

ESR REVIEW

Economic and Social Rights in South Africa

Ensuring
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Editorial

This is the second issue of the *ESR Review* for 2009.

Fighting poverty remains at the centre of the South African government's focus. This was highlighted by President Jacob Zuma in his first state of the nation address to Parliament on 3 June 2009. The provision of social services, health care and education is another key priority of the new government. In addition, as part of social infrastructure development, the government has committed itself to providing 'suitably located and affordable housing and decent human settlements'. In addition, ensuring equal access to housing for all is crucial.

In that regard, Heléne Combrinck examines the implications of the right of access to adequate housing for women experiencing domestic violence and the nature and extent of the South African government's obligations. Combrinck observes that the government's approach to housing for women experiencing domestic violence falls short of the standards set by the Constitution and international human rights law in several respects.

Siyambonga Heleba considers

the extent to which the South African government has met its constitutional obligation to provide access to sufficient water. Heleba concludes that though great strides have been made in ensuring access to water to poor households, many still do not have access to water, or have access to insufficient water.

Continuing the discussion on access to water, Jackie Dugard and Sandra Liebenberg review a recent decision of the South African Supreme Court of Appeal on the sufficiency of the City of Johannesburg's free basic water policy and the lawfulness of prepayment water meters. Dugard and Liebenberg argue that notwithstanding promising aspects in the judgment, it fails to provide normative clarity in interpreting the right of access to sufficient water and the nature of the obligations it imposes on water services providers.

Reverting to the question of access to housing, Lilian Chenwi examines a recent decision of the South African Supreme Court

CONTENTS

- Access to housing for women who are victims of gender-based violence** 4
- Realising the right of access to sufficient water 7
- Muddying the waters: The SCA's judgment in the *Mazibuko* case** 11
- Enforcing housing rights 17
- Seminar on litigating socio-economic rights at the international level** 22
- Public hearings on the Millenium Development Goals and the realisation of economic and social rights 23
- New publication** 26
- Non-discrimination in socio-economic rights 27

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of Appeal, in which it overturned a High Court judgment ordering the Ekurhuleni Metropolitan Municipality to buy land which had been unlawfully occupied by about 76 families. Chenwi observes that the case illustrates the difficulties that poor people face in accessing housing and shows that there are still questions as to the extent to which courts should defer to the executive or administrative agencies in the area of socio-economic rights in general and housing rights in particular.

In this issue, we also provide a summary of election promises of the African National Congress (ANC) in relation to socio-economic rights, particularly health care, education, housing, social security, food, basic water, electricity, sanitation and land. Since the ANC won the elections, it must be held to account on its promises.

The issue also includes reports on two events. First, Lea Mwambene reports on a seminar on litigating socio-economic rights at the international level and introducing the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), hosted by the Socio-Economic Rights Project of the Community Law Centre. Second, Timothy Serie reports on the public hearings on the Millennium Development Goals and the realisation of socio-economic rights organised by the South African Human Rights Commission. A crucial issue highlighted during both events is the urgent need for South Africa to ratify the ICESCR, having signed it almost 15 years ago.

We conclude with a summary of the recently adopted General Comment 20 of the United Nations Committee on Economic, Social and Cultural Rights, which deals with non-discrimination in economic, social and cultural rights. It aims to clarify the obligations on states, the prohibited grounds of discrimination and the measures to be taken by states parties to ensure that discrimination in the exercise of socio-economic rights is eliminated at the national level.

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

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

Access to housing for women who are victims of gender-based violence

Heléne Combrinck

South Africa currently faces high levels of domestic violence and an acute housing crisis. A considerable proportion of the women who experience gender-based violence invariably lack access to housing.

Yet the link between the right to housing and the incidence of gender-based violence is rarely made.

This article considers the implications of the right of access to adequate housing for women experiencing domestic violence. It examines the nature and extent of the South African government's obligations in relation to the right of women who are victims of gender-based violence (particularly domestic violence) to have access to adequate housing.

Housing needs of women experiencing domestic violence

One may explain people's changing housing needs through what is called the 'Housing Ladder' (Wicht, 2006: 9). This 'ladder' represents a continuum, ranging from emergency shelter at one end to full independent home ownership at the other. In brief, the first stage represents a person's initial need for basic *emergency housing*. Thereafter, the person will need a more secure form of *shelter* where a greater level of support is offered. From this, the person may move into *transitional housing* before progressing to *communal housing*. The latter entails higher rent and less support. As the person becomes more independent, he or she can move into *social housing*, where there is an individual flat with its own facilities such as a kitchen and bathroom, or secure a separate family house.

Women who are abused should ideally be able to stay in their own homes (with their children) while the *perpetrator* moves out. In practice, however, it is usually the woman who leaves and seeks alternative accommodation (Emdon, 2007: 4). Depending on the woman's financial resources and the ability of family or friends to accommodate her and her children, she may seek accommodation at a shelter for abused women when she leaves the violent home. Such shelters in South Africa are mostly run by non-governmental organisations and are currently mostly situated in urban areas. The operational costs are subsidised by the provincial departments of social development (Charlton, 2004: 30). The majority of these shelters operate at maximum capacity, often with a waiting list (Wicht, 2006: 9).

The length of the woman's stay in such shelter is

usually limited to, for instance, a maximum of three to six months. During this period, she will receive emergency or short-term counselling and, at some shelters, have access to legal advice and assistance regarding, for example, obtaining a protection order in terms of the Domestic Violence Act or instituting divorce proceedings against the perpetrator. These 'first-stage' shelters usually also accommodate the woman's children, although certain shelters do not allow boys over the age of 12 (Emdon, 2007: 11). Because most shelters offer short-term stays only, the biggest worry for victims of domestic violence is where to go when their time in the shelter ends. For many women, the realities of unemployment and financial dependence on their partner leave them with no option but to return to the abusive relationship (Charlton, 2004: 31).

A number of shelters (such as the Saartjie Baartman shelter in Heideveld, Cape Town) offer 'second-stage' accommodation, where women can stay for up to two years. In some instances, women are expected to pay low or nominal rent (Emdon, 2007). The purpose of these second-stage shelters is to allow women and their children a period of stability: women can receive ongoing counselling and attend skills training programmes, while their children can go to local schools (Charlton, 2004: 31). The emphasis in this phase is on encouraging women to become independent so that they can find gainful employment at the end of their stay, which will enable them to secure their own permanent accommodation (Emdon, 2007). Unfortunately, the number of second-stage shelter facilities in South Africa is very small. This means that many abused women cannot access such shelter, while those who do so but fail to find suitable employment or means of survival do not have access to 'third-stage' shelter because the latter is not available in South Africa at the moment (Emdon, 2007).

Domestic violence and forced evictions

It can be argued that where a woman leaves her home as a result of domestic violence, this should be seen as a form of forced eviction. 'Forced eviction' has been defined as the permanent or temporary

When a woman leaves her home as a result of domestic violence, it should be seen as a form of forced eviction.

removal of individuals, families or communities against their will from the home or land they occupy, without their being provided with legal and other forms of protection (Committee on Economic, Social and Cultural Rights [CESCR] General Comment 7, *The right to adequate housing: Forced evictions*, UN doc E/C.12/1997/4, para 3). The reasons for eviction are many, but can also be gender-specific: for example, domestic violence or discriminatory inheritance laws and customs (Paglione, 2006: 136).

It could be argued that these abused women leave their homes 'voluntarily', which implies that their eviction was not 'forced'. In reality, however, remaining in the abusive relationship is not an option for abused women. According to Paglione:

The decision of a battered woman to leave her abusive husband is therefore not a truly voluntary one; if the alternative includes the daily threat to one's own life and the permanent cohabitation with a violent partner, whose violence intensifies beatings after beatings, such decision loses its discretionary aspect and clearly turns into a compulsory survival act (Paglione, 2006: 138).

The obligation to promote access to housing

The South African Constitution (the Constitution) guarantees the right to have access to adequate housing (section 26(1)). In addition, section 26(3) prohibits evictions from, or the demolition of, homes without an order of court made after considering all the relevant circumstances.

The state has a general obligation to 'respect, protect, promote and fulfil' the rights in the Bill of Rights (section 7(2)). Section 26(2) imposes a specific duty on the state to take reasonable measures, within its available resources, to achieve the progressive realisation of the right to have access to adequate housing. In the context of access to adequate housing, it is also important to have regard to section 25(5) of the Constitution, which requires the state to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

The constitutional duty of the state to 'progressively realise' the right to have access to housing was first considered and interpreted by the Constitutional Court in *Government of Republic of South Africa v Grootboom* 2000 (1) SA 46 (CC) [*Grootboom*]. The Court noted

that this obligation was not an absolute or unqualified one, but rather qualified by three key elements: the obligation to 'take reasonable legislative and other measures', 'to achieve the progressive realisation' of the right and 'within available resources'. The first of these elements received particular attention in this judgment.

The Court explained that the state was required to take 'reasonable legislative and other measures' (para 42), and that legislative measures by themselves were not likely to constitute full compliance by the state with the Constitution. The legislative measures would invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive (para 42). This meant that 'the legislative and other measures' had to establish a coherent housing programme directed towards the progressive realisation of the right of access to adequate housing (para 41). The programme also had to be capable of facilitating the realisation of the right. It had to be well coordinated and comprehensive, determined by all three spheres of government in consultation with each other (para 40). The precise content of the measures to be adopted was primarily a matter for the legislature and executive. A court would not enquire into whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent.

The requirement of reasonableness extended to both the formulation of housing programmes and policies and their implementation (para 42). An otherwise reasonable programme that was not *implemented* reasonably would not constitute compliance with the state's obligations. Importantly, the Court pointed out that in determining whether a set of measures was reasonable, it would be necessary to consider housing problems in their social, economic and historical context, and the capacity of the institutions responsible for implementing the programme (para 43). Furthermore, a court would consider whether the programme was balanced and flexible and whether it made appropriate provision for housing crises and short-, medium- and long-term needs.

It stressed that the use of the term 'progressive realisation' underscored the fact that the right to adequate housing could not be realised immediately

(para 45). However, this term meant that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing had to be made more accessible, not only to a larger number of people but to a wider range of people, as time progressed.

The expression 'within available resources' meant that both the content of the obligation (in relation to the rate at which it was achieved) and the reasonableness of the measures employed to achieve the result depended on the availability of resources (para 46).

Following the *Grootboom* judgment, the national Department of Housing (now called the Department of Human Settlements) introduced an Emergency Housing Programme in 2004. Thus far, provinces and municipalities have experienced problems in implementing this programme (McLean, 2008: 55-21).

The right to freedom from all forms of violence

The Constitution also recognises the right to be free from all forms of violence from either public or private sources (section 12(1)(c)). It also provides for the right to gender equality (section 9(3)).

In *S v Baloyi* 2000 (1) BCLR 86 (CC) [*Baloyi*], the Constitutional Court examined the constitutionality of the Prevention of Family Violence Act 133 of 1993. It observed that the state had an obligation to enact appropriate legislation to prevent and reduce domestic violence (paras 11-12).

In *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) [*Carmichele*], the Constitutional Court dealt with state liability in respect of acts of violence by private actors. In this instance, the Court found that the rights to life, dignity and freedom of the person imposed a duty on the state (and all its organs) to refrain from infringing these rights (para 44). In certain circumstances, these rights involved a positive duty to provide appropriate protection to everyone through laws and other means (para 62). The Supreme Court of Appeal followed the *Carmichele* case in *Van Eeden v Minister of Safety and Security* 2002 (4) All

SA 346 (SCA) and *K v Minister of Safety and Security* 2005 (9) BCLR 835 (CC)).

In *Omar v Government of SA* (2006 (2) SA 289 (CC)), the Constitutional Court reiterated the principle laid down in *Baloyi* - that there is a constitutional obligation on the state to eliminate domestic violence through legislation among other means (paras 14-17). It stated: 'Domestic violence brutally offends the values and rights enshrined in the Constitution' (para 17).

Links between access to housing and domestic violence

An examination of international human rights law standards shows the emergence of a clear link between women's right of access to adequate housing and domestic violence. For instance, the former UN Special Rapporteur on adequate housing, in his 2005 report on women and adequate housing, acknowledged the links between violence against women and the right to adequate housing and observed that

women living in situations of domestic violence inherently lived in inadequate housing, due to the violence they faced in the home (UN doc E/CN.4/2005/43, paras 41 and 43). Similarly, in his 2006 report, on the same subject, he expressed the view that persistent poverty, where women and others were forced to live in inadequate and insecure housing and living

conditions, was itself a form of violence (UN doc E/CN.4/2006/118, para 32).

In addition, a number of UN bodies, including the General Assembly, have adopted resolutions dealing with various aspects of violence against women, women's equal access to housing and freedom from forced eviction. For example, the UN Commission on Human Rights (now the Human Rights Council), in resolution 2000/13 on women's equal right to adequate housing, emphasised that the impact of gender-based discrimination and violence against women on women's equal ownership of, access to and control over land and the equal rights to own property and to adequate housing was acute, particularly during complex emergency situations, reconstruction and rehabilitation (preamble). In 2005, the Commission adopted a further resolution

International human rights law standards show the emergence of a clear link between women's right of access to adequate housing and domestic violence.

addressing women's right of access to adequate housing (resolution 2005/25), the preamble of which explained that a lack of adequate housing could make women more vulnerable to various forms of violence, including domestic violence, and in particular that the lack of housing alternatives might limit many women's ability to leave violent situations.

Conclusion

The South African government's approach to housing for women experiencing domestic violence falls short of the standards set by the Constitution and international human rights law in several respects.

The National Housing Code does not make express provision for women experiencing domestic violence (and other persons who are vulnerable due to their special housing needs). These women may, depending on their housing needs at a particular time and their own financial resources, benefit from existing housing programmes, but the availability of these programmes varies widely across provinces. For the Code to pass the test of reasonableness, it must exhibit the elements of flexibility and comprehensiveness in recognising the full spectrum of the housing needs of all people, including women experiencing domestic violence. Many women who are forced to flee their homes in fear of their own lives and those of their children fit the description of persons in 'desperate need' of alternative accommodation as contemplated in the *Grootboom* judgment. To cater for such women, some form of prioritisation, for example in relation to the consideration of applicants on waiting lists for rental housing, may be necessary.

The former UN Special Rapporteur on adequate housing undertook a mission to South Africa in 2007

at the invitation of the government (*Mission to South Africa*, UN doc A/HRC/7/16/Add.3). He acknowledged the efforts of the South African government at all levels to meet its goal of delivering 30% of housing to women-headed households (para 85). However, he noted, among other things, that the lack of affordable housing and timely access to public housing, and inadequate government provisions for long-term safe housing, particularly in rural areas, forced women either to remain in, or to return to, situations of domestic violence and continue to live in unsafe housing. Furthermore, he observed that there was no specific housing programme to address vulnerable groups (para 89). He also noted that there was an urgent need to restructure the availability of rental housing for low-income groups, to guarantee security of tenure for tenants, and to formulate a specific national policy for groups with specific housing requirements (para 105).

The introduction of these measures will benefit not only women experiencing domestic violence but also other persons with special housing needs. However, whatever measures are adopted should form part of a comprehensive housing programme for women experiencing domestic violence.

Helène Combrinck is a senior researcher in, and the coordinator of, the Gender Project of the Community Law Centre.

For further reading on the subject, see *Research Series 5 of the Socio-Economic Rights Project (forthcoming, 2009)*.

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Realising the right of access to sufficient water in South Africa

Progress and challenges

Siyambonga Heleba

While South Africa has made great strides in ensuring access to water, the poor and vulnerable either do not have access to sufficient water, or have access to water that is not of suitable quality for drinking or personal hygiene. This in turn limits their enjoyment of other human rights. The United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), has commented on the link between the right to water and the enjoyment of health and other human rights as follows:

Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights (General Comment 15 on the right to water, UN doc E/C.12/2002/11, para 1).

This article considers the extent to which the South African government has met its constitutional obligation to provide access to sufficient water. It examines the protection of the right to water in international and South African law and the corresponding state obligations. It also considers the recent judicial decisions on this right.

The right to water in international law

The right to water is not explicitly recognised in key UN human rights treaties such as the Universal Declaration of Human Rights of 1948, the ICESCR, and the International Covenant on Civil and Political Rights of 1966. Although this omission has been rectified in subsequent treaties and conference declarations (see below), it remains unclear why the right to water was not expressly recognised in these earlier treaties.

However, given the interdependence and interrelatedness of all human rights, the right is regarded as implicitly recognised by these treaties. It has been accepted, for instance, that articles 11 and 12 of the ICESCR (the right to an adequate standard of living and the right to the highest attainable standard of health, respectively) cannot be fully realised without water (Gleick, 1999: 491). In fact, Gleick remarks: 'Logic also suggests that the framers ... considered water to be implicitly included as one

of the "component elements" [ie of the right to food, housing, health care, etc] - as fundamental as air' (Gleick, 1999: 491). Moreover, the minimum amount of clean water envisaged by the ICESCR is that which is necessary to 'prevent death from dehydration, to reduce the risk of water-related diseases, and to provide for basic cooking and hygienic requirements' (Gleick, 1999: 491). Daniel *et al* (1999: 492) also see the exclusion of an explicit right to water in key human rights instruments as no stumbling block to the realisation and enforcement of this essential right; they contend that it is just as enforceable as the other explicitly recognised rights.

The CESCR, in its interpretation of article 11(1) of the ICESCR, appears to treat the right to water for personal and domestic uses as an independent right. It has noted that other listed rights in the article were not intended to be exhaustive (General Comment 15, para 3). The CESCR has also derived a right to water from the right to health, holding that the former is 'inextricably related' to the latter (General Comment 15, para 3).

The right of access to water was explicitly recognised in subsequent international instruments. For instance, the Convention on the Elimination of All Forms of Discrimination against Women of 1979 obliges states parties to ensure that rural women enjoy the right to adequate living conditions, particularly

in relation to housing, sanitation, electricity, water supply, transport and communications (article 14(2)(h)). The Convention on the Rights of the Child of 1989 requires states parties to take measures to combat disease and malnutrition, including measures within the framework of primary health care, through, among other things, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution (article 24(2)(c)).

At the African regional level, the right to water is also recognised in the African Charter on the Rights and Welfare of the Child of 1990 (article 14) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2003 (article 15). South Africa has ratified all these instruments.

A number of international conferences have also affirmed water as a fundamental right. The Mar del Plata Declaration of the 1977 UN Water Conference stated in its preamble that 'all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs'. The Dublin Statement on Water and Sustainable Development adopted at the 1992 International Conference on Water and the Environment acknowledged that all human beings had the 'basic right ... to have access to clean water and sanitation at an affordable price' (principle 3).

Furthermore, one of the goals listed in the Millennium Declaration of 2000 is to reduce by half, by the year 2015, the proportion of people without sustainable access to safe drinking water (Millennium Development Goal 7). The Johannesburg Declaration adopted at the 2002 World Summit on Sustainable Development also resolved to speedily increase access to clean water.

The World Health Organization (WHO) and UN Children's Fund (UNICEF) have set 20 litres as the minimum amount of safe drinking water a person requires per day. Both organisations have also emphasised that water sources must be located within

a reasonable distance of households (see WHO and UNICEF, 2000).

The right to water in South African law

Section 27(1) of the South African Constitution (the Constitution) guarantees the right of everyone to have access to sufficient water. Parliament sought to give effect to this right by enacting the Water Services Act 108 of 1997 (WSA). Section 3(1) of this Act states: 'Everyone has a right of access to basic water supply and basic sanitation.' Furthermore, section 3(2) states: 'Every water service institution must take reasonable measures to realise these rights.'

In terms of section 1 of the WSA, 'basic water supply' means a prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households to support life and personal hygiene. Subsequently, regulations made under the Act (published in *Government Gazette* 22355, Notice R509, 8 June 2001) prescribed the amount of basic water. Regulation 3 states as follows:

- The minimum standard for basic water supply services is ...
- (b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month -
 - (i) at a minimum flow rate of not less than 10 litres per minute;
 - (ii) within 200 metres of a household; and
 - (iii) with an effectiveness such that no consumer is without supply for more than seven full days in any year.

Thus, the WSA (as read with regulation 3(b) referred to above) guarantees everyone the right of access to a minimum quantity of 25 litres of water per person per day or six kilolitres of water per household per month.

There is also the National Water Act 36 of 1998, which mainly regulates access to water in order to support livelihoods and establishes a system of licensing in order to secure access to water. The WSA codifies a 1994 Department of Water Affairs and Forestry (DWAF)'s Water Supply and Sanitation Policy (Water Policy) with similar provisions.

In 2003, DWAF issued a Strategic Framework for Water Services entitled *Water is Life, Sanitation is Dignity* (Strategic Framework). In terms of this

The Constitution guarantees the right of everyone to have access to sufficient water.

Strategic Framework, basic levels of service would be reviewed in future with a view to raising the basic level from 25 litres per person per day (or six kilolitres per household per month) to 50 litres per person per day.

Obligations on the state

Section 27(2) of the Constitution provides that '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.

Regarding the term 'progressive realisation', the CESCR has commented that the phrase should be interpreted as obliging the state to 'move as expeditiously and effectively as possible' towards the full realisation of a particular right (General Comment 3 on the nature of states parties obligations, UN doc E/1991/23, para 9). The Constitutional Court of South Africa has adopted this interpretation (*Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), para 45). With regard to the term 'availability of resources', the CESCR has stated that it refers to resources existing within a state as well as resources available from the international community through international assistance and cooperation (General Comment 3, para 13).

In addition, section 7(2) of the Constitution provides that '[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights'. The duty to respect requires the state to desist from interfering with the enjoyment of the right of access to sufficient water (General Comment 15, para 21). The state must refrain from engaging in any practice or activity that denies or limits equal access to adequate water and desist from arbitrarily interfering with customary or traditional arrangements for water allocation (General Comment 15, para 21). The state must also not unfairly discriminate when allocating water resources (Langford and Kok, 2005: 203). The duty to respect the right to water has been enforced in a number of cases in South Africa. In *Mangele v Durban Transitional Metropolitan Council* 2002 (6) SA 423 (D), the applicant, an unemployed woman

with seven children, challenged the lawfulness of the discontinuation of water services to her house. Her contention was that the council had exceeded its authority by discontinuing the service. The Court found in favour of the metropolitan council, holding that the council had acted within its powers. The

reliance on the right to a 'basic water supply' in the Act failed because the regulations defining the meaning of the right had not yet been passed.

In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W), the applicants brought an urgent application for interim relief against the disconnection of their water supply. The Court

held that disconnection of the water supply constituted a *prima facie* breach of the right to water (para 20). The state had a duty to justify the disconnection (para 27). It also held that where a person proved to the satisfaction of the relevant water services provider that he or she was unable to pay for basic services, the service could not be discontinued (para 27).

The duty to *protect*, on the other hand, requires the state to prevent violations of the right of access to water by third parties. A component of this obligation is a duty to regulate private water services providers (General Comment 15, para 24).

The duty to *promote* the right of access to sufficient water involves, among other things, the promotion of educational and informational programmes aimed at generating awareness and understanding of the right (see General Comment 15, para 25). The obligation to *fulfil* requires states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of the right (*Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997*, para 6; General Comment 15, para 26).

Progress achieved in providing access to sufficient water

South Africa has made some progress towards ensuring access to water. The former South African President, in his 2009 state of the nation address, stated that access to potable water had improved

The indigent register policy adopted by local government has been a practical and effective way of targeting free basic services to those who cannot afford to pay for them.

from 62% in 1996 to 88% in 2008, while access to sanitary facilities had improved from 52% in 1996 to 73% in 2007.

A practical and effective way of targeting free basic services such as water to those who cannot afford to pay for them has been through the indigent register policy adopted by local government (*City of Johannesburg and Others v Lindiwe Mazibuko and Others* Case No 489/08 [2009] ZA (SCA) 20 (paras 42 and 46) [Mazibuko (SCA)]. Municipalities are responsible for identifying households that are eligible to receive free basic services. Of the estimated 5.5 million indigent households in the country, over 4 million (73%) are registered on municipal databases and currently receive free basic water (Presidency, 2008: 50).

In *Mazibuko and Others v City of Johannesburg and Others* 2008 JOL 21829 (W), the High Court found that the use of prepayment water meters was unlawful as it was not authorised by the City of Johannesburg's by-laws (para 105). It also held that the use of prepayment meters for poor and black residents in Soweto constituted unfair discrimination in that it did not give the applicants an opportunity to make representations before disconnection, an opportunity available to more affluent Johannesburg residents (paras 91-92). Furthermore, it held that 25 litres per person per day or six kilolitres per household per month was insufficient to meet the applicants' daily needs and ordered that the City provide a minimum of 50 litres per person per day (para 183). The Court also ordered the immediate removal of prepayment meters (para 183).

The City appealed against this decision to the Supreme Court of Appeal (SCA). The SCA upheld the High Court's decision in so far as it related to the lawfulness of prepayment water meters. It also agreed that 25 litres per person per day or six kilolitres per household per month was insufficient to meet drinking, cooking, bathing and personal hygiene. By way of remedy, it ordered the City to immediately provide those on its indigent register with 42 litres per person per day (para 62). Interestingly, the SCA did not endorse the order for the immediate

removal of prepayment water meters. Instead, it gave the City two years to revise its water policy in relation to the respondents (para 62) (This case is discussed on page 11.)

Challenges faced by poor households in accessing water

Despite improvements in government services to the poor, data released by Statistics South Africa in 2007 indicate that these services do not reach many of the poorest municipal districts or informal settlements and farm workers. As a result, poor households continue to lag behind in accessing government services. For instance, in 2005, half of all poor households still did not have their own piped water. According to the state, these shortfalls place an unbearable burden on women and girls, who continue to undertake most of the household labour (see Presidency, 2008: 36).

The data also shows that poor households find it difficult to pay for services. In September 2005, 3.3% of households earning under R800 a month had experienced

water cut-offs for failure to pay. In contrast, among better-off households, cut-offs totalled only 2.1% for water (Presidency, 2008: 37).

The government concedes that households often do not know what programmes are available, and that it does not always correctly identify the needs of households and communities. Furthermore, the working poor may find it hard to prove they are indigent and so end up paying for education, health, water and electricity (Presidency, 2008: 46).

Conclusion

While great strides have been made in bringing basic services such as water to poor households, many still do not have access to water, or have access to insufficient water. The state should revise its national water policy to ensure, among other things, that every person has access to sufficient water to meet basic needs, that water is available every day and that the right to water is fully realised. In addition, the state should provide, as far as possible, effective remedies for violations (see Langford and Kok, 2005). The

The government concedes that the working poor may find it hard to prove they are indigent and so end up paying for education, health, water and electricity.

government has in fact acknowledged that 'ensuring clean water [and] adequate sanitation ... [is] critical in overcoming poverty' (Presidency, 2008: 35).

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Muddying the waters

The Supreme Court of Appeal's judgment in the *Mazibuko* case

Jackie Dugard and Sandra Liebenberg

City of Johannesburg and Others v Lindiwe Mazibuko and Others Case No 489/08 [2009] ZA SCA 20 (25 March 2009)

On 25 March 2009, the Supreme Court of Appeal (SCA) handed down judgment in the *Mazibuko* case. The case was an appeal against the judgment of the Johannesburg High Court (now the South Gauteng High Court) of 30 April 2008, concerning the sufficiency of the City of Johannesburg's free basic water (FBW) policy and the lawfulness of prepayment water meters (PPMs).

Background

In 2000, the City of Johannesburg (the City) experienced a fiscal crisis. From the City's perspective, it became increasingly important to minimise

inefficiencies and revenue losses in water and electricity supplies. One of the main areas of such identified inefficiencies and losses was Soweto, which (like most former township areas) did not have meters for water supply for each household. Rather, it had a 'deemed consumption system', which meant that each household (or property) was charged for 20 kilolitres of water each month, regardless of actual consumption. A consequence of the system was that most households could not afford the monthly charge and, by 2000, Soweto households owed the City millions of rands for water-related services. In addition, Soweto's apartheid-inherited water infrastructure was in a state of collapse, with inferior piping and numerous water leakages.

In 2002, the City devised a plan to repair the water infrastructure in Soweto. It was also obliged, in terms of the National Free Basic Water Policy and the Water Services Act 108 of 1997 (section 3 as read with section 9(1)(a) and Regulation 3(b) of the Regulations relating to Compulsory National Standards and Measures to Conserve Water, published in *Government Gazette* 22355, Notice R509, 8 June 2001 (National Standards Regulations)), to provide a minimum quantity of potable water of 25 litres per person per day or six kiloliters per household per month. However, it was not possible to allocate the FBW under the deemed consumption system as individual household water supply was not metered. This is one of the reasons which compelled the City to review the deemed consumption supply system in Soweto.

While other municipalities, such as eThekweni, replaced the deemed consumption system with conventional metering, the City chose to install PPMs throughout Soweto and other townships. Conventional meters supply water on credit. Prepayment meters, however, have an automatic disconnection function that physically restricts water consumption in poor households to the obligatory FBW allocation, unless the household purchases additional water in the form of water credit vouchers. Calling the programme *Operation Gcin'amanzi*, meaning 'conserve water' in isiZulu, the City chose the poorest suburb of Soweto, Phiri, as the pilot project for the roll-out of prepayment meters.

The City's water services provider, Johannesburg Water (Pty) Ltd, began the bulk infrastructure construction work for the installation of PPMs in Phiri on 11 August 2003, and individual household prepayment meters were installed starting in February 2004. Initially, the only choice given to households was between a prepayment meter and total water disconnection. Households that rejected the prepayment meters had to suffer for months without any on-site access to water until they capitulated and accepted prepayment meters. Later on, households that refused prepayment meters were given an outside tap (standpipe), with explicit instructions not to connect a hose to the tap (the punishment for violating these terms being compulsory PPM installation). For these households, a standpipe represented a major regressive measure as, for example, they now had to

collect water in a bucket to flush the toilet and wash the dishes.

For the households with prepayment meters, access to water was similarly restricted. With an average of 13 or more people living on each property, the standard FBW allocation (of six kilolitres per household per month, providing each person in a household of eight with 25 litres per day) was grossly insufficient to meet everyone's basic sanitary needs. For those who exhausted their FBW supply before the end of the month, failure to purchase additional water credit resulted in an automatic and immediate disconnection of water supply. This meant no water for those who could not afford additional water until the next month's FBW allocation.

The High Court case and judgment

Responding to the hardships and infringements of basic rights associated with the imposition of PPMs, in mid-2004, the residents of Phiri decided to build a legal case against the City. With the support of social movements - the Anti-Privatisation Forum and the Coalition Against Water Privatisation - and the assistance of the Freedom of Expression Institute (FXI) and the Centre for Applied Legal Studies (CALS), the application was launched in the Johannesburg High Court on 12 July 2006. (The two years it took to initiate the litigation testifies to how difficult it is to mount socio-economic rights cases.)

The application was brought by five residents of Phiri, on behalf of themselves, all similarly positioned residents of Phiri and everyone in the public interest. The applicants were initially represented by FXI, but CALS took over as their attorneys from March 2007. The respondents were the City of Johannesburg, Johannesburg Water and the Minister of Water Affairs and Forestry. The Centre on Housing Rights and Evictions (COHRE), a Geneva-based international organisation focusing on housing and water rights, intervened as *amicus curiae* to raise relevant issues of international and comparative law.

The applicants challenged the sufficiency of the City's FBW policy, arguing that this policy was inconsistent with section 27(1)(b) of the Constitution of South Africa (Constitution), which recognises the right of everyone to sufficient water. They also challenged the legality of PPMs in terms of the City's water services by-laws and the Water Services

Act 108 of 1997. In addition, they argued that by targeting poor residents (who also happened to be black) for the rollout of PPMs, the City had violated section 9(3) of the Constitution, which prohibits unfair discrimination. The applicants asked the City to provide them and all similarly positioned residents of Phiri with 50 litres of FBW per person per day and the option of the conventional meters provided to the wealthier, mostly white, residents of Johannesburg.

The application was heard in the High Court (3-5 December 2007) and judgment was handed down on 30 April 2008. In a landmark judgment (discussed by Khalfan and Conteh, 2008: 12-15), Judge Moroa Tsoka ruled in favour of the applicants, holding that the City's imposition of PPMs was unlawful and unconstitutional. He ordered the City to provide the applicants and all similarly positioned residents of Phiri with 50 litres of free water per person per day and the option of a conventional metered water supply at the City's cost. The court accepted the expert evidence of Peter Gleick, a highly regarded international expert on water rights, that 50 litres per person was the minimum quantum of water needed by Phiri residents to meet their basic needs, to avoid threats to their health and to live in dignity. It further held that it was 'uncontested that the respondents [had] the financial resources' to increase the FBW allocation. In these circumstances, it was unreasonable for the City to limit its FBW allocation to 25 litres per person per day when it was capable of providing 50 litres per person 'without straining its capacity on water and its financial resources' (para 181).

The rollout of PPMs only in predominantly black residential areas was also found to contravene the constitutional right to equality. As Judge Tsoka observed:

The prepayment meters discriminate between the applicants and other residents within the municipality of the City. While other residents of the City, for example Sandton, get water on credit from the respondents, the applicants do not. If the residents of Sandton, a wealthy and formerly white area, served by the respondents, fell in arrears with their water bills, they are entitled to notices ... before their water supply is cut off. Moreover, they are given an opportunity to make arrangements with the respondents to settle their arrears.

The High Court accepted expert evidence that 50 litres per person per day was the basic needed to meet basic needs, to avoid threats to health and to live in dignity.

Before their supply is cut off, they are not only afforded reasonable opportunity to settle the arrears, but are afforded a reasonable opportunity to make representation concerning the arrears and the settlement thereof. The applicants, the residents of Phiri, a poor and predominantly a Black area, are denied this right. This is not only unreasonable, unfair and inequitable, it is also discriminatory solely on the basis of colour (para 94).

The Court also held that the introduction of PPMs exclusively in an impoverished historically black area and not in historically rich white areas was based on an invidious stereotype that poor, black consumers were generally defaulters while rich consumers were reliable debtors. As the Judge observed, 'Bad debt is a

human problem, not a racial problem.' The targeting of historically black geographical areas for the introduction of PPMs also constituted indirect racial discrimination (paras 154-155). Finally, the Judge held that PPMs had the effect of arbitrarily limiting access to water by the applicants. It also placed a disproportionate burden on poor black women who, in a patriarchal society such as ours, bore the brunt of household chores and care-giving responsibilities (para 179).

The Supreme Court of Appeal judgment

Unsurprisingly, the City, Johannesburg Water and the Minister of Water Affairs and Forestry appealed against the entire High Court judgment. The appeal was heard before five judges of the SCA on 23-25 February 2009. On 25 March 2009, Judge Piet Streicher handed down a unanimous judgment of the SCA. In the main, the judgment upheld the appeal, but it made a number of orders which affirmed some aspects of the residents' case.

Despite the fact that the appeal was allowed, the SCA found in favour of the respondents (the residents of Phiri) in relation to the free water policy by the City and the introduction of PPMs.

The 'direct reliance' rule

The SCA dismissed the appellants' argument that the residents of Phiri could not rely directly on their water rights as protected in section 27 of the Constitution, which guarantees everyone the right of access to sufficient water (the 'direct reliance' rule). Rather, the

SCA found that the residents of Phiri were not obliged to ground their claim exclusively in terms of the Water Services Act and the National Standards Regulations promulgated in terms of the Act.

The SCA ruled that such measures, taken to give effect to section 27, were not intended 'to cover the field and to deprive anyone of [their] right to rely on the provisions of s 27(1)' (para 13).

We are of the view that the SCA's approach is sound, as section 27(2) clearly envisages that both legislative and 'other measures' must be taken to achieve the realisation of the various rights in section 27(1). Thus, challenges to water policies cannot be based on existing legislation, as this would place a constitutional straitjacket on litigants seeking to challenge the adequacy of existing legal and policy measures which impact on the realisation of socio-economic rights. In any event, it is clear that the Act and the regulations were intended to provide a minimum national standard of 25 litres per person per day. It was therefore important to answer the critical question of whether the decision of the City of Johannesburg to provide no more than this national minimum was consistent with its constitutional obligations to take reasonable measures to ensure that everyone has access to 'sufficient water' (section 27(1)(b) read with (2)).

The FBW water policy

The SCA considered section 3 of the Water Services Act along with regulation 3(b) of the National Standards Regulations as measures to give effect to the constitutional right of everyone to have access to 'sufficient' water. It held that the 25 litres per person per day provided for in regulation 3(b) constituted 'the minimum that may constitute sufficient water' (para 14). However, as the circumstances of different communities differed, with some having access to waterborne sanitation and others only to pit latrines, it was incumbent on the City and other local authorities to consider what would constitute a sufficient supply in the light of such differing particular contexts.

The critical question was whether the City's decision to provide no more than the national minimum was consistent with its constitutional obligations to take reasonable measures to ensure that everyone has access to sufficient water.

In evaluating what would constitute a sufficient water supply, the Court endorsed three interrelated standards concerning life, health and dignity (para 17). It found support for these standards in international law, particularly the influential General Comment 15 adopted in 2002 by the UN Committee on Economic, Social and Cultural Rights (CESCR) (UN doc E/C.12/2002/11). The Court further held that assessing the quantity of water needed for a dignified existence required a context-sensitive evaluation that took into account, for example, whether people needed additional water because they relied on flush toilets (such as the Phiri residents). It found that the 25 litres standard could not have taken into account the water needs of communities relying on waterborne sanitation (para 18).

The Court proceeded to consider the quantity of water which would meet the abovementioned standards of sufficiency in respect of the Phiri residents. It did so by referring to the evidence of two experts, Peter Gleick and Ian Palmer, on behalf of the residents and the City, respectively. Where there was a discrepancy in the evidence of the experts, it tended

to rely on the evidence of Palmer for the respondents. Taking into account the quantity of water required for various household needs such as drinking, food preparation, bathing and toilet flushing, the Court held that 42 litres of water per person per day would constitute sufficient water for the Phiri residents in terms of section 27(1) of the Constitution (para 24).

The next major issue considered by the Court was whether the City was obliged to provide 42 litres (or a lesser quantity of water) free of charge. The City contended that there was nothing in the Water Services Act or regulations that obliged them to provide 'free' water. In interpreting the phrase, 'access to', in section 27(1)(b), the Court endorsed the CESCR's stipulation that 'access to water entails both physical and financial access' (General Comment 15, para 12(c)). In other words, water should be affordable for all 'and must be accessible to all including the most vulnerable or marginalized sections of the population,

in law and in fact' (para 28). The contention that the City was not obliged to provide at least some quantity of water free of charge was rejected on the basis of the Court's interpretation of the Act, the FBW policy of the government and the City, and the obligation to ensure that water was economically accessible in terms of section 27(1) of the Constitution. In determining the extent of the obligation to provide water free to people living in poverty, the SCA stated that the key criterion was what would be reasonable, taking into account the City's available resources and other competing claims.

The Court considered the fact that the City had various other claims on its budget. It concluded, however, that the City's decision to provide only six kilolitres of water per household (or 25 litres per person per day) was 'materially influenced by an error of law' and fell to be set aside on that basis (para 38). Essentially, the City had failed to appreciate that it had both statutory and constitutional obligations to provide a sufficient amount of water, including, reasonable provision of free water for those who could not afford to pay for it.

Having set aside the City's FBW policy, the Court ordered the City to formulate a revised water policy 'in the light of the finding that it is constitutionally obliged to grant each Phiri resident who cannot afford to pay for water access to 42 litres of water per day free in so far as it can reasonably be done having regard to its available resources and other relevant considerations' (para 43). As an incentive to the City to adopt a revised free water policy as soon as possible, and to cater for those in dire need of water, the City was required to provide each account holder in Phiri who is registered with it as an indigent with 42 litres of free water per day per household member.

There are certain positive features of the Court's reasoning in relation to this aspect. These include its willingness to engage with the substantive interests and values that affect water as a human right, and to articulate normative standards against which the sufficiency of the water supply to an impoverished community must be measured. The Court was also unambiguous in affirming that the right of 'access to' water was not equivalent to access through exclusively commercial mechanisms. It included a constitutional obligation to ensure that water is

economically accessible to the poor, including an obligation to supply free water to meet basic needs. The serious consideration which the Court gave to leading international law standards on water rights in interpreting section 27 of the Constitution and its engagement with expert evidence on the water needs of the Phiri community are also positive features of the judgment.

More problematic is the reduction of 50 litres of water to 42 litres on the basis of preferring Palmer's evidence in cases where his figures diverged from those of Gleick. A generous and substantive interpretation of the evidence regarding the relevant water needs would have been preferable in the light of the vital interests protected by the right to water - particularly in an impoverished community such as Phiri, with a high HIV/AIDS prevalence.

Furthermore, there are difficulties with the Court's construction of section 27 of the Constitution read as a whole. Section 27(1)(b) defines the full scope of the right to which 'everyone' is entitled. Section 27(2) describes the nature of the state's obligations in achieving the realisation of this right. The state must take 'reasonable legislative and other measures, within its available resource, to achieve the progressive realisation' of this right. An approach that implies that 42 litres of water per person per day represents the full extent of the right guaranteed in section 27(1)(b) (ie a ceiling), would be unduly limiting of the scope of the right and would also fail to take into account the diversity of water needs of differently placed groups and communities.

A better interpretation is that 50 litres (or 42 litres, if the SCA's assessment is accepted) of water per person per day is what currently constitutes a reasonable measure in terms of section 27(2). However, relevant organs of state remain under an obligation to take reasonable measures towards the full realisation of the right as defined in section 27(1)(b). The assessment of the reasonableness of the measures adopted by the state at a particular juncture should take into account the lived realities of poor communities and the impact of a lack of water on their lives, and the implications of a lack of water for women and the ability of poor communities to participate fully in the activities of society. Moreover, this assessment cannot occur without a prior normative understanding being developed of the right to sufficient water and the

interaction between the right to equality and the need for ecologically sustainable development and use of natural resources. It is only against this normative and contextual background that a proper judgment can be made on whether a reliance by organs of state on resource constraints can be deemed reasonable.

The lawfulness of the PPMs

Regarding PPMs, the SCA held that the City's Water Services By-Laws of 21 May 2004 did not authorise the installation of a PPM other than as a penalty for breaching the conditions of service of a standpipe. Consequently, the installation of PPMs in Phiri was found to be *ultra vires* and unlawful (paras 57 and 58).

The SCA rejected the City's argument that the cutting off of water services by a prepayment meter when the credit ran out did not constitute a discontinuation of services (para 55). It further held that

procedures for the limitation or discontinuation of water services must be fair and equitable, provide for reasonable notice of intention to limit or discontinue the services and for an opportunity to make representations. They may not result in a person being denied access to basic water services for non-payment, where that person proves to the satisfaction of the relevant water services authority that he or she is unable to pay for basic services (para 54).

In their arguments in the SCA, the residents highlighted the unlawfulness of both the installation of PPMs and the functioning of PPMs. Although the SCA correctly ruled that the PPM installation was unlawful, the judgment failed to deal meaningfully with the issue of the inherent unlawfulness of PPMs, such as their automatic disconnection without satisfying the procedural requirements of reasonable notice and opportunity to make representation prior to disconnection.

While the judgment briefly mentioned the legal requirements for fair and equitable procedures for the discontinuation of water supply (located in section 4(3) of the Water Services Act), the SCA did not go on to decide whether PPM functioning violated these requirements. Nor did the SCA base its order on any finding in this regard. The neglect of this critical component of the case against PPMs contributed to the ineffective remedy on the issue of PPMs, which we discuss next.

Moreover, in contrast with the High Court judgment, the SCA's judgment was also notable for not dealing at all with the argument that the

imposition and continued application of PPMs in impoverished black communities and the credit supply option offered to communities in historically white areas constituted a breach of equality rights.

The remedy

The SCA starts off promisingly by reinforcing the principle laid down by the Constitutional Court in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) that 'an appropriate remedy must mean an effective remedy', and that where an 'infringement of an entrenched right has occurred, it must be effectively vindicated' (paras 69 and 44). However, in fact, the SCA provides neither an effective remedy nor a vindication of the infringed rights.

On the issue of FBW, the SCA's interim order is exclusionary, restricting the allocation of the 42 litre amount to Phiri residents on the City's indigency register, despite having found a long-standing violation of the right to water. In addition, the evidence presented by the residents to the SCA was that the indigency register was woefully under-representative of the number of formally qualifying indigent households. Moreover, as highlighted in the record, the City's indigency register captures only each account holder, and not the number of people living in a household or on a property. This means that there is no way for the interim order to achieve the objective of providing 'each account holder in Phiri who is registered ... as an indigent with 42 litres of free water per day per member of his or her household' (para 62(4)).

The SCA's order in respect of PPMs is even less effective and more problematic. Having found that the installation of PPMs in Phiri was unlawful, the SCA ruled that obliging the City to remove them was an inappropriate remedy, and that a better remedy, which would safeguard residents who genuinely preferred PPMs, was to suspend the order of invalidity for a period of two years to enable the City to legalise the use of PPMs. Here, the judgment is not only wrong in its inference that the High Court ordered the removal of PPMs (it did not), but it is also wrong in its legal logic. Having found that the City had acted unlawfully in installing PPMs in Phiri, the SCA ought to have upheld the High Court order, which obliged the City to provide residents of Phiri with the option of a conventional water meter at the City's cost. This remedy would have provided effective

relief to residents opposed to PPMs, while allowing residents who preferred PPMs to retain them.

Finally, possibly because the SCA did not deal with the arguments about the inherently unlawful functioning of PPMs, the order is lamentably weak in its prescriptions of the 'steps' the City should take to legalise the use of prepayment meters. In the context of the Water Services Act's procedural requirements, it is doubtful that any simple amendment of the City's by-laws to allow for the installation of PPMs in the first instance would render PPMs lawful, as these by-laws would not operate retrospectively. As things stand, even if the City were to merely amend the by-laws as advised by the SCA, it would still be open to Phiri residents to raise the issue of the inherent unlawfulness of PPMs.

Conclusion

Despite promising aspects, the SCA's judgment ultimately fails to provide normative clarity in interpreting the right of access to sufficient water and the nature of the obligations it imposes on water services providers. It also falls short of its stated intention to provide an effective remedy for the constitutional infringements caused by FBW supply and the use of PPMs.

At the time of writing, the applicants had applied for leave to appeal to the Constitutional Court against the SCA judgment. The appeal raises some of the shortcomings in the SCA decision discussed above.

Jackie Dugard is a senior researcher at the Centre for Applied Legal Studies, University of the Witwatersrand. She is part of the legal team that has been representing the Phiri residents since 2004.

Sandra Liebenberg is a law professor and H F Oppenheimer Chair of Human Rights Law, University of Stellenbosch.

The background section draws from Jackie Dugard's paper 'Rights, regulation and resistance: The Phiri water campaign' (2008) 24(3) *SAJHR* 588-606.

Reference

Khalfan, A and Conteh, S 2008. Big leap forward for the right of access to water in South Africa. 9(2) *ESR Review*: 12-15.

Enforcing housing rights

How far can the courts go?

Lilian Chenwi

On 27 March 2009, the Supreme Court of Appeal (SCA) overturned a High Court judgment ordering the Ekurhuleni Metropolitan Municipality (the municipality) to buy land which had been unlawfully occupied by about 76 families (the occupiers). This case illustrates the difficulties that poor people face in accessing housing.

Ekurhuleni Municipality v Dada NO and Others Case No 280/2008(SCA) [*Ekurhuleni Municipality case*]

The facts

The matter arose when the respondent, the Islamic Dawah Movement Trust (the Trust), brought an application in the Witwatersrand Local Division of the High Court for the eviction of a group of people who had illegally occupied its property. The illegal occupiers came from an informal settlement on a neighbouring piece of land, which had become uninhabitable because of flooding and marshy

conditions caused by the summer rains (para 2). The application was brought under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, and the municipality was joined as the second respondent (para 3).

Issues before the High Court and its decision

In the main application at the High Court, the occupiers opposed the eviction. Although they conceded that their occupation of the land was unlawful, they argued that they had a *bona fide* (genuine) belief that an official of the municipality had authorised the occupation (para 4). They also argued that the municipality had not complied with its constitutional duties, which had contributed to the plight they were in.

In their counter-application, the occupiers argued that the municipality had a duty under section 26(2) of the Constitution of South Africa (the Constitution), to 'devise and implement within its available resources a comprehensive and coordinated programme progressively to realise (the occupiers) right of access to adequate housing'. They added that the municipality had a duty to adopt reasonable measures to provide relief to them because they would be rendered homeless and were vulnerable to living in intolerable conditions if evicted (para 4).

The occupiers sought detailed relief in the form of a declaratory order defining the municipality's constitutional obligations; an interim interdict against their eviction by the Trust; a supervisory order to ensure that the municipality complied with its constitutional obligations; and provisions regarding the resolution of any disagreements concerning the implementation of the court orders.

In reply to the argument that the municipality had done nothing to afford the occupiers access to housing and had no plans to improve their living conditions, the municipality presented 'strategic frameworks' and 'integrated development plans' to demonstrate that it was doing something to fulfil its section 26(2) obligations. It also cited the Housing Act 107 of 1997, the National Housing Programme, the Development Facilitation Act 67 of 1995, the National Environmental Management Act 107 of 1998 and the regulations made under it as further evidence of the efforts it had already undertaken to

progressively achieve the objects of the Constitution (para 5).

The High Court was not persuaded by the municipality's arguments. In particular, it was dismayed by 'the level of inactivity, with regard to the circumstances of the occupiers, shown by the municipality over the period between the lodging of the eviction application and the date of the hearing' (para 10). The Court found this to amount to a breach of the municipality's constitutional duty. It also found that 'the courts had not gone far enough towards enforcing the rights in s 26 of the Constitution' (para 10). Section 26 of the Constitution guarantees the right of access to adequate housing and the right not to be evicted arbitrarily. The High Court directed the municipality to buy the land from the Trust at a price of R250 000 within thirty days from the date of the court order, and to provide essential services to the occupiers (para 11).

The decision of the Supreme Court of Appeal

The municipality appealed against the order of the High Court directing it to buy the land. The municipality did not appeal against the order to provide services because these, as noted by the SCA, had already been supplied or the municipality was already in the process of supplying them (para 12).

The SCA observed that the High Court had failed to consider the principles of judicial deference (paras 10-11). Generally, deference implies that courts should respect policy decisions taken by the legislature, the executive or administrative agencies. The SCA was of the view that the order directing the municipality to purchase the land had not specifically been sought by the occupiers, and in making it, the judge had based it on a 'pre-conceived notion ... that it was time "to get things moving"'. In the words of the SCA (para 13),

[the High Court Judge] was not asked, in the papers or in the course of evidence, to make such an order and it was not rationally related to the evidence which was adduced concerning the municipality's policies and plans and the extent of its immediate obligations to alleviate the plight of these particular occupiers. He plainly persuaded himself that it was time to cut across the principles of 'progressive realisation' of housing emphasized in the decisions of the Constitutional Court to which he had referred.

Although it agreed with the High Court's conclusion that the municipality had not dealt with the problems

of the occupiers with the measure of promptness that could reasonably have been expected of the municipality, the SCA held nevertheless that this could not justify the High Court's order, 'which was well outside the limits of [the Judge's] power' (para 14). The SCA held that the order directing the municipality to buy the land was not 'appropriate relief' and set it aside (para 14). The order directing the municipality to provide services to the occupiers was upheld.

Conclusion

This case shows that there are still questions as to the extent to which courts should show deference to the executive or administrative agencies in the area of socio-economic rights in general and housing rights in particular. While the SCA was arguably correct in holding that the High Court had gone overboard

in directing the municipality to buy the land (this could be seen as problematic from a separation of powers perspective), its judgment did not say what the appropriate relief was in this particular case. An appropriate relief should take into consideration the interests of all those involved in the case, including the interests of the individual occupiers. Moreover, it must be effective in providing relief to the occupiers.

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The full judgment is available at www.saflii.org/za/cases/ZASCA/2009/21.html.

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- should not be on a topic already published in the *ESR Review*, unless they take the debate forward;
- should not be a marketing exercise for a particular project or programme; and
- should be written in a simple, clear style that avoids technical language and legal jargon where possible, taking into account that the *ESR Review* is read by both legal practitioners and grassroots human rights organisations.

Send contributions in electronic format (MS Word) to serp@uwc.ac.za. Provide your full name and present position. Titles and qualifications are not necessary.

If the article has already been published elsewhere, give full details, including whether it has been shortened, updated or substantially changed for the *ESR Review* and whether the required authorisations have been granted.

Length

Contributions should be no longer than 3 000 words, except contributions for the Events section (1 500 words) and the Publications (Book Review) section (1 000 words).

References and notes

- No footnotes. Rather try to work explanations into the text.
- Use the abbreviated Harvard style of referencing, for example: 'Child abuse is rising (Author, 1999: 10)', or 'According to Author (1999: 10), child abuse is rising.'
- Keep references to the absolute minimum – preferably only for publications from which direct quotes have been taken, or for backing up potentially contentious statements.
- Provide a list of the key references at the end of the contribution.

Previous editions of the *ESR Review* and the complete guide for contributors can be accessed on our website: www.communitylawcentre.org.za/Socio-Economic-Rights/esr-review.

What to hold the new government accountable for

The ANC's election promises on socio-economic rights

South Africa held its general elections on 22 April 2009. Out of the 39 contesting political parties, the African National Congress (ANC) emerged victorious, obtaining 65.9 per cent of 17 million votes. On 9 May, Jacob Zuma was sworn in as the President of the Republic of South Africa and a cabinet has since been constituted.

In the run-up to the elections, several parties presented their manifestos to the electorate, which represented what they would deliver after winning the elections. Having won the elections, therefore, the ANC must be held to account on its promises on service delivery.

Here is a summary of what the ANC promised in relation to health care, education, housing, social security, food, basic water, electricity, sanitation and land.

Health care

Among other things, the ANC promised to

- phase in a national health insurance plan (to be publicly funded and administered, providing free health care and a choice of service providers in each district) over the next five years;
- upgrade and improve public hospitals, clinics, administrative systems and infrastructure, including addressing long queues and waiting times;
- improve the quality of health services in both the private and the public sector;
- improve working conditions and provide decent wages for health professionals;
- achieve health-related Millennium Development Goals; and
- conduct a feasibility study for the establishment of a state-owned pharmaceutical company.

On HIV/AIDS, it promised to

- reduce the HIV infection rate by 50% by 2011;
- provide care and support to at least 80% of those living with HIV and their families by 2011;
- allocate more resources to the national plan on HIV/AIDS and sexually transmitted infections; and
- upscale the prevention of mother-to-child transmission (PMTCT) of HIV to 95% in all districts

(noting that the Department of Health recently promised to launch the PMTCT Acceleration Plan, with a view to achieving the Millennium Development Goals on maternal mortality, infant mortality and combating HIV/AIDS, malaria and tuberculosis).

Education

In relation to education, the ANC promised to

- renew the schooling and education system to ensure the progressive realisation of universal schooling, improve the quality of education and eliminate disparities in the education system;
- eliminate illiteracy by 2014 and revive the role of state-owned enterprises in skills development;
- introduce an early childhood education system in both public and private sectors;
- train and employ 15 000 trainers per annum and strengthen support for crèches and preschools in rural and urban areas;
- work towards free and compulsory education for all children, including taking immediate measures to ensure that 60% of all schools are no-fee schools;
- extend feeding schemes to all qualifying high schools and improve their implementation in primary schools;
- encourage working and poor communities to pursue tertiary education; and
- improve graduate output in specialised areas where the country faces skills shortages.

Housing

Access to housing is a huge challenge facing the government. The ANC promised to

- increase access to secure and decent housing through the 'Breaking New Ground' strategy;
- accelerate the delivery of housing and improve the quality of subsidised housing;
- equip people to build their own houses;
- convert hostels into family housing units;
- accelerate the delivery of new rental housing;
- provide support for housing cooperatives and

ensure that provincial and local governments allocate land for this purpose;

- spearhead programmes for the allocation of building materials to rural communities and equipping them with building skills to enable them build houses for themselves;
- ensure that land close to urban areas is made available for low-cost and public housing; and
- work with the community to improve the living conditions of farm dwellers, including through the provision of subsidised houses and other basic services.

Social security

In the area of social security, the ANC undertook to

- introduce a contributory social security system to provide for guaranteed retirement, disability and survivors' benefits;
- streamline road accident, occupational injury and unemployment benefits;
- work towards making the social security system comprehensive and inclusive;
- extend the child support grant in phases up to the age of 18 (linked to a compulsory schooling requirement); and
- expand unemployment insurance.

Food

Regarding the issue of food security, the ANC promised to

- introduce 'food for all' programmes, which will include procuring and distributing basic foods at affordable prices to poor households and communities, and develop an institutional approach to implementation;
- expand access to food production schemes in rural and peri-urban areas and support existing schemes that use land for food production; and
- devise an emergency food relief programme in the form of food assistance projects such as soup kitchens for the poorest households and communities.

Water, electricity and sanitation

The ANC promised to

- work with municipalities to ensure the continued implementation of the free basic water policy to the poor and vulnerable;
- ensure universal access to water and sanitation by 2014;

- ensure a stronger link between water resource allocation and land and agrarian reform programmes;
- ensure that everyone (including the poor) has access to water of the best quality;
- ensure all schools and health facilities have access to basic infrastructure such as water and electricity by 2014; and
- provide proper sanitation systems in rural areas.

Land reform

The ANC undertook to

- intensify the land reform programme to ensure that more land is transferred to the rural poor;
- provide technical skills and financial resources to the rural poor so that they can use their land productively and create sustainable livelihoods; and
- review existing land redistribution programmes and speed up the pace of land reform and restitution.

Conclusion

The ANC's promises and plans make up a commendable array, particularly because they offer pledges to tackle most of the pressing concerns of the citizenry. But the proof of the pudding is in the eating. We will have to wait and see whether the ANC lives up to these commitments.

This summary was prepared by **Rebecca Amollo**, a doctoral researcher, and **Siyambonga Heleba**, a researcher, both in the Socio-Economic Rights Project.

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Seminar on 'Litigating socio-economic rights at the international level

Introducing the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights'

Lea Mwambene

On 26 May 2009, the Socio-Economic Rights Project of the Community Law Centre, University of the Western Cape, hosted a one-day seminar in Cape Town entitled 'Litigating Socio-Economic Rights at the International Level: Introducing the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights'.

The seminar was held in the wake of the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), which establishes individual and interstate complaint procedures and an inquiry procedure. By submitting a communication to the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR), victims of socio-economic rights violations who fail to obtain justice in their countries now have an opportunity for redress at the international level.

The seminar brought together 40 participants from civil society across South Africa, including community and non-governmental organisations, academics and constitutional bodies such as the South African Human Rights Commission.

The objectives of the seminar were

- to raise awareness of the OP-ICESCR and its procedures;
- to provide a forum for discussing socio-economic rights and enforcement strategies, including litigation; and
- to bolster existing networks and collaborative efforts on these issues among the participating institutions and organisations.

In order to meet these objectives, presentations were made on the challenges and opportunities of litigating socio-economic rights at the international level; the OP-ICESCR; litigating socio-economic rights with the African Commission on Human and Peoples' Rights (African Commission); bringing socio-economic rights cases to the African Court on Human and Peoples' Rights (African Court); public interest litigation; prisoners and the right to health; and the use of international law in socio-economic rights

litigation at the national level. Presentations were followed by discussion.

The South African Constitution (the Constitution) empowers courts to have regard to international law when interpreting the Bill of Rights (section 39). The Constitutional Court, in the case of *S v Makwanyane* 1995 (3) SA 391 (CC), held that courts could consider binding as well as non-binding international law for interpretation. South African courts have generally referred to the ICESCR and general comments of the CESCR when interpreting socio-economic rights provisions under the Constitution. The case of *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) is one example. It was noted that this case used various sources of international law when defining the terms 'progressive realisation' and 'within available resources' in article 26(2) of the Constitution.

The seminar noted concern at the fact that most countries, including South Africa, ratify international covenants but fail to comply with their reporting obligations under those instruments. Hence the need to encourage states to submit periodic reports to international human rights monitoring bodies was emphasised.

The seminar also identified international human rights litigation as a powerful means of enforcing socio-economic rights at the national level. However, participants argued in the discussions that the potential for such litigation to bring about tangible changes in the states concerned was limited, hence the need to supplement this strategy with others.

On the OP-ICESCR, the seminar considered the history of its adoption, its benefits, its content and

possible challenges to its implementation. The role that South Africa had played during its development was also discussed. The following points were further noted about the OP-ICESCR:

- The OP-ICESCR does not create new substantive rights.
- People bringing complaints have a choice between the three procedures (individual complaints, interstate complaints and the inquiry procedure).
- Only states parties to the ICESCR can be parties to the OP-ICESCR.
- The OP-ICESCR is optional. Therefore parties to the ICESCR are not automatically bound by the OP-ICESCR.

Following the OP-ICESCR's adoption, the Human Rights Council has invited all states parties to the ICESCR to participate in the signing ceremony in New York on 24 September 2009. Advocacy initiatives are also under way to encourage states to sign and ratify the OP-ICESCR.

As far as litigating socio-economic rights at the international level is concerned, participants agreed that the best way of enforcing socio-economic rights is through national mechanisms. Only when local remedies have been exhausted is it necessary to seek remedies at the regional or international level.

The seminar also highlighted good practices that could be emulated and bad practices that should be avoided in litigating socio-economic rights. Examples of good practice discussed included: identifying

clients' needs and working towards those needs until the end of the case, pre-litigation research and the efficient use of international standards on socio-economic rights in local courts. Some participants also noted the importance of coordination among partners to avoid the duplication of litigation efforts, and the role the media can play in socio-economic rights litigation and the monitoring of court orders.

The seminar also identified some challenges that can be encountered in litigating socio-economic rights. These include

- lengthy negotiations;
- high costs (which can be reduced if volunteers are used);
- the lack of NGOs involved in litigation; and
- the lack of experienced staff in those NGOs that are involved in litigation.

In conclusion, the seminar explored practical ways in which collaboration among all those interested in the implementation of socio-economic rights, including litigation, can be enhanced. It also explored practical ways in which stakeholders can participate in raising awareness of the OP-ICESCR. The seminar also highlighted the urgent need for South Africa to ratify the ICESCR.

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Public hearings on 'The Millennium Development Goals and the realisation of economic and social rights in South Africa'

Timothy Serie

From 8 to 12 June 2009, the South African Human Rights Commission (the Commission) hosted a series of public hearings in Johannesburg on 'The Millennium Development Goals (MDGs) and the realisation of economic and social rights in South Africa'. The primary objective of the public hearings was to critically assess South Africa's progress in realising economic and social rights in the context of its commitment to meeting the MDGs.

The MDGs are eight international development goals (and 21 quantifiable targets measured by 60 indicators) that United Nations (UN) member states and international organisations have committed themselves to achieving by 2015. These goals are to

- eradicate extreme poverty and hunger (Goal 1);
- achieve universal primary education (Goal 2);
- promote gender equality and empower women (Goal 3);
- reduce child mortality (Goal 4);
- improve mental health (Goal 5);
- combat HIV and AIDS, malaria and other diseases (Goal 6);
- ensure environmental sustainability (Goal 7); and
- develop a global partnership for development (Goal 8).

The Constitution of South Africa (the Constitution) requires the Commission to monitor and assess the observance of human rights by calling upon relevant state organs to provide it with information on the measures they have taken towards the realisation of socio-economic rights (section 184(3)). In line with this mandate, the Commission called for written submissions from relevant national and provincial departments for the period April 2006 to March 2009. It further called for written submissions from civil society, academia and any other relevant interested party. The Commission requested that the submissions provide

- an assessment of the progress the state has made in the realisation of economic and social rights from both a quantitative and a qualitative perspective; and
- an understanding of the content of the obligation placed on the state to achieve the 'progressive realisation' of economic and social rights.

The Commission further stressed that active participation by all members of society in the democratic process was essential to the realisation of human rights. The public hearings thus brought

together representatives from communities, academia, civil society and government departments at the national and provincial levels, who gave presentations and engaged with the Commission and participants over five days.

Each day focused on a different set of socio-economic rights: the environment, water and food; social security; health; land and housing; and education. The daily presentations were followed by intense questioning from a panel of experts and open sessions for public participation. The presentations were highly informative, and the questioning and debates that followed were lively and thought-provoking.

Environment, water and food

On the first day of the public hearings, the government's progress in providing access to water and sanitation, food and a clean environment was discussed. It was noted that South Africa still faces many challenges in realising the right to food and water. The national Department of Water and Environmental Affairs pointed out that it is currently providing access to water to a majority of South Africans. However, this still leaves over two million people without access to water. Furthermore, 4.3 million households do not have access to adequate sanitation. The participants stressed that water scarcity is a serious problem in South Africa and that in future, the government cannot focus exclusively on providing access to water. It must develop a comprehensive plan that combines

The government must develop a comprehensive plan that combines the effective use of available water sources with sustainable development.

the effective use of available water sources with sustainable development.

Also, participants were overwhelmingly concerned about the lack of public participation in realising environmental, water, and food rights. Many civil society organisations expressed concern at the government's failure to engage with communities affected by environmental degradation or to respond to problems raised by the communities. In addition, participants stressed that national and local governments must be accountable to these local communities.

Social security

Social grants have made a large impact in fighting poverty and lowering inequality in South Africa. On the second day of the public hearings, the challenges of realising the right to social security and social assistance in South Africa were identified. One of the key challenges relates to the availability and distribution of social grants. Grants fail to reach a substantial portion of the population, and the available grants are often insufficient to support families. Also, poor households continuously have to prove their level of poverty through a process that stigmatises them. Some participants noted that the South African social security system is unsustainable - that social grants temporarily relieve poverty but do not eradicate it.

The importance of good-quality data and statistics for analysing issues of social security was also noted. Many representatives of civil society complained about the 'frightening' lack of sound data and statistics concerning poverty indicators. Statistics South Africa confirmed that there is insufficient data, and that the data that is available is of poor quality. It admits to having met only 54% of its goal of producing greater amounts of quality data. Without sufficient data and statistics, it is difficult to adequately address the issue of poverty in South Africa.

Health

Health was the topic of discussion on the third day of the public hearings. It was noted that South Africa is not on track to meet the MDGs concerning the right to health. The government has not done enough to eradicate extreme poverty and hunger or combat HIV/AIDS, malaria and other diseases. An important concern that was highlighted is the recruitment and retention of high-quality doctors, nurses and health services staff. Limited funding makes it difficult for hospitals and clinics to retain enough qualified health professionals. This problem is exacerbated as patient loads increase at poorly funded clinics.

Several recommendations were made regarding the realisation of the right to health. These included the development of monitoring and evaluation bodies

and the implementation of the Health Care Act 17 of 2002. The implementation of comprehensive national health services, it was noted, must become a government priority because there is a sharp divide between the content of the law and the government's implementation of this policy.

Land and housing

Day four of the public hearings addressed the government's successes and failures in addressing the right to housing in South Africa. The Department of Human Settlements (DoHS) noted that the government has delivered over 2.8 million houses since 1994. The DoHS claims it has spent all its resources and cites a lack of funding as a major limitation in delivering housing. Dealing with

backlogs was noted as another major challenge. The housing backlog, according to the DoHS, stands at 2.2 million households, almost 1 675 000 of them currently in free-standing informal settlements.

Some participants pointed out that the government is putting too much focus on eradicating slums and not enough on improving the lives of slum dwellers. The government was blamed for failing to address the structural problems that lead to the creation of informal settlements.

Much of the discussion centred on the need for coordination between different levels of government and departments. Participants urged the government to develop a comprehensive plan to address housing needs in South Africa that incorporates all levels of government. The government was called upon to recognise that the issue of housing is intertwined with development: it is not just about chasing delivery numbers, but rather about viewing housing in a holistic sense. The government needs to look at the quality of houses being built. Also, spatial planning is important. It was emphasised that the government cannot keep building housing developments on the outskirts of urban areas with little or no access to employment opportunities or transport infrastructure.

Education

On the final day of the public hearings, it was reported that the South African education system is

The government is focusing too much on eradicating slums and not enough on improving the lives of slum dwellers.

failing the students of South Africa in certain aspects. With regard to the MDGs, South Africa is performing quite well in achieving universal primary education. However, it was noted that 50% to 70% of students entering Grade 1 now will not complete secondary school.

The need to address qualitative indicators of success in schools was identified, as the MDG indicators are purely quantitative and do not address issues of quality and equity. It was noted that the right to education is not just about access to education, but also about offering quality education. Many other education challenges were discussed, including gender equality, disabilities, transportation, discipline, security, and nutrition in schools. Lastly, many of the participants highlighted the importance of well-qualified teachers, especially for disadvantaged schools. It was recommended that the government increase access to teacher training colleges and ensure that teachers act in a professional manner.

Conclusion

The public hearings strove to increase access to information, transparency, public participation and

governmental accountability. They sought to include the people of South Africa in the process of policy-making, lawmaking, and service delivery.

Many government departments, civil society organisations and academics that attended the conference noted South Africa’s progress in realising socio-economic rights. However, all parties agreed that South Africa still faces many daunting challenges in realising these rights and in attaining the MDGs. The chief concerns of the public hearings related to the lack of good-quality data and statistics, the lack of coordination between various branches of government, and the lack of public participation in the democratic process and in service delivery. The need to focus on the qualitative dimension of realising socio-economic rights was noted as crucial in ensuring that delivery of these rights results in actual improvement in people’s lives.

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NEW PUBLICATION

On 10 December 2008, the General Assembly of the United Nations (UN) adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), which establishes a complaints mechanism for socio-economic rights violations. The Protocol will come into force three months after the deposit of the 10th instrument of ratification.

The publication *Claiming economic, social and cultural rights at the international level* provides useful and accessible information on, and aims to raise awareness of, the OP-ICESCR and other complaints mechanisms at the UN and African regional levels. It briefly explains what the ICESCR is and the rights it

Lilian Chenwi, 2009. *Claiming economic, social and cultural rights at the international level*, Community Law Centre, University of the Western Cape

guarantees; explains what the OP-ICESCR is and its importance; provides information on the complaints and inquiry procedures established under the OP-ICESCR; underlines the role of international assistance and cooperation in the realisation of economic, social and cultural rights; and draws attention to other complaints mechanisms at the UN and African levels.

The publication is available electronically at www.communitylawcentre.org.za/Socio-Economic-Rights/publications.

For printed copies, contact the Socio-Economic Rights Project on (021) 959 3708/2950 or serp@uwc.ac.za.

Non-discrimination in socio-economic rights

In May 2009, the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment 20 (UN doc. E/C.12/GC/20[2009]) on non-discrimination in economic, social and cultural (ESC) rights.

The CESCR held a half day of general discussion on non-discrimination and ESC rights during its 41st session in 2008, aimed at reviewing its draft general comment on non-discrimination in the light of comments and suggestions made by experts, such as states parties, UN specialised agencies and bodies, UN human rights mechanisms, national human rights institutions, trade unions, employers' organisations, non-governmental organisations, academic institutions and other interested organisations or individuals.

General comments are the CESCR's interpretation of the content of human rights provisions contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966. General Comment 20 is an interpretation of the meaning and scope of the right to non-discrimination, guaranteed in article 2(2) of the ICESCR, which requires states parties

to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

General Comment 20 deals with the scope of state obligations, the prohibited grounds for discrimination and the measures that states parties must adopt to ensure implementation at the national level.

Scope of state obligations

The CESCR defines discrimination as

any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on equal footing, of the [ICESCR] rights (para 7).

Discrimination also includes incitement to discriminate and harassment. The CESCR also observes that non-discrimination is an immediate and cross-cutting obligation (para 7).

States parties must eliminate formal (*de jure*)

and substantive (*de facto*) discrimination (para 8). To eliminate formal discrimination, they must ensure that their constitutions, laws and policy documents do not discriminate on prohibited grounds. The CESCR gives the example of laws denying equal access to social security benefits to women on the basis of their marital status as being contrary to the obligation to eliminate formal discrimination. However, it adds that eliminating formal discrimination does not necessarily achieve substantive equality. Hence, eliminating substantive discrimination requires that states parties, instead of merely comparing the formal treatment of individuals in similar situations, should pay sufficient attention to individuals or groups that suffer historical and persistent prejudice. They should therefore adopt measures that prevent, diminish and eliminate the conditions and attitudes that cause or perpetuate substantive discrimination (para 8).

The CESCR acknowledges that special measures such as affirmative action may be required to address substantive discrimination. These measures must be reasonable, objective and proportionate to redressing substantive discrimination, and must be discontinued once substantive equality is sustainably achieved (para 9).

States parties are further required to eliminate direct and indirect forms of discrimination. The CESCR clarifies that 'direct discrimination occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground'. It also includes 'detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation'. The case of a pregnant woman is cited as an example. Indirect discrimination, on the other hand, refers to:

laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of [the rights in the ICESCR] as distinguished by prohibited grounds of discrimination (para 10).

An example of indirect discrimination is requiring the presentation of a birth certificate for school enrolment, which may discriminate against ethnic minorities or non-nationals who do not have or have been denied such certificates.

States parties must also adopt measures to prevent discrimination on prohibited grounds in the private sphere (para 11). This is because discrimination often occurs in families, workplaces and other sectors of society. They must also address systematic discrimination (para 12).

General Comment 20 also deals with permissible differential treatment. The CESCR believes that differential treatment based on prohibited grounds is not discrimination if the justification for the differentiation is reasonable and objective. This will entail assessing the aims and effects of the measures or omissions and their compatibility with the nature of the rights in the ICESCR, and whether they are solely for the purpose of promoting the general welfare in a democratic society. The CESCR adds that 'there must be a clear and reasonable relationship of proportionality between the aim sought to be realised and the measures or omissions and their effects' (para 13). However, states parties cannot use the lack of resources to justify failing to remove differential treatment, unless they have made every effort to use the resources at their disposal to address and eliminate the discrimination as matter of priority.

Prohibited grounds of discrimination

General Comment 20 makes reference to the prohibited grounds of discrimination listed in article 2(2) of the ICESCR – 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The inclusion of 'other status' shows that the list is not exhaustive (para 15). The CESCR further notes that some individuals or groups of individuals such as women belonging to an ethnic or religious minority could face discrimination on more than one of the grounds (para 17). States parties are required to eliminate all the grounds of discrimination.

General Comment 20 further elaborates on each of the listed grounds (paras 19–26) and implied grounds under 'other status' (paras 27–35). The CESCR encourages a flexible approach to the ground of 'other status', listing some possible grounds but stressing that they are illustrative rather than exhaustive. They include disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence, economic and social situation.

National implementation

State parties must take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of the rights in the ICESCR is eliminated. They must also ensure that individuals, who may be distinguished by one or more of the prohibited grounds, have the right to participate in decision making processes over the selection of such measures. They must regularly assess whether the measures adopted are effective in practice (para 36).

An indispensable requirement in complying with

article 2(2) of the ICESCR, as the CESCR points out, is the adoption of legislation that prohibits or addresses discrimination. State parties must review laws on a regular basis, and, where necessary, amend them so that they do not discriminate or lead to discrimination in relation to the enjoyment of ESC rights (para 37).

Strategies, policies and plans of action must be put in place to address both formal and substantive discrimination by public and private actors; and temporary special measures be adopted to accelerate the achievement of equality (para 38). Education on principles of equality and non-discrimination is also vital. State parties must adopt appropriate preventive measures to ensure that new marginalised groups do not emerge, take steps to eliminate systematic discrimination and segregation in practice (para 39), remedy violations of the right to non-discrimination, including the provision of effective remedies (para 40), and monitor the implementation of measures to comply with article 2(2) of the ICESCR (para 41). The CESCR further notes that institutions dealing with allegations of discrimination should be accessible to everyone without discrimination (para 40).

Conclusion

Prohibition of discrimination is important in ensuring that individuals fully enjoy their socio-economic rights. As noted by the CESCR in General Comment 20, discrimination 'undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population' (para 1). The CESCR adds that non-discrimination is 'essential to the exercise and enjoyment of economic, social and cultural rights' (para 2). The adoption of General Comment 20 is therefore crucial in advancing socio-economic rights, especially as it clarifies what states have to do to ensure equal enjoyment of these rights.

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

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Committee on Economic, Social and Cultural Rights 2008. Half-day of general discussion on 'discrimination and economic, social and cultural rights'. Available at www2.ohchr.org/english/bodies/cescr/discussion17112008.htm [accessed 29 June 2009].

General Comment 20 is available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>