

Impediments to the delivery of socio- economic rights in South Africa

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“The government tends to highlight statistics to show its achievements, such as the proportion of households with access to clean water increasing from 60% in 1996 to 85% in 2001.³⁷ This translates into around 9 million citizens or about 3,7 million additional households gaining access to water between 1995 and 2003. The government has spent an estimated R5 billion on water and sanitation over the past decade. In terms of electrification, the government points out that there has been a major increase in household electricity connections, from 32% of the population in 1996 to 70% in 2001. The record on housing suggests that, between 1994 and 2003, 1 985 545 subsidies were approved to the value of R24,22 billion. In terms of gender equality, 49% of all subsidies approved were granted to women. Also in terms of gender equality, government contends that it has promoted such equity through the recognition of customary marriages, the establishment of the Office of the Status of Women in the Presidency, labour equality, maternity benefits, attending to issues of sexual harassment, and affirmative action. Land and the challenge of land restitution and redistribution remains a key challenge and could even be a time bomb in a highly unequal society. Since 1994 about 1,8 million hectares of land have been transferred under redistribution programmes to about 137 478 households. About 80% of these transfers occurred between 1997 and 2002. The ANC has set a deadline of 2005 for the land restitution process; they regard this as imperative if South Africa is to avoid a ‘Zimbabwe-style land grab’. Despite the above-mentioned achievements, and ten years after apartheid was officially ended, statistics reveal many setbacks and problems. These statistics reveal the severity of a deeply uneven and unequal society. They reveal significant development challenges faced by the country, and bring to the fore the fact that South Africa exhibits both first world and third world characteristics. Serious disparities exist in the society given that the Republic has one of the most unequal distributions of income in the world, as measured by the Gini coefficient (0,57 in 2000)”.(South African Human Rights Commission, 2006:12)

“I close my eyes and try to see her fighting for the right to false teeth – and for the right to electricity in her home, the right to water in her house. And the picture refuses to be born in my mind. Why would she fight for things when she does not know she has a right to them? Why would she fight when rights are not in her recollection of things she knows, things she does, things people like her do? How can she do something that is so completely foreign to her? And do it with ease?

And that is what I fear. The steps you have to take to avail yourself of the opportunity the new South Africa promises all its people, simple as they appear to be, may be too much for people who have no memory of ever walking them” (Magona 1995:NI).

1. Introduction

The purpose of including Second and Third Generation (STG) rights in a constitution is to provide guidelines to lawmakers to formulate policy and to enable the courts to intervene where these policies are not being implemented satisfactorily. In theory these rights allow citizens to demand from the state access to basic needs, such as adequate land, housing, education, health care, nutrition, and social security. However, this inclusion of rights in the constitution often does not translate into action. The first reason for this is that Second and Third Generation rights may clash with First Generation rights. For example the right to private property may, and in South Africa does, contradict the need for land for the majority. The major problem is whether the policies flowing out of Second and Third Generation rights are pursued with enough vigour by governments, the private sector, primary groups and individuals to overcome this contradiction. In many countries in the world it is the poorest sections of the population, and as Mamdani (1996) pointed out, migrant non-citizens, that bear the brunt of administrative and bureaucratic bungling and neglect. Liebenberg and Pillay state that in South Africa:

Poverty and traditional gender roles lead to black women in rural areas being disadvantaged more than men and white women by a lack of basic social services. They spend long hours collecting water and fuel to meet household needs, making it difficult for them to find the time to take advantage of employment and development opportunities. Because of expected gender roles and their extra burden of poverty, women do not participate equally in the economic and social structures of society (2000:16).

Many writers have addressed the problem of trying to turn “paper rights” into access to resources for the more disadvantaged sectors of society (Ambrose 1995; Cousins 1997, 2001; Glasius 2007; Liebenberg and Pillay 2000; Mohanty et al 1998). Glasius (2007:70) points to the United Nations Development Program’s (UNDP) incorporation of human rights into development theory and practice with its *Human Rights and Human Development* report in 2000 as giving impetus to this process. Liebenberg and Pillay argue that the meaning of rights develops over time through a number of processes. In South Africa these would include community organisation and activism around human rights demands; advocacy by the institutions of civil society such as NGOs, church groups, and trade unions; the active engagement with human rights issues by the Human Rights Commission and academics; appropriate legislation adopted by parliament; and, the interpretation of rights by the courts (2001:26).

Certain conditions are required for effective implementation of rights in South Africa. I argued in a previous paper (Roodt, 2005) that in order for STG rights to be effectively implemented four spheres have to operate. These are the state, its administration and courts; the public sphere, parliamentarians and political parties; civil society in its various guises, and in the primary sphere comprised of individuals, families and clans. However, a number of strategies involving an interaction of all these spheres are necessary for the successful functioning of the STG rights regime. These are a legislative framework, a good communication strategy, the development of institutional capacity, and access to conflict resolution mechanisms.

With regard to the first, that is an adequate legislative framework, the South African legislature has given the limitations imposed by the negotiated transition, made impressive progress. In many areas South Africa’s Constitution is regarded as one of the most progressive in the world. However, if we use the land reform program as a well-publicised example of an attempt to deliver socio-economic rights, in a situation of gross inequality in the distribution of land ownership and given the unequal power relations that spring out of this fact, especially in rural areas, the

limitations imposed by the property clause have resulted in legislative frameworks that offer inadequate protection to the intended beneficiaries or require expensive and complex legalistic processes to realise the right. The Restitution of Land Rights Act (Act No 22 of 1994) is an example of the latter and has been amended on numerous occasions in order to iron out problematic areas. The Extension of Security of Tenure (ESTA) (Act 62 of 1997), and the Interim Protection of Informal Rights Act (IPILRA)(Act 31 of 1996) are examples of rights based legislation that has been passed to safeguard the rural poor, although critics would argue that these laws do not provide adequate protection for farm workers (Hornby 1998, South African Human Rights Commission, 2006). It is however in the implementation that the real problems lie.

Rights activists agree that a good communication strategy is essential in ensuring that adequate information reaches the broad mass of citizens, especially those who may potentially benefit from the realisation of these rights. (Cousins 2001, De Oliveira, 2008, Kortzen (1990) Liebenberg and Pillay, 2000)

The development of institutional capacity, both inside and outside of government, is also important in order to “advise and support rights-holders and facilitate their active use of the law (Cousins 2001:2). Liebenberg and Pillay give examples of bodies that have been set up specifically to assist people to protect and advance their human rights. These include the South African Human Rights Commission, the Commission for Gender Equality, the Public Protector, the Auditor-General, the Public Services Commission and many more (2000:52). I would add the Commission on Restitution of Land Rights to this list. NGOs such as the Legal Resources Centre, the Treatment Action Campaign and the various land and development NGOs such as Border Rural Committee in the Eastern Cape and the Surplus Peoples Project in the Western Cape are examples of organisations outside of the government that are dedicated to assisting people, especially disadvantaged people, in realising their rights.

Perhaps the weakest link in the chain leading to the realisation of socio-economic rights is access to courts and other conflict resolution mechanisms. A number of successful cases have been brought to the courts by the Legal Resources Centre (LRC) and to the Land Claims Court (LCC) by the Commission on Restitution of Land Rights (CRLR). The most pertinent example of the former is the class action brought by the Grahamstown office of the LRC against the Eastern Cape Welfare Department for the cancellation of disability grants and the Grootboom case against the Western Cape Department of Housing. However, the LRC has offices in only a few of the main centres. The Legal Aid Board, which is supposed to pay for legal assistance to those unable to afford it, has a shortage of funds and a huge backlog in terms of payment, such that most members of the legal fraternity other than the most junior refuse to do any work for it¹. This means that given the huge costs of attorneys and especially advocates, the majority of South Africa’s people are simply unable to afford legal representation. The same conditions apply to restitution claimants, although the Commission itself provides generalised and rudimentary legal assistance through its fulltime legal officers.

In this paper I will look in more detail at the most common causes of the failure of rights to resources to translate into “effective command over those resources” (Cousins 2001:1).

¹ Interview with Sarah Sephton, LRC, Grahamstown. September 11, 2000.

2. Impediments to the realisation of socio-economic rights

2.1 The definition of rights

The problem with the realisation of socio-economic rights begins with the way in which different types of rights are defined. “First generation” civil and political rights frequently take precedence over “second generation” social and economic rights, which as the name of the latter suggests, is seen as second-class rights. Developmental and environmental rights, often dubbed “third generation” rights, are thus even further down the ladder of neglect. This can be seen in the light of the nature of liberal democratic states, which promote political and civil equality, but they simultaneously promote material inequality through the protection of private property. Many countries include only first generation civil and political rights in their constitutions. The United States of America is one example. As such they have not ratified the International Covenant on Economic, Social and Cultural Rights, arguing that “these are not rights but aspirations” (Glasius 2007:74)

In countries that do have social and economic rights in their constitutions, they are often framed in such a way as to make it difficult for them to be justiciable in a court of law. In these cases they are called “directive principles of state policy” and are meant to serve as guidelines to the government (Liebenberg and Pillay 2000:15). The Indian, Namibian and Irish constitutions are examples of the latter approach. In South Africa during the negotiations process leading to the creation of a new constitution, a number of civil society organisations, such as human rights, and development non-governmental organisations (NGOs), church groups civics and trade unions, campaigned for the full inclusion of social and economic rights in the constitution. Fifty-five organisations presented a petition to the Constitutional Assembly in July 1995 to press for this demand, which was eventually accepted:

South Africa became an international role-model by including socio-economic rights as enforceable rights in its Constitution ... The poor, the vulnerable and the disadvantaged have the rights to special assistance from the government to gain access to social services, resources and opportunities. They also have the right to go to court or to bodies like the South African Human Rights Commission (SAHRC) or the Commission for Gender Equality (GCE) to get a remedy if their socio-economic rights are violated (Liebenberg and Pillay 2000:17).

However, as we shall see, this is only the first step. The ability of South Africa’s poor and landless to access rights driven resources has been patchy.

2.2 Communication and participation

The Manila Declaration on People's Participation and Sustainable Development states as the aim for people:

To exercise their sovereignty and assume responsibility for the development of themselves and their communities, the people must control their own resources, have access to relevant information, and have the means to hold the officials of government accountable (Korten 1990:218).

De Oliveira (2008:120) argues that when leaders “acknowledge the capacity of ordinary people, when knowledge and information are provided about what is at stake, when credible calls are made for citizen participation and involvement, the popular response tends to be extensive and vigorous”. Liebenberg and Pillay (2000:29) suggest that effective information dissemination

should be promoted by the state through educational programs, media campaigns, active support from government ministers for example in speeches, and by encouraging the work of non-governmental organisations and community-based organisations (CBOs) on socio-economic rights.

The Restitution program is a good example of a rights-based program undermined by a lack of adequate communication strategy.

The first step for people who were dispossessed of land rights (or their descendants) in demanding the restitution of their right is for them to fill in the required claims form. As there is only one regional land claims commission office per province, and in the case of Mpumalanga the office was not even in the province but in Pretoria, getting hold of the form was difficult, especially for people in the rural areas². In the Eastern Cape, for example, the Commission office is situated in East London. Attempts were made to increase access by making the forms available in DLA provincial offices, but during this first phase of the restitution process there were relatively few district offices, so the effect was limited. The DLA in the Eastern Cape only had offices in East London and Port Elizabeth. NGOs such as the National Land Committee affiliates also attempted to distribute claim forms in the areas they were working.

The second problem was that once people managed to obtain the claim form, a large number did not understand the requirements or the process which was to follow. It is not possible to quantify the number or percentage but interviews with Commission staff nationally revealed that a significant number of claim forms contained inadequate information and were incorrectly filled in. In many cases lack of or incorrect information meant that Commission staff was unable to contact or trace claimants to investigate their claims further³. A delegation of claimant representatives, representing a two rural communities being assisted by the Border Rural Committee in the Eastern Cape, namely Macleantown and Cwengewe, presented a list of grievances to the Land Claims Commissioner, Dr Peter Mayende in April 1998. Their main complaints were that the claimants did not understand the restitution process and that the operations of the Commission are perceived to be legalistic. They requested a more comprehensive information brochure be made available, setting out what had to be done by claimant groups or communities in order to expedite the processing of claims (RLCC Minutes of meeting with claimants 14 April 1998).

There was recognition of this problem at a national level. At a Commission strategic planning workshop held in Cape Town in April 1998, participants drawn from regional offices around the country, identified a number of bottlenecks affecting the effectiveness of the restitution process. One of these was the lack of documentation submitted by claimants to support their claims and it was agreed that in order to address this problem claimants need to be better informed about the requirements of the restitution process and the documentation needed (Du Toit/PLAAS 1998:27).

Another problem that affected public awareness of the restitution program and was to a large extent responsible for the slow pace of claimant registration was the lack of finances and resources available to the Commission to launch an effective communications campaign. By February 1998, after the expiry of the original closing date and a few months before the expiry of the extended one (December 31 1998), the CRLR Communications Officer, Mr Human, reported

² Interview with Anthony Lazarus, Eastern Cape Land Committee, Somerset East, 1998.

³ Interviews with Commission staff conducted over a two year period, 1998-99.

to a meeting of the Land Claims Commissioners held in Pretoria that “no funds have been made available as yet but were (sic) promised R2 million by April for the Restitution Awareness Campaign. The R2 million will be used for radio campaign in all languages, printing of pamphlets and poster (sic)”.(CRLR Minutes February 1998:4).

The Restitution Awareness Campaign finally kicked off on June 1 1998. In the Eastern Cape a “mini-launch” was held at the Mdantsane taxi rank as well as talk shows on Radio Umhlobo Wenene (RLCC Investigative Division Minutes May 1998: 3). However, by October (with 70 days left to the lodgement deadline) funding problems were still being experienced and plans being made to draw up a basic workshop manual and evaluation form, with the purpose of “making people aware that they have a right to claim and that they understand the process, within the government’s Land Reform Programme” (RLCC Eastern Cape Communication Team Minutes October 1998).

Thus, one of Korten’s basic requirements for effective participation by claimants in the process, access to relevant information, as well as Liebenberg and Pillay’s requirement for the realisation of a right, was not adequately fulfilled for the first three and half years of the Commission’s existence. There are indications that a number of potential claimants failed to make the extended deadline. During the process of claimant verification, the West Bank and East Bank group claims in East London, the PELCRA claim in Port Elizabeth, as well as the Macleantown claim, all turned up claimants who had not registered⁴. Similarly, a number of people from the former Transkei approached the Commission to try and register during 1999⁵. The most common reason given for failure to register before the cut-off date was that people did not know.

For those fortunate enough to have registered by the deadline, their next contact with the Commission was a letter of acknowledgement and a request for any required missing documentation. Due to the volume of claims, especially after the cut-off date, the lack of an adequate computerised data-base, and a shortage of administrative staff, claimants often had to wait months for this letter (RLCC Eastern Cape and Free State Staff Meeting Minutes: February 16 and March 30 1999). Many did not receive them at all due to inadequate information on the claim forms, relocation to another address, failure of the postal service, or due to the remoteness of their residence (deep rural areas).

For the majority of claimants the next phase in the restitution process was one of simply waiting for the Commission to prioritize their claim. For those that did not meet the criteria for prioritization the wait could be anything up to ten years or more, depending on the longevity of the restitution program. Claimants, whose claims have been prioritized, generally received a visit from a Commission field researcher. The purpose of this field visit is to obtain any outstanding documentation in the possession of the claimant family, group or community, to gather oral testimony regarding the location and extent of the land claimed, the circumstances surrounding the forced removal, especially loss and suffering experienced during the relocation. This is the claimant’s first real opportunity to engage actively with Commission staff. It also affords the field

⁴ Interviews with Clive Felix, Urban Services Group, Port Elizabeth, June 7 2000; Christo Theart of Theart Mgijima and Associates, East London, November 6 1999, and Ashley Westaway, Managing Director, Border Rural Committee, East London, March 23 2001.

⁵ Interview with Zodidi Zonyane, Client Relations Officer, RLCC Eastern Cape, East London, May 26 1999.

researcher an opportunity to explain the restitution process and the restitution options available to them:

It is therefore crucial for field workers to explain the restitution process to claimants in their first interface with them so that they are able to investigate deeper into the claim. This can help the claimants as well make informed decisions about their claim (RLCC Field Work Manual 1997:1).

One of the problems with this aspect of the restitution process is the superficial nature of the field worker's engagement with the community and the limited opportunity that it gives the claimants to participate meaningfully in the process. Due to the vast number of claims, the scattered nature of the claimants over vast areas, such as the Eastern Cape, the pressure to process as many claims as quickly as possible, and the limited number of restitution field researchers, most claimants were lucky to see Commission field researchers more than once or twice⁶. Du Toit puts this succinctly:

...to be offered a choice by a harried government official at a once-off workshop, between a number of cut-and dried options ("restoration", "alternative land", or "compensation") is not to be offered a choice at all. There needs to be much more scope for flexibility, and for claimants to design a range of tailor-made, integrated solutions which the entitlement can be used to underwrite. I believe in particular that, we need to much more imaginative in devising alternative forms of compensation which can allow claimants to access social goods where they are. Restitution should be allowed to deliver, not just land or cash, but schools, hospitals, roads, water and power (2000:88).

The ability to participate in an active and informed manner in demanding rights thus depends to a great extent on the willingness and ability (in terms of resources) of the state and institutions of civil society such as land NGOs to communicate effectively with claimants.

Another impediment to the realisation of rights by the poor is the collusion between reactionary elements of the state and those with a vested interest in maintaining the status quo.

2.3 Interaction of formal and informal institutions

Cousins, drawing on a number of writers who have contributed aspects of what has become known as the environmental entitlements framework, points to the way in which access to rights-backed resources through formal institutions is mediated by the operation of informal institutions. He defines formal institutions as those backed by the law, which enforce the rules of the state. Informal institutions are upheld by mutual agreement or by relations of power and authority, with "rules enforced endogenously". He argues that the relationship between formal and informal institutions take place at a multiplicity of levels within society and within a variety of social fields where "numerous conflicting or competing rule-orders exist, characterised more often than not by ambiguities, inconsistencies, gaps, conflicts and the like" (2001:3). Du Plessis (2006:2) points out that in many countries around the world, forced evictions are not legal except when strict guidelines are followed. However, "despite these national protections of the rights of individuals and families against forced evictions, authorities will often try to circumvent the applicable laws and rules, in order to secure the speedy eviction of residents who, they argue, are obstructing

⁶ Interview Kwandi Kondlo, Senior Researcher, RLCC Eastern Cape and Free State, East London, June 1998.

development projects”. And as Glasius (2007:89) notes, “Ultimately human rights needs to be understood as operating in the arena of political contestation, not just neutral interpretation of the law”.

An example of informal institutions interacting with formal institutions is to be found in the implementation of the various land reform acts. This interaction is often to the detriment of the intended beneficiaries in terms of their constitutional rights contained in the acts. Both Cousins (2001) and Euijen (2001) give examples of collaboration between magistrates and white farmers in rural areas that allow the latter to escape the obligations placed on landowners by rights-based land acts. Cousins states:

Another problem in implementing the Act (Land Reform – Labour Tenants Act 3 of 1996) lies in its reliance on local magistrate’s courts to determine whether or not an evictee falls within the definition of a labour tenant (which is problematic in its definition in any case), since the local magistrates, as the NGOs have pointed out, are closely linked to farmers through local social networks (2001:5).

A similar anomaly exists in terms of the Extension of Security of Tenure Act (ESTA). Here a Land Claims Court judge, Judge Gildenhuis, declared that the onus is on the occupier (ie. the farm labourer) to show that the provisions of ESTA apply and not the landowner seeking the eviction. Euijen points out that this means that in uncontested or poorly defended cases (a likely scenario with illiterate farm labourers who do not have access to legal assistance), a landowner can ignore ESTA and bring an application to court in terms of common law thus avoiding the rights bestowed upon the occupier by the constitutionally mandated act. According to Judge Gildenhuis, in *Skhosana/Roos* case, there is no onus on the magistrate to assist the illiterate farm worker in this regard:

In the present case, the first respondent was fully entitled to formulate the particulars of claim in his action for eviction the way he did (as common law *rei vindicatio*). The magistrate, in the absence of a plea by the applicants that they are occupiers, was also fully entitled to grant default judgement. A judicial officer must decide a case on the issues raised by the parties. His failure to raise or consider the possibility that the applicants could be occupiers under ESTA before granting default judgement against them was not irregular (quoted in Euijen 2001:31).

The adversarial system, which has been the norm in South African courts, allows the judge to base his judgement on the evidence before him, no matter how incomplete, whereas an inquisitorial system requires the judge to assist the litigants in obtaining relevant evidence and make sure that the applicable legislation is applied. However, Euijen argues that even under an adversarial system:

A magistrate or any judicial officer, particularly one created by statute, always has it as his/her first duty to satisfy themselves as to their jurisdiction. In eviction matters, the powers exercised by and the procedures which have to be followed prior to obtaining an eviction order from a magistrate in terms of the Magistrate’s Courts Act, the ESTA, and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) are very different. It ought to be of some moment to a magistrate to satisfy him or herself at the outset that the powers about to be exercised to secure another’s eviction are the correct legal ones. Indeed at the very least, it is submitted, magistrates are obliged by provisions of the Constitution to enquire in any eviction matter whether the person sought to be evicted is being evicted from their home or residence. If the answer to the question

is “yes” then the Constitution further provides that no such eviction order may be issued by a court until it has investigated all relevant circumstances (2001:35).

By 2007 the situation had not changed. A workshop organised by the Association for Rural Advancement (AFRA), an NGO from KwaZulu-Natal, highlighted the continuing extent of the problem. They showed that between October 2001 and May 2005 there were 1 238 eviction cases, 76% of them unresolved. Of the cases they were involved in 30% of them involved reports of interference with rights, while 39% of cases involved threats of eviction. The AFRA workshops confirmed the ongoing impotence of the acts promulgated to deal with rural evictions: an “imbalance in the level of knowledge of the law”. Farm dwellers reported that landowners used their knowledge of the law to restrict and abuse legally illiterate farm dwellers, while effecting “constructive dismissal”. (South African Human Rights Commission, 2006:6) At a Foundation for Human Rights workshop in April 2008, Landless People Movement’s (LPM) Shadrack Khubeka stated that “farmers will continue to evict farm dwellers because they know that they do not have lawyers. These lawyers are representing us (farm dwellers) not defending us”. He asked NGOs working with farm dwellers “to unite in order to confront farmers and ensure that they have access to legal services” (Sangonet, 2008).

The South African Human Rights Commission (2006:3) argues that “the consolidation of ESTA and LTA through the Consolidated ESTA/Labour Tenants Bill is a step towards improving the lives of labour tenants and farm dwellers. The effectiveness of the Consolidated Bill will be determined by its enactment into law and the political will to enforce it. Three years have gone by without passing this legislation. This implies that the State has failed to protect these people, considering that two legislations have failed to protect them over the past ten years”.

What we have here is a complex interplay of not only informal institutions with formal ones, the collusion of farmer, magistrate and judge, but also the lack of information and legal resources of the farm worker, the refusal of even the top echelons of the legal system to abandon the tried and tested systems of the past, a refusal to embrace the spirit of the Constitution and the Bill of Rights and move, as the constitution requires towards a more inquisitorial and purposive⁷ mode of operation. The plight of poor rural people with regard to accessing rights has been the subject of judicial notice. Judge Didcott states:

The state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons...are either unaware of or poorly informed about their legal rights and what they should do to enforce those, and where access to the professional advice and assistance they need so sorely is often difficult for financial and geographic reasons (cited in Froneman 2000:13).

It is ironic that the Land Claims Court, that was specifically set up to implement a rights-based land reform program and to operate in an inquisitorial and purposive manner, should produce judgements such as that discussed by Eujen above. Other judges in the Land Claims Court have taken a different more generous approach in keeping with the spirit of the Constitution. The result has been a set of contradictory judgements. On the other hand, there are indications that the High Court is moving, in the face of administrative anarchy, corruption and incompetence in the provinces, towards playing a more meaningful role in trying to enforce its “constitutional task of

⁷ A purposive mode of interpretation takes into consideration the purpose or intent of the legislation and its compatibility with the spirit of the constitution. Also referred to by some judges as a “generous interpretation”.

controlling public power so that it conforms to the principle of legality” (Judge Froneman J. 2000:9). Why has this administrative illegality arisen in the first place?

2.4. Administrative incompetence

There is no doubt that one of the principle reasons for the lack of translation of “rights to resources” into “access to resources”, is the dearth of administrative competence, especially at middle management level:

There are still many challenges that need to be addressed, such as the continuing lack of administrative capacity on the part of some Provincial departments for effective and efficient delivery of social security services. Although there was progressive realisation of the right, the actual increase in the rate of delivery was so marginal that the full realisation of the right remains distant (South African Human Rights Commission 2001:8).

By the time the 2006 SAHRC report on socio-economic rights was released it was acknowledged that the state was attempting to address these problems but problems remain:

...analysis by Meth in 2004 revealed that approximately 19,5 million people were living below the poverty line in 2002. This represents an increase of 2,2 million from the reported 17,2 million people living below the poverty line in 1997. Meth’s analysis further holds that of those living below the poverty line, between seven and 15 million people live in utter destitution. Furthermore, the United Nations Development Programme reported in 2004 that the poverty rate in South Africa stood at 48%, and this is in congruence with the report by the Taylor Commission of a poverty rate of between 45% and 55%.

Part of the problem in addressing this massive problem is the lack of motivation to improve the situation and the culture of entitlement and corruption that has developed as a result. Much of the blame for this situation can be laid at the door of the apartheid regime and its bantustan policy. For it was here that the necessity for political control of the black “independent states” political and civil servant classes spawned the Midas-head of multiple bureaucratic institutions where tax payer’s money sponsored an ever-growing culture of patronage with the attendant corruption and lack of accountability. But while much of the blame may be apportioned to the apartheid bantustan system, not all of it can. That the situation continues, with some notable exceptions, is largely due to a lack of political will to deal decisively with those guilty of consuming vast amounts of tax-payers money while delivering very little in terms of services or developmental resources necessary for the livelihood of especially the poor. The Public Service Accountability Monitor attached to Rhodes University in Grahamstown have documented numerous cases of state officials in the Eastern Cape who, having been found guilty of some form of corruption or malpractice, continue to draw their salaries and occupy their positions⁸.

A pertinent example of a government department failing dismally to fulfil its constitutional obligations due to administrative incompetence, corruption, and lack of political will, is the Department of Welfare in the Eastern Cape, specifically in its dealings with disabled people and their grants. In an attempt to weed out ghost beneficiaries and to update their database the department stopped payment of all disability grants leading to close to a hundred thousand people

⁸ See Public Service Accountability Monitor website.

in the Eastern Cape province losing their entitlement to social grants which they had previously enjoyed, without any of them being afforded a proper hearing (Froneman 2000:6-7). Judge Froneman's judgement describes a litany of attempts by the Black Sash, the Legal Resources Centre (LRC), and the Human Rights Commission to work with the department to rectify the situation. Virtually every agreement reached (and there were many attempts) to alleviate the plight of the grantless disabled beneficiaries subsequently came to naught – through what can only be ascribed to a combination of incompetence, lack of empathy, and ultimately a lack of leadership and management with the political will to sort out the problem timeously. The LRC finally resorted to litigation. It is worth quoting Judge Froneman at length:

The litigation campaign was interrupted when the acting permanent secretary of the welfare department requested the regional director of the LRC in Grahamstown to attend a meeting in an attempt to resolve the remaining applications against the department. The meeting was held in April 1998. A minute of the meeting reveals that the necessity for a fair procedure to be followed when reviewing social grants was again brought to the department's attention. Since August 1998 the details of approximately 2000 erstwhile beneficiaries, all of whom alleged that their grants were terminated without observance of administrative fairness, have been sent to the department. Barely one third of these cases elicited any response from the department. Of these people approximately 20% were reinstated. For more than a thousand no response has been forthcoming. A further meeting was held with the officials of the department in November 1999 to discuss the department's poor performance in rectifying matters. It was reiterated that the procedure for the cancellation of grants was defective. Further suggestions were made by LRC lawyers to expedite and alleviate matters. Nothing came of it (2000:5).

The lack of performance by the Eastern Cape Welfare Department, and the problems of state administrative departments generally may be attributed to many causes. The SAHRC report covering 1999/2000 deals with four problems within state administrative departments at both national and provincial level. They occur across provinces and departments. They are: a lack of commitment by the government to the delivery of socio-economic rights; corruption; the fact that the lion's share of the budget is spent on salaries rather than delivery of resources to the poor; and, in spite of the ever-shrinking budgets, the lack of ability to spend allocated budgets leading to monies being rolled-over from year to year.

The report addresses the government's commitment to the delivery of socio-economic rights in the following manner:

It is unsatisfactory that measures aimed at addressing poverty reach only 3 million people when poverty statistics point to about 20 million people living below the poverty line. The fact that 2,8 million beneficiaries were reported in the previous reporting period of 1998/1999, means that there has not been any significant quantitative increase in the number of people being reached by policy measures aiming to address poverty. It is unsatisfactory that only 40% of people with disabilities are reached when it has been widely reported that people with disabilities have difficulty securing employment and other economic opportunities. The social security system in the country does not adequately address the needs of the unemployed (2001:10).

This lack of commitment to the delivery of socio-economic rights is not limited to the national government. The SAHRC report finds that most provinces still fail to demonstrate the way the measures undertaken address constitutional obligations and to give special consideration to vulnerable groups (2001:19). The bad news extends all the way to the bottom: "problems

encountered in the implementation of the Consolidated Municipal Infrastructure Program (CMIP) and Rural Municipal Infrastructure Programme (RMIP) by the provinces were due to lack of capacity and insufficient budget allocation for Local Authorities tasked with the provisioning of water and sanitary facilities (2001:25).

The report highlights the fact that both National and Provincial Treasuries have efficient monitoring systems in place as required by the Public Finance Management Act 1 of 1999 (PFMA), including an Early Warning System as a way of monitoring over or under-spending. In spite of this, the report quotes “independent research” that has shown that although budget reform and auditing systems of the Medium Term Expenditure Framework has contributed to improving financial management, several provinces still showed large rollover funds which were unspent, while others were racked by corruption and the misuse of public money (2001:32).

The large percentage of budgets spent on salaries is most marked in precisely the areas most in need of delivery of resources, namely education, health and social welfare. The salary component of provincial and national state departments is the only component of departmental budgets that is not ever rolled over due to lack of spending. Ironically, the little left of the budget after the payment of salaries for supernumeraries as well as ghosts, ie. for the delivery of the actual services that these civil servants are employed for, is rarely spent in full and is often rolled over to the never-never land of the following year. The result is a progressively worsening situation as treasury responds by lowering budget allocation. A number of instances of this sorry situation are documented by the SAHRC report. Provinces spent only 57% of budgeted expenditure between 1997/1998 and 1998/99. As the report notes, this means that provinces were even less able to keep their facilities from degrading than their budgets suggest (2001:18)

Until the early 2000s the Department of Land Affairs did not break ranks with the rest of the governmental regiment:

Perhaps the greatest area of concern from the response of the Department of Land Affairs is that the department has consistently, and across programmes, failed to utilise the complete budgetary allocation for land reform, pointing to inefficiencies in the application of financial resources towards the land reform. For example, in the Land Tenure Reform programme, only about half (R24 734 000) of the allocated funds of R45 849 000 was spent. It is difficult to understand or justify such under-expenditure given the dire need for land reform in the country (2001:23).

Whilst there was an improvement in the delivery of land reform following the 2001 report quoted above, it seems to have been short-lived as the Director General of the Department of Land Affairs, Tosi Gwanya, highlights. He announced that an extra R150-billion would be needed to support new farmers and avert a complete collapse of the country’s land redistribution plan. His comments follow the announcement of a Land Affairs Strategic Plan, that details major shortcomings in the pace and effectiveness of land reform, with only 5% of white- owned land having been transferred thus far with much of it lying idle due to mismanagement or lack of funds and resources (Times, 2008).

There have in recent times been a number of challenges to the present government and the state that it presides over, about its inability and lack of will to realise constitutional rights. These challenges have occurred on a broad front, giving credence to rural consultant David Tapson’s belief that “the state doesn’t just deliver; it has to be forced to deliver”⁹. They include the national

⁹ Interview, Dr David Tapson, Bathurst, June 6, 1996.

trade union federation the Congress of South African Trade Unions (COSATU) which has questioned the validity of the government's privatisation policies; the National Land Committee (NLC), the Landless People's Movement and the Legal Resources Centre (LRC) that have been highly critical of the state's implementation of land reform, housing and welfare policies; and a wide range of individuals, political parties, and organisations that have questioned the government's intention to spend an ever-growing number of billions of rands on military arms while failing to implement an effective and adequate HIV Aids program.

These civil society challengers have utilised a wide range of tactics, from legal challenges through the courts, peaceful marches, conferences and workshops, publicity campaigns in sympathetic media, international collaboration with foreign institutions of civil society, to more radical tactics such as encouraging land invasions. There is thus an increased awareness that the courts are only one avenue – albeit a powerful one – in enforcing the realisation of rights. The efforts of civil society in working with the state where there is willingness and against it where there is not, is becoming more and more necessary. As Cousins pointed out at a LRC workshop on rights and land reform on Robin Island in 2001:

Again it is clear that enacting the proposed law will not by itself resolve the conflicts; it may create a framework within which processes of “democratisation” of land rights can occur, but active agents will have to press their claims and struggle to make their rights realities. This may well require the kind of connection between (localised) struggles over property rights and a (wider) politics of land pointed to by Bernstein (2001:7).

3. Conclusion

As we have seen, many countries propound human rights, but not as many manage to turn these considerations into realisable rights, into social and economic resources necessary for life for the majority of the population. A number of basic requirements are necessary in order to turn the good intentions of paper rights into tangible rights.

The first of these is an effective communication of rights entitlement to especially the poor and illiterate sectors of society to enable them to actively participate in demanding the fulfilment of their constitutional rights, especially Second and Third Generation rights.

Another aspect is an adequate legislative framework. In the arena of land rights, the property clause in the Constitution has imposed severe limitations on the effectiveness of the legislation, due to its complexity and inadequacy in the face of existing power relations based on unequal land ownership. These existing power relations, to a large extent a product of the negotiated settlement also impact on the way in which the court system and other institutions that deal with conflict resolution operate. The operation of formal institutions tasked with the enforcement and delivery of rights are often mediated in a negative way by powerful informal institutions. Courts often operate to maintain the status quo.

Beyond the unreformed nature of the legal system is the limitation imposed by the lack of capacity within appropriate institutions whose task it is to advise, deliver and support those that are attempting to gain access to their rights. For those unable to afford the services of the legal fraternity, an efficient state-sponsored legal aid and a vibrant and well-funded legal and para-legal NGO sector, are essential. In South Africa the limitations in this sector are more marked within the state than within civil society, although even the latter has suffered reduced capacity due to drop off in funding because of a re-channelling of financial resources by foreign donors to the state after 1994.

Another requirement for the effective delivery of socio-economic rights is an efficient state administration, at national regional and local level, with decisive political leadership and efficient management within the civil service. This is the weakest link in the Second and Third generation rights delivery chain in South Africa. In situations where state administrations act in an arbitrary and uncaring manner, are inefficient and corrupt, a lack of remedy is often due to a lack of willingness on the part of political leadership to act decisively and due to a lack of experienced and efficient management within the administration itself.

The state has targeted its budget towards those line departments that deal with the realisation of socio-economic rights, but because of the large bureaucracies inherited from the apartheid bantustan system, the large numbers of supernumeraries and ghost workers, eighty percent of the budgets of many departments go to salaries. Tragically, the remaining twenty- percent is often not spent in full and ends up back in the treasury.

There are increasing signs that the government and the state that it presides over are being challenged by institutions of civil society, through a variety of strategies. These range from attempts at collaboration (with NGOs often doing the work of the state), strikes, protest marches, court action and open acts of defiance. As the South African Human Rights Commission states in its ten year review:

The fact that the country has now reached the ten-year mark of democracy should therefore not conceal the fact that the country continues to face the twin challenges of addressing poverty and inequality, and putting the economy on an accelerated growth path. Policies pursued thus far have had, at best, limited results, and at worst have contributed to a growing crisis. (2006:11)

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