

The courts and socio-economic rights

Carving out a role

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Although the jurisprudence on the socio-economic rights in the Bill of Rights is still in its infancy, the number of cases coming before the courts is gathering momentum. In particular, the Constitutional Court judgment in the case of *Government of the RSA v Grootboom* 2000 (11) BCLR 1169 (CC) [the *Grootboom* case] is a landmark in socio-economic rights enforcement in South Africa. Several important insights can be garnered from the emerging jurisprudence, particularly from the *Grootboom* case.

The Constitutional Court has confirmed that the socio-economic rights in the Bill of Rights place both a duty on the State and other important role players to respect these rights, and a positive duty on the State to protect, promote and fulfil them.

The duty to respect

The duty to respect socio-economic rights means the State must refrain from law or conduct that would result in people being deprived of access to their socio-economic rights. For example, in *Despatch Municipality v Sunridge Estate and Development Corporation* 1997 (8) BCLR 1023 (SE) the court declared that old apartheid legislation permitting landowners to summarily (without an order of court), demolish informal structures on their property, was in conflict with section 26(3) of the Constitution. Section 26(3) explicitly prohibits arbitrary evictions and requires a court to take into account 'all relevant factors' before ordering peoples' eviction from their homes.

It is still unclear what circumstances

will be considered relevant in eviction proceedings, and who bears the onus of proving that these circumstances exist – the owner of the property or the person being evicted. A full bench of the Cape High Court held in *Ellis v Viljoen* 2001 (4) SA 795 that section 26(3) does not place a duty on the owner of property to allege and prove the existence of these 'relevant circumstances'. The *Ellis* decision suggests that 'relevant circumstances' will be interpreted in the light of common law principles governing eviction proceedings. There is, however, scope to challenge this decision in other jurisdictions because it seems in effect to negate the essence of section 26(3). It would accord more with the value of human dignity and social justice underlying the Constitution if section 26(3) were interpreted to place a duty on the courts to consider the circumstances of vulnerable groups facing the loss of their homes through eviction proceedings.

Positive duties

The courts have also demonstrated a clear willingness to enforce the positive duties imposed by those socio-economic rights. The *Grootboom* decision was important as it set out criteria for judging whether the State has fulfilled its positive duties to realise the socio-economic rights in sections 26 and 27 of the Constitution – access to adequate housing, health care services (including reproductive health care), sufficient food and water, and social security. In terms of the relevant subsections, the State must:

- take 'reasonable legislative and other measures'

- 'within its available resources'
- to achieve 'the progressive realisation' of each of these rights.

The *Grootboom* Principles

The Court established several important principles for evaluating whether the State has fulfilled its positive duties:

- The key question is whether the measures adopted by the State are 'reasonable'. This means that a court will not tell the State it could have adopted a more favourable policy or spent public money better. Rather, the State will have to show that the measures it has adopted are reasonable, given its positive duties under the Constitution to realise access to socio-economic rights.
- The reasonableness of the measures adopted by the State must be considered in their social, economic and historical context.
- The State must establish comprehensive and coherent programmes, which are capable of facilitating the realisation of the right.
- A reasonable programme must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.
- When deciding on the reasonableness of a programme, the court will pay special attention to the question of whether the needs of the most vulnerable sections of society have been addressed. In the words of the Court, 'The poor are particularly vulnerable and their needs require special attention'. In practice this means a State programme designed to promote access to socio-economic rights must make provision for people in desperate need. In the context of the right to housing this means that the housing programme must provide relief for people 'who have no access to land, no roof over

their heads, and who are living in intolerable conditions or crisis situations'. An example would be an accelerated land release programme for people in dire circumstances. It was on this ground that the Court found that the current state housing programme in the area of the Cape Metropolitan Council did not comply with section 26 of the Constitution.

- However, it is not enough to merely design reasonable policies and legislation. The relevant programmes must also be reasonably implemented. This means, for example, that if the government does not allocate enough resources for the implementation of a programme or where people's access to a socio-economic right is hampered by bureaucratic inefficiency or very onerous regulations, it could be challenged in court as unreasonable.

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- Progressive realisation means the State has a duty to examine legal, administrative, operational and financial barriers to accessing socio-economic rights and, where possible, to take steps to lower them over time. Housing must be made accessible to both a larger number and also a wider range of people as time progresses. The Court also accepted that the State would have to fully justify any deliberately retrogressive measures that reduced people's access to socio-economic rights. An example in the housing context would be abolishing the housing subsidy

scheme without putting in place a suitable alternative programme to facilitate access to housing by the poor.

- Finally, the availability of resources would be an important factor in assessing the reasonableness of the measures adopted by the State.


The *Grootboom* judgment paves the way for civil society advocacy aimed at ensuring that the Government applies the principles set out in the judgment, not only in the housing sphere, but also in relation to the other socio-economic rights.

Key challenges

A number of key challenges remain in using the courts as a vehicle for enforcing socio-economic rights.

- The application of the separation of powers doctrine and the extent to which courts are willing to intervene in socio-economic policy matters remain highly contested terrain. Arguments must be developed to demonstrate that the separation of powers doctrine can be interpreted in such a way that it allows for a strong role for the courts to enforce socio-economic rights in our democracy. The case brought by the Treatment Action Campaign relating to the prevention of mother-to-child transmission of HIV (MTCT) is an important test of the extent to which the Constitutional Court is prepared to go in enforcing socio-economic rights, particularly the nature of the remedy that is given if a violation is found.
- There is a need to develop a coherent jurisprudence on the way in which courts should engage with the issue of available resources. Any move to insulate the courts from examining the allocation of resources to socio-economic rights should be resisted.

- The concept of retrogressive measures could be developed further to ensure that where the State or other role players take action that reduces access to socio-economic rights, the courts will find these actions unreasonable. This is an untapped area of the law that might well provide activists with a potent weapon against poor-unfriendly policies and actions.
- The Court in *Grootboom* did not endorse the idea that the socio-economic rights in the Bill of Rights impose a minimum core obligation on government to provide a basic level of services to the poor. Neither did it completely close the door to this argument. This basic level of services is essential to make the value of human dignity a reality, and is part of the obligations that States parties have under the International Covenant on Economic, Social and Cultural Rights.
- The interpretation that the Court in *Grootboom* gave to the children's socio-economic rights has been criticised by children's rights activists. The interpretation that the Constitutional Court gives to the right of children to basic health care services (s 28(1)(c)) in the TAC-MTCT-prevention case will be important for the development of the jurisprudence on children's socio-economic rights.
- NGOs and other civil society organisations have the challenge of supporting poor communities in their struggle to realise socio-economic rights. Litigation should ideally be part of a broader campaign of mobilisation for social justice and development.

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