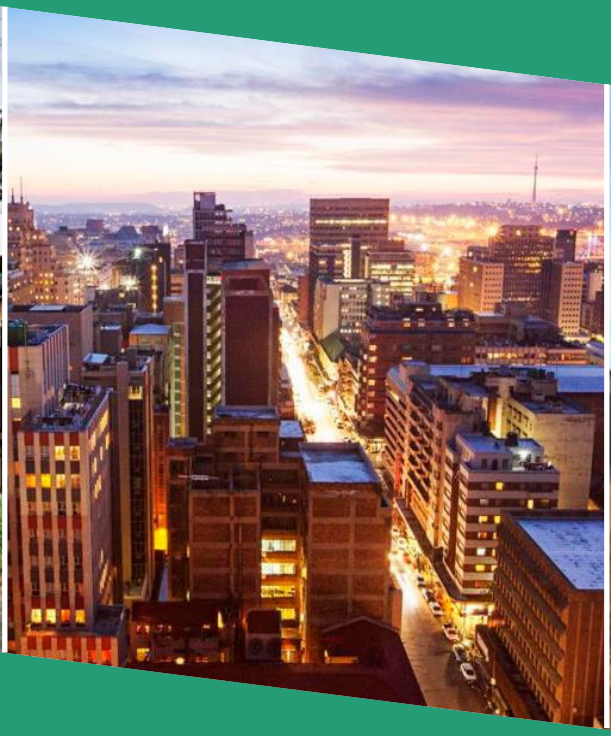

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ESR REVIEW

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ENSURING **RIGHTS** MAKE REAL **CHANGE**

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Editorial

Welcome to the second issue of ESR Review in 2020, the second in a series of five special issues focusing on access to justice. It comes at a time when countries worldwide are grappling with the coronavirus and the need to protect socio-economic rights is more important than ever before.

Our first feature article, by Soraya Beukes, examines how adequate the courts are in the protection of the right to housing against sales in execution. The second feature, by Ebi Achigbe Okeng, looks at the judicial contribution to constitutional obligations in the delivery of basic services in post-1996 South Africa. The author argues that the failure to redistribute resources defeats the realisation of a broader concept of access to justice.

In the third feature, Donna Hornby and Laurel Oettle examine how record-keeping can assist in the realisation of the land and socio-economic rights of farm dwellers on commercial farms. They argue for an approach that engages civil society where the state is functionally absent. This could aid the organic development of local practices that challenge the status quo and lead the way for national policy.

In the Events section, Robert Doya Nanima reports on the community leaders training workshop held in Cape Town in March this year. In the Updates section, Paula Knipe offers insight on a recent statement by the Committee on Economic, Social and Cultural Rights on Covid-19 and its human rights implications .

We thank our anonymous peer reviewers as well as guest contributors, and trust readers will find this issue stimulating and useful in the advancement of socio-economic rights.

Robert Doya Nanima
Guest Editor

FEATURE

Are the Courts Nuanced Enough in Protecting the Right to Housing against Sales in Execution?

Soraya Beukes

Tenuous access to housing is a problem worldwide and in South Africa in particular. In this jurisdiction, more than 3.3 million people either live in abject poverty in informal settlements and backyards, or are simply homeless (Housing Development Agency 2013).

Despite the country's transformative constitution, poverty – and, with it, inequality – looms large for the overwhelming majority of people, who still yearn to be dignified with access to basic housing 25 years into constitutional democracy. Security of tenure is highly compromised.

Those few people that have managed to brave the odds and purchased a primary home, such hard-earned homes enjoy protection under the Constitution in terms of property and housing rights. As such, caution should be exercised when primary residences that are mortgaged to banks come under sale in execution. Judicial oversight is key in orders for such executions because these sales often lead to homes being sold at a fraction of what is owed to the bank. This situation leaves the debt defaulter liable for the cost of an asset that he or she no longer possesses. Every year this action leaves scores of impoverished families dispossessed of ownership, with insecurity of tenure, and still owing the bank the shortfall.

A major reason for this situation is that the jurisprudence on court oversight is far from settled in regard to how the court should balance housing rights and (mortgage) contractual rights. This uncertainty results in infringements of the right to housing and property.

Healing the ills of the past

Contemporary South Africa has evolved from a past where the majority of people were routinely deprived of owning immovable property. Therefore the preamble to the Constitution 'promises to heal the division of the past, improve the quality of life and free the potential of each person'. The Constitution articulates the vision of dismantling the systemic discrimination that resulted in the social and economic deprivation of the majority of the people. Accordingly, it ushers in a modern-day social contract with a Bill of Rights that enshrines the rights to property and housing:

- According to section 25(1), 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'
- Section 25(3)(c) recognises 'the market value of the property'.

- Section 26(1) recognises '[e]veryone['s] ... right to have access to adequate housing'.
- Section 26(2) obligates the state to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'.
- In terms of section 26(3), 'No one may be evicted from their home ... without an order of court made after considering all the relevant circumstances.'

Promotion of substantive equality

According to ***Government of the Republic of South Africa and Others v Grootboom and Others*** (2000), the equality clause in the Constitution promotes the concept of equality in its social and historical context. Substantive equality requires an inquiry into the historical past of the individual and how that past has affected his or her life. The historical lack of adequate housing, together with stunted economic growth, must inform the court today on how these deprivations have affected security of tenure.

When engaging the social contract, there has to be a move towards balanced property rights, which are indispensable to a well-ordered society (Rousseau 1762). However, private property has been unjustly instituted due to the illegitimate manner in which property came to be protected in society (Siroky and Sigwart 2014: 391). The ownership of private property is the ultimate basis on which the ever-growing inequality between people is perpetuated. For this reason, historical deprivation of property in South Africa should be considered when balancing (mortgage) contractual rights and constitutional, property and housing rights. In doing so, the courts should be alert to the Constitution's recognition that property has a market value.

Furthermore, inequality and economic exclusion remain deeply entrenched: the poor still mirror apartheid's exclusions in that they are black and languishing on the fringes of the economy. This should compel the court to adopt a social-justice approach that achieves the constitutional demands of restoration and prosperity. In this endeavour, the judiciary should protect persons disadvantaged by unfair mortgage agreements insofar as the right to housing and property is concerned.

A gender-nuanced approach to legislation

The transformation project should be seen as a remodelling of the country's socio-economic deliverables (Beukes 2017: 120). This is the social change that has been promised through adult suffrage, and the judiciary must ensure that these socio-economic deliverables are improved on in every court decision. This means that court decisions, which are based on theories of interpretation, should be redirected to arguments that resonates with the natural-law approach of the Constitution.

In this regard, the judiciary cannot ignore that the social and economic standing of the poor has not improved. In order to change this, the courts are urged to have a more activist approach in orders for forced sales to create certainty in its endeavours to progressive realisation. The conservative rule-bound approach of the judiciary should be energised by a judiciary that is also mindful of how the imbalances of the past affect the present.

As it is, the lower courts are known to not sufficiently push the transformation envelope to bring about a more equitable society. The history of sales in execution of primary homes bears out this trend. Access to credit is important in acquiring private property serving as a home. However, ***Absa Bank Limited v Lekuku*** (2014) confirmed that, notoriously, mortgage bond agreements resonate with a 'take it or leave it' stance. Therefore, when faced with a sale-in-execution order, the court should be mindful in ensuring that the defaulting debtor does not end up losing the primary home without proper justification.

Diverse views of the courts on execution sales

The law is far from settled on sales in execution and how they affect the right to housing. A plethora of recent sales-in-execution cases demonstrate how varied court interpretations are. This inconsistency was highlighted in ***Standard Bank of South Africa Ltd v Bekker*** (2011).The case deals with five applications for

> **All mortgage cases that involve a home would require that a judge exercise discretion before an execution order is granted**

default judgments on mortgage agreements involving homes. The court confirmed that these matters were being heard because of the divergent views that judges had taken as to what is required in terms of court rule 46 before a court authorises a writ of execution against immovable property. The court emphasised that this divergence of views had arisen in the main from inconsistent conclusions in the cases discussed below.

Between 2005 and 2011, there was no court oversight over orders for sales in execution of primary homes because the registrar and the clerk of the court held these powers. In the landmark case ***Jaftha v Schoeman and Others*** and ***Van Rooyen v Stoltz and Others*** (2005), the government-sponsored social homes of the applicants were executed to satisfy trifling debts. The Constitutional Court held that 'any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in section 26(1)'. Therefore, the Court held that the magistrate's court, and not the clerk, should have oversight over execution sales to have due regard for 'all the relevant circumstances'. This court decision did not change the fact that the registrar could still issue execution orders in the High Court.

In the wake of ***Nedbank Limited v Mortinson*** (2005), the registrar was obliged to refer all cases wherein a mortgaged property is sought to be declared executable, to the High Court to be heard in the open court. Thus, since 2005, the High Court was also obliged to have oversight over orders for forced sales of primary residences.

In ***Standard Bank of South Africa Ltd v Saunderson*** (2006), the registrar granted an order for the forced sale of primary home. This order was brought into question, but the court in this case held that the registrar was duly empowered to grant the order. What is noteworthy is that although the court rules empowered the registrar as such, those powers did not take cognisance of the limitation on housing rights. The SCA in ***Saunderson*** found it unlikely that housing rights could ever defeat a creditor's claim against a mortgaged property. The Court said the decision must be seen in the light of the ordinary legal process of recovering debt.

Thus, the Court took little notice of the fact that, when the registrar grants the application for direct enforcement of a creditor's private law rights, this could result in an unjustified limitation of a debtor's constitutional rights. What was problematic is that the registrar issued orders of execution resulting from a default judgment in which, at best, the debtor did not participate – consequently, not all the relevant circumstances were considered, as would be necessary for a just and equitable decision.

Hence, judicial complacency left housing rights at risk in the High Court between 2005 and 2011, until ***Gundwana v Steko Development and Others*** (2011) settled this. In this case, the Constitutional Court held that all mortgage cases that involve a home would require that a judge exercise discretion before an execution order is granted.

Notwithstanding ***Gundwana***, in ***Nkata v FirstRand Bank Ltd*** (2016), the registrar issued default and execution orders. This action caused an unjustified public auction of a primary home. The Constitutional Court ordered the reinstatement of title deed and urged credit providers to join the courts in recognising the imbalance in the negotiating power between the parties by noting the values of the Constitution at stake.

In ***FirstRand Bank Ltd v Folscher*** (2011), the Court confirmed the importance of 'whether the mortgaged property is the debtor's primary residence and the proportionality of prejudice the creditor might suffer if execution were to be refused, compared to the prejudice the debtor would suffer if execution went ahead and he lost his home'. In contrast, in ***Nedbank***

Ltd v Fraser & Four other Cases (2011), the Court held that the creditor would enjoy relative primacy above the debtor's housing interests because legitimate claims for repayments of debts would not be defeated by the debtor's reliance on his right to housing.

The case ***ABSA Bank Ltd v Ntsane*** (2007) saw 'gross unfairness' in allowing a sale that would obtain a lower price than the market value. The Court held that the right to adequate housing would be violated by enforcing the bank's right to execute against the home. The Court recognised that a private sale could obtain a price that might leave the debtor with some money after the bank's claim is settled. The Court showed that, when necessary, such as in the event of losing one's home, there should be a deviation from formalistic adherence, particularly where abuse of power occurs. In ***FirstRand Bank Ltd v Maleke and Others*** (2010), the Court also took cognizance of the increased market value of the properties and the fact that the debtors expected to benefit from the capital growth.

In ***Nkwane v Nkwane and Others*** (2018), the Court had to answer whether the forced sale of a primary home with a market value worth R492,470 for R40,000, to settle a debt of R370,000, was substantially and procedurally unconstitutional. The Court also had to consider whether selling without a reserve price was arbitrary. The Court is empowered by court rule 46 to set a reserve price but it maintained it had no authority to order a mandatory reserve price as this was best left for policy consideration.

Basically, the Court held that the bank was justified in selling a primary home at a fraction of its value and that this was not arbitrary and did not amount to an unjustified infringement of the rights to housing or property. Notwithstanding that the Constitution, ***Ntsane*** and ***Maleke*** took cognizance of the increased market value of a private property and that debtors expected to benefit from the capital growth. Noteworthy is that, a few months later, ABSA ***v Makube and Others*** (2018) found in favour of setting a reserve price.

Most importantly, ***Sebola and Another v Standard Bank of South Africa Ltd and Another*** (2012) held that selling a primary home at a fraction of its value fails to resonate with promoting a 'fair market place', as is called for in the preamble of the National Credit Act. Moreover, in ***Lekuku***, the Court recognised the sanctity of contracts, but held that, although crucial, it is not sacrosanct and may be departed from if other constitutional values require prominence for justice to prevail. Therefore, the application of the Bill of Rights in mortgage contracts is necessary.

The human-rights-based home interest of the debtor

It is commonly accepted that the right to housing is a component of the right to an adequate standard of living as set out in the Universal Declaration of Human Rights. As such, a primary home is more than a commodity: it is the basis on which dignity rests because it brings stability, security, safety, and happiness to people (Special Rapporteur: 2017). Rousseau (1762: 263) describes the right to immovable private property as 'the most sacred of all the rights of citizens and even more important in some respects than liberty itself'. Moreover, within the political economy, access to private property is the cornerstone of social justice because immovable private property constitutes and strengthens the bonds between state, society, and citizen.

The exercise of a legal right to possession of an individual's home (as in mortgage agreements) is a serious interference regarding the home. In sales of execution, the court should move away from the stance that 'the creditor must win' to a rights-based approach that progressively realises access to housing. This should not be seen as a human rights challenge to possession but as a human rights challenge to a primary home which provides shelter and security of tenure.

Balancing the rights of creditor banks and defaulting debtors

Although it is rational to enforce payment of validly registered mortgage bonds, a proportionality test requires that this be balanced in a justifiable manner.

Selling a mortgaged primary residence at a fraction of its market value is an 'abuse of the execution process and negates social interests', as warned by the ***Fraser*** court. If there is no alternative but to sell the beleaguered primary home, this cost should satisfy the full debt. Anything less cannot pass the constitutional limitation clause in justifying the debtor's being deprived of his or her home.

In balancing interests, the Constitutional Court in ***Jaftha*** was thus at pains to state that while the creditor's interests should not be ignored, an unjustifiable sale that advantages the creditor outweighs the immense prejudice and hardship caused to the debtor. The Court juxtaposed the debtor's vulnerable situation in losing the security of tenure against the financial interests of the creditor.

Similarly, in ***Nkata***, the Constitutional Court recognised the unequal financial power dynamics at play between the creditor bank and debtor. If a mortgaged primary residence faces execution due to debt defaulting, in balancing the rights the court should justify the invasion of housing rights only if the execution satisfies the full debt. In this way the debtor dispenses of the debt and the bank is satisfied. Anything less would not be justifiable.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) sets out obligations that recognise the importance of protecting housing. South Africa is, accordingly, obliged to ensure that it takes reasonable measures to provide adequately for the progressive realisation of the right to housing.

In this regard, the Committee on Economic Social and Cultural Rights (CESCR) responded to a complaint from Spain about a situation in which the courts failed to take all reasonable measures to notify a woman that the lending institution had filed a mortgage foreclosure claim against her (UN High Commission on Human Rights 2015). As a result, she was deprived of the opportunity to defend her right to housing adequately in judicial proceedings. The CESCR found Spain to be in breach of the progressive realisation of housing as prescribed in article 2(1) of the ICESCR. The Committee concluded that Spain violated the ICESCR and its Optional Protocol because the country's courts failed to take all reasonable measures to adequately notify the homeowner.

The CESCR requested that Spain adopt legislative measures ensuring that the rules concerning mortgage enforcements contain appropriate requirements and procedures to be followed before the auctioning of a dwelling, in accordance with the Covenant. The courts in South Africa compromised the Covenant's progressive realisation of housing by not recognising the obligations under its own court rule 46, which gives judges the discretion in setting a reserve price on the sale of a house in execution.

The value of judicial oversight

In ***Fraser,*** the Constitutional Court held that the purpose of judicial oversight is to 'act as a filter or check on execution that does not serve social interests and which is an abuse of the execution processes'. Although this Court recognised the contractual entitlement of the creditor, it held that the right to execute debts is not absolute and has limitations.

The value of judicial oversight was compromised when, in ***Nkwane***, the court found it rational for the bank to sell a primary home at a fraction of its price in order to recover the debt – in taking this stance, the court did not consider the constitutionally recognised market value of the home and, as such, it (the court) allowed an unjustifiable infringement of the right.

The essence of court oversight over a sale in execution of a home is to consider all the relevant circumstances and seek to balance the rights of the parties. The protection the defaulting debtor enjoys in this regard is that the circumstances are assessed fairly in relation to the constitutional prescripts. Accordingly, the court would prevent the sale of a primary residence at less than the cost owed to the bank. This would be in keeping with the Constitution's vision of reducing inequality through the progressive realisation of housing.

Court oversight should thus bring about advancement in access to housing, not lead to insecurity of tenure. In other words, court oversight is lost where

it overlooks market value and agrees to deprive the debtor of a hard-earned home at a fraction of its value. This action by the court is not benign: here, financial interests trump housing rights.

Conclusion

For the many who are vulnerable to insecurity of tenure, the promise of a better life in South Africa remains just that: merely a promise. Progressive realisation of housing entails that there is continuous advancement in access to housing. However, the foundational concepts of reasonableness, justice and fairness, which accord with good faith in contracts, do not resonate with the forced sale of a primary home at a fraction of its value that does not satisfy the debt.

This is at odd with the key reason for the court's intervention, namely, to ensure the protection of housing rights: the sale of a primary home below its market value, under the watch of the court, is tantamount to a retrogression of these rights because such a sale renders the debtor homeless and in debt. A more progressive approach is to allow the sale at market value so that the debtor can satisfy the debt and have a surplus with which to again enjoy access to housing.

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This article is an extract from a forthcoming publication entitled 'Housing is a right not a commodity: The implications of sales in execution – a critical analysis of Nkwane v Nkwane and Others (2018) ZAGPPHC 153'.

References

Absa Bank Limited v Lekuku (2014) ZAGPJHC 244

ABSA Bank Ltd v Ntsane 2007 (3) SA 554 (T)

ABSA v Makube and Others (2018) GLDJ

Beukes S (2017) 'The effect of corruption on the "available resources" for the right to housing as espoused by the Constitution of South Africa' (unpublished LLD UWC)

FirstRand Bank Ltd v Folscher 2011 (4) SA 314 (GNP)

FirstRand Bank Ltd v Maleke and Others 2010 (1) SA 143 (GSJ)

Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169

Gundwana v Steko Development and Others 2011 (3) SA 608 (CC)

Housing Development Agency (2013) ***South Africa: Informal Settlements Status.*** Available at https://bit.ly/2zxZpS6

Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC)

Nedbank Limited v Mortinson 2005 (6) SA 462 WLD

Nedbank Ltd v Fraser & Four other Cases 2011 (4) SA 363 (GSJ)

Nkata v FirstRand Bank Ltd 2016 (4) SA 257 (CC)

Nkwane v Nkwane and Others (2018) ZAGPPHC 153

Rousseau J (1762) ***The Social Contract***. Available at https://bit.ly/37sbaWP

Sebola and Another v Standard Bank of South Africa Ltd and Another 2012 (8) BCLR 785 (CC)

Siroky D and Sigwart H (2014) 'Principles and prudence: Rousseau on private property and inequality' ***Polity*** 46

Standard Bank of South Africa Ltd v Bekker 2011 (6) SA 111 (WCC)

Standard Bank of South Africa Ltd v Saunderson 2006 (2) SA 264 (SCA)

UN Office of the High Commission on Human Rights Committee (2015) 'Spain violated the rights of a woman whose house risks being auctioned'. Available at https://bit.ly/2UF6VC0

UN Office of the High Commission on Human Rights Committee (2017) 'Housing can't be reduced to a financial asset for the wealthy, says UN expert'. Available at https://bit.ly/2YvoANA

FEATURE

The Judicial Contribution to Constitutional Obligations to Deliver Basic Services in South Africa

Ebi Achigbe Okeng Ebi

This paper seeks to critically analyse the nexus between human rights (hereinafter referred to as NBHR) and access to justice (hereinafter referred to as ATJ) as a means to promote greater access to justice in socio-economic matters in South Africa.

South Africa has been rebuilt on the strong foundations of a democratic legal system to ensure that the human rights violations of the past are not repeated. The Bill of Rights chapter 2 of the Constitution is a cornerstone of democracy that affirms the democratic values of human dignity, equality, and freedom (Liebenberg 2017: 1). In view of the many years of oppression that preceded contemporary South Africa, we must acknowledge everyone's rights and ensure they are upheld by the judicial system (Deegan 1999: 31). South Africa's Constitution legally enforces the vision of integrating social, economic and cultural rights with civil and political rights. Not only does it allow for citizens to vote and enjoy freedom of expression and right to fair trial, but they are able to hold the government accountable for infringing on their rights and freedoms (Gumede 2015: 252).

Background

In the South African justice system, socio-economic rights are accorded such importance that the country's constitution is one of the few national constitutions that expressly recognise socio-economic rights as justiciable rights. Unfortunately, countless citizens cannot count on the legal system to advance their socio-economic rights, either because of the cost and length of litigation or because victims of violations do not understand their basic rights (Dixon 2007: 390). In turn, the issue of inadequate free, quality legal services to the poor and marginalised has become a topic which is especially important to consider in the light of the key interrelated challenges of high unemployment, extreme poverty, and gross inequality.

The poor and vulnerable citizens, who need the most protection, encounter difficulty when enforcing their constitutional right to have access to justice in terms of section 34, they are always faced with challenges such as lack of understanding of their basic rights. As a result, such persons often suffer under discriminatory laws since they lack the legal means necessary to enforce laws that should protect them. Though the government of South Africa has committed itself to realising the rights in section 7 and

27 of the Constitution in terms of its developmental goals but in practice there is still plenty that need to be done.

The goal is to further consider possible approaches, challenges, and opportunities with regard to the nexus between human rights (NBHR) and access to justice (ATJ). This paper argues that emphasis should be placed on using improved quality access to free, quality legal assistance as a stepping stone to greater social justice in South Africa and this contribute and counter serious socio-economic ills to a certain level. Unless this comes to pass, a significant portion of the population will continue to suffer from negligible access to justice and be denied the constitutional rights promised to them at the advent of South Africa's democratic dispensation (Moyo 2015: 13).

Access to justice in South Africa

The purpose of ATJ was to redress injustice among all classes of South Africans after the end of apartheid. ATJ is implemented through the public and private sectors in the judicial system. Socio-economic rights must be considered in all types of legal matters because they are the fundamental basis of the Bill of Right and ensure that the judicial system is accountable for maintaining the basic standard of living for the citizens of South Africa (McQuoid-Mason 1999: 3, 8 & 11).

South African civil procedure is dictated by two principles of fundamental or natural justice, namely ***audi et alteram partem*** ('hear the other side') and ***nemo iudex in causa*** ('no one should be a judge in his or her own cause') (Van der Walt 2010: 1).

The principle of ***audi et alteram partem*** has its origin in the custom that one had one's grievances heard by a neutral party. The idea of the right of access to court, as envisaged by section 34 of the Constitution, does not simply mean the right to litigate but includes the right to have a matter heard by someone impartial. The judicial authority of the Republic of South Africa is vested in the courts (section 34 of the Constitution).

> **Transforming our society into one in which there is human dignity, freedom and equality lies at the heart of our new constitutional order**

It is also constitutionally mandated that the courts must remain independent and be subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice (see section 165 of the Constitution). The impartiality of the judiciary is upheld when it remains independent and accountable for its decisions – this gives embodiment to the principle of ***nemo iudex in causa.***

We live, however, in a society in which there are great disparities in wealth. Chaskalson noted that South Africans experience high levels of unemployment, inadequate social security, and limited access to clean water and adequate health services (Sobramooney 1998: 45). He added that these conditions existed when the Constitution was adopted and that the commitment to address them by transforming our society into one in which there is human dignity, freedom and equality lies at the heart of our new constitutional order. Chaskalson concluded therefore that as long as these conditions continue to exist, that aspiration will have a hollow ring (Sobramooney 1998: 45).

Criminal litigation protects socio-economic rights as well. According to section 35(2)(e) of the Constitution, 'Everyone who is detained, including every sentenced prisoner, has a right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.' As regards criminal procedure, a person who has been arrested and detained has

rights that must be upheld in terms of the Constitution (Van der Walt 2010: 1).

As Jessie Duarte (2020) remarks, corruption is deadlier than the coronavirus. It denies the people of South Africa, especially the poor, their enjoyment of socio-economic rights: in other words, access to socio-economic rights is a major problem because corruption has depleted resources that are needed for the state to comply with its obligation to deliver basic services. This reflects poorly not only on the credibility of the government but on the Constitution itself. Van der Walt (2010: 1) argues that the government cannot be the only party that is responsible for delivering justice and that community involvement is also important.

In respect of the Constitution, the government merely has to provide 'access' to the judicial system; thus, providing functioning institutions would suffice. However, in regard to implementing socio-economic rights, 'access' involves more than just functioning institutions but requires that the judicial system define all rights with reference to citizens' social and economic contexts (Ramotsho 2011: 1). South Africa's judicial system has functioning dispute-resolution institutions and processes, but conditions may prohibit vast numbers of citizens from utilising the legal system (Van der Walt 2010: 1). These conditions include poverty, illiteracy, geographical location and lack of information. The government lacks the resources to make the legal system more accessible, which is why it has to be selective in interpretations of socio-economic rights, as is illustrated in the case of ***Soobramoney*** (1998).

Contextualising the nexus between human rights in South Africa

In case of ***Soobramoney*** (1998) the socio-economic right at issue was the right to health care envisaged in section 27 of the Constitution. Section 27(3) gives everyone the right not to be refused emergency medical treatment, while section 27(1)(a) entitles everyone the right to access to health-care services. The question the court had to consider was whether Mr Soobramoney ought to receive dialysis treatment at a state hospital in accordance with the provisions of the Constitution. The KwaZulu-Natal Department of Health's policy was to limit access to dialysis to persons suffering from acute renal failure or to chronic renal failure patients awaiting a kidney transplant. This was necessary to ensure that those whose kidneys could be completely cured were given the best chance of eventually living without dialysis.

The court took cognizance of the fact that the state has a constitutional obligation within its available resources to provide health care. It held, however, that should such treatment be provided to Mr Soobramoney, it would also have to be provided to all other persons in a similar position to him and that the resources available to the hospital could not accommodate such a demand (Soobramoney 1998: 23).

The cost of providing renal dialysis twice a week to a single patient is R60, 000 per annum, and to expand the programme to cover everyone who requires renal dialysis would make substantial inroads into the health budget and prejudice other obligations that the state has to meet.

The court concluded that it had not been shown that the state's failure to provide renal dialysis facilities for all persons suffering from chronic renal failure amounted to a breach of its constitutional obligations as it was not a condition that called for emergency remedial treatment. It found instead that the decision to limit access to dialysis in these circumstances was rational and that 'a court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters'.

The approach taken by the court was indicative of its reluctance to delve into a substantive account of what entitlements fall within the scope of the right of access to health-care services and how these might impact on the allocative decisions taken by the state. Therefore, ultimately, to be justifiable, a decision to limit access to health care need only be 'rational' and taken honestly by a lawful authority.

Chaskalson P, as he was then known, concluded that mere 'access' to health care and treatment services would suffice. The courts thus take a restrictive interpretation when determining access

to socio-economic rights because of the lack of availability of resources and funding. Thus, everyone has a right to socio-economic rights in terms of the Constitution, but the judicial system indirectly infringes on access to these rights because South Africa does not possess the infrastructure to maintain such rights.

The Constitution provides for equal rights but rights may be limited in terms of section 36 of the Bill of Rights at the discretion of the court. According to section 36(1), 'The rights in the bill of rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking all factors into account.' Section 36 provides that courts have the jurisdiction to limit rights where this is deemed reasonable and justifiable, as happened in ***Grootboom.***

In this case, the court stressed that the rights in the Bill of Rights are interrelated and mutually supporting. Human dignity, freedom and equality are denied to those without food, clothing or shelter. The court held that the state must also foster conditions that enable citizens to gain access to land on an equitable basis, though this does not oblige the state to go beyond its available resources or to realise these rights immediately. Nevertheless, the state must give effect to these rights, and in appropriate circumstances the court can and must enforce these obligations.

The court rejected the contention that the right to housing in section 26(1) of the Constitution had any interpretive content independently of the duty to take reasonable measures under section 26(2) of the Constitution. It found that the state's positive obligation under section 26 was primarily to adopt a reasonable policy, within its available resources, to ensure access to adequate housing over time.

It is clear from both of the cases mentioned above that emphasis is placed on the state's available resources, irrespective of whether resources have been budgeted or not to a specific programme. Such budgetary constraints are placed on the realisation of constitutional rights and obligations performed by the state which have been constitutionally validated and upheld by the constitutional court.

Apart from budgetary constraints that prevent socio-economic rights from being realised for all South African citizens, the flexibility of the reasonableness standard makes success in any socio-economic rights claims difficult to predict. The reasonableness standard was adopted by the court in ***Grootboom*** and has been adhered to ever since. The reasonable test focuses on the ability or appropriateness of government action to give effect to the socio-economic rights contained in the Constitution. However, the specific goods and services guaranteed by the rights themselves are not taken into account.

South Africa's infrastructure needs to be improved in order to eliminate the use of section 36 of the Bill of Rights. However, the country has not evolved enough to allow strict interpretation when implementing the Bill of Rights and is still combating the atrocities that occurred in the past. Strict interpretation creates animosity towards the Bill of Rights because citizens lack the knowledge to understand the social and economic factors that affect the implementation of these rights. In order for the Bill of Rights to have more than formal value in society, it must be supported by government action promoting constitutional values.

As such, the contribution of the paralegal cannot be overemphasised, as it has helped to bridge the gap between the poor and the legal system and improved their access to justice. Without paralegals, most of South Africa's poor would not have access to justice, as legal services are too expensive and beyond their reach.

Conclusion

It is that clear that socio-economic rights are more complex when interpreting. Social and economic conditions impact on these types of rights, while the judicial system is not equipped to redress the issues caused by a lack of access to courts. South Africa has failed to achieve a more just redistribution of resources that would allow a broader concept of 'accesses to justice to prevail. The government is hence not held fully accountable for failing to deliver justice to the people who need it.

Access to justice cannot be understood merely as the ability to gain access to legal and state services; it must encompass social, economic and environmental justice. What is thus necessary is improved and better co-ordinated provision of free legal services dealing with socio-economic matters. Expanding the mandate of free legal services to poor South Africans would enhance services that are already available, such as Legal Aid South Africa. Their mandate must be expanded to focus on socio-economic disputes and thereby guarantee access to justice for all.

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References

A(1) Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)

(2) South African Constitution: The Bill of Rights https://www.sahistory.org.za/article/south-african-constitution-bill-rights (Date of use: 8 July 2019).

(3) Liebenberg S Socio-economic rights: Adjudicating under a transformative Constitution (Juta & Co Ltd 2010)

(4) (Deegan H. 1999: 31). Deegan H South African Reborn: Building a New Democracy (UCL Press Limited1999)

International Covenant on Economic, Social and Cultural Rights 1996, adopted by United Nations General Assembly Resolution 2200a (XX1) of 10 December 1996

(5) Gumede, V. Political Economy of Post-apartheid South Africa., 2015, 252

https://www.codesria.org/spip.php?article2625&lang=en (Date of use: 8 July 2019).

(6) Ebi EAO, Enforcing the Right of Access to Healthcare Services in South Africa 2016, 126 available at https://core.ac.uk/download/pdf/129899180.pdf access 11/6/2019

(7) (Lomahoza K (2013) 16 Universal Declaration of Human Rights 1948

(8) McQuoid-Mason D, Access to Justice in South Africa by David McQuoid-Mason 1999: 3, 11 & 12 http://clarkcunningham.org/LegalEd/SouthAfrica-McQuoid-Mason-Windsor.pdf

(9) *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97)[1997] 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)

(10) Section 35 (2) (e) of the Constitution of South Africa

(11) Van der Walt, S. & Du Plessis, T., 2010, 'Leveraging multi-generational workforce values in interactive information societies', *SA Journal of Information Management* 12(1), Art. #441, 7 pages. DOI: 10.4102/sajim.v12i1.441

(12) Ramotsho K 2011: 1 'High litigation costs deprive the poor access to justice' http://www.derebus.org.za/high-litigation-costs-deprive-the-poor-access-to-justice/ (Date of use: 8 July 2019).

(13) *Government of RSA and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

Soobramoney v Minister of Health 1998 (1) SA 765 (CC).

(14) (section 26 (2) of the Constitution)

(15) Chenwi L 'Unpacking progressive realisation its relation to resources, minimum core and reasonableness and some methodological considerations for assessing compliance' 2013 ***De Jure***

(16) Dugard J International Law a South African Perspective (4th ed Juta & Co Ltd 2011)

(17) Liebenberg S 'The interpretation of socio-economic rights' in Chaskalson et al (eds) Constitutional Law of South Africa (2ed OS 2003 Juta & Co Ltd)

FEATURE

‘Counting in’ Farm Dwellers: Using Record-Keeping to Realise the Rights of People Living on Commercial Farms

Dr Donna Hornby and Laurel Oettle

Farm dwellers – that is, people who live on commercial farms owned by someone other than themselves – are a heterogeneous social group whose socio-economic rights, including those to land, continue to be violated and neglected. Little progress has been made in realising the constitutional rights farm dwellers have to housing, water, sanitation and security of tenure. A key reason for this is that farm dwellers are not ‘legible’ to the state: there is no data available that enables the state to plan and implement programmes targeting them.

To address this, the Association for Rural Advancement (AFRA), a land rights NGO, implemented a pilot project in 2018 to record the rights of 850 farm dweller households in the Umgungundlovu District in KwaZulu-Natal province. Each household was issued a record with a GPS location, property description, household members, and land and service rights. This ‘put farm dwellers on the map’, allowing them to be ‘counted in’. It facilitated progress on a farm dweller programme to address their legal rights and inclusion in the district IDP.

The pilot shows the importance of basic geo-referenced records with demographic data in realising a range of socio-economic rights for people who live in off-register contexts, such as commercial farms and urban shack settlements. It also points to a possible role for civil society organisations in spaces where state authority has little traction.

Invisible and marginalised

Farm dwellers are among the most invisible and marginalised groups in South Africa. They live on other people’s property and experience high levels of poverty and insecurity, which are historical conditions perpetuated today by state failure and the power dynamics on farms.

Most farm dwellers know no other place that they regard as home. They fight to hold on to the security and cultural rootedness their homes provide in spite of the long-term decline of farm employment and increased post-apartheid evictions (Presidential Advisory Panel on Land Reform and Agriculture (PAP) 2019: 4; Wegerif et al. 2010). Their history, poverty, insecurity and invisibility make farm dwellers a specific category of rural dweller with specific needs.

> **We suggest that an interim measure is to 'count farm dwellers in' by providing them with records of residential rights**

Despite this, the state has made little progress in implementing their constitutional rights to equitable access to land, housing, water and sanitation, and decent labour conditions.

We argue that the persistence of this situation today is partly a legacy of South Africa's dual system of property rights. The property system that evolved historically to give whites registered ownership of land is tightly integrated with state planning, spatial development, and private-sector professionals and banking. It is a land management 'edifice' which leaves people who do not have title deeds 'invisible' to the system (Kingwill et al., 2017).

Historically, Africans were forced into land administration systems which were managed by localised authorities – the chief, the magistrate, the farmer – and disconnected from white South Africa's overarching land management system. The effect of their consequent invisibility is that they cannot be systematically organised and planned for as groups that have rights to state services. The PAP argues that a coherent, comprehensive land management system thus requires a new approach to 'recognising and recording the diverse range of tenure rights that exist within South Africa' (2019: 87) as a first step to supporting land reform.

We suggest that an interim measure is to 'count farm dwellers in' by providing them with records of residential rights and to collect and use demographic and socio-economic data in municipal planning. AFRA, which has worked for 40 years to redress the land and livelihood rights of Africans living on white-owned commercial farms, has piloted such an approach in the Umgungundlovu District in KwaZulu-Natal, and it is this approach which the article considers.

Who are farm dwellers?

Farm dwellers are a heterogeneous social group who live on commercial farms owned or managed by someone other than themselves. They include people (and their families) who live on the farm where they work as well as people who no longer work on the farm where they live and their families. The mean income of farm dwellers in the Umgungundlovu District in 2017 – R4,400 per month per household or R611 per individual – was below the lower-bound poverty line (of R810) that the government uses as the preferred threshold for policy-making and monitoring (AFRA 2017). As a result, farm dwellers must sacrifice either basic needs or sufficient food since they cannot afford both.

Currently, 2.7 million people, comprising more than 750,000 households, live on farms in South Africa. Visser and Ferrer (2015) report that in 2014 only 51 per cent of farm workers had permanent employment, while 25 per cent were seasonal and part-time workers (mainly women). They also report low wages, the increasing use of labour brokers, and the fact that 58 per cent of dweller families live on commercial farms but no longer work on them.

According to Visser and Ferrer, the main causes of labour restructuring on farms are intermittent but persistent drought, the poor implementation of land reform, and agricultural profitability pressures resulting in mechanisation. Farm-dweller 'migration' (through eviction or in search of employment) into peri-urban informal settlements has contributed to the rapid growth of these areas, resulting in a shift of poverty to towns and cities (Hornby et al. 2018; Murray 1995).

It is widely acknowledged that land reform has been largely unsuccessful in addressing farm dwellers' needs, leading to deepening rural poverty and marginalisation. Among the reasons for this are that legislation has not achieved intended outcomes to

protect farm dwellers; that the current approach of providing tenure security on a project-by-project basis is slow and inefficient; and that systems to monitor rights violations – including evictions – on commercial farms do not exist (DRDLR 2018).

The status quo is unsustainable and keeps farm dwellers overly dependent on farmers for the enjoyment of their rights to homes and basic services.

Constitutional rights-holders whom the state cannot 'see'

Section 25 of the Bill of Rights provides that a person whose land tenure is legally insecure as a result of historical racially discriminatory laws or practices is entitled to secure tenure or comparable redress. As a result of apartheid's legacy of legal, spatial and bureaucratic fragmentation, this provision applies to approximately 60 per cent of South Africa's total population (Hornby et al. 2017).

The extent of this right has been defined in a number of laws that provide statutory protection for off-register holders of land rights. The latter include farm dwellers (in terms of the Extension of Security of Tenure Act, 1997) and labour tenants (in terms of the Land Reform (Labour Tenants) Act, 1996), as well as customary land rights-holders, occupiers of urban land and city buildings, and members of communal property associations.

Despite these laws, however deprivation of rights to land persists across all categories of non-registered land rights holders. How is this possible? Kingwill (2019a: 7) argues that South Africa's history of land dispossession led to a 'disproportionate corrective focus on "rights"' and the neglect of the legal and bureaucratic infrastructure necessary to manage and enforce these rights – a critical element given South Africa's legal dualism and the fragmentation of land administration under apartheid. The statutory definition of rights and the juridical institutions to support them are only one component of the architecture necessary to realise secure tenure.

The absence of land administration institutions for managing off-register rights isolates these rights-holders from public and private services and benefits. The consequence is that only registered rights are 'fully legally recognised rights' that are capable of fitting into 'the spatial planning, land use management and revenue frameworks, which makes them eligible for servicing' (Kingwill 2019a: 6). The government has not explored alternative methods for recording and administering statutory but non-registered rights.

A multiplicity of informational factors also place farm dwellers in the state's blind spot. Local practices of measurement and landholding – which include the complex overlapping rights found on farms – are 'illegible to the state in their raw form' (Scott 1998: 24). Governments can 'see' only regular, numerical data that creates big patterns, and thus they require simplified, aggregated statistics for ease of comparison and planning (ibid: 27). However, in South Africa, government information systems are fragmented, with varied, and often incompatible, systems and data sources.

In addition, farm dweller mobility, together with the private ownership of the properties where they live, contributes to the complexity of collecting and maintaining accurate data on farm dwellers. This makes it difficult for the state to secure the information it needs to plan effectively for farm dwellers and other categories of off-register rights-holders.

Records: Enumeration as a 'promising practice'

Enumeration provides informational links between population, rights and space. It is an incremental process that maps households to statutory rights (such as ESTA and labour tenancy) and to a set of numerical values (such as GPS co-ordinates). The data set that the enumeration creates thus links particular households with identified rights to specific spatial locations and can be used in multiple ways:

- It provides evidence of residence as an interim measure for securing tenure, and has been used in this way in urban shack settlements where

settlement upgrading is planned for the future (Royston 2013; Barry and Kingwill forthcoming).

- It documents provisional evidence of rights where such evidence does not exist officially. It is provisional because it can be challenged in court by the property owner.
- It can be used in municipal planning processes. Because it links particular populations to particular spaces, municipalities and government departments responsible for housing and services can identify who needs them and where those services are necessary.

Royston (2013) describes enumeration as one of a set of 'promising practices' for building a body of alternative practice that challenges the status quo and that can fill the gap where the state is failing to implement constitutional rights.

Piloting records for farm dwellers

In 2017, AFRA surveyed 843 farm-dweller households in the Umgungundlovu District. The survey covered 81 farms and constituted 15.3 per cent of the district's farm-dweller population. It doubled up as an enumeration of existing occupiers in the sample area, providing an information baseline and data bank. It also generated evidence of individuals' residential status, and mapped them using spatial identifiers for each household. This information was used to create records of residential occupation.

The extent of poverty and unemployment found among farm dwellers is of such a scale and gravity that their tenure must be seen a priority social and political issue. Hornby et al. (2018: 9) argue that, by Stats SA's definition, farm dwellers are one of the poorest, albeit socially differentiated, social categories in the country, and that their poverty levels and the inequalities may be obscured in national data sets.

Farm-dweller households are larger than the national mean, at 7.2 members, with 55.8 per cent with six or more members as opposed to the national mean of 3.5 members, indicating the national importance of 'the farm' as an occupied, lived-in space and not merely the site of commodity production.

The data shows farm dwellers and labour tenants should not be confused (at least in this regional context) with straightforward 'employees'. More than half of the households have graves on the farms where they live, which forges a link between identity, place and belonging and possibly explains why 'the entanglement of graves, land, family, and community … hold such potential for conflict between farmers and farm dwellers' (Hornby et al. 2019: 15). Apart from actual eviction or attempts to evict, some owners threaten farm-dweller security by constricting 'the space and normative activities' of farm dwellers by targeting those aspects 'that underpin "home" for farm dwellers' (ibid).

It was in recognition of this complex layering of a social tenure over the formal registered ownership of the farm, together with the state's failure to implement land reform, that prompted AFRA to document farm-dweller rights and give interviewees records of that documentation.

The resulting 'record' is an A4 sheet. The front page records the (sur)name of the household; the name of the person interviewed; the name of the municipal ward councillor; farm property details including ownership, title deed reference and location of the farm; a list of members of the family and when they were born; a map and photograph of the respondent's house with a GPS location that makes exact location of the house and farm possible; and a photograph of the identity document of the respondent. In other words, the records show the relationship between the rights-holders and the underlying registered rights.

On the back of the record is a summary of the household's land use and access to services, and space for an affidavit verifying the truth of the oral information provided to AFRA to be witnessed and signed by a councillor (or Commissioner of Oaths such as accredited police officers).

The records were produced and distributed after the survey was complete, nearly a year after data collection had begun. While AFRA hoped that the records would provide legal evidence in the event of

an eviction and a verified address that would give farm dwellers some autonomy from the farm owner to negotiate public spaces (such as voter registration and access to school), the responses from farm dwellers indicate how important the fact of a record is to a sense of citizenship.

One elderly woman, after receiving her record from AFRA staff, said: 'I thank you, my children. I can now see my home, and my children are also visible. I am no longer afraid of anything. I am at home here.' Perhaps even more surprising has been the response of councillors and the police, even amongst those who initially questioned whether they had the authority to serve as commissioners of oaths. Both expressed support for the records, which would allow them to locate particular houses if they needed to do so in the course of their duties, and which they have struggled with to date.

Two critical issues have emerged. The first has been the use of the records as 'proof of address' (or PoR). The physical address, together with the underlying data set, helps to put people 'on the map' for the purposes of linking them up with the state, especially local government for service provision, but also private services such as subscriptions and accounts. Thus, apart from land tenure issues, these documents potentially and actually make people visible for a whole range of state and private functions, which is one of the roles of titles.

Secondly, AFRA emulated the emerging urban practice of including the signatures of local government officers (in this case municipal councillors) and police who have powers as commissioner of oaths to formally witness documents of residence. The official affidavits on AFRA's records has made a significant impact on their local legitimacy and usefulness, and has increased their chances of being taken seriously by state officials as well as landowners and the private sector.

Conclusion

The AFRA pilot project highlights farm dwellers as a category of marginalised people with insecure tenure despite statutory rights and the urgent need to develop an inclusive land governance system.

Post-apartheid South Africa has yet to grasp the full implications of focusing on rights while neglecting the institutional architecture required to realise these rights

Farm dwellers and other statutory rights-holders continue to experience insecure tenure and essential-services marginalisation because they live in the shadows of a land management 'edifice' that is based on registered land rights, the consequence of South Africa's historical legal dualism. The integration of property with demographic and spatial information, spatial planning, service delivery, and finance renders off-register rights-holders, despite their statutory protections, invisible to the state. Post-apartheid South Africa has yet to grasp the full implications of focusing on rights while neglecting the institutional architecture required to realise these rights and link rights-holders to the state as the bearer of duties.

The approach taken by AFRA, like those in some urban shack-dweller settlements, is an interim measure that contributes to the long-term goal of incorporating off-register rights in a larger integrated land administration system. Although it is interim, it goes beyond the idea that statutory rights are merely protection ***from*** a threat to rights that can be positively recognised. Such approaches help to break down the binary opposition between 'formal' and 'informal', and demonstrate how bottom-up interventions can inform a staged process of top-down institutional changes.

Moreover, the approach demonstrates a possible

role for civil society in spaces where the state is functionally absent. Weak public authority can be appropriated by non-state authorities that have local legitimacy, particularly when there is co-operation with local-level public authority, creating the prospect of hybrid governance involving a combination of state and non-state actors, such as NGOs and community-based organisations. The involvement of civil society in bottom-up land administration initiatives could see the organic development of local practices that challenge the status quo and lead the way for national policy.

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References

Barry M and Kingwill R (forthcoming) 'Local record systems as a going concern in Monwabisi Park Informal Settlement'

Department of Rural Development and Land Reform (31 August 2018) PowerPoint presentation: 'Towards a farm dweller implementation plan'

Hornby D, Nel A, Chademana S and Khanyile N (2018) 'A slipping hold? Farm dweller precarity in the changing agrarian economy and climate of KwaZulu-Natal, South Africa' ***Land***, 23 March.

Hornby D, Royston L, Kingwill R and Cousins B (2017) 'Introduction: Tenure concepts, practices and theories in South Africa' in Hornby D, Kingwill R, Royston L and Cousins R (eds) ***Untitled: Securing Land Tenure in Urban and Rural South Africa***. Pietermaritzburg: University of KwaZulu-Natal Press, 1-43

Kingwill R (2019a) 'Inclusive land administration in the context of people-centred land governance. Discussion document prepared for LandNNES' (January 2019). Available at https://landnnes.org/discussions-documents/

Kingwill R (2019b) ***AFRA Pathways Project: Tenure Review.*** Available https://bit.ly/2YzrRLA

Kingwill R, Hornby D, Royston L and Cousins B (2017) 'Conclusion: Beyond "the edifice"' in Hornby D, Kingwill R, Royston L and Cousins R (eds) ***Untitled: Securing Land Tenure in Urban and Rural South Africa***. Pietermaritzburg: University of KwaZulu-Natal Press, 388-430

Murray C (1995) 'Structural unemployment, small towns and agrarian change in South Africa' ***African Affairs*** 94(374)

Presidential Advisory Panel on Land Reform and Agriculture (2019) ***Final Report of the Presidential Advisory Panel on Land Reform and Agriculture for his Excellency the President of South Africa***

Royston L (2013) ***Promising Practices: A Guide on Incrementally Securing Tenure in Southern Africa***. Available at https://bit.ly/30DITLf

Scott JC (1998) ***Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed.*** Yale University Press

Visser M and Ferrer S (2015) ***Farm Workers' Living and Working Conditions in South Africa: Key Trends, Emergent Issues, and Underlying and Structural Problems.*** International Labour Organisation (ILO) Research Report

Wegerif M, Russell B and Grundling I (2005) ***Still Searching for Security: The Reality of Farm Dweller Evictions in South Africa***. Nkuzi Development Association and Social Surveys

EVENT

The Community Leaders Training Workshop, Cape Town, 10-11 March 2020

Robert Doya Nanima

This workshop formed part of a series that since 2015 has been looking at issues of housing, health, social security and other constitutional matters. With its emphasis on the social determinants of the right to health, the workshop was attended by community representatives from Fisantekraal, Ocean View, Bloekombos and Manenburg, along with experts on socio-economic rights in the areas such as health and housing. Nine presentations were made over a period of two days.

Prof Ebenezer Durojaye discussed the social determinants of the rights to health, which he described as the conditions in which people born, live, work and age and which affect their health. These relate to factors such as sanitation, electricity, water, food, housing, employment, poverty and culture.

Prof Durojaye said South Africa had ratified international instruments that provide for the right to health. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples' Rights. He also referred participants to the national laws, which include the Constitution. He discussed various sections, such as section, 27 in a wider context that related to the right to health, maternal mortality, child care, sufficient food and water, and social security.

Prof Durojaye explained that the state had a duty to take reasonable steps to ensure progressive realisation of the right within available resources. He referred to cases such as ***Treatment Action Campaign*** and ***Grootboom*** where the government had to show that it had taken reasonable steps to ensure that the right to health is progressively realised. He also referred to ***Soobramoney v Minister of Health***, where the principle was that a health service provider is expected to balance the provision of the right to emergency treatment without impugning the same rights of others.

He reiterated the need for the community to ensure that it holds the government accountable. Prof Durojaye reminded members that questioning how the government uses resources is crucial to ensuring that the government meets its obligations on the right to health. He said health care services have to adhere to the principles of availability, accessibility, acceptability and quality.

Dr Soraya Beukes from the Cape Peninsula University of Technology discussed the nexus where the right to housing and right to health overlap. Her emphasis was on the sexual and reproductive health of women in the communities. She was of the view that failure to release resources to the maximum was contrary to the ICESCR, and said that the Auditor-General had to account for the various forms of malfeasance that are

> **Questioning how the government uses resources is crucial to ensuring that the government meets its obligations on the right to health**

being committed. This included taking action on non-adherence to laws and policies, poor bookkeeping, unlawful payments, non-deserving contractors, and incompetence.

Going forward, she recommended that community-based organisations engage with policy-makers and revisit the housing bouquet on offer. In addition, Parliament has to control the executive's spending of public funds. She advised that the local housing authority should provide information under the Promotion of Access to Information Act.

Dr Olufunke Alaba of the University of Cape Town discussed the implications of social inequalities for the enjoyment of the right to health. These affect all aspects of a girl's life, such as relationships with peers and family members, and yield outcomes that entrench inequality if not dealt with properly. The presenter was of the view that we need to eliminate all forms of discrimination starting now, and called for the girl child to be empowered to lead to the empowerment of the future woman. She advised that collectively everyone in the community should act appropriately and actively.

Prof Dianne Cooper of the University of the Western Cape led the conversation on the link between socio-economic inequality and issues related to girls' menstruation in informal areas. She underscored the effect of menstruation on girls' ability to attend school. Challenges included lack of proper sanitary pads, which led to girls missing school and losing out on classes for about five days every month. She highlighted other challenges in the communities, such as lack of facilities, lack of privacy, and issues of bullying, shaming or humiliation.

The second day began with an overview by Ms Valma Hendricks of the previous days' session. Ms Paula Knipe led the presentation on gender inequality as a social determinant of HIV/AIDS in South Africa. The discussion examined, among other things, the use of legal protection, sexual and health practices, and the role of information services in the prevention of HIV/AIDS.

Ms Damaris discussed the effects of violence and gangsterism on the right to health, including sexual and reproductive health, in the context of on SDG 3 and 5. She stated that Goal 3 is to ensure healthy lives and wellbeing for people of all ages. Goal 5 covers a range of issues of discrimination, violence, early and forced marriages, unpaid domestic work, participation in politics, economic and public life, access to sexual and reproductive health and rights, and access economic resources.

She reiterated the challenges that women face in reproductive health. These include inadequate levels of knowledge about human sexuality, inappropriate or poor- quality reproductive health information and services, and the prevalence of high-risk sexual behaviour and discriminatory social practices.

Dr Anan Nyembezi led a discussion on sexual and reproductive health and the links between education and access to health. He explained the life-cycle approach to reproductive health and how it affects children from 0 to 9 years, adolescents, youths and persons in the post-reproductive years. He said that at the centre of these cycles are challenges such as unplanned pregnancies, gender violence, certain occupational hazards, and depression. He said educational attainment, working conditions and social support can improve an individual's standard of health.

Robert Doya Nanima is a postdoctoral researcher at the Dullah Omar Institute.

UPDATE

Statement by the CESCRC on Covid-19 and Its Human Rights Implications

Paula Knipe

On 6 April 2020, the Committee on Economic, Social and Cultural Rights (CESCR) released a statement on the impact of Covid-19 and its implications for the enjoyment of economic, social and cultural rights. The Committee urges states to act within a human rights framework that recognises their commitment to international obligations when enforcing measures to curb the transmission of the virus.

The Committee highlights the indivisibility and interdependence of all human rights, and the effects of COVID-19 on all spheres of life – including the economy, social interaction, education, and production. While the pandemic is essentially a 'global health threat', the Committee notes that it is directly affected by housing, food, and water. The statement illustrates how marginalised groups are disproportionately affected by the pandemic, and notes that 'no one should be left behind in taking the measures necessary to combat this pandemic'. The Committee also recognises the threat of the pandemic on deepening gender inequalities, as women are still largely burdened with the care of the young, old and sick.

The Committee reiterates that states are obligated to take measures to mitigate the effects of the pandemic. They have to ensure that the emergency measures taken are reasonable, proportionate and in line with international human rights standards. These measures should be based on the best available scientific evidence and aimed at ensuring the fulfilment of human rights obligations, particularly public health. Accordingly, the Committee calls on states to use their maximum available resources to respond to the pandemic equitably.

Interestingly, the Committee notes that 'health-care systems and social programmes have been weakened by decades of underinvestment' and consequently are 'ill-equipped to respond effectively ...with the intensity of the current pandemic'. With this in mind, the Committee urges states to adopt appropriate measures focusing on the public health system, decent work, social protection, sanitation, food and water.

In doing so, states are urged to protect marginalised groups, provide accurate and accessible information about the pandemic, and increase international assistance and co-operation in consideration of 'fragile countries' and extraterritorial obligations.

The Committee highlights that these measures are necessary both for immediate purposes as well to ensure that 'the world is better prepared for future pandemics and disasters'.

For more information, visit ***https://undocs.org/E/C.12/2020/1***

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