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ESR REVIEW
Economic and Social Rights in South Africa

A publication by the Community Law Centre (University of the Western Cape)

EDITORIAL

Sandra Liebenberg

Welcome to the first edition of *ESR Review* for 2003. We are planning to produce four editions this year.

In this issue David Bilchitz critiques the Constitutional Court's jurisprudence on socio-economic rights for failing to endorse the concept of minimum core obligations. He argues why this concept is important to South Africa's evolving jurisprudence on socio-economic rights.

Facilitating access to housing finance is an important mechanism for advancing access to adequate housing. Collette Herzenberg evaluates the strengths and weaknesses of the Community Reinvestment (Housing) Bill in terms of its potential to help realise the right of access to adequate housing.

It is often tempting to claim a socio-economic rights victory once a positive judgment has been delivered on these rights. However, the real test is the extent to which such judgments are effectively implemented and result in real improvements in people's lives. In our case law section, Mark Heywood provides us with valuable insights into the aftermath of the landmark decision of the Constitutional Court in *Minister of Health and Others v TAC and Others* (the *TAC case*). His paper highlights the importance of civil society activism in the implementation of court orders.

Finally, we conclude with an overview of research projects undertaken by the Socio-Economic Rights Project during 2002, our plans for 2003, and introduce you to our new electronic newsletter.

We acknowledge and thank all the guest contributors to this edition, and hope that you will find it stimulating and useful.

IN THIS ISSUE

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CALL FOR CONTRIBUTIONS/ LETTERS

We welcome contributions and letters relating to socio-economic rights. Contributions must be no longer than 1500 words in length and written in plain, accessible language. All contributions are edited.

Please e-mail contributions to Sandy Liebenberg at:
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Placing basic needs at the centre of socio-economic rights jurisprudence

David Bilchitz

The South African Constitution is committed to healing the divisions of the past, improving the quality of life of all citizens and freeing the potential of everyone. This commitment is demonstrated by the inclusion of socio-economic rights in the Bill of Rights. These rights are designed to ensure that the sharp inequalities of wealth that exist in South African society are ameliorated. Most importantly, they provide protection for people's fundamental interests, ensuring that government policy meets the most basic needs of every person.

Unfortunately, thus far the Constitutional Court seems to construe the purpose of socio-economic rights in a different way. The Court's jurisprudence suggests that socio-economic rights are analogous to administrative law rights – that they are designed to protect citizens from arbitrary, incoherent and unreasonable government actions. This article reveals some of the weaknesses of this vision of socio-economic rights and argues for an approach that places people's most fundamental interests at the centre of socio-economic rights jurisprudence.

The Treatment Action Campaign case

This article focuses on the recent decision of the Constitutional Court in *Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1033 (CC) (the *TAC case*).

This case concerned the government's policy regarding the provision of Nevirapine, an anti-retroviral drug that reduces the likelihood of mother-to-child transmission of HIV. This policy was implemented in only 18 research and training sites. The state was challenged for its failure to conform to section 27 of the Constitution, which protects the right of everyone to have access to health care services.

In deciding the *TAC case*, the Court evaluated the government's policy against the test of reasonableness developed in the *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) (*Grootboom*). It found that the government policy to restrict Nevirapine to research and training sites was unreasonable and ordered that the provision of Nevirapine should be extended beyond the research sites without delay.

The need to interpret the content of the rights

The government's policy in relation to the provision of Nevirapine had the potential to prejudice the vital interests of thousands of people. The Court's findings provided a clear answer to those who doubted whether socio-economic rights could play a meaningful role in a constitutional democracy.

By focusing on the notion of 'reasonableness', the Court has demonstrated that it will scrutinise government's policy and its conduct for their ability to meet this standard of justification. This ties in with

a prominent argument for constitutionalism which resists a culture in which authority is to be respected for its own sake and promotes an environment in which all the decisions of those in positions of authority, even those of the legislature, must be justified.

In turn, an emphasis on justification has certain salutary effects on laws and policies. It requires a high degree of accountability and thus provides incentives for public servants to consider carefully their reasons for taking decisions. This has the potential to expose weaknesses in such decision-making.

However, the distinctive role of socio-economic rights is not simply to draw attention to a failure in the justification of government policy. It is a particular type of failure we are concerned with – a failure to adequately address certain vital interests that people have. Viewed thus, the primary defect of the Court's approach in adjudicating socio-economic rights claims is its failure to place the interests of individuals at the centre of its enquiry in such cases.

The 'reasonableness' approach is derived from the duty of the state contained in section 27(2) of the Constitution to take "reasonable legislative and other measures within available resources to achieve the progressive realisation of the rights" contained in section 27(1).

The Court went to great lengths to stress that the two sections must be read together. It is precisely this integrated reading of the sections that requires the reasonableness of the state's measures to be assessed in relation to whether or not they are aimed at progressively realising the rights contained in section 27(1). If this is so, then an enquiry into the reasonableness of the measures adopted by the state must also involve an enquiry into the content of the rights.

However, the problem with the Court's approach in the *TAC case* is that it fails to provide any analysis of what is meant by the right to health care services. Logically, the enquiry concerning the reasonableness of the measures adopted by government cannot be conducted in a vacuum. It requires some content to be given to the right to which these measures are designed to give effect.

One of the advantages of an approach that gives content to a right is that it places the interests that are affected under the spotlight. This approach also questions the extent to which government policy detrimentally impacts upon these interests.

Urgency and the minimum core

An 'interest-based' approach recognises that socio-economic rights protect interests of differing degrees of urgency for individuals. Significantly, it recognises that these rights are concerned with the most basic and urgent interest in the very survival of a person.

However, these rights also protect interests of persons that go beyond survival interests. Their realisation enables people to pursue their own activities and live a good life by their own lights. Thus, an analysis of the content of these rights leads to the recognition that these rights impose differing obligations upon the government, some of which have greater priority than others.

At an international level, the UN Committee on Economic, Social and Cultural Rights has recognised the priority of certain obligations by developing the notion of a 'minimum core obligation'. States are required immediately to marshal all available resources so as to provide the minimum essential levels of a right. This requirement essentially refers to the survival needs of each person, which can then be built upon over time. If states do not meet these basic needs, they are in *prima facie* breach of their obligations under the International Covenant on Economic, Social and Cultural Rights and they are required to justify their failure to fulfil such an obligation.

An 'interest-based' approach recognises that socio-economic rights protect interests of differing degrees of urgency for individuals.

Unfortunately, the Court has sought to develop its jurisprudence relating to socio-economic rights without invoking the notion of a minimum core obligation. In the *TAC case*, it claimed that an integrated reading of sections 27(1) and 27(2) required that this notion be rejected. However, the notion of the minimum core can fit neatly into an integrated reading of section 27 by being understood to explicate what is meant by the 'progressive realisation of the right'. The minimum core underlines the fact that the notion of progressive realisation must be read to include, as a baseline, the provision of minimum essential levels of a right that the state is then required to improve over time.

The Court also claimed that the minimum core approach could

require the state to do the impossible, by ordering it immediately to provide for the basic needs of all citizens. However, proponents of the minimum core would claim that the government is required to do all that it can in realising the minimum core of the right. Essentially, the claim that such a core obligation exists commits one to the proposition that when it is possible, the government must realise the core. If the government claims it is not possible to realise the core, then the courts must require proof that the government lacks the capacity to do so.

Unfortunately, the Constitutional Court did not seem to require any proof before concluding that it is "impossible to give everyone access even to a core service immediately" (*TAC case*, para. 35).

The objections to employing the idea of the minimum core raised by the Court are not convincing. Not only has the failure to invoke this notion rendered the basis for its decisions more vague and less coherent, but it has also led to a situation where no clear guidance has been given to the government as to the obligations that have priority under the socio-economic rights provisions.

The failure to exercise a supervisory jurisdiction

The fact that the Court failed to place the interests of the parties at the centre of its enquiry could also explain its decision not to exercise a supervisory jurisdiction over the implementation of its order. This decision is fairly difficult to understand considering the government's stance in relation to the provision of Nevirapine.

The government's policy on HIV/AIDS is notably slow in progress and has not been adequately responsive to the health crisis facing the country. Nevirapine has the potential to prevent children from being infected by a life-threatening disease and it was thus of the utmost urgency that it be dispensed immediately.

Under these conditions, it seems that the Court should have been prepared to ensure that its order was implemented as soon as possible. The vital importance of the interests affected in this case support a more stringent remedy than the one adopted by the Court.

Content over form

The recent experience of South Africa has demonstrated that the judicial enforcement of socio-economic rights can play an important role in ensuring that the most pressing interests of individuals are taken into account in the formulation and implementation of government policies. The approach of the Constitutional Court can be criticised for focusing primarily on the procedural defects – coherence, comprehensiveness and coordination – of government policy, rather than upon the substantive interests at stake in cases concerning socio-economic rights.

It is quite possible for the idea of a minimum core obligation to be integrated into the approach of the Court. This could in turn result in the orders of Court being more robust.

David Bilchitz is a PhD candidate at St. John's College, University of Cambridge.

Also see: S. Khoza, 'Reducing mother-to-child transmission of HIV' 3(2) *ESR Review* 2002, 2–6.

The Community Reinvestment Bill

Will it help to realise the right to adequate housing?

Collette Herzenberg

South Africa faces an enormous challenge of poverty, inequality and homelessness. A large proportion of our population lives in poor socio-economic conditions, with inadequate housing and without the financial resources to improve their existing housing. Low- and medium-income earners face financial exclusions by the finance sector due to their economic status and to the areas in which they live.

First, they do not enjoy access to affordable credit and adequate banking facilities, particularly in townships and rural areas. Second, the banks' practice of 'redlining' certain geographical areas – which involves a blanket refusal to grant mortgage bonds in certain areas because of their poor socio-economic status – exacerbates the living conditions of the poor.

The financial institutions have been criticised by government and other role-players for a lack of commitment to addressing the high levels of underdevelopment in South Africa. Specifically, these institutions' policies have not been able to address the poor socio-economic conditions that prevail in African and coloured communities. The implementation of their policies has had a largely discriminatory, rather than developmental, impact.

Government asserts that broadening access to housing finance will increase home ownership and lead to the restoration of dignity and reinvestment in property and neighbourhoods.

In 2002 government indicated that legislative interventions were necessary to increase private sector investment in the lower end of the housing market. This indication led to the drafting of the Community Reinvestment (Housing) Bill (the Bill).

Purpose of the Bill

The Bill aims to give effect to the constitutional right of access to adequate housing (s26(1)) and the state's obligations (s26(2)) in relation thereto. According to these provisions, the state is obliged to "take reasonable *legislative* and other measures, within its available resources, to achieve the progressive realisation" of the right to adequate housing.

The right of access to adequate housing as envisaged by the Constitution suggests something more than just a roof over one's head. At the very least, it means that adequate housing must be accessible to everyone without discrimination of any kind. This could be achieved through making housing subsidies and finance available and by protecting the poor from unreasonable restrictions that impede their access to housing finance.

It is the latter that the Bill attempts to achieve. This Bill is therefore aimed at expanding access to finance, thereby boosting housing opportunities for low- and medium-income households.

The Bill intends to move beyond the disclosure of information regarding home loans as required by the Home Loan and Mortgage Disclosure Act of 2000 (the Mortgage Disclosure Act). The Bill compels all financial institutions engaged in providing home loans "to contribute towards making finance available to the lower end of the home loan market". These institutions must set aside a portion of their funding to meet the needs of low- and medium-income households in accessing home loans finance.

The drafting of this Bill is an important step towards fulfilling the state's obligations under the right of access to adequate housing. It is crucial to ensuring that everyone is afforded access to finance for housing.

Significantly, this Bill forbids redlining practices and encourages real investment in, and development of, poorer communities. Such developments are concerned with ensuring equitable access to resources and opportunities that will increase people's standards of living and remove the barriers that impede access to housing rights. When it becomes law, this Bill will place positive obligations on private institutions to respond to social development needs through providing home loans to low- and medium-income earners.

Principles, targets and standards

To achieve its purpose, the Bill establishes certain principles, targets and standards that need to be fulfilled by these financial institutions. These include:

- refraining from refusing home loan finance purely on the grounds of the socio-economic characteristics of the neighbourhood in which the home is located;
- refraining from the practice of redlining unless it is dictated by safe and sound business practice;
- ensuring that borrowers know the outcome of their applications and, if rejected, that they are also furnished with reasons why their applications were unsuccessful.

Significantly, this Bill forbids redlining practices and encourages real investment in, and development of, poorer communities.

In addition, if a financial institution is unable to meet these targets and standards (together with those not mentioned above) by lending directly to the applicants, it is obliged to seek certain alternatives to lending for them. These include:

- providing funding through prescribed wholesale lenders at a mutually agreed interest rate;
- purchasing such wholesale lenders' securities and debt issues; and
- providing funding directly to market lenders for them to make available for loans.

In an attempt to strike a balance of interests, the Bill also exhibits sensitivity to what it terms "sound and safe business principles". It specifically stipulates that financial institutions must not provide home loans in certain circumstances. For example, they must not provide a loan without

due regard to a borrower's ability to repay it. This means that those who may not be able to repay home loans may be reasonably refused access to them.

Also, the provision of certain services is subject to reasonable justification by business necessity. For instance, a financial institution may "refuse to extend credit or use different underwriting methods".

However, it is not clear how this attempt to balance interests will work in practice. The Bill forbids redlining unless it is reasonably justifiable in terms of "sound and safe business principles" or "business necessity". But these phrases are not defined in the Bill. They are arguably susceptible to abuse by financial institutions as a justification for excluding certain people from access to home loans. Their open-ended nature may render the principle of forbidding redlining ineffective.

Institutional mechanisms, procedures and penalties

The Bill gives the Office of Disclosure (established in terms of the Mortgage Disclosure Act) an important role to play as a monitoring body.

This Office will receive annual reports from the financial institutions, prepared in accordance with regulations. It will also be responsible for analysing banking data and monitoring the progress of financial institutions in meeting their targets. If financial institutions do not comply with the legislation they will be liable to pay fines not exceeding R500 000.

The institutional mechanisms and procedures will have positive consequences in terms of holding financial institutions accountable for facilitating access to home loans to low-income earners. However, its offence provisions are a cause for concern: they are ambiguous and do not specify what penalties are to be applied in the event of repeated offences. In particular, the fine of up to R500 000 (draft Bill clause 11(2) might be perceived by banks as negligible compared to the risk involved in extending loans to poor communities. There is a fear that such fines will become merely a business expense as redlining continues.

A 'skeleton Bill'

Another aspect of concern is that the Bill leaves much of its substantial law to regulations, which are typically formulated by the Minister after the Bill becomes law. This has reduced it to a 'skeleton Bill'. Aspects left to regulations include the definition of 'low income', targets for financial institutions in terms of lending to low income households, punitive measures that can be imposed, as well as incentives, and targets for reinvestment in communities. It is noteworthy that the phrase that gives the most cause for concern, "sound and safe business principles", is not part of a pool of definitions to be determined or described by regulations. If the Bill is passed without some definition of its meaning, it will be left to the financial institutions to determine and to the judiciary to interpret.

The concerns of financial institutions

Since the first draft was released, several controversial provisions have been amended. The current Bill offers banks a range of options for providing finance to low-income borrowers, making it more user-friendly to the banking sector. The Banking Council has also indicated that the current draft of the Bill would be more acceptable to banks than the earlier ones.

Issues of concern to the banking sector included a clause that would have compelled banks to provide mortgages to a specific number of people, a figure that would be decided upon by the Minister of Housing. Banks argued that such targets would force them to make loans to people who could not afford to repay them, and would constitute bad business practice. They also rejected the notion of punitive measures designed to punish banks as well as the lack of incentives for compliance.

The financial sector argues that reckless lending will lead to greater poverty through defaulting on loans. Many people do not have the financial stability to finance land tenure through incurring debt.

Further, banks have called for the need to investigate alternative forms of land tenure, arguing that home ownership financed by debt is not necessarily appropriate for the poor. They have particularly highlighted their inability to act on defaulters due to robust community action against corrective measures such as repossession.

Unemployment and the breakdown of the rule of law in certain areas make the implementation of new loans, or relocations, extremely difficult.

Thus, in such circumstances, prescribing certain levels of lend-

ing can also amount to inappropriate lending with negative consequences. A large number of poorer residents in such areas have defaulted on their repayments. Further lending into such areas without first normalising the repayment situation may worsen, rather than improve, these areas.

Further, it is argued that the cure for many communities may not lie in compulsory lending. This approach hides other social complexities that may require intervention by government or other roleplayers.

The Bill is an important attempt to improve access to adequate housing for low and middle-income households. However, it will need to deal with some of the problematic aspects outlined above in order to ensure that housing rights are progressively realised by facilitating poor communities' access to private capital through loans.

The state is required to strike a balance between the interests of private business and the housing needs of poorer communities in South Africa. Crucial among these is the issue of an apparent clash between redlining and sound and safe business practice.

This issue is not only likely to reenforce current policies and practices that discriminate against certain groups of people in accessing home loans, but it also has the potential to undermine this legislative attempt to improve access to adequate housing.

Collette Herzenberg is a senior political researcher with Chapter 2 Network at Idasa.

Update

The Bill is currently being redrafted by the Department of Housing after a number of lengthy submissions were received on the first draft. A final draft should be submitted to Cabinet in early April 2003.

Once approved by Cabinet and sent to Parliament, it will be open to public comment again.

Comments and submissions on the Bill:
COSATU: http://www.cosatu.org.za/docs/2002/invest.htm

The Banking Council's comments, in a quarterly update (June 2002). See:
http://www.banking.org.za

Pambazuka highlight the discriminatory practice of redlining:
http://www.pambazuka.org/newsletter

NEDLAC addresses the National Summit on the Financial Sector:
http://www.nedlac.org.za/docs

Press coverage of the Bill:
http://www.dispatch.co.za
and
http://www.netassets.co.za/equities

Contempt or compliance?

The *TAC case* after the Constitutional Court judgment

Mark Heywood

> The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case (*Minister of Health v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC) (the *TAC case*) para. 129).

One of the poster displays celebrating the Constitution at the Old Fort on Constitution Hill in Johannesburg shows a picture of a Treatment Action Campaign (TAC) volunteer, marching to the Constitutional Court on May 2nd 2002, carrying a poster proclaiming 'Stand Up for Your Rights!' The outcome of the legal process in the *TAC case* is now history.

But the question remains: was the TAC right to stand up for its rights before the judiciary? Have the national and provincial governments complied with the order of the Court? Have lives been saved?

In their original Notice of Motion the applicants in the *TAC case* not only sought orders for the provision of Nevirapine and the roll

out of a national prevention of mother-to-child-transmission programme (PMTCT). They also tried to build on the precedent set by the Court in the *Grootboom* case (*Government of the Republic of SA and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC)), in which the Constitutional Court had only given declaratory orders to the effect that government had not complied with its constitutional obligations in terms of section 26 of the Constitution (the right of access to adequate housing).

This effectively meant that a new case would have to be brought if it was alleged that government was not complying with its orders in terms of this judgment.

The question remains: was the TAC right to stand up for its rights before the judiciary?

The TAC requested that if the Court agreed with their claims, then government should be instructed to return to Court with its programme within a set time-frame to ensure that it met the constitutional requirements (a supervisory order).

Making this request was a signal of the seriousness of the issue (tens of thousands of children and parents were affected), as well as of the degree of distrust that existed between civil society and government over the management of the HIV/AIDS epidemic, particularly government's opposition to the use of anti-retroviral drugs.

To supervise or not?

On December 14th 2002 the High Court handed down an order which included the instruction that each respondent should deliver a report by 31st March 2002 setting out "what he or she has done to implement the order [to plan an effective comprehensive national programme]", as well as "what further steps he or she will take to implement the order...and when he or she will take each such step" (*Treatment Action Campaign and Others v Minister of Health and Others* 2002 (4) BCLR 356 (T)).

The reasons for making this order are explained earlier in the judgment. Botha J declared that what government had presented to the court was "open-ended", left everything for the future and was not "coherent, progressive or purposeful" (385 F-G). He stated that a PMTCT programme was an "ineluctable obligation of the state" (386 A).

In its judgment on appeal, the Constitutional Court upheld Botha J's main finding that the PMTCT programme was inflexible, unreasonable and "a breach of the state's obligations under section 27(2) read with section 27(1) of the Constitution" (para. 80).

However, between August 2001 (when the *TAC case* was launched) and May 2002 (when the Constitutional Court heard the case), the circumstances in dispute had changed significantly.

In particular, on April 17th 2002 Cabinet had issued a statement that had promised a universal roll out of a PMTCT programme after December 2002.

Partly in view of this, the Court substantially changed the original order and the supervisory order was dispensed with (para. 117).

The orders handed down by the Constitutional Court were nevertheless an advance on *Grootboom* as the Court also handed down mandatory orders. Thus government was ordered without delay to "remove the restrictions" that prevent the use of Nevirapine, to "permit and facilitate" its use, and to "take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV" (para. 135).

As cited in the introduction to this article, the Court explicitly stated that it believed government would carry out its orders. Has it?

Engaging with implementation

The TAC is an activist organisation that invokes constitutional law to reinforce its demands for access to health care services for people living with HIV/AIDS.

But, learning from the sequels to *Grootboom*, *Ngxuza* (*Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others* 2001 (10) BCLR 1039 (SCA)) and other cases, there is an understanding that there will be shades and speeds of compliance by government with court orders concerning socio-economic rights. This may range from active and vigorous implementation, to turgid and tortoise-like.

Further, there is an understand-

ing that – to a large extent – the pace will be dictated by the ongoing engagement of civil society organisations, including the South African Human Rights Commission (SAHRC), with the implementation of the Court's orders.

Thus, on 9th July 2002, four days after the judgment, a letter was sent by the TAC to all nine provinces and the Ministry of Health, requesting information on what steps would be taken and when.

This letter led to partial responses from the Director-General and four provinces (Gauteng, KwaZulu-Natal, Limpopo and North-West). There was no response at all from the remaining five provinces.

In assessing the degree of governmental compliance it is important to remember that the order in the *TAC case* was directed at the national government and at the nine provinces. At all levels it had several consequences and effects.

At a national level, a press release issued by the Minister of Health immediately after the judgment promised to "accept the ruling of the Court on this matter". However, there has been remarkably little direct action flowing from the Court's orders.

In a letter of 19 July 2002 the Director-General of the Department of Health wrote, "The Department is in compliance with the order handed down by the Court in April this year". He added that the department's communication unit was looking at "how to implement that aspect of the judgment that requires communication of the programme". But, as far as can be determined, there was not even a circular addressed to provincial MECs of Health explaining the duties arising and nor was there a budgetary reallocation.

The judgment seems to have been misunderstood as simply a negative injunction to remove the restrictions on the availability of Nevirapine. The positive dimensions of the order, such as permitting and facilitating the use of Nevirapine and the taking of reasonable measures to extend access to it, seem to have been misunderstood.

This misunderstanding is evident in the answering affidavit of the Director-General of Health in the contempt matter (described later). Thus Dr Ntsaluba "denies that either the National or Provincial government were obliged to inform the Applicant about what they have done, what they were going to do or when they were going to do it" (at para. 26).

In September 2002, this realisation led to a request by the TAC for a meeting with the Director-General and, later, a new threat of legal action. At the meeting with the Director-General it was agreed that the Health Department would supply the TAC with names of relevant contact persons in the provinces, as well as provide a report on what had been done up to that point.

This information was duly received in a letter from Dr Ntsaluba of 4 October 2002, which contained a table setting out what the nine provinces had done since the order, under five headings:

- communication efforts to the general public;
- communication to hospitals and doctors;
- Nevirapine availability/uptake;
- counselling facilities/efforts to train counsellors; and
- other efforts.

The information in this table revealed that in most provinces there had been an expansion of Nevirapine's availability, although there was a paucity of information concerning counselling and communication.

Civil society can play a large role in dictating the pace of implementation of court orders.

Consequently, much more attention was given to monitoring and pursuing implementation at the provincial level.

Implementation in the provinces

The TAC found that generally in provinces where there was already a commitment to establishing a comprehensive PMTCT programme (Gauteng, Western Cape, KwaZulu-Natal, North West), the judgment unshackled health departments and politicians and opened the door to implementation. In these provinces there has been an ongoing expansion and improvement.

By contrast, other provinces have required active engagement and the TAC's advocacy and legal team has focused on improving compliance at this level.

A decision was taken to focus

on the perceived non-compliers. Mpumalanga was singled out in particular, because, unlike in the Eastern Cape where a general collapse of government is a major factor impeding implementation, this province has a recent history of political interference in health matters.

The MEC in the province is infamous for her prolonged campaign to close down an NGO that offers services to rape survivors, including the choice of using anti-retrovirals as post-exposure prophylaxis.

She also dismissed a hospital superintendent for supporting the NGO. Legal action to halt this, led by the AIDS Law Project, continues.

In addition the TAC received reports from health providers and users that suggested the Court's orders were being deliberately flouted, with the MEC herself taking direct responsibility for restricting access to Nevirapine.

Between July and December a body of correspondence built up. In August a meeting with the MEC for Health took place. Monitoring was ongoing, and the TAC began to organise volunteers in Mpumalanga, marking its presence with a demonstration in Nelspruit on November 29th 2002.

Legal action to force compliance

The failure of these initiatives to bring substantive improvements led to two further legal strategies. First, the evidence of non-compliance was compiled into a complaint and request for an investigation, filed with the SAHRC on 2nd December 2002.

Then, additionally, on December 17th contempt proceedings were launched against the national Minister of Health and the MEC in Mpumalanga (*TAC v MEC for Health, Mpumalanga and Minister of Health*, TPD, Case No: 35272/02).

These actions and the publicity around them seem to have been the proverbial straw that broke the camel's back. In December, Mpumalanga commenced a roll out of Nevirapine to tertiary hospitals.

According to the MEC's Answering Affidavit six hospitals received Nevirapine between December 6th and 18th.

In addition, the affidavit described a roll out plan that would see most remaining facilities in the province receiving Nevirapine by April 2003.

At the time of writing, however, the contempt case was continuing.

A wake-up call

In conclusion, it should be evident that the *TAC case* is still ongoing. Although Mpumalanga is in the process of being forced into compliance, this is many months after the original order and undoubtedly at a cost in lives.

Further, social movements like the TAC have a limited capacity to monitor and ensure compliance.

There are other provinces whose report card is blotted, such as Limpopo and the Northern Cape. While not outwardly contemptuous of their duties, their compliance with the court order is inadequate and incomplete. So far, they have acted with impunity.

The Constitutional Court judgment served as a wake-up call for government departments tasked with responsibility for social delivery. A social cluster, including the Directors-General of Education, Health and Social Welfare, has set up a study group to better understand the implications of the Constitution for their departments.

Although the etiology of the 'benefit of the doubt' approach of the Court in not asserting its supervisory powers may have been understandable, with hindsight it may have been mistaken.

Mark Heywood is Head of the AIDS Law Project, Centre for Applied Legal Studies (Wits University).

The complaint of non-compliance with the Constitutional Court order submitted to the SAHRC is available on the TAC website: www.tac.org.za.

For further details on supervisory orders, see W Trengrove, 'Judicial remedies for violations of socio-economic rights' *ESR Review* (1999), 1(4), 8.

Socio-Economic Rights Project News

Research series – 2002

During 2002, the Socio-Economic Rights Project produced two booklets featuring research papers written by project staff.

Research series 1:

Obligations of non-state actors in relation to social, economic and cultural rights under the South African Constitution

by Danwood Mzikenge Chirwa

Non-state actors have come to occupy central positions in the provision of key services and goods essential for an individual's day-to-day life. These include the privatisation of municipal services, the role of banks in ensuring finance for adequate housing and the role of medical aid schemes and pharmaceutical corporations in people's struggle to access quality healthcare services and treatment. This is part of a global phenomenon.

This paper explores the highly contentious issue of the applicability of economic, social and cultural rights in the private sphere. It demonstrates that international law and some domestic jurisdictions are painstakingly moving in the direction of imposing enforceable obligations relating to socio-economic rights on private actors.

It can be readily accepted that private actors should be enjoined, at the very minimum, to respect the duties of non-interference imposed by socio-economic rights by, for example, refraining from arbitrarily cutting off people's access to water supplies. The difficulty lies in identifying under what circumstances certain private actors have positive duties to protect, promote and fulfil people's socio-economic rights. This is a difficult issue considering the wide range of private actors.

The paper argues that the South African Constitution offers a wider opportunity for holding private actors directly and indirectly accountable for socio-economic rights. It also suggests certain criteria for holding private actors responsible for the positive duties imposed by socio-economic rights.

Research series 2:

HIV, infant nutrition and health care: Implications of the state's obligations in providing formula milk to prevent HIV transmission through breastfeeding

by Sibonile Khoza

This paper was produced as part of the Project's research and advocacy focus on the right of access to adequate food and nutrition. We decided to pay special attention to the nutritional needs of people living with and affected by HIV/AIDS.

The paper examines the applicability of children's rights to basic nutrition and health care services in the context of mother-to-child transmission of HIV during breastfeeding. It questions the absence of a policy on infant feeding in respect of the provision of formula milk to prevent HIV transmission and argues that such a policy gap effectively denies HIV-infected mothers living in poverty the right to make an informed choice about infant feeding. The information provided by the health sector on the options HIV-infected women have on infant feeding is not an adequate response to the problem given the difficult socio-economic circumstances these women face. Without making formula feeding a viable choice for HIV-infected women in appropriate circumstances, their infants are effectively deprived of a nutritional support, which, in conjunction with other necessary medical interventions, could potentially save their lives.

The paper also criticises the judgment in *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BLCR 1033 (CC) for failing to pronounce on whether the state has an obligation to make formula milk available to HIV-infected mothers who choose not to breastfeed after proper counselling. The paper argues that the fragmented nature of addressing mother-to-child transmission of HIV, and the absence of a policy in regard to infant feeding, are not consistent with the test of reasonableness developed in the *Grootboom* case.

These papers can be accessed online: www.communitylawcentre.org.za/ser/research.php
Go to the headings: 'Private actors and socio-economic rights' and 'Health rights'.
A synthesised version of the research paper by Danwood Chirwa is featured in *ESR Review* (2002) 3(3), 2 and is also available online.

Research project

Socio-economic rights and transformation in South Africa

The research papers which formed part of the above research project conducted by the Project during 2001–2002 will be published in 2003 in a special two-part edition of *Law, Democracy and Development*, the journal of the UWC Law Faculty.

Synthesised versions of the research papers and the key themes emerging from the national colloquium at which the preliminary research papers were presented were featured in a special edition of *ESR Review*, 3(1), July 2002.

This edition can be accessed on-line at: www.communitylawcentre.org.za/ser/esr2002/2002july

Research and advocacy focus areas for 2003

Our current focus areas are:

- Advancing the jurisprudence on socio-economic rights.
- The right of access to social assistance.
- The right to food.
- The socio-economic rights of child-headed households.
- Privatisation of basic services and socio-economic rights.

To find out more about our work in these areas, please contact Project staff. We would be interested in sharing information and collaborating with other organisations working in these areas.

Socio-Economic Rights Project electronic newsletter

In July 2002 the Project developed a dedicated website on socio-economic rights. This website provides access to the Project's research and resource materials to a range of groups interested in socio-economic rights. We have recently added a section that contains summaries of the major South African Constitutional Court cases on socio-economic rights.

Over time, we hope to develop this section to include cases of the Supreme Court of Appeal, the High Courts, and eventually also international and comparative case law.

The Project has recently developed an electronic newsletter subscription. This newsletter aims at communicating key developments relating to the Project's work to subscribers on a monthly basis and enables them to communicate directly with the Project staff.

To subscribe to our electronic newsletter:

(1) Access the socio-economic rights website's home page: www.communitylawcentre.org.za/ser/index.php

(2) Fill in the subscription form, which requires only your first name and email address.

This and previous issues of the *ESR Review* are available online.

Please visit our website at: http://www.communitylawcentre.org.za/ser/esr_review.php