ESR REVIEW
Economic and Social Rights in South Africa

SPECIAL 10 YEAR REVIEW

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Editorial

Sibonile Khoza

We are pleased to present the final issue of the *ESR Review* for 2004.

This issue celebrates and reviews ten years of democracy and socio-economic rights in South Africa. We would also like to highlight the key achievements of the Socio-Economic Rights Project since its establishment in 1997, and pay tribute to its founder and the former editor of the *ESR Review*, Professor Sandra Liebenberg.

As technical adviser to the Constitutional Assembly, Professor Liebenberg played an important role in the drafting of provisions protecting socio-economic rights in the 1996 Constitution. She founded the Socio-Economic Rights Project in 1997 to help translate these rights into reality for the people of South Africa, through applied research, engaging in advocacy, supporting litigation, and producing educational and resource materials. This included the launching of the *ESR Review*, which has become the Project's flagship.

Project research staff under Professor Liebenberg's leadership included Karrisha Pillay (1997–2000, now an advocate of the Cape Bar), Danwood Chirwa (2002–2003, now a lecturer in the Law Faculty, University of Cape Town), Sibonile Khoza (2002, the current Project Co-ordinator) and Annette Christmas (2003, a current researcher).

Under her leadership, the Project contributed to the development of socio-economic rights jurisprudence, policy formulation and law reform, and to creating awareness about these rights. It also conducted research, focusing on a broad range of topics pertaining to socio-economic rights, including poverty and development, equality, obligations of non-state actors, monitoring, and the rights to social security, health, housing, food and water.

Some highlights of the Project's achievements during the period under review include:

- hosting two major conferences: *Giving effect to socio-economic rights: The role of the judiciary and other institutions*, October 1998 (co-hosted with the Legal Resources Centre), Johannes-

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burg; and *Realising socio-economic rights in South Africa: Progress and challenges*, March 2002, Cape Town. The latter was part of a bigger project assessing the implications for policy development and law reform of the Constitutional Court judgment in *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) (*Grootboom*);

- holding a number of seminars and workshops on social security and social assistance, housing rights, privatisation of basic services and the enjoyment of socio-economic rights, and the rights to food, nutrition and health care services;
- producing lay publications, among others, *Socio-economic rights in South Africa: A resource book* (2000), and *Realising the rights of children growing up in child headed households: A guide to laws, policies and social advocacy* (2004), and producing 17 editions of the *ESR Review*;
- intervening as *amicus curiae* ('friend of the court') in three Constitutional Court cases: *Grootboom*; *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1075, and, more recently, *President of the Republic of South Africa and the Minister of Agriculture and Land Affairs v Modderklip Boerdery, Pty Ltd*, Case CCT 20/04. (The Project also intervened as *amicus* in the latter case.) The Project's intervention as *amicus* has been aimed at providing the courts with research assessing not only the content of socio-economic rights but also the nature of the obligations they engender;
- giving lectures on social, economic and cultural rights as part of the Masters of Law module on Human Rights and Democratisation in Africa, offered by the University of Pretoria in partnership with the University of the Western Cape, Makerere University (Uganda), the Catholic University of Central Africa (Cameroon), the American University Cairo (Egypt), Universidade Eduardo Mondlane (Mozambique) and the University of Ghana (Ghana); and
- creating a website in which all the Project research and advocacy work is posted and archived.

These and other achievements of the Project can be accessed online at www.communitylawcentre.org/ser.

The Project is grateful to have Professor Liebenberg's continued support despite her challenging new position as H.F. Oppenheimer Chair in Human Rights Law at Stellenbosch University.

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Turning to this issue, Dennis Davis critiques the Constitutional Court's approach on socio-economic rights cases. In particular, Davis argues that the Court's refusal to grant a structural relief and to follow the minimum core approach on socio-economic rights has produced limitations in its own role and negative consequences for successful litigants.

Thereafter, Liebenberg examines whether the standard of reasonableness is responsive enough to basic needs claims. She suggests ways to strengthen the standard's ability to offer greater protection to those claimants who lack access to basic social services, including a

proposition that the justificatory elements of the standard for such situations should be tightened.

Edgar Pieterse and Mirjam van Donk evaluate the politics of socio-economic rights in South Africa in the post-apartheid era. They contend that robust democratic politics is a prerequisite for realising social justice and freedom. They warn that the government will have already failed in creating an enabling environment for a fully rights-based society to flourish if it continues to single-handedly map out the path for realising socio-economic rights.

Karrisha Pillay reviews the recent Constitutional Court judgment in *Port Elizabeth Municipality v Various Occupiers*, Case CCT 53/03. She argues that the judgment reflects a welcome contribution to providing strategic and tangible guidance on the numerous challenges posed in balancing interests in eviction applications.

We also report on two important events that we hosted in November 2004, namely, a seminar that explored the potential for introducing an academic course linking food, nutritional health and human rights, held in Cape Town, and the inaugural Dullah Omar Memorial Lecture, held in November at the University of the Western Cape.

On behalf of the Project, I wish to take this opportunity to express our sincere gratitude to all contributors to the *ESR Review*.

Their insightful and interesting contributions have earned this publication respect and prestige in the area of socio-economic rights.

We also thank our readers for their positive feedback on some articles featured in our editions.

Feedback enables us to improve the quality of the publication and ensure that it is responsive to your needs.

We trust that you will find this and other issues of the *ESR Review* produced this year useful in advancing socio-economic rights.

Socio-economic rights in South Africa

The record of the Constitutional Court after ten years

Dennis Davis

A few years before the unbanning of the African National Congress in February 1990, Albie Sachs published a number of papers that challenged the conventional jurisprudential thinking about the role of law in social transformation. In particular, he argued that a new South African Constitution needed to provide for an orderly and fair redistribution by establishing a minimum floor of rights to a series of carefully defined social and economic goods.

At an early stage of the debate about the inclusion of these rights a series of significant objections were raised. First, it was contended that these rights could not be considered universally-accepted fundamental rights to be included in a Bill of Rights. Second, it was argued that their inclusion was inconsistent with a doctrine of separation of powers because once courts are entrusted with the determination of social and economic rights the judiciary would in effect encroach upon the powers to determine policy, which resided in the legislature and executive. These objections were raised in the process of certification of the 1993 Interim Constitution of South Africa, and were rejected by the Constitutional Court (the Court).

It came as no surprise when a number of social and economic rights were included in the 1996 Constitution. Among protected socio-economic rights are the rights of access to adequate housing (section 26(1)), to health, sufficient food and water, and to social security (section 27(1)). Also protected is a range of children's rights to basic nutrition, shelter, basic health care services and social services (section 28(1)(c)).

Except for the latter, the general socio-economic right provisions are subject to internal limitations. They require the state to only take reasonable legislative and other measures within its available resources to progressively realise them (section 26(2) and section 27(2)).

The record of the Constitutional Court

It took some time before social and economic rights were litigated. When the first challenge was launched, the Court approached the issue with great caution. In *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 (12) BCLR 1696, the appellant was a diabetic who suffered from renal failure. He asked to be admitted to a state hospital for dialyses treatment but did not meet that hospital's eligibility criteria. He sought judicial relief claiming that he had a right to receive treatment in terms of section 27(3), namely the right to emergency medical treatment.

The Court insisted that the concept of reasonableness means more than an assessment of simple statistical progress.

The Court held that this right could not be construed outside of the context of the availability of health services generally. It thus found that the hospital authority could not be expected to provide treatment to all patients matching the appellant's health profile. The determination of an appropriate policy lay with the hospital authorities, who had acted in good faith. Hence, the Court was slow to interfere with decisions made within the context of scarce resources and compelling medical demands.

Two years later, in *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) (*Grootboom*), the Court finally set out a framework for a South African jurisprudence on socio-economic rights.

In this case, some 900 squatters were evicted from informal homes they had erected on private land. Many of the litigants had applied for subsidised low-cost housing from the municipality but had been on the waiting list unsuccessfully for many years. The question for decision was whether the measures already taken by the State to realise housing rights in terms of section 26 were reasonable.

In considering the test for reasonableness, the Court held that it should not enquire whether "other more desirable or favourable measures could have been adopted or whether public money could have been better spent" (para. 41). It accepted that a measure of deference must be given to the legislature, and particularly the executive, to implement a proper housing programme. However, the Court insisted that the concept of reasonableness meant more than an assessment of simple statistical progress and that evidence had to be provided to show that there was sufficient attention given to the needy and most vulnerable within the community (para. 44). They were to be considered a priority in the development of any sensible and constitutionally valid housing policy.

The Court was invited to follow the minimum core approach of the United Nations Committee on Economic, Social and Cultural Rights in its General Comment 3 (GC3), to the effect that there was "(a)t the very least a minimum essential level of each of the rights..." (GC3, para. 10). While it acknowledged that "it may be possible and appropriate to consider the contents of a minimum core to determine whether measures taken by the State were reasonable," the Court felt that it was not provided in this case with "sufficient information to determine what would comprise this core in the context of our Constitution" (*Grootboom*, para. 33).

Instead, the Court adopted the test of reasonableness to hold that the internal limitation did not permit the state to sacrifice the interests of those in desperate need in favour of medium- and long-term goals (para. 43).

The Court's next encounter with socio-economic rights was in the case of *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC) (*TAC*). This case concerned a government policy that appeared to be based upon a refusal to make an anti-retroviral drug called Nevirapine available in the public sector to prevent mother-to-child transmission of HIV. The applicants supported their challenge to government policy by invoking section 27, the right of everyone to have access to health care services, and the right of the child to basic health care services in section 28(1)(c).

The Court refused to conclude that section 27(1) gave rise to a self-standing independent positive right, enforceable irrespective of the considerations contained in section 27(2) (para. 39). It applied the approach adopted earlier in *Grootboom* to section 27(2) and found that:

> *the policy of confining Nevirapine to research and training sites fails to address the needs of mothers and their*

> *newborn children who did not have access to these sites. It fails to distinguish between the evaluation of programmes for reducing mother-to-child transmission and the need to provide access to health care services required by those who do not have access to these sites.* (Para 67.)

A more recent court encounter on socio-economic rights was in *Khosa and Others v Minister of Social Development and Another; Mahlaule and others v Minister of Social Development and Another (Khosa/Mahlaule)* 2004 (6) BCLR 569 (CC). This case involved a constitutional challenge to certain provisions of the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act 106 of 1997, including provisions that had not yet been brought into force. These provisions restricted access to social assistance to South African citizens only, thus excluding permanent residents such as aged persons and children, who would have qualified for social assistance but for the requirement of citizenship.

The Court ruled that the exclusion of permanent residents from the social security scheme was unreasonable and inconsistent with section 27 (social assistance) of the Constitution.

Implications of this jurisprudence

The *TAC* judgment was important, among others, for its refusal both to find that section 27(1) constituted a self-standing right and to grant a structural interdict. The Court's reluctance to follow a minimum core approach to socio-economic rights is consistent with its unwillingness to grant a structural interdict. A structural interdict is an injunctive remedy that requires the party to whom it is directed, to report back to the court, within a specified period, the measures that have been taken to comply with the court's orders.

By making section 27(2) or section 26(2) do all the work in a case dealing with the applicable socio-economic right, the Court ensures that no direct claim can be made by a litigant against the State for the delivery of a minimum core of rights. Every case must be tested in terms of the concept of reasonableness.

In turn, this allows a court the room to mould the concept of reasonableness so that, on occasion, it resembles a test for rationality and ensures that the court can give a wide berth to any possible engagement with direct issues of socio-economic policy.

Similarly, a refusal to grant a structural interdict prevents the Court from monitoring the efficacy of any order granted and hence being compelled to engage in the very mechanisms of policy implementation.

Negative consequences of refusing to grant structural relief

The reluctance of the Court to exercise any form of tangible control over the process of implementation has already had negative consequences for successful litigants. The order in the *Grootboom* case, for example, did not contain any time frames within which the State had to act. The result is that, more than three years later, there has been little visible change in housing policy to cater for people who find themselves in desperate and crises situations.

A failure by successful litigants to benefit from constitutional litigation of this kind can only contribute to the long-term illegitimacy of the very constitutional enterprise with which South Africa engaged in 1994.

In some ways, the Court's reluctance to be an activist court is reflective of a more deep-seated difficulty inherent in this area of jurisprudence. As the reports of the South African Human Right's Commission (SAHRC) on economic and social rights have consistently indicated, there has been a significant gap between the promise of housing, medical care and basic infrastructure, and the delivery thereof. While these reports are critical of the government's record, they are illustrative of a more deep-seated set of difficulties, which require a more complex explanation than reliance upon the usual levels of administrative incompetence.

The Court's deferential approach: Where does it come from?

In 1994 and 1995, when the final Constitution was being negotiated, the government had not yet reached a clear decision on the direction of its economic policy. Accordingly, the Constitution reflected a social-democratic view of the future South African society. By the time the *Grootboom* case was decided, government's economic policy had begun to take clear shape. A maximum tax-to-GDP ratio of 25%, inflation targeting designed to ensure that inflation would be in relatively low single digits, deficits on the budget that did not exceed 2%, all contributed to a particular form of economics that began to be incongruent with the economic

vision contained in the supreme law of the land.

The government saw the solution to the economic burdens bequeathed by apartheid to lie in financial austerity and a more minimalist role for the state. Through competition on the global stage, it sought to produce the kind of growth rate sufficient to release resources to redress the poverty of the majority.

It is here that we may begin to locate the basis for the Court's theory of deference, viewed within the context of the knowledge that, were the Court to do more, it may place the Constitution at war with government policy on a key issue of the shaping of the economy. The Court's approach is reflective not of an ignorance of international jurisprudence, nor of a lack of cognisance of the implications of section 26(1) and 27(1) of the Constitution, but rather of the knowledge that the latter itself holds out a promise of a kind of society predicated upon a very different approach to economics from that which presently holds sway.

Government has done little to produce the tangible benefits litigants were entitled to expect from winning their cases.

This deferential approach of the Court has found significant support among academic commentators. Cass Sunstein has contended that the Court has remained faithful to the transformative character of the Constitution by developing an approach to socio-economic rights that gives tangible effect to these rights without undermining the need for democratic judgment about how to set priorities. He contends that the Court has carved a path between the establishment of a 'juristocracy' in which judges assume the exclusive role of setting the allocative priorities and being the distributors of the public purse, on one hand, and the unfettered exercise of the power of a transient majority in which these rights may well be honoured more in the breach than in the implementation, on the other hand.

To an extent, Sunstein may be correct. The present strategy has appeared to be at least partially successful and it would be wrong to reject the body of cases in this area as justification for a conclusion that the rights contained in sections 26 and 27 serve no transformative purpose. The Court's judgments have provided a framework for, at the very least, holding government accountable to the constitutional commitments imposed upon it. A jurisprudence based upon the principle that the poorest must be given priority is not a development that should be discarded as being unhelpful to the vision of the Constitution.

The role of a structural relief in promoting accountability

The lack of delivery of basic rights reflected in the SAHRC reports may have been exacerbated by the reluctance of the Court to follow through with the implementation of its chosen model. Its refusal to grant structural relief that would empower courts to supervise the implementation of their own orders has produced unfortunate results. Litigants have won cases and government has done little to produce the tangible benefits that these litigants were entitled to expect from their success. The Court, in effect, has surrendered its power to sanction government inertia and, as a direct result, litigants have not obtained the shelter or drugs that even a cursory reading of the judgments promised.

The structural injunction is not intended to substitute the judiciary for the administration, but to relive the judge from framing relief in a way that would constitute democracy by judicial decree. It would also afford the successful litigant an opportunity to be heard after the defendant has formulated its policy in accordance with the order of the Court. Without a second opportunity to be heard the plaintiff may have little further avenue to be heard, particularly by members of government whose initial failure to listen is often the cause of the litigation.

The Court's approach has replaced the principle of democratic accountability that should lie at the heart of the adjudication of these rights. This principle takes into account the essence of the constitutional promise that citizenship in a post-apartheid society means more than the provision of a range of negative rights, which cannot on its own drive the model of a society prefigured in the Constitution read as a whole. This model is one based upon the cardinal values of dignity, freedom, equality and democracy.

While the value of democracy warns against the activity of a judicial Hercules who, possessed of the right answer, always does better than the imperfect product of politics, the remaining three

foundational values should guide the Court to an approach whereby government is given a margin of appreciation to formulate and implement these socio-economic commitments and be held accountable for them. In this way, the Court continues to be a forum in which those most in need can engage with government and thus ensure that government is forced to account to them for the manner in which it has decided to respond to its constitutional obligations.

This form of accountability must be distinguished from political accountability, which depends upon the manner in which a government is elected and, if so provided in a constitution, recalled. But that is a matter of political design and the exercise of popular sovereignty in the way elections take place.

By contrast, a constitution like South Africa's introduces another form of accountability in terms of which the government owes a fidelity to the preservation and promotion of the very basic cornerstones of the society of which it has been elected. The government is required to fulfil certain constitutional obligations, including a commitment to some key distributional issues as prefigured in the socio-economic rights sections of the Constitution.

That government may seek to fashion a particular response in the image of its own core policies is one thing. But that it remains accountable to those who are the beneficiaries of these basic commitments is a separate consideration. It is with regard to the latter that the court plays a vital role as a transmission belt between the government of the day and the constituencies who seek to rely on these most basic of commitments.

Conclusion

If the role of the Court remains solely at the level of analysis of the invoked right without being a watchdog for litigants who want to exercise their full citizenship, the promise of socio-economic rights may remain at the level of the worst of negative rights – the right to assert without any meaningful remedy.

In turn, the greater the gap between uplifting promises of the Constitution and the degrading realities of South African life, admittedly inherited from hundreds of years of racist rule, the more significant the impact upon the very legitimacy of the constitutional community born but a decade ago.

Dennis Davis is a judge of the Cape High Court.

Basic rights claims

How responsive is 'reasonableness review'?

Sandra Liebenberg

> *If life on earth was such that people could easily provide for their needs and develop and protect their capacities, perhaps disputes about how to live and how to organise society could emphasise the heights to be attained and ignore the depths of misery to be avoided, but in our world, minimal standards are indispensable.* (James W. Nickel, 1987.)

South Africa's 1996 Constitution (the Constitution) is widely renowned for its holistic, inclusive Bill of Rights. A particular innovation is its inclusion of a wide range of fully justiciable socio-economic rights. There is now a burgeoning body of jurisprudence from the Constitutional Court (the Court) interpreting these rights. There can be little doubt that South African jurisprudence has given a significant boost to international endeavours to protect socio-economic rights.

Through its jurisprudence, the Court has to achieve a critical balance between effectively protecting the socio-economic rights of the poor, while also respecting the roles of the legislature and executive as the primary branches of government responsible for realising socio-economic rights.

In its most recent decision of *Jaftha v Schoeman and Others* CCT 74/03, 8 October 2004 (*Jaftha*), the Court gave effect to its earlier indications that it would strongly protect people against negative invasions of socio-economic rights. In *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) (*Grootboom*), the Court held that the first subsection of section 26 (and by implication, section 27) imposed "at

the very least, a negative obligation...upon the State and all other entities and persons to desist from preventing or impairing the right of access to housing" (at para. 34). Section 26(1) enshrines the right of access to adequate housing and section 27(1) entrenches the rights of access to health care services, sufficient food and water, and social security.

Jaftha concerned the constitutionality of provisions of the Magistrates' Courts Act, which permitted the sale in execution of people's homes in order to satisfy (sometimes trifling) debts. The Court accepted the appellants' arguments that measures that permit a person to be deprived of existing access to housing constitute a negative violation of the right of access to housing. This negative violation is not subject to the qualifications of "reasonable measures", "progressive realisation" and the availability of resources in section 26(2). Instead any justification offered by the State for the violation falls to be determined in terms of the general limitations clause (section 36).

The Court did not find it necessary to delineate all the circumstances in which a measure will constitute a violation of the negative obligations inherent in socio-economic rights. One can anticipate that given the strong protection accorded to them, the scope of these negative duties will be an area of contestation in future litigation.

However, it is in the area of the positive duties imposed on the State by the socio-economic rights provisions that the Court is confronted most starkly with the dilemma of how far it should go in reviewing the policy, legislative and budgetary choices of the legislature and executive. The landmark cases that established the foundations of the Court's jurisprudence on the positive duties imposed by the socio-economic rights provisions are *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (*Soobramoney*), *Grootboom*, and *Treatment Action Campaign and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC) (*TAC*).

The Court voiced concerns regarding the concept of minimum core obligations.

The model of reasonableness review

The Court has rejected the notion that the socio-economic rights provisions in the Constitution impose a direct, unqualified duty on the State to provide social goods and services on demand. It has done this in the context of arguments raised by the *amici curiae* ('friends of the court') interventions in *Grootboom* and *TAC*. The *amici* sought to persuade the Court to adopt the notion of "minimum core obligations" developed by the UN Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 3 (GC3, The nature of State parties' obligations, article 2(1) of the International Covenant on Economic, Social and Cultural Rights, para. 10). In *TAC*, the Court rejected an interpretation of socio-economic rights that would "give rise to a self-standing and independent positive right enforceable irrespect-ive of the considerations mentioned in section 27(2)" of the Constitution (para. 39).

The Court voiced a number of concerns regarding the concept of minimum core obligations. These included practical issues concerning the definition of the rights in the context of varying social needs (*Grootboom*, paras. 32–33), the impossibility (according to the Court) of giving everyone access even to a "core" service immediately (*TAC*, para. 35), and its incompatibility with the institutional competencies and role of the courts (*TAC*, paras. 37–38). However, the Court did indicate that evidence in a particular case might show that there is a minimum core of a particular service that should be taken into account in determining whether the measures adopted by the State are reasonable (*Grootboom*, para. 33 and *TAC*, para. 34).

The Court has instead adopted a model of reasonableness review for dealing with the positive duties imposed by the socio-economic rights provisions. The central question that the Court asks is whether the means chosen are reasonably capable of facilitating the realisation of the socio-economic rights in question. In the words of the Court:

> *A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of*

> *reasonableness. Once it is shown that the measures do so, this requirement is met.* (*Grootboom*, para. 41.)

The assessment of the reasonableness of government's programmes is influenced by two factors. First, the internal limitations of section 26(2) require that the rights may be "progressively realised" (*Grootboom*, para. 45), and that the availability of resources is "an important factor in determining what is reasonable" (para. 46). Second, reasonableness is judged in the light of the social, economic and historical context, and consideration is given to the capacity of institutions responsible for implementing the programme (*Soobramoney*, para. 16 and *Grootboom*, para. 43).

The standard of scrutiny employed by the Court is more substantive than simply enquiring whether the policy was rationally conceived and applied in good faith. Thus, in the *Grootboom* and the *TAC* cases, the Court set the following standards for a reasonable government programme to realise socio-economic rights:

- the programme must be comprehensive, coherent, co-ordinated (*Grootboom*, para. 39–40);
- it must balanced and flexible and make appropriate prevention for short-, medium- and long-term needs (para. 43);
- it must be reasonably conceived and implemented (para. 40–43); and
- it must be transparent, and its contents must be made known effectively to the public (*TAC*, para. 123)

However, the element of the reasonableness test that comes close to a threshold requirement is that the programme in question must cater for those in urgent need:

> *To be reasonable, measures cannot leave out of account, the degree and extent of the denial of the right they endeavour to realise. Those whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.* (*Grootboom*, para. 44.)

This requirement of the reasonableness test is justified particularly in terms of the value of human dignity (*Grootboom*, para. 83).

In *Grootboom*, the otherwise rational, comprehensive housing programme was faulted for its failure "to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations" (para. 99). In *TAC*, the Court held that the failure to extend the provision of the anti-retroviral drug, Nevirapine (described as "a simple, cheap and potentially lifesaving medical intervention") to prevent mother-to-child transmission of HIV throughout public health care facilities in South Africa, was unreasonable, and hence a breach of the right of access to health care services in the Constitution (paras. 73 and 135).

Evaluating 'reasonableness review'?

The model of reasonableness review gives the Court a flexible and context-sensitive tool in relation to socio-economic rights claims. On the one hand, it allows government the space to design and formulate appropriate policies to meet its socio-economic rights obligations. On the other hand, it subjects government's choices to the requirements of rationality, inclusiveness and particularly the threshold requirement that all programmes must provide reasonable measures of relief for those whose circumstances are urgent and intolerable. Government has the latitude to demonstrate that the measures it has adopted are reasonable in the light of its resource and capacity constraints and the overall claims on its resources. The Court has made it clear that although its orders in enforcing socio-economic rights claims may have budgetary implications, they are not "in themselves directed at rearranging budgets" (*TAC*, para. 38).

The important point is that government will have to justify its policy choices when they impact detrimentally on people's access to socio-economic rights, and these justifications will be scrutinised by the Court. This promotes, to borrow Etienne Mureinik's words, "a culture of justification".

But does the Court's jurisprudence do enough to protect vulnerable groups who face an absolute deprivation of minimum

essential levels of basic socio-economic goods and services? This category of claimants is in danger of suffering irreparable harm to their lives, health and sense of human dignity if they do not receive urgent assistance. In addition, if their urgent needs are not met, there is no foundation for the progressive improvement in their living standards. For example, once the harms of malnutrition and a deprivation of adequate early childhood education have been suffered, progressive improvements in the provision of these services cannot undo the damage to those affected.

It is useful in this regard to distinguish between the two interests protected by socio-economic rights identified by David Bilchitz. The first is the more basic interest in survival and non-impaired functioning. The second is a more extensive interest (which includes the minimal one) in "being able to live well" (D Bilchitz, Giving socio-economic rights teeth: The minimum core and its importance, (2002) 118 *South African Law Journal* at 484 at 490). The latter interest extends beyond mere survival and meeting of basic needs. This distinction allows us to recognise that there are differences between the two interests, "and that the minimal interest has an urgency and must be prioritised in a way that the maximal interest does not" (at 491).

The Court's model of reasonableness review has been criticised for not catering adequately to this group of claimants. Thus, for example, the Court has indicated that not everyone who is deprived of basic services will have an entitlement to claim immediate relief from the State (*Grootboom*, paras. 69 and 95; and *TAC*, paras. 39 and 125).

Making 'reasonableness review' more robust

The Court's review standard could be strengthened to offer greater protection to those claimants who lack access to a basic level of social services. First, vulnerable litigants seeking access to basic socio-economic services would benefit from having the burden of proving the reasonableness of government's programmes placed on the State. Thus, in situations where a vulnerable group is excluded from accessing a basic social service, the duty would be on the State to justify why the exclusion is reasonable in the circumstances.

Government has done little to produce the tangible benefits litigants were entitled to expect from winning their cases.

In terms of practical litigation, individual litigants currently bear a difficult burden of proof to illustrate that government programmes are unreasonable. They are required to review the whole panoply of government programmes and assess their reasonableness in the light of the resources available to the State and the latitude of progressive realisation that it enjoys. The alternative proposed above would give individuals the benefit of a presumption of unreasonableness in circumstances where they cannot gain access to basic survival needs.

Second, requiring a compelling government purpose for failing to ensure that all have access to basic needs could strengthen the review standard. Government should be required to show that that its resources are "demonstrably inadequate" (GC3, para. 11) for meeting basic needs in the light of other compelling government purposes. This would require placing both evidence and arguments before the Court regarding why its budgetary resources are inadequate to ensure a basic level of social provisioning to all. The Court would be required to scrutinise the evidence and arguments closely with a view to assessing whether they present a compelling justification for failing to provide basic needs.

The final element that should strengthen the Court's review standards in respect of basic needs is the inclusion of a more vigorous proportionality analysis. The Court comes close to including such an analysis by its threshold requirement that a government programme will be found unreasonable if it does not make provision for those in desperate need. However, the Court has also indicated that this does not necessarily imply that all in desperate need should receive relief immediately, but only "a significant number" (*Grootboom*, para. 39).

The inclusion of a stronger proportionality analysis would require government to show that there are no less restrictive means of achieving its purposes than limiting access to essential levels of the socio-economic rights, and that other less restrictive measures have been considered. Thus, even if the State can make a compelling case that it is not possible to provide everyone with a basic level of service immediately, it should also be required to show that other 'lesser' forms of provision have been considered. In addition, it must show that it is monitoring the deprivation

of basic needs, and devising programmes and strategies for remedying the situation. The views of the CESCR in this regard are instructive:

> *The Committee wishes to emphasise, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realisation, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints....Similarly, the Committee underlines the fact that even in times of severe resource constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.* (GC3, paras. 11–12.)

It is beyond the scope of this article to discuss the question of remedies. Suffice to say that the nature of the remedies handed down by courts should be informed by the urgent nature of the interests at stake and the danger of claimants suffering irreparable harm if they do not receive immediate relief. The courts should be willing to grant orders of interim individual relief to litigants pending government's adoption of a comprehensive programme for ensuring access to the various socio-economic rights. In addition, in cases of this nature, the courts should be willing to exercise a supervisory jurisdiction to ensure that adequate progress is made in designing effective remedial programmes.

Conclusion

The Court has developed a model of reasonableness review for adjudicating the positive duties imposed by socio-economic rights. Of particular importance is the element of the reasonableness test that enquires whether the state has made short-term provision for vulnerable groups in desperate need and living in intolerable conditions. This model of review has given the courts a flexible, context-sensitive tool to adjudicate positive socio-economic rights claims. It allows the Court to respect the role and competencies of the other branches of government – the democratically-elected legislature and the executive – while not abdicating its responsibilities to enforce the positive duties imposed by socio-economic rights.

However, this paper has argued that the justificatory elements of the reasonableness test should be tightened when dealing with situations where vulnerable groups are deprived of basic essential levels of social goods and services. A high standard of justification is warranted in this category, given the nature and urgency of the interests at stake. Members of groups who are deprived of basic socio-economic needs face severe threats to their life, health and future development. When a society has the resources to provide basic levels of socio-economic rights, it constitutes a serious denial of human dignity to neglect to do so. It also undermines society's efforts to build an inclusive, caring political community. As expressed by Justice Mokgoro in the case of *Khosa, Mahlauli and Others v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC):

> *Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society.* (Para. 74, footnotes omitted.)

The stronger review standard proposed above will ensure respect for the dignity and equal worth of the poor within the model of reasonableness review developed by the Court. It requires a higher degree of justification from the State in respect of basic needs claims, but does not impose inflexible standards nor demand the impossible.

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The politics of socio-economic rights in South Africa

Ten years after apartheid

Edgar Pieterse and Mirjam van Donk

Although human rights are considered indivisible and interrelated, evidence from around the world suggests that it is more straightforward for states to realise civil and political rights than socio-economic rights. This may be largely so because realising civil and political rights is less resource-intensive and requires less direct state intervention. The rights (of access) to food, water, education, housing, health care and social security are more difficult to realise in practice as they are qualified by the availability of resources and by capacity constraints. This is particularly the case in a context characterised by historical exclusion and service delivery backlogs. Clearly, the apartheid legacy has made the realisation of socio-economic rights in South Africa not just urgent, but also complex.

In the first ten years of democracy and political freedom, the South African government has made significant progress in overcoming and rectifying past human rights violations and deprivations. All indications are that the government is serious about speeding up delivery and working towards the progressive realisation of socio-economic rights in the decades to come.

Yet, a fundamental question remains: Can socio-economic rights simply be conferred on beneficiaries by a benevolent and rational state? A rights-based approach to development holds that this is not sufficient. While the State has a constitutional obligation to respect, promote and fulfil socio-economic rights, it needs to fulfil this responsibility in a way that recognises its citizens and their representative organisations as 'rights-holders' and active agents in the realisation of human rights and development.

This perspective raises fundamental questions about the nature and quality of the democratic order that is most conducive to realise socio-economic rights. Put more starkly, the State is not recognising the fact that it needs to cede control to a contested democratic public sphere in order for citizens and their associations to construct a polity conducive to the realisation of socio-economic rights. Thus, although the State is clearly working very hard to ensure effective service delivery, it is also incapable of seeing the inherent limitations of its current positioning. This argument finds support from the government's own review of its performance and achievements since 1994, as documented in the discussion document, *Towards a Ten Year Review: Synthesis report on implementation of govern-ment programmes* (Ten Year Review), which was released by the Presidency in October 2003.

The first decade of political freedom: The government's scorecard

According to the government's own assessment, its overall performance in the first decade of democracy has by and large been positive. The Ten Year Review reflects a very positive picture of the ability and effectiveness of the democratic state to meet its legal and constitutional obligations. Among other achievements, the Review highlights that:

- school enrolment and completion rates have increased (p.19-20);
- the policy to provide free health care for women and children under the age of six has resulted in increased utilisation rates, meaning better access to health for women and young children (p.21);
- the proportion of households with access to water has increased, as has the proportion of households with access to sanitation (p.24);
- access to housing has improved as a result of housing policy and subsidies, with women being specifically targeted (p.25);
- social grants have been de-racialised and because these are "exceptionally well-targeted", individual poverty has been reduced (p.18);
- the level of macroeconomic

stability achieved has been unprecedented in the past 40 years (p.33); and
- between 1996 and 2002, employment grew by 1.6 million net new jobs – although not enough to provide jobs for all those seeking work, which increased by almost 2.4 million during the same period (p.36).

Of course, there have been weaknesses as well as delays, which are mainly attributed to unforeseen or uncontrollable challenges. One of these, as the Ten Year Review suggests, is the complicated and slow nature of institutional transformation and re-building of state structures (see section 3).

Another unforeseen dynamic is the unbundling or decomposition of households, especially poorer ones. Whereas between 1996 and 2001 the total population grew by about 10% (from just over 40 million to close to 45 million), the number of households increased by more than 25% (from just over 9 million to 11.2 million). This means that the average household size has decreased from 4.5 to 3.8.

A further challenge referred to in the Ten Year Review relates to the global setting, more specifically the global political economy and its constraints on the South African state (p.9 and pp.100-101).

Apart from these dynamic trends that are beyond the control of the government, the Ten Year Review also reflects a sense of disappointment in the commitment and ability of other stakeholders (in particular business, media and organised civil society) to support the government's development project. Specific mention is made of the lack of private investment (related to the prospect of job creation), perceived negative portrayal of the South African story in the media and a more subtle criticism of formal civil society organisations, suggesting that many of these do not adequately represent poor and marginalised communities.

Embedded in this assessment by the government lies a deeper perspective on the politics of socio-economic rights that we wish to interrogate a bit closer, for it will inform progress in the realisation of socio-economic rights over the coming decade.

The politics of socio-economic rights: Who sets the agenda?

With respect to socio-economic rights, the Ten Year Review emphasises the notion of "progressive realisation" (p.86). It accepts that the government has constitutional obligations to realise socio-economic rights, but that there are resource constraints that limit what could be referred to as 'the art of the possible'. Yet, in our view, socio-economic rights are not simply realised by purposeful action of a rational state, which prudently and efficiently allocates limited available resources to ensure that these rights are realised gradually.

The realisation of socio-economic rights is an inherently political process.

The realisation of socio-economic rights is an inherently political process, which needs to involve rights-holders (directly, or through associations and organisations representing their interests) in determining the desired outcomes, objectives, strategies and acceptable trade-offs so that they are enabled to take control of their own destinies. This inevitably implies a political process of negotiation, disagreement, conflict, occasionally consensus, and, at a minimum, forms of mutual accommodation.

Such an agonistic perspective is completely absent in the Ten Year Review (which, rather ironically, is called a "discussion document"), as the following extracts make clear:

> *... in a number of critical areas, and in terms of overall balances, government had to make various trade-offs and take deliberate decisions on the course of action that it followed...All these trade-offs and choices were made in full recognition of the risks involved, but it was the informed assessment of the government that there were no viable alternatives. As is evident from the observations contained in this Review, at times government could have acted more quickly or more decisively or with better coordination or sequencing,* but there is little or no evidence to suggest that it should have made alternative choices...*Government is making progress in achieving its stated objectives and most of these are the correct objectives.* (Emphasis added, p.74.)

What the Ten Year Review leaves us with is a very assertive, if not uncompromising, notion regarding the role and capabilities of the state (and, by implication, of other actors) to direct social change, not only in the past decade but also in decades

to come. The premise is clear: the government sets the agenda for the progressive realisation of socio-economic rights, and other actors and stakeholders have to embrace and support the path chosen.

This perspective leaves little space for critical engagement with the selected objectives of development and pathways of change towards the realisation of social justice and freedom.

Yet, if the past decade has taught us anything, it is that there are fundamentally different interpretations of the nature and execution of state responsibilities with respect to socio-economic rights – and so there should be in a democratic polity. Three obvious examples serve to illustrate this point more precisely.

At the heart of the national development challenge is the question of jobs and job creation.

The first example concerns the macroeconomic policy framework pursued by the government, its underpinning assumptions and what are considered acceptable trade-offs between social and economic imperatives.

The second relates to HIV/Aids and the right to health and, ultimately, life.

The third example relates to social security as a safety net for the poor, and specifically the introduction of a Basic Income Grant.

Each of these examples is associated with campaigns characterised by strong and broad-based social mobilisation, which have by and large been met with equally robust and persistent government opposition. These examples cannot be explored in great depth here. The following discussion on some of the issues pertaining to the economic policies of the government serves to illustrate our main argument.

Issues pertaining to government's economic policies

At the heart of the national development challenge is the question of jobs and job creation. At the dawn of democracy in 1994, a very large proportion of South Africa's working population faced the degrading prospect of unemployment. Their prospects worsened with the eclipse of the Reconstruction Development Programme (RDP) by the Growth, Employment and Redistribution (GEAR) policy in 1996, when government embraced the Washington consensus and introduced its home-grown structural adjustment programme, which was meant to deliver accelerated growth and dramatic inflows of foreign direct investment.

Both of these critical variables failed to materialise and instead, by 2004, the government seemed ready to jettison much of GEAR in favour of a more expansionist fiscal stance.

According to Alan Hirsch, this stance was further complemented with a more self-reliant attitude borne out of frustration with the lack of substantial volumes of foreign direct investment.

This self-reliance finds expression in a major refocus from macro-economic discipline to a focus on micro-economic inputs to make the economy more labour-absorbent, fast growing and productive.

Of course, in the government's rationalisation, none of the recent increased expenditure on social services would have been possible without the pain that GEAR involved.

The point of emphasis here is not on the merits of the argument, but rather on the fact that GEAR was introduced as a subject not fit for debate in case international investors would be scared off.

It is fascinating to see how the same rectitude characterises the discourse in the Ten Year Review and the new policy edifice that aims to bridge the gap between the so-called first and second economies in South Africa.

In our reading, the politics of socio-economic rights will play out over the next decade around the critical question of how the first and second economies can be linked so that large masses of working citizens will enter the domain of formal employment and secure decent wages.

On 11 November 2003, the President explained in his address to the National Council of Provinces (NCOP) that the government's key strategies to meet the growth and development challenges of the second economy include:

- *the Integrated and Sustainable Rural Development Programme (ISRDP);*
- *the Urban Renewal Programme (URP);*
- *the Expanded Public Works Programme (EPWP);*
- *a major boost to infrastructure spending, with an emphasis on improved underdeveloped regions and communities;*
- *further support to local*

government's preparation and implementation of Integrated Development Plans (IDPs);

- *the development of SMMEs and cooperatives, in both urban and rural areas;*
- *black economic empowerment and special programmes for women's economic development;*
- *the expansion of microcredit to enable the poorest to engage in productive economic activity;*
- *the incorporation of the unemployed within the Skills Development Programme, especially as implemented by the SETAs;*
- *the continued restructuring of our system of education so that it gives our youth the necessary skills to engage in economic activities of benefit to them;*
- *agrarian reform, including a Farmers Support Programme and forestry development in the interests of communities; and*
- *the creation of the echelon of community development workers to help build social cohesion in the Second Economy, and to help to develop strategies and forge links that can transform the Second Economy.*

Upon closer examination of these programmes, it is clear that all hold great potential, but are also ridden with contradictions and problems stemming from institutional complexities, power conflicts, capacity constraints, weakly embedded in local contexts (i.e. one-size-fits-all solutions), and so on.

It is therefore crucial that these policies and programmes be debated and linked with a wider array of interventions not necessarily within the control of the State. It is only by reinserting the State's agenda within a much larger and more diverse social project for social justice that the politics of socio-economic rights can truly come to the fore. This perspective seems to be one that must still be won in engagements with the State on the meaningful realisation of socio-economic rights.

Policies and programmes must be debated and linked with a wider array of interventions not necessarily within the control of the state.

Conclusion

In summary, robust democratic politics is a prerequisite for the realisation of social justice and freedom (as outcomes of the realisation of human rights). However, if the State is determined to map out the path to the realisation of socio-economic rights single-handedly on its own terms, as intimated in the Ten Year Review, it will have already failed in creating an enabling environment for the full realisation of socio-economic rights.

The managerial and resolute tone of the Mbeki agenda suggests a continuing belief that citizens and civil society need to climb on board the government's development vision, instead of seeking to construct a transformative project through struggle in what remains a profoundly divided, unjust and unequal society.

It goes without saying that those civil society actors with the know-how to hold in tension their own agendas and that of the government are most likely to advance the struggle for socio-economic rights, as evidenced in the inspiring repertoire of social mobilisation of groups like the Treatment Action Campaign and the Basic Income Grant Coalition.

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The Ten Year Review is available online at www.info.gov.za / reports / index.htm.

The address of the President of South Africa, Mr Thabo Mbeki, to the National Council of Provinces on 11 November 2003, is available online at www.info.gov.za / speeches / 2003 / 03111115461004.htm.

CASE REVIEW

Port Elizabeth Municipality v Various Occupiers
(CCT 53/03)

Property v housing rights: Balancing the interests in evictions cases

Karrisha Pillay

On 1 October 2004, the Constitutional Court (Court) handed down a landmark judgment in *Port Elizabeth Municipality v Various Occupiers* CCT 23/03 (*Port Elizabeth/PE Municipality*). The judgment reflects a particularly valuable contribution to the emerging jurisprudence on socio-economic rights. It is one of the few cases in which the Court gave attention to the State's negative obligations in respect of socio-economic rights.

The judgment also provides both a strategic and philosophical framework within which eviction matters pursuant to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998 (PIE) fall to be determined.

Facts

The applicant in the matter was the Port Elizabeth Municipality. The Municipality launched an eviction application in response to a petition signed by 1600 people in the neighbourhood, including the owners of the property in question.

The respondents were some 68 people, including 23 children who occupied 29 shacks, which they erected on privately owned land within the municipality. Occupants had been living on the property (which consisted of undeveloped land) for periods ranging between two and eight years. It was common cause that the shacks were erected without the consent of the Municipality and that the occupiers were willing to vacate the property subject to two conditions: first, that they be given reasonable notice and second, that they be provided with suitable alternative land onto which they could move.

The Municipality contended that it was aware of its obligations to provide housing and for that reason had embarked on a comprehensive housing development programme. However, it argued that if it were obliged to provide alternative land, the Court would effectively be permitting queue jumping, which the Municipality argued would disrupt the housing programme and force the Municipality to grant preferential treatment to this particular group of occupiers (in this case, who had not applied to the Municipality for housing). The Municipality's argument bore close similarity to an argument advanced on behalf of the State in *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (1) BCLR 1169 (CC) (*Grootboom*) some four years ago.

This is one of the few cases in which the Court gave attention to the State's negative obligations in respect of socio-economic rights.

The courts' decisions

The High Court held that the occupiers were unlawfully occupying the property and it was in the public interest that their unlawful occupation be terminated. Having had regard to the relevant statutory provisions, the Court ordered the occupiers to vacate the land and authorised the sheriff to demolish the structures if necessary (with the assistance of the police if required).

On appeal to the Supreme Court of Appeal (SCA), it was held that the occupiers were not seeking preferential treatment in respect of access to

housing but were merely requesting that land be identified where they could put up their shacks and have some measure of security of tenure. The SCA concluded that the High Court should not have granted the eviction order without an assurance that the occupiers would have some measure of security of tenure. It accordingly upheld the appeal and set aside the eviction order.

Interpreting PIE in context

According to the Constitutional Court, PIE was adopted with the objective of overcoming abuses and ensuring that evictions take place in a manner consistent with the values of the new constitutional dispensation. It confirmed judgments of some Provincial Divisions as well as the SCA that the protection offered by PIE is both procedural and substantive. (See, for example, *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA); *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA); *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C)).

The Court should not have granted the eviction order without an assurance that the occupiers would have some measure of security of tenure.

The Court observed that PIE sought to provide a framework within which the twin objectives of preventing unlawful occupation, on one hand, and ensuring dignified and individualised treatment of unlawful occupiers with special consideration for the most vulnerable, on the other. It acknowledged the challenging role accorded to the Court in ensuring that this balance was maintained and, ultimately, that justice and equity prevailed. In achieving this balance, the Court observed, "the starting point and ending point of the analysis must be to affirm the values of human dignity, equality and freedom" (*PE Municipality*, para. 15).

In essence, the *PE Municipality* case sought to determine an appropriate constitutional relationship between property rights (section 25) and housing rights (section 26).

As was recognised in *Grootboom*, the State has a constitutional impera-tive to satisfy both of these rights. In the same case, the Court provided some guidance in satisfying this imperative.

In *PE Municipality* (paras. 20–22) it noted that there are three salient features of the way the Constitution approaches the interrelationship between land, hunger, homelessness and respect for property rights:

- *First, the rights of the dispossessed in relation to land are not generally delineated in unqualified terms as rights intended to be immediately self-enforcing. Accordingly, the Constitution does not purport to effect transfer of title by constitutional fiat;*
- *Second, the eviction of people living in informal settlements may take place even if it results in the loss of a home;*
- *Third, concrete and case-specific solutions to difficult problems must be found.*

The role of the judiciary in respect of eviction matters was aptly described as follows:

> *The judicial function in these circumstances is not to establish a hierarchical arrangement between different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking into account all the interests involved and the specific factors relevant in each particular case.* (Para. 23.)

Relevant circumstances in eviction cases

Perhaps one of the most significant aspects of the Court's judgment is the ruling that the mere establishment of unlawful occupation and structures that are unauthorised, unhealthy and unsafe, *does not require* a court to make an eviction order as a matter of necessity.

On the contrary, according to the Court, it "merely triggers the court's discretion". In exercising this discretion, the Court observed:

> *it must take account of all relevant circumstances, including the manner in which the occupation was effected, its duration and the availability of suitable*

alternative accommodation or land. (Paras. 25 and 53).

In respect of the latter consideration, the Court held that this is not an inflexible requirement. It noted:

> *There is therefore no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available.* (Para. 28.)

However, in general terms, the judgment noted that a court should be "reluctant" to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal programme (para. 28).

In respect of the circumstances referred to in section 6 of PIE, the Court noted that the three specifically identified circumstances are peremptory, but not exhaustive.

It accordingly reaffirmed the principle established by the SCA in *Baartman and Others v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA) (para. 8), in respect of the range of circumstances a court can have regard to in respect of eviction applications under PIE.

In this case, particular attention was given to the vulnerability of the groups against whom an eviction order was sought.

The Court noted that the vulnerability of these groups as referred to in section 4 of PIE could constitute a relevant circumstance under section 6 (evictions at the instance of an organ of State).

The Court further referred to the question of the extent to which serious negotiations had taken place with equality of voice for all concerned, including the reasonableness of offers made in connection with suitable alternative accommodation as another possible relevant circumstance.

The Court referred the extent to which serious negotiations had taken place with equality of voice for all concerned.

However, it ultimately decided that each case must be decided in light of its own particular circumstances.

On a consideration of these factors, the Court concluded as follows:

> *To sum up: in the light of the lengthy period during which the occupiers have lived on the land in question, the fact that there is no evidence that either the Municipality or the owners of the land need to evict the occupiers in order to put the land to some other productive use, the absence of any significant attempts by the Municipality to listen to and consider the problems of this particular group of occupiers, and the fact that this is a relatively small group of people who appear to be genuinely homeless and in need, I am not persuaded that it is just and equitable to order the eviction of the occupiers.* (Para. 59.)

Rejecting an unduly technical approach

The Court's approach in respect of onus is particularly encouraging. Its point of departure was that it must be appraised of the circumstances before it can pronounce on them. However, it observed that technical issues such as onus should not play an unduly significant role in matters such as these. The objective, according to the Court, was that it is incumbent on the interested parties to make all relevant information available.

In instances where evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain, it recognised that a court might be obliged to procure ways of establishing the true state of affairs so as to enable it properly to have regard to the relevant circumstances.

Conclusion

The judgment reflects a welcome contribution to providing strategic and tangible guidance to the numerous challenges posed in the balancing of interests in respect of eviction applications.

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Seminar: Linking food, nutritional health and human rights

On 8 and 9 November 2004, the Socio-Economic Rights Project in conjunction with the International Project on the Right to Food in Development (IPRFD) of the University of Oslo and Akershus University College (Norway) co-hosted a seminar on linking food, nutritional health and human rights. It brought together experts, activists and government officials working in the fields of nutrition, health and human rights.

The seminar's aim was to explore the potential for introducing an academic course linking food, nutritional health and human rights in South Africa. It also sought to provide a platform for a comprehensive discussion on some of the crucial substantive issues relating to nutrition and human rights in South Africa.

Speakers from the nutrition and health field provided an overview of the food and nutrition situation in South Africa. It was established that while South Africa generates more than enough food for its population, the household and individual data showed that most people, especially the vulnerable groups (children, women, HIV/Aids-infected persons, the disabled and the aged) lack access to food.

Speakers from a human rights background provided an overview of the State's constitutional and international obligations in respect of the right to food and related rights. It was emphasised that there is a need for the government to adopt a rights-based approach to efforts aimed at addressing food-related issues. The content and nature of the State's duties and its current efforts to meet these obligations were discussed. It was revealed that current programmes are poorly formulated and implemented, inadequate to meet set targets and lack proper funding. Other challenges noted included the lack of economic empowerment, disparities in land ownership and the lack of collaboration among government departments.

Experiences were shared from both South Africa and Norway on the academic programmes linking nutrition and human rights. Based on the experience in Norway, the need to offer a comprehensive course in South Africa was highlighted. Among other things, the course would:

- contribute to improving the capacity to monitor the realisation of the right to food;
- generate a critical mass of young and competent scholars, researchers, activists and advocates concerned with food issues;
- facilitate the application of a human rights-based approache to issues involving nutrition, health and development; and
- provide a platform for networking in the field of human rights, health, nutrition and development.

However, the seminar also discussed and anticipated the challenges that could be faced in introducing such a course. It was recommended that a working group or steering committee be formed to take the matter forward.

In short, the seminar revealed that the food and nutritional health situation in South Africa calls for robust action not only from government, but also from other key role players such as nutrition and human rights experts. Participants underscored the significance of co-operation between various stakeholders as a means of strengthening strategic efforts, improving their impact and reach in society.

The report of the seminar proceedings is being compiled and will be posted on our website in due course. This piece was prepared by Omowumi Asubiaro who was a rapporteur during the seminar.

First Dullah Omar Memorial Lecture

On 22 November 2004, the Community Law Centre and the Faculty of Law at the University of the Western held the first Dullar Omar Memorial Lecture to pay tribute to the late Dullah Omar.

Dullah was instrumental not only in the struggle against apartheid, but also in the establishment of the new constitutional dispensation. He believed that the law must serve justice and the community, and must give effect to human rights and democracy.

As a legal practitioner, he represented numerous political prisoners and acted as counsel for trade unions, civic and religious organisations.

In 1990, Dullah came to the University of the Western Cape as the first Director of the Community Law Centre. He worked tirelessly for the Centre's establishment as a centre of research and advocacy on human rights and democracy.

Though the Socio-Economic Rights Project was only established in 1997 after his departure from the Centre, one cannot deny that this is one of the dreams for which he lived.

Under his directorship the Centre became a major contributor to policy formulation for the new constitutional order, focusing on the structure of the state, the electoral system, gender issues, children's rights, policing and transformation of the judiciary.

With his colleagues at the Centre – including Bulelani Ngcuka, Brigitte Mabandla, Zola Skweyiya and Albie Sachs – Dullah participated in the constitutional negotiations, charting the course towards shaping the new constitutional dispensation.

Bulelani Ngcuka, the former Deputy Director of the Centre during Dullar's reign as Director and former National Director of Public Prosecutions, delivered a lecture at the memorial on *The National Prosecuting Authority and the promotion of human rights and democracy*. The NPA is one of the institutions that were established under the leadership of Dullah as the first Minister of Justice in the new democracy.

Other achievements of the Ministry under his leadership include the transformation of the administration of justice, the establishment of the Constitutional Court and the transformation of the judiciary.

Bulelani highlighted some of the challenges that faced the criminal justice system prior to the establishment of the National Prosecuting Authority (NPA).

These included the absence of a uniform criminal justice system through out the country, like a single prosecuting authority, incompetent and politically-biased prosecutors, and torture and other unlawful means of extracting evidence endorsed by the State, among others.

He highlighted the strides that the NPA has made in addressing these challenges.

These include institutional transformations, such as the establishment of the Scorpions and the Asset Forfeiture Unit, the recruitment and facilitation of prosecutors, the instillation of ethics and integrity in the prosecutors, and the winning of public confidence in the NPA.

He said that this is a dream that he and Dullah worked to achieve.

Other speakers at the memorial lecture included the Rector of the University of the Western Cape, Professor Brian O'Connell; the Director of the Community Law Centre, Professor Nico Steytler; Vincent Saldanha, a member of the Board of Trustees of the Community Law Centre and Director of the Legal Resources Centre; Professor Lovell Fernandez of the Faculty of Law; and Farieda Omar, wife of the late Dullah Omar.

The Dullah Omar Memorial Lecture was inaugurated as an annual event.

In attendance were, among others, academics, legal practitioners, judges and magistrates, members of civil society organisations, students and members of Dullah's family.