commission on Human and Peoples' Rights during its 48th ordinary session held from 10 to 24 November 2010 in Banjul, The Gambia. This long-awaited instrument is a landmark in the evaluation of economic social and cultural rights in Africa.**

The principles and guidelines clarify the scope and content of economic, social and cultural rights – among others, the rights to work, health, adequate housing, water and education – and the corresponding obligations on states to ensure that these rights are respected, protected and fulfilled. This is especially significant this year, which marks the 30th anniversary of the adoption of the African Charter on Human and Peoples' Rights (African Charter). It is anticipated that the principles and guidelines will lead to much-improved coherence in the African human rights system, thus bringing the enjoyment of economic, social and cultural rights in Africa closer to reality.

In South Africa, the government has committed itself to reducing poverty by half by 2014, in line with the Millennium Development Goals. That commitment is admirable, but fraught with significant challenges, given the fact that South Africa remains 'classified as one of the most unequal countries in the world, characterised by extreme degrees of inequality in the distribution of income, assets and opportunities' (Foreword to the 7th Report on Economic and Social Rights 2006–2009 published by the South Africa Human Rights Commission). As a result of the recent economic and financial crisis, people living in poverty are particularly susceptible to social exclusion and violations of their socio-economic rights.

Consensus by analysts reveals that the 'lived experience of poverty, deprivation, marginalization and social exclusion often manifests itself outwardly into feelings of racism, racial discrimination, and xenophobia' (Adv Lawrence Mushwana, chairperson of the South Africa Human Rights Commission, speaking at Human Rights Day celebrations on 21 March 2011, http://www.sahrc.org.za/home/index.php?ipkMenuID=16&ipkArticleID=45). This has been demonstrated in South Africa by recurring violent service delivery protests, prolonged trade union strikes and despicable xenophobic attacks.

Although South Africa's Constitution has commendable and progressive socio-economic rights provisions, the challenge of translating these rights into reality through the implementation of poverty eradication programmes and policies endures. According to the Report by the Public Service Commission on an Audit of Government's Poverty Reduction Programmes and Projects, dated February 2007, this can be attributed to programmes not being coordinated, exclusionary practices, and a lack of monitoring and evaluation.

Apart from celebrating the adoption of the Principles and Guidelines on the Implementation of Economic, Social and Cultural

Rights, this issue attempts to evaluate the progress being made in realising socio-economic rights in South Africa and beyond.

It begins with a case review by Kate Tissington and Stuart Wilson, who provide an overview of the recent South African Supreme Court of Appeal decision in which it found the City of Johannesburg's housing policy unconstitutional because it unfairly discriminated between people evicted from state-owned land and those evicted from private land. The decision is a landmark one, given the protection it offers poor occupiers who would otherwise face homelessness upon their eviction from private property.

Gladys Mirugi-Mukundi examines a recent decision of the South African Constitutional Court, in which it found that the High Court Rules and practice allowing a High Court registrar to grant default judgment declaring immovable property executable without judicial oversight were unconstitutional.

Mariah McGill discusses legislative and policy reforms on economic, social and cultural rights in the United States of America by highlighting the Vermont campaign for universal health care. This offers valuable lessons in South Africa's current debate on the proposed national health insurance scheme.

In this issue we also provide a summary update of the 30th Anniversary of the African Charter on Human and Peoples' Rights, and also present highlights of the preliminary findings of the African Committee of Experts on the Rights and Welfare of the Child, during its 17th session, on the case against Kenya involving Nubian children.

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.

We also extend special thanks to the external editor of this issue, Lilian Chenwi, who was a member of the Socio-Economic Rights Project for close to six years. She was the project coordinator, a senior researcher and editor-in-chief of the *ESR Review*. She made important contributions to the work of the project and the Community Law Centre, as well as the discourse on socio-economic rights in South Africa and internationally. She has now taken up a new appointment as an associate professor in the School of Law at the University of the Witwatersrand. The Socio-Economic Rights Project, on behalf of the Community Law Centre, would like to congratulate her on this new appointment and wish her all the best in her future endeavours.

**Gladys Mirugi-Mukundi, co-editor**

# SCA upholds rights of urban poor in *Blue Moonlight* judgment

**Kate Tissington and Stuart Wilson**

*City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (338/10) [2011] ZASCA 47 [*Blue Moonlight case*]

*On 30 March 2011, the Supreme Court of Appeal (SCA) handed down judgment in the* Blue Moonlight case*. The judgment has important implications for poor occupiers who face homelessness upon their eviction from private property.*

## Background to the case

*Blue Moonlight* concerns a community of 86 desperately poor people living in a disused industrial property situated at 7 Saratoga Avenue, Berea, in the Johannesburg inner city. Formerly the site of a carpet factory, the property consists of a large garage area which has been filled with shacks and a double-storey building that has been subdivided into smaller rooms. The occupiers initially paid rent to a caretaker who ostensibly collected it on behalf of the owner. A property letting firm started collecting rent during 2000. However, the property and living conditions began to deteriorate, and the occupiers laid a complaint with the Gauteng Rental Housing Tribunal. Nothing came of the complaint.

In 2004, the property was bought by Blue Moonlight Properties. On 28 June 2005, the company posted a notice to the occupiers to vacate the property by 21 July 2005. In 2006, the company launched an application for the eviction of the occupiers. The occupiers opposed the application with legal representation provided by the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand. The occupiers argued that they could not be evicted unless and until the City of Johannesburg discharged its constitutional obligation to provide them with temporary alternative accommodation. The occupiers joined the City of Johannesburg (the City) to the proceedings and sought an order compelling the City to report on what steps it had taken, and would in future take, to provide accommodation to the occupiers.

> The High Court declared the City's housing policy unconstitutional.

## The City reports to the High Court

The City reported to the High Court on two separate occasions. In both reports, its position was that, while it had an emergency housing programme, places on this programme were reserved for people it evicted from derelict buildings in terms of the National Building Regulations and Building Standards Act 103 of 1977 (NBRA). The Act provides for the promotion of uniformity in the law relating to the erection of buildings in the areas of jurisdiction of local authorities and for the prescribing of building standards. No accommodation could be made available for people ejected by private landowners in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE). In respect of people evicted by private landowners, the City argued that it had no duty beyond applying to the provincial authorities for funding for a project to be implemented in terms of the Emergency Housing Policy. Since the provincial authorities had rejected its application for assistance, the City argued that it had discharged its obligations towards the occupiers. The occupiers should, the City told the court, be evicted.

## Summary of the High Court order

The High Court rejected this proposition and declared the City's housing policy unconstitutional because it unfairly discriminated between people evicted from state-owned land and those evicted from private land. It granted the eviction and ordered the occupiers to vacate the property by no later than 31 March 2010, but simultaneously directed the City either to provide the occupiers with temporary accommodation or to pay each of the occupiers' households R850 per month towards the cost of finding their own alternative accommodation. The High Court also granted a structural interdict which required the City to report back to the court on steps taken, or steps to be taken in the future, to remedy the constitutional defect identified in its housing policy. Blue Moonlight Properties was also awarded constitutional damages. The City was directed to compensate the company for the loss of the use of its property caused by the City's defective housing policy. Reasons for the order were provided in a judgment handed down on 18 February 2010.

## Minister of Human Settlements criticises judgment

The *Blue Moonlight* order met with some criticism. The national Minister of Human Settlements, Tokyo Sexwale, was quoted in the press as saying in the wake of the order that he was going to approach Chief Justice Sandile Ngcobo to voice his concern that the court order could throw housing policy into chaos. He told members of Parliament in March 2010 that while he respected 'the separation of powers', there was a danger that case law could impact on policy with dramatic consequences and 'may end up pushing us into chaos'. In his May 2010 Budget Vote speech he stated that the *Blue Moonlight* judgment amounted to 'the legalisation of illegality' and added that the

> Ministry of Human Settlements is concerned about rulings that could virtually collapse government budgets and plans where unlawful behaviour – in this case illegal land and buildings' occupation – is legitimised by a series of court rulings.

## Appeal to the Supreme Court of Appeal

Following the High Court order, the City appealed to the SCA against the declaration of constitutional invalidity and against the order to provide the occupiers with temporary shelter or pay them R850 per month. The City argued that it bore no constitutional obligation to provide shelter when an eviction was prompted by a private landlord. It further argued that it had, in any event, limited housing stock to deal with life-threatening emergencies. The City expressed its dissatisfaction at the High Court's refusal to allow its application to join the provincial government as a party to the proceedings.

The occupiers cross-appealed against the eviction order, and against the order that the City make payments towards their rent. The occupiers argued that the payments directed by the High Court would not protect them from becoming homeless upon eviction, as there was little accommodation available for R850 per month. The only appropriate relief would be to provide them with temporary alternative accommodation and direct that they might occupy their current homes until this was made available to them. Blue Moonlight Properties contended that its rights to the property could not be thwarted indefinitely by the occupants, and that it should not be obliged to carry the burden of accommodating the unlawful occupiers, particularly since it was receiving no income and was under threat from the City about meeting safety and health regulations. It thus argued that the eviction order by the High Court was justified.

The *Blue Moonlight* appeal was heard in the SCA on 18 February 2011, with the occupiers represented in court by Paul Kennedy SC, Heidi Barnes and Stuart Wilson.

## Summary of Supreme Court of Appeal judgment

Judgment in the *Blue Moonlight* case was handed down on 30 March 2011. The SCA declared the City of Johannesburg's housing policy 'irrational, discriminatory and unconstitutional'. In a powerful judgment written by Justices Mohamed Navsa and Clive Plasket, the SCA directed the City to provide temporary emergency accommodation to the occupiers by 1 June 2011. The SCA stated that the City, in the application of its policy,

> effectively ties its own hands and renders itself blind to the real plight and homelessness of persons who find themselves in the circumstances of the occupiers. It precludes itself from considering the duties placed on it by the Constitution ... [B]y drawing [an] irrational and arbitrary distinction, [the City] is effectively putting potentially vast numbers of persons beyond state assistance in the face of an obligation to take positive steps to assist those who, because of their poverty and because of circumstances beyond their control, find themselves in dire need (para 65).

The SCA further stated that the City was directly obliged to prevent homelessness, using ratepayers' money if necessary, as the occupiers 'in their humble way' contributed 'to the economic lifeblood of the City' and their needs had to be catered for (para 53).

The SCA found that the City was obliged to give equal treatment to all persons who, because of their circumstances, would be rendered homeless by an eviction. In other words, the City was not entitled to take a casuistic approach to the homelessness that would inevitably follow upon the eviction of those in desperate circumstances. The question of whether a person would be in a desperate situation following their eviction had nothing to do with whether or not they had lived in a dangerous building; it was primarily a function of their personal circumstances. People with similar personal circumstances had to be treated in the same way, but, the SCA found, the City was irrationally differentiating between different groups of people in equal need of temporary shelter by providing such shelter only to people the City itself had removed from unsafe buildings. It provided no shelter to people evicted by private landowners – whether from an unsafe building or not.

The City had claimed that it did not have the money to provide temporary shelter to the occupiers, but the SCA found that the City had failed to provide sufficient information to the Court as to what was possible, given the City's budget surplus. According to the SCA, the City had for a long time faced emergency housing situations of all kinds, but chosen to adopt an 'entrenched position that excludes persons such as the occupiers from assistance', which prevented it from developing 'a long-term strategy, which ought to have included financial planning, to deal with such exigencies' (para 51). Thus, according to the SCA,

> to a great extent the City is to blame for its present unpreparedness to deal with the plight of the occupiers. It knew of their situation from the time that the litigation started, through its many delays extending over three financial years. It did not, in all that time, make any provision, financial or otherwise, to deal with a potentially adverse court order or take steps to reallocate resources or re-work priorities so that the occupiers could be accommodated. As a result, the City has, through its general reports, vague responses to its budget surplus and denial of any obligations towards the occupiers, failed to make out a case that it does not have the resources to provide temporary accommodation for the occupiers if they are to be evicted (para 52).

Another issue raised by the City was its submission that if compelled to accommodate the occupiers, it would be enabling them to 'jump the queue' of those waiting patiently to be allocated permanent accommodation by the state. The SCA refuted this claim, arguing that the occupiers would be 'the last in the line and would have to wait their turn like everyone else' (para 55). The relief sought by the occupiers was for nothing more than temporary emergency accommodation, and the objective of this was 'to place the occupiers on the lowest rung of their climb towards ultimate permanent accommodation' (para 68).

The SCA also found that the High Court had incorrectly categorised the differentiation in treatment between those evicted from state-owned property and those evicted from privately owned property (para 57). The SCA held that the difference was 'one between persons evicted from privately-owned unsafe buildings by the City itself, acting in terms of section 12(6) of the NBRA, and those evicted from privately-owned buildings (which are not necessarily, but could be, dangerous buildings) by private landowners' (para 57). The SCA further found that the High Court had erred in its categorisation of the differentiation in treatment as unfair discrimination in terms of section 9(3) of the Constitution, arguing that the constitutionality of the differentiation must be considered against section 9(1), which provides that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law' (para 58). In terms of the latter, the SCA found the City's policy to be inflexible and thus irrational (para 61) and, furthermore, 'arbitrary and unequal in its operation and effect' (para 62).

In terms of the constitutional damages awarded to Blue Moonlight Properties, the SCA found the situation in *Blue Moonlight* to be distinguishable from that of a previous case, *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* (Agri SA and Legal Resources Centre, Amici Curiae); *President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd* (Agri SA and Legal Resources Centre, Amici Curiae) 2004 (6) SA 40 (SCA) – where constitutional damages to the owner had been awarded by the Constitutional Court – on a number of grounds (para 71). The SCA thus found that the High Court's compensation order was not appropriate relief, further stating that 'wisely, Blue Moonlight eschewed any reliance on the compensation granted to them' (para 71). In terms of the cash amount of R850 awarded to the occupiers, the SCA found that

> the granting of the stipend to the occupiers, albeit in the alternative, is in itself extraordinary. It has no basis in law that we can discern and, if allowed to stand, would have had the potential to serve as a precedent for abuse by unscrupulous landlords who might see the State as a default source of rental income. It, like the compensation order, is relief which is not appropriate.

The SCA replaced the High Court order with one that ordered the occupiers to vacate the property by no later than 1 June 2011, and the City to provide them with 'temporary emergency accommodation as decant in a location as near as feasibly possible to the area where the property is situated' (para 77). The City was ordered to pay the occupiers' legal costs in the High Court and in the SCA.

## Broader implications of the *Blue Moonlight* judgment

*In South Africa, the implicit equation of homelessness with criminality is a recurring theme in the traditional responses of municipalities to the informally housed.* This approach is furthermore reinforced by high-level government officials, as highlighted by the statements of the Minister of Human Settlements after the *Blue Moonlight* judgment in the High Court. At the heart of these conflicts lies fundamental disagreement about what developmental role the state generally, and municipalities in particular, should perform. One view is that municipalities must merely facilitate free enterprise, protect property rights and minimally regulate the creation of nuisance in urban areas. Traditionally, South African cities have conceived of their role as being merely to ensure compliance with building regulations and that health and safety by-laws are enforced.

The cities argue that the primary responsibility for providing housing falls within the ambit of the national Department of Housing, and accordingly have dealt with housing quite separately, merely by providing ownership of houses in new township developments on the urban periphery. These have been funded by a capital subsidy provided by national government. The other view, which is embodied in *Blue Moonlight*, is that a municipality has additional duties. They are to develop reasonable and coherent housing policies which ensure that homeless people – particularly people under threat of eviction – are provided with access to shelter, even if only as a temporary measure pending access to permanent subsidised housing.

**Kate Tissington is a research and advocacy officer and Stuart Wilson the director of litigation, both at the Socio-Economic Rights Institute of South Africa**

**The full judgment can be accessed at http://www.justice.gov.za/sca/judgments/sca_2011/sca2011-047.pdf.**

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# Judicial oversight required for sales in execution of residential property

**Gladys Mirugi-Mukundi**

*Gundwana v Steko Development CC and Others* CCT 44/10 (2011) ZACC 14 [Gundwana case]

*The* Gundwana case *was a challenge to the constitutionality of the High Court Rules and practice, which allowed a High Court registrar to grant default judgment, without judicial oversight, declaring immovable property executable. A sale in execution is the act of getting an officer of the court to take possession of the property of a losing party in a lawsuit (judgment debtor) on behalf of the winner (judgment creditor), sell it and use the proceeds to pay the judgment debt.*

Central to the case, therefore, was rule 31(5)(a) of the Uniform Rules of Court (High Court Rules), which sets out the manner and circumstances in which a registrar may grant and enter a default judgment.

The judgment gives effect to the constitutional right to have access to adequate housing and not to be arbitrarily evicted without a court order considering all the relevant circumstances, as guaranteed in section 26 of the Constitution of South Africa. It also reinforces the right not to be arbitrarily deprived of property guaranteed in section 25(1) of the Constitution.

## Facts and decisions of lower courts

In 1995, Ms Elsie Gundwana bought her property in Thembalethu, near George, Western Cape, using a mortgage bond loan from Nedcor Bank. Ms Gundwana used this property as her home, from which she ran the only black-owned bed and breakfast in the area. In 2003, she fell in arrears with her monthly repayments. In November 2003, at the bank's formal application, the High Court registrar granted a default judgment against her and declared the property executable for the debt (para 5).

Ms Gundwana continued to make payments on the bond over the next four years, without the bank letting her know that they were unacceptable because they had obtained a default judgment against her' (para 61). In August 2007, the bank carried out the execution, four years after the default judgment had been granted. The property was sold to Steko Development CC. However, Ms Gundwana did not vacate the property.

The case began in April 2008, in the George Magistrates' Court, where Steko Development CC sought to evict Ms Gundwana. The Court granted the eviction order, despite Ms Gundwana not fully responding to the allegations in the affidavit seeking the eviction (para 10). She appealed the eviction order in the High Court, which dismissed her appeal. The Supreme Court of Appeal also refused further leave to appeal. Ms Gundwana then approached the Western Cape High Court to seek rescission of the 2003 default judgment. Ms Gundwana also approached the Constitutional Court in August 2010, at which time the rescission application was still pending the Constitutional Court's consideration of the case.

## Issues and decision of the Constitutional Court

Ms Gundwana, represented by the Socio-Economic Rights Institute of South Africa (SERI), approached the Constitutional Court to seek permission to appeal against the eviction order as well as direct access to the Constitutional Court to overturn the ruling (para 12). The Constitutional Court found rule 31(5)(a) of the High Court Rules to be constitutionally invalid in as far it allows the sale in execution of a person's home without judicial oversight.

The Court struck a delicate balance between the property rights of individuals and commercial interests of banks by stating that '[t]o agree to a mortgage bond does not ... entail agreeing to forfeit one's protection [from arbitrary eviction]' (para 46). The Court stated that due regard should be taken of the impact that the sale in execution might have on judgment debtors who were poor and at risk of losing their home (para 53). As such, judicial oversight by a court of law of the execution process is necessary.

> The Court recognised that Ms Gundwana's socio-economic right to have access to adequate housing was threatened.

The Court further referred to its previous decision in the case of *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others* 2005 (1) BCLR 78 (CC), where it had declared section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 invalid. This was on the basis that the section breached section 26(1) of the Constitution to the extent that it allowed execution against the homes of indigent debtors, resulting in them losing their security of tenure (para 40). In that case, the Constitutional Court noted that judicial oversight had the effect of preventing the unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, were ill-equipped to make use of the remedies available to them.

The Court further held that case-by-case analysis was necessary in order to determine whether a declaration might be made that residential property was executable. This kind of evaluation, the Court held, had to be done by a court and not a registrar; allowing the registrar to do so was unconstitutional (para 49).

The Court thus set aside the eviction order and referred the case back to the Western Cape High Court for the determination of the rescission application in the light of the Constitutional Court's decision (para 65).

## Conclusion

The effect of the judgment, as noted by the Constitutional Court, is that it overturns the Supreme Court of Appeal's decision in *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) and *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W). It was decided in these cases that the High Court registrar was constitutionally competent to make execution orders when granting default judgment in terms of rule 31(5)(b) (para 52).

By allowing Ms Gundwana's application and setting aside the eviction order, the Court recognised that her socio-economic right to have access to adequate housing was threatened. While appreciating the importance of banks enabling citizens to access housing through mortgage loans, the Court ruled that in doing so, the constitutional rights of citizens had to be respected and given due

consideration. As such, the Constitutional Court's judgment cautions courts to give due regard to the impact that the execution of immovable property would have on judgment debtors who are indigent and who may, in addition, risk losing their livelihood (para 53).

Following the *Gundwana* decision, the High Court Rules were amended with effect from 24 December 2010. Debtors seeking to set aside past default judgments and execution orders issued against them by the registrar must first apply for the original default judgment to be set aside before applying for the execution orders to be set aside.

Debtors are also required to give sufficient reason for the delay in bringing the rescission application and why the judgment against them should be set aside. That requirement will undoubtedly limit the number of cases that can be legitimately challenged in courts.

The office of the Deputy Judge President, North Gauteng High Court, issued a practice note in April 2011 to inform legal representatives how the North Gauteng High Court was going to deal with applications for default judgments.

**Gladys Mirugi-Mukundi is a researcher with the Socio-Economic Rights Project**

The full judgment can be accessed at http://www.saflii.org/za/cases/ZACC/2011/14.pdf

# If the grassroots lead, the government will follow

## Lessons from the Vermont campaign for universal health care

**Mariah McGill**

*Although Franklin and Eleanor Roosevelt championed economic, social and cultural rights (ESCR) in the 1940s, the United States has been ambivalent towards ESCR for the past few decades. The United States Constitution does not recognise such rights, and although President Jimmy Carter signed the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1977, the United States Senate has not yet ratified the treaty and is unlikely to do so in the near future. Notably, a similar situation exists in South Africa, which has yet to ratify the ICESCR, despite having signed it more than 16 years ago. Unlike the United States Constitution, however, the South African Constitution provides for justiciable socio-economic rights.*

Although the United States has lagged behind other countries on ESCR, activists in the country have begun using human rights frameworks and principles to advance economic and social policy agendas at the state and local level.

The Vermont Workers' Center, for example, has made human rights principles the basis of their campaign for universal health care in the state of Vermont. The use of a human rights framework has enabled the Center to mobilise thousands of Vermonters, many of whom were not previously involved in political campaigns, to build a strong grassroots movement for health care reform. The successful passage of health care reform legislation in May 2011 would not have been possible without the sustained grassroots pressure placed on Vermont politicians and policymakers by the Vermont Workers' Center. As South Africa moves towards a national health insurance programme, Vermont can serve as an example of a grassroots movement that achieved universal health care reform.

### Vermont campaign for universal health care

Vermont is a small rural state on the north-east border of the United States. In 1996, a group of low-income Vermonters founded the Vermont Workers' Center for the purpose of addressing a variety of socio-economic issues including liveable wages, affordable housing and child care. The Center partners with individual Vermonters and a variety of organisations, including faith-based groups, labour unions and community organisations, to improve the quality of life of working Vermonters. The Center is a member-run organisation, and, as such, it emphasises transparency and the participation of its members in all of its work. The Center actively fosters and encourages leadership in as many people as possible in order to build a sustainable grassroots movement.

The Center has been addressing health care issues for over a decade. However, in mid-2000, its staff began noticing that Vermont workers were contacting the Center more frequently with requests for assistance on health care matters. Vermont has one of the best-ranked health care systems in the United States, but that does not guarantee all Vermonters health care. Like every other state, Vermont relies on a patchwork system of private, for-profit health

insurance plans, with publicly subsidised programmes for vulnerable populations. Vermonters who cannot afford private insurance, but are not eligible for the publicly subsidised health programmes, are often forced to go without adequate health care. The reliance on private insurers has made the system inefficient and extremely costly. Health care costs continue to spiral, while thousands remain uninsured. Faced with mounting evidence that the health care system was leading to chronic illness, poverty and, in some cases, death, the Vermont Workers' Center decided to take action.

The Center launched the 'Healthcare is a Human Right' campaign in 2008. Its previous health care reform efforts had failed to secure universal health care for all Vermonters. Politically powerful interest groups in the health insurance and pharmaceutical industries influenced health care policies in ways that were favourable to their industries but harmful to working people. Even politicians who supported the idea of universal health care reform did not believe it was 'politically possible' to achieve it within the state due to the power of special interest groups.

The Center attributed the failure of previous reform efforts to the lack of a strong, vocal grassroots movement for universal health care. Center organisers realised that the first step towards achieving universal health care was to build such a strong grassroot movement in sufficient numbers to hold politicians and policy-makers accountable for their inaction on health care reform. The Center decided to focus first on building the movement before reaching out to Vermont legislators.

In launching the new campaign in 2008, organisers decided to focus on the idea of health care as a human right. Previous reform efforts had tended to focus on specific solutions to the limitations of the health care policy rather than on how access to health care impacted on peoples' lives. Center organisers believed that these campaigns had failed in part because health care policy discussions did not reflect the everyday experiences of working Vermonters. Therefore the Center decided to use a human rights framework as the centre of the campaign.

The Center adopted a set of human rights principles derived from the ICESCR: universality, equity, transparency, accountability and participation. Specifically, the Center argued that health care should be universally available to all Vermonters regardless of their ability to pay; that the health care system should be financed equitably; that Vermonters should have a role in the design and operation of the system; that the system should be transparent, efficient and accountable to the people it served; and that government bore the responsibility for ensuring that the system complied with these principles (Vermont Workers' Center, 2011).

Although the notion of human rights was unfamiliar to many Vermonters, the campaign found that framing health care as a human rights issue actually made it easier to connect with working people. People who might not have grasped complicated health care policy choices could understand that the current health care system was hurting their families and communities. Vermonters intuitively grasped that the current system was unjust and were very receptive to the idea that health care should be a human right and that government bore the responsibility to ensure that right. Using the human rights framework enabled the Center to make health care reform more understandable and reach a broader group of Vermonters.

The campaign used a variety of strategies to mobilise Vermonters, including letter-writing campaigns, marching in parades and door-to-door canvassing. One of the most effective organising tools used was public meetings known as 'human rights hearings' that were held all over the state. Local community leaders were invited to attend these hearings and listen to testimony from local residents regarding their experiences in the health care system. The hearings also served as a forum to educate Vermonters on the human right to health care.

Prior to the hearings, many Vermonters suffered the inadequacies of the health care system in silence. According to campaign organisers, a large number believed that their experiences were the result of bad luck, or were somehow their own fault, rather than the result of a systemic problem in the health care system. The hearings gave Vermonters an opportunity to share their stories publicly, with their friends and neighbours, and created solidarity among them as they became aware of the depth and breadth of the crisis. The hearings also empowered participants to demand fundamental reforms to the health care system.

At every event hosted by the campaign, Vermonters were asked to complete a short survey describing their experiences in the health care system. By the end of 2008, the campaign had collected over 1 500 responses, which revealed the depth of the health care crisis in Vermont. Many Vermonters reported going without necessary medical care because they could not afford it, or becoming bankrupt and homeless due to astronomical medical bills.

The campaign used the survey results to compile a report entitled 'Voices from the Vermont Healthcare Crisis', which was released on 10 December 2008, in honour of the 60th anniversary of the adoption of the Universal Declaration of Human Rights. The report revealed the unnecessary personal tragedies caused by Vermont's inadequate health care system, and emphasised that building the system on a human rights framework would prevent these tragedies. The report served to further mobilise Vermonters to demand universal health care as a human right.

By the end of 2008, the campaign had established a strong, vocal and motivated grassroots movement in support of universal health care. In 2009, the campaign changed focus and began reaching out to Vermont legislators to demand legislative reform. Campaign organisers recognised that inaction on health care reform was due to an imbalance of political power. Vermont legislators were subject to powerful pressure from lobbyists and special interest groups who opposed substantive health care reform, but were not receiving a comparable level of pressure from ordinary citizens. The campaign's strategy was to exert strong, grassroots political pressure over and over

> There are a number of obstacles that Vermont will have to overcome before a universal health care system can be fully implemeneted.

again to demonstrate to legislators that ordinary citizens demanded change.

The campaign organised a series of 'people's forums' around the state, where legislators were invited to learn about the health care crisis and the human right to health care, and to hear directly from their constituents about their experiences in the health care system. Almost half of all Vermont legislators attended the forums. Previously, many legislators had argued that health care reform was unnecessary because the current system was working well. However, they could not continue to argue that the status quo was acceptable when confronted with testimony from voters. Many legislators began expressing support for the notion of health care as a human right and publicly pledged to work on health care reform.

During the 2010 and 2011 legislative sessions, the campaign organised a 'people's team' to ensure that campaign volunteers attended every health care committee meeting at the State House. These volunteers wore matching red T-shirts and served as a visible reminder to elected officials of the support for universal health care within the state. The campaign also mobilised hundreds of Vermonters to provide testimony regarding their health care experiences at public hearings held at the State House.

The campaign also organised letter-writing campaigns, in which hundreds of volunteers delivered thousands of postcards signed by individual Vermonters expressing support for health care reform. Beginning in 2009, the campaign has held annual rallies on 1 May in support of universal health care. The rallies, held on the steps of the Vermont State House, have attracted more participants each year.

## Impact of the campaign: Health care reform

The strong grassroots pressure exerted by the Healthcare is a Human Right campaign resulted in legislative victories in 2010 and 2011. The first step on the road to universal health care was the passage of Act 128 in 2010. Act 128 provided funding to hire an independent expert to design three health care system models, each based on the human rights principles advanced by the campaign.

In January 2011, the independent expert hired by the state presented his findings to the Vermont Legislature and recommended that Vermont should adopt a 'public-private' single-payer system with a standard benefits package. The recommendations were promptly incorporated into health care reform legislation that was passed by the legislature and enacted into law in May 2011. Act 48 gradually transitions Vermont to a universal, single-payer health care system over the next six years.

In three short years, the Vermont Workers' Center has changed the political environment in the state and ensured the passage of health care legislation that incorporates human rights principles and paves the way for universal health care.

Although Act 48 does not explicitly recognise health care as a human right, a section entitled 'Principles for Health Care Reform' adopts a reform framework which incorporates all the human rights principles advanced by the campaign. The legislation mandates the state to 'ensure universal access to and coverage for high-quality, medically necessary services for all Vermonters' and asserts that systemic barriers must not prevent people from accessing care.

The Act also states that the health care system must be transparent, efficient and accountable to the people it serves, and that the state must ensure public participation in the design, implementation, and accountability mechanisms of the health care system.

Finally, the legislation stipulates that the financing of the health care system must be sufficient, fair, predictable, transparent and shared equitably.

While important gains have been made, Vermont's health care reform is an ongoing process. Although Act 48 is promising, there are a number of obstacles that the state will have to overcome over the next few years before a universal health care system can be fully implemented. The opposition to health care reform has been relatively muted thus far, but as Vermont moves closer to a system where health care is treated as a basic human right rather than a source of profit, the opposition will become stronger and more vocal. To counteract the opposition's influence, the campaign continues to build the grassroots movement it believes will be necessary to achieve universal health care in the years ahead.

## Conclusion

The Healthcare is a Human Right campaign has transformed the way Vermonters view human rights, particularly ESCR. Human rights advocates have often observed that people in the United States tend to view human rights, especially ESCR, as irrelevant to their lives and experiences. Now Vermonters know how human rights principles can improve their lives. Center organisers report that Vermonters are more receptive to human rights in other policy areas due to their exposure to such rights in the health care context. Most importantly, the human rights framework has united Vermonters from a variety of socio-economic backgrounds and made them aware of their political power.

While the final outcome of Vermont's quest for universal health care is as yet unknown, the human rights framework advanced by the Vermont Workers' Center has already had a profound impact on the state. It has helped alter the perspectives of politicians, elected officials and policy-makers regarding the role of human rights within the state. Human rights have become part of policy discussions in ways that they never were previously. Mainstream

Vermont newspapers have begun writing editorials in support of health care as a human right, and many politicians have made public statements in support of a human right to health care. When one considers that neither the Vermont nor the federal Constitution recognises a right to health care, these are staggering developments.

**Mariah McGill is the Ford Foundation fellow at the Program on Human Rights and the Global Economy at Northeastern University School of Law, Boston, Massachusetts, USA**

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Vermont Workers' Center 2011. People's toolkit. Available at http://www.workerscenter.org/toolkit [accessed: 9 June 2011].

# Preliminary finding of the African Committee of Experts on the Rights and Welfare of the Child in the Nubian case

*Nubian Minors v Kenya* Communication 002/2009

In a landmark preliminary finding issued in March 2011, subsequent to considering its first communication, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) found the Kenyan government to be in violation of the rights of Nubian children and its obligations in terms of the African Charter on the Rights and Welfare of the Child of 1990 (African Children's Charter). The ACERWC is the supervisory body of the African Children's Charter. This preliminary finding was based on the fact that Nubian children were not granted Kenyan nationality at birth, and were unlawfully discriminated against in terms of access to citizenship. Other rights that the denial of the right to nationality could impact on include the rights to property and equal access to services such as education and health care.

For more information:

- Kenya violates African Children's Charter as Nubian children suffer discrimination and statelessness, http://www.ihrda.org/2011/03/kenya-violates-african-children%E2%80%99s-charter-as-nubian-children-suffer-discrimination-and-statelessness/
- *Nubian Minors v Kenya*, http://www.soros.org/initiatives/justice/litigation/minors

# 30th Anniversary of the African Charter on Human and Peoples' Rights

This year marks 30 years since the adoption of the African Charter on Human and Peoples' Rights (African Charter). The African Charter was adopted in Nairobi, Kenya, on 27 June 1981 at the Eighteenth Assembly of Heads of State and Government of the Organisation of African Unity. In commemoration of this anniversary, a number of events have been organised around various themes.

The African Charter came into force in 1985. Four years later, the African Charter's treaty-monitoring mechanism, the African Commission on Human and Peoples' Rights (African Commission), was formally established and inaugurated. The African Commission currently sits in Banjul, The Gambia, and is charged with the duty of promoting and protecting human and peoples' rights in Africa.

The stated objective for the creation of the African Charter was to prepare an instrument based upon an African legal philosophy and responsive to African needs. The African Charter is celebrated as a progressive document that is distinct from other international human rights treaties in that, among other provisions, it recognises the indivisibility of civil and political rights from economic, social and cultural rights.

Mrs Julia Dolly Joiner, Commissioner for Political Affairs at the African Commission, made a special appeal for wider ownership over the African Charter and human rights in Africa at the 30th anniversary celebrations during the 48th ordinary session of the African Commission held from 10 to 24 November 2010 in Banjul. She stated that the celebration 'provides us with the prospects of creating a new dawn in our human rights efforts and an optimism for what is to come'. Finally she indicated that the anniversary was an opportunity 'to further deepen efforts directed at promoting the Charter amongst all peoples of our Continent'.

Admittedly, in the 30 years of the Charter's existence, there have been numerous challenges to the protection and promotion of human rights on the continent. These include inadequate compliance with the norms and standards enunciated by the treaty and a general lack of awareness of the African Charter and the African Commission's mandate. However, the African Commission has contributed to some notable gains while interpreting the African Charter, especially on the indivisibility of rights and the importance of socio-economic rights.

For more information:

- Institute for Human Rights and Development in Africa, http://www.ihrda.org/2011/06/african-charter-turns-30-time-to-celebrate-time-to-reflect/
- Centre for Human Rights, University of Pretoria, http://www.chr.up.ac.za/images/files/education/moot/2011/mc_2011_programme_web.pdf, http://www.chr.up.ac.za/index.php/news.html

# International Women's Day 2011, a hundred years on

## Time to reflect

International Women's Day is observed annually on 8 March. The 2011 celebration was a milestone, as it marked the 100th anniversary of International Women's Day. The official launch of UN Women, the United Nations Entity for Gender Equality and the Empowerment of Women, gave cause for both celebration and reflection.

This year's International Women's Day theme was 'Equal access to education, training and science and technology: Pathways to decent work for women'. The purpose of the day was to promote decent work for women through those pathways, and the theme is significant to women in South Africa, who, by all accounts, play a crucial transformative role in society.

Sections 9 and 29 of the South African Constitution provide for the right to equality and education, respectively. However, it must be noted that the right to education as enunciated in the Constitution relates to basic education and does not address higher education, training or access to science and technology, whose realisation is essential for women as a platform to advance their social and economic leverage. Education has enabled women leaders around the world to participate in the political and economic spheres.

In terms of political leadership, South Africa has made significant progress, with 40% of parliamentary representatives being women, putting this country third in the international rankings of women in parliament. In addition, a third of the current members of the South African cabinet are women. However, although there has been commendable progress on women's rights on the political front, socio-economic realities continue to oppress women in this country. The South African Women's Charter for Effective Equality of 1994 identifies key issues which, if addressed and implemented effectively, would guarantee full realisation of women's rights. These include:

- the eradication of domestic and gender violence;
- provision of full opportunity and access to leadership positions and decision-making at all levels and in all sectors of society, and, if need be, through affirmative action; and
- the establishment of a programme of action for equality in all spheres of public and private life, including the law and the administration of justice, the economy, education and training, health, development infrastructure, family life and partnership, customs, culture and religion.

It is anticipated that the work of UN Women will accelerate the promotion of gender equality and the empowerment of women globally. It will also address the underlying challenges that hinder women from accessing socio-economic rights and, in particular, basic education and decent work. In South Africa the critical issues that demand urgent attention in order to ensure decent work for women, as envisaged by this year's International Women's Day theme, include: evaluating the extent to which women empowerment programmes in South Africa are adequate and sufficient; undertaking programmes and initiatives aimed at increasing the enrolment, retention and pass rates in further education and training colleges and other higher education institutions; and, equally important, promoting the significant role that women play in the informal work sector.

Based on the above, and in the light of South Africa's domestic and international commitments to women's rights, it is expected that the country will seek strategies to make greater advances to realise women's rights.

As the world marks a century of International Women's Day celebrations, and almost two decades since South Africa attained popular democracy, it is an opportune mo-

ment to reflect on progress made in realising women's rights and, importantly, to chart the way forward in giving true meaning to effective equality for women in all spheres.

For more information:

- International Women's Day 2011, http://www.internationalwomensday.com/
- International Women's Day 8 March 2011, http://www.un.org/en/events/women/iwd/2011/

# World Water Day 2011

## Less talk and more action

World Water Day was convened on 22 March 2011, and hosted by the government of South Africa in Cape Town. The theme for this year's celebrations was Water for Cities: Responding to the Urban Challenge.

Apart from increasing public awareness of global water-related issues, the objective of World Water Day is to focus 'attention on the impact of rapid urban population growth, industrialization and uncertainties caused by climate change, conflicts and natural disasters on urban water systems'. The 2011 event highlighted the challenge of access to clean water and sanitation in urban areas. It is important to note and acknowledge that the challenge of access to clean water and sanitation is not limited to urban areas; it applies equally in the rural areas.

The rate of urbanisation is threatening access to this pivotal resource. According to Joan Clos, the Executive Director of UN-Habitat, 'Africa is the fastest urbanizing continent on the planet and the demand for water and sanitation is outstripping supply in cities'.

In 2010, the United Nations General Assembly recognised 'the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.' Similarly, the United Nations Millennium Report in 2000 acknowledged in its conclusion that 'no single measure would do more to reduce disease and save lives in the developing world than bringing safe water and adequate sanitation to all'.

One of the targets of Millennium Development Goal 7 on environmental sustainability is to 'halve, by 2015, the proportion of people without sustainable access to safe drinking water and basic sanitation'. The indicator used is the 'proportion of the population with sustainable access to an improved water source'. As an indication that access to safe drinking water and sanitation is of crucial importance in the international as well as the national realm, the United Nations Human Rights Council renewed the mandate of the United Nations Special Rapporteur on the human right to safe drinking water and sanitation in March 2011.

It is significant that South Africa was selected as the global hub for the 2011 World Water Day, given its own efforts and the challenges it faces in realising the right to clean water and sanitation. The Department of Water and Environmental Affairs is primarily responsible for policy formulation, regulation, and supply and sanitation. The need to preserve water is an ongoing concern in South Africa, mainly because it is a largely arid country with an increasing urban population. Although South Africa has made remarkable progress in ensuring access to water by adopting a progressive law and policy framework based upon the constitutional recognition of the right of access to water, the delivery of clean water and adequate sanitation remains a formidable challenge.

Thus, as the world celebrates World Water Day year in and year out, the critical question that remains is how to ensure adequate and equitable realisation of the right to sustainable clean water and sanitation for all. Indeed, despite the existence of domestic and international norms and standards on access to these rights, realisation of the right remains a mirage for many poor citizens. In order to transcend the talk and move to real action, the following principles, among others, should guide initiatives aimed at realising the right to clean water and sanitation in South Africa, and would apply equally across Africa.

- The state should ensure adequate allocation of financial, human and technical resources to ensure sufficient water allocation to meet the basic water needs of the populace.
- Commercialisation of water supply and sanitation, including regulation of access, should not be to the detriment of indigent communities. Accordingly, public-private partnerships in that regard, while welcome, should be implemented in such a way that they enhance adequate and affordable access to clean water and sanitation.

For more information:

- World Water Day 2011, http://www.unwater.org/worldwaterday/
- Water and sanitation: A human right for all, even slum-dwellers and the homeless, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10875&LangID=E

**B Goldblatt and K McLean, 2011.** *Women's social and economic rights: Developments in South Africa.* **Juta, Cape Town**

Women constitute the majority of the world's poor, and their access to socio-economic rights is often impeded by social, cultural, economic and political barriers. This well-structured and lucidly written book covers the most important aspects of women's socio-economic rights and provides a critical and analytical discourse on women's rights in South Africa.

It not only links poverty and gender, but also delves into the relatively recent discourse on the significance of socio-economic rights in addressing the feminised nature of poverty in an African context. In doing this, the book unpacks the equality jurisprudence in South Africa, questions it where necessary, and elaborates on new opportunities for asserting the rights of disadvantaged women.

In Chapter 1, the book's framework chapter, Sandra Fredman argues for a gendered approach to the implementation, interpretation and enforcement of socio-economic rights.

The other chapters, written by seasoned socio-economic rights activists and scholars, cover women's rights to health, housing, social security, land, food, water and basic services, education and work, and also explore these rights through a cross-cutting examination of the girl child's rights and customary law.

The chapters are arranged as follows:

- Introduction – Beth Goldblatt and Kirsty McLean
- Engendering social and economic rights – Sandra Fredman
- The right to social security: Addressing women's poverty and disadvantage – Beth Goldblatt
- Girls' social and economic rights in South Africa – Ann Skelton
- Rural women redefining land rights in the context of living customary law – Aninka Claassens and Sindiso Mnisi
- Elusive equality: Women, property rights and land reform in South Africa – Cherryl Walker
- 'A woman's home is her castle?' Poor women and housing inadequacy in South Africa – Lilian Chenwi and Kirsty McLean
- More work for women: A rights-based analysis of women's access to basic services in South Africa – Jackie Dugard and Nthabiseng Mohlakoana
- The right to reproductive health and access to healthcare services within the prevention of mother-to-child transmission programme: The reality on the ground in the face of HIV/AIDS – Muriel Mushariwa
- The right to food: Addressing women's needs as individuals, wombs and mothers – Karen Kallmann
- Gender equality and education in South Africa – Faranaaz Veriava
- Women and the right to work – Carole Cooper

Sandra Liebenberg, H F Oppenheimer Chair in Human Rights Law and director of the Law and Poverty Project, Stellenbosch University, has stated that the book 'makes a critical contribution to the literature on socio-economic rights, and to the jurisprudence, legislation and social programmes which are responsive to gendered power relations and women's lived realities'. This book is undoubtedly a must-read for scholars and human rights activists working in the area of gender equality, social justice and the emancipation of women in the African societies.

For further details on the book, go to http://www.jutalaw.co.za/catalogue/itemdisplay.jsp?item_id=16008.

To order the book, contact Juta at email cserv@juta.co.za, tel: 021 659 2300 or fax: 021 659 2360.

**B Meyersfeld, 2010.** *Domestic violence and international law.* **Hart Publishing**

Based on empirical data and combined with an assessment of whether or not domestic violence is recognised by the international community as a human rights violation, this book provides a comprehensive legal analysis on why a state should be held accountable in international law for allowing women to suffer extreme forms of domestic violence and how this can help individual victims. The book argues that certain forms of domestic violence between cohabitants are a violation of international human rights law. The argument is based on the international law principle that, where a state fails to protect a vulnerable group of people from harm, whether perpetrated by the state or private actors, it has breached its obligations to protect against human rights violations.

The book will be useful to lawyers, judges, policy-makers, institutions, organisations and individuals working in this area or in international law in general.

For further details on the book and to order it, go to http://www.isbs.com/partnumber.asp?cid=&pnid=294628. (The first paragraph of the summary above is drawn from this site.)

# Call for contributions to the ESR Review

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

Contributions should focus on any theme relating to socio-economic rights, on specific rights or on socio-economic rights in general. In addition, we are currently seeking contributions on:

- the African Commission and socio-economic rights;
- using international law to advance socio-economic rights at the domestic level;
- South Africa's reporting obligations at the UN or African level, or both, in relation to socio-economic rights;
- socio-economic rights of persons with disabilities; and
- socio-economic rights of women in general, and specifically on the right to access to adequate housing for women and/or special needs housing.

Contributions should be sent in electronic format (MS Word) to serp@uwc.ac.za or gmirugi-mukundi@uwc.ac.za. Previous editions of the ESR Review and the complete guide for contributors can be accessed online: www.communitylawcentre.org.za/clc-projects/socio-economic-rights/esr-review-1.